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I. Introduction

In *Kelly v. Gwinnell*,[1] an overwhelming six-to-one majority of the New Jersey Supreme Court decided that a social host who directly serves liquor to a guest, knowing that the guest is intoxicated and will thereafter drive, may be held jointly liable to a third party for injuries caused by the guest's drunken operation of a motor vehicle.[2] To date, only Oregon, California, and New Jersey have recognized a social host's duty to protect third parties from the negligent and intoxicated actions of a guest.[3] *Kelly* stands as the only decision that has not been abrogated or restricted by subsequent legislative action.[4] In a society that is growing increasingly concerned with reducing the incidence of drunken driving, *Kelly* represents a dramatic step by the judiciary to remedy the thousands of deaths that are caused each year by drunken drivers.[5] The decision therefore serves as a prece-

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1. 96 N.J. 538, 476 A.2d 1219 (1984).

2. *Id.* at 548, 559, 476 A.2d at 1219, 1230.

3. *See* Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity, 258 Or. 632, 485 P.2d 18 (1971); Coulter v. Superior Court, 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978).

4. In 1979, the Oregon legislature limited a cause of action against a private host for damages incurred or caused by an intoxicated guest to situations in which the host "has served or provided alcoholic beverages to a social guest, when such guest was visibly intoxicated." OR. REV. STAT. § 30.955 (1979). In addition, *Coulter* was abrogated by the California legislature that mandated that the consumption, and not the furnishing of alcoholic beverages, constituted the proximate cause of injuries inflicted upon a third party by the intoxicated person. *See* CAL. CIV. CODE § 1714 (1985).

5. *See, e.g., Kelly*, 96 N.J. at 545 n.3, 476 A.2d at 1222 n.3. The court states:

> from 1978 to 1982 there were 5,755 highway fatalities in New Jersey. Alcohol was involved in 2,746 or 47.5% of these deaths. Of the 629,118 automobile accident injuries for the same period, 131,160, or 20.5% were alcohol related. The societal cost for New Jersey alcohol-related highway deaths for this period has been estimated as $1,149,516,000.00, based on statistics and documents obtained from the New Jersey Division of Motor Vehicles. The total societal cost figure for all alcohol-related accidents in New Jersey in 1981 alone, including deaths, personal injuries and property damage was $1,594,497,898.00.

Id. (citing N.J. DIV. OF MOTOR VEHICLES, SAFETY, SERVICE, INTEGRITY, A REPORT ON THE

dent to other states that are dealing with the devastating consequences of drunken driving.

Part II of this Note examines the absence of a licensee's liability at common law for injuries resulting from the negligent service of liquor. The section further examines the role the courts played in regulating the sale and service of alcoholic beverages during the past three centuries within New Jersey. In addition, it examines the legal and factual background surrounding the New Jersey Supreme Court's imposition of civil liability upon a licensee and the gradual expansion of such liability through the present *Kelly* decision. Part III presents the facts and procedural history of *Kelly* and summarizes the majority and minority opinions of the New Jersey Supreme Court. Part IV analyzes the opinion and the reasoning of the supreme court, and also examines the precedents upon which the court primarily based its *Kelly* decision. Part V concludes that although the supreme court may have properly expanded the liability of social hosts, the court reached its result using an incomplete common law analysis. In an attempt to formulate a general rule that would be applicable to all social hosts, the court failed to examine the nature of the relationship existing between the social host, his guest, and the injured third party, which is required for a proper duty analysis under New Jersey case law. Instead, the *Kelly* court concluded that liability for the negligent service of liquor proceeded from the duty of care that accompanied the control of the liquor and not from a consideration of whom the controlling party might be. Thus, the court failed to recognize that a social host's liability to a third party for injuries resulting from the intoxicated driving of his guest results only if a special relationship exists between the host and his guest, which places upon the host a duty to control the activities of his guest.

ACCOMPLISHMENTS OF THE NEW JERSEY DIVISION OF MOTOR VEHICLES 45 (Apr. 1, 1982 through Mar. 31, 1983)). The New Jersey statistics are consistent with those in other states. *Id.* (citing PRESIDENTIAL COMM'N ON DRUNK DRIVING, FINAL REPORT 1 (1983)).

II. Background

A. *Absence of Common Law Liability for Sale or Service of Alcoholic Beverages*

At common law, it was not a tort to sell or give intoxicating liquor to an ordinary able-bodied man.[6] In addition, there was no affirmative duty to aid a voluntarily intoxicated individual because all men were considered responsible for themselves and their actions.[7] A seller of alcoholic beverages was not liable for failing to assist an intoxicated customer, and a seller was also not liable to third parties who were injured by the subsequent negligent acts of a drunken customer.[8] The legal principle generally cited for this rule was that the proximate cause of intoxication was not the furnishing of the liquor but its consumption by the purchaser or donee.[9]

This failure to recognize the existence of a licensee's duty of care to either his customers or third parties probably stemmed from the common law distinction between "misfeasance" and "nonfeasance."[10] Misfeasance gave rise to liability and occurred when active misconduct caused injury to others. Nonfeasance, from which liability did not follow, consisted of passive inaction or failure to take steps to protect others from harm.[11] At early common law, the courts focused on rectifying misfeasance, which was a more flagrant form of misbehavior.[12] Courts were also hesitant to create affirmative duties that would force individuals

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6. *See* Annot., 97 A.L.R.3d 528, 533 (1980); 45 AM. JUR. 2D *Intoxicating Liquors* § 553 (1969).

7. *See* Bageard v. Consol. Traction Co., 64 N.J.L. 316, 323, 45 A. 620, 622 (1900) (stating that a person "who voluntarily uses [liquor]. . . until he has become . . . so far impaired that he is unable to exert the necessary effort to avoid danger, is guilty of negligence."). *See also* W. PROSSER & P. KEETON, THE LAW OF TORTS § 56 (5th ed. 1984); Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. PA. L. REV. 217, 221 (1908).

8. *See* 45 AM. JUR. 2D *Intoxicating Liquors* §§ 553-554 (1969); Annot., 97 A.L.R.3d 528, 533 (1980).

9. *See* 45 AM. JUR. 2D *Intoxicating Liquors* §§ 553-554 (1969); Annot., 97 A.L.R.3d 528, 533 (1980). *See generally* Rappaport v. Nichols, 31 N.J. 188, 194-200, 156 A.2d 1, 4-5 (1959).

10. *See* W. PROSSER & P. KEETON, *supra* note 7, at § 56; Bohlen, *supra* note 7, at 221.

11. *See supra* note 10.

12. *See supra* note 10.

to assist one another. Thus, liability for nonfeasance was slow to receive recognition.[13]

Although the distinction between action and inaction seems obvious, its application is sometimes difficult. The negligent sale or service of alcohol would appear to be a matter of action constituting misfeasance, justifying the imposition of tort liability. However, it is possible that at common law the sale or service of alcoholic beverages by a licensee was viewed as nonfeasance for two reasons: the negligent sale or service of alcohol was not considered the proximate cause of subsequent injuries, and a voluntary drunk was deemed responsible for himself and his actions.[14] To hold a licensee liable for injuries sustained by an individual who consumed alcohol or to third parties injured by an intoxicated customer would have been equivalent to demanding that the licensee affirmatively assist another. This requirement would have directly contradicted the longstanding common law rule that an individual had no duty to act for the protection of others[15] absent the existence of a special relationship between the parties.[16]

Recognizing the injustice of the common law rules that provided virtually no remedy against a negligent licensee, courts developed an exception that recognized that a liquor licensee had a special relationship to customers creating a duty of care to

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13. *See supra* note 10.

14. *See* Bageard v. Consol. Traction Co., 64 N.J.L. at 323, 45 A. at 622; *see also* Bohlen, *supra* note 7, at 221; W. PROSSER & P. KEETON, *supra* note 7, § 56.

15. *See* RESTATEMENT (SECOND) OF TORTS § 314 (1965). Section 314 states: "The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action." In addition, comment c states: "The rule stated in this Section is applicable irrespective of the gravity of the danger to which the other is subjected and the insignificance of the trouble, effort, or expense of giving him aid or protection." *Id.* § 314, comment c.

16. *See id.* § 314A comment b. Comment b, which covers special relations giving rise to a duty to aid or protect, states:

> exceptions to the general rule, stated in § 314, that the fact that the actor realizes or should realize that his action is necessary for the aid or protection of another does not in itself impose upon him any duty to act. The duties stated in this Section arise out of special relations between the parties, which create a special responsibility, and take the case out of the general rule. The relations listed are not intended to be exclusive, and are not necessarily the only ones in which a duty of affirmative action for the aid or protection of another may be found.

Id.

them.[17] This special relationship arose because there was an implied service contract between the licensee and the customer and because the licensee received an economic benefit from the sale of alcohol.[18]

At common law, however, a licensee's special obligation to a patron did not explicitly establish a duty of care to third parties who had been injured by intoxicated customers. [19] To remedy this inequity, the legislatures of many states enacted statutes known as "civil damage acts" or "dram shop acts."[20] These statutes created a right of action against liquor licensees in favor of third parties injured by intoxicated patrons. [21] A recent common law development imposes a duty on a liquor licensee to take reasonable precautions to prevent an intoxicated customer from injuring third parties.[22] This obligation is based on the special relationship between the tavernkeeper and his patron. Neither the dram shop acts nor this new common law duty of care impose liability on social hosts who serve alcohol.

B. *New Jersey: The Role of the Legislature and the Courts in Regulating Alcoholic Beverages*

1. *In general*

For more than 250 years, the legislature and the courts of New Jersey have shared responsibility for regulating the sale of alcoholic beverages.[23] New Jersey's legislature, however, has never assumed a role in defining civil liability for injuries stemming from the negligent sale of liquor.[24]

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17. *See* Butler v. Acme Mkts., Inc., 89 N.J. 270, 276-77, 445 A.2d 1141, 1144 (1982); *see also* W. PROSSER & P. KEETON, *supra* note 7, at § 56; RESTATEMENT (SECOND) OF TORTS § 314A (1965).

18. *See supra* note 17.

19. *See* Annot., 97 A.L.R.3d 528, 533 (1980).

20. *See* 45 AM. JUR. 2D *Intoxicating Liquors* § 561 (1969).

21. *See id.*

22. *See* W. PROSSER & P. KEETON, *supra* note 7, § 56 n.18 (citing McFarlin v. Hall, 127 Ariz. 220, 619 P.2d 729 (1980); Slawinski v. Mocettini, 217 Cal. App. 2d 192, 31 Cal. Rptr. 613 (1963).

23. Hudson Bergen & Co. v. Hoboken, 135 N.J.L. 502, 508-09, 52 A.2d 668, 672 (1947).

24. *See* Soronen v. Olde Milford Inn, Inc., 46 N.J. 582, 592, 218 A.2d 630, 636 (1966). Justice Jacobs adverted to this fact by stating:

> Many states have dram shop acts in which the legislature has specifically

Early control over the distribution of liquor licenses and over the establishment of liquor prices was vested in the courts by the New Jersey legislature.[25] This control by the courts continued until the late nineteenth century when the legislature shifted responsibility for granting liquor licenses to towns and municipalities.[26] The transfer of licensing authority was challenged in a series of unsuccessful court battles beginning in 1883.[27] The courts consistently affirmed the legislature's "almost limitless" power to regulate the sale of liquor.[28] These cases also established that this broad regulatory power exists because a liquor licensee operates his business as a matter of privilege, not of right.[29]

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fixed the scope and extent of the tavernkeeper's civil responsibility for injuries which result from his service of alcoholic beverages to an intoxicated person. We have no such act and must therefore deal with the common law principles of negligence and proximate causation.

Id. See also Kelly v. Gwinnell, 96 N.J. 538, 552-53, 476 A.2d 1219, 1226 (1984).

25. Mazza v. Cavicchia, 15 N.J. 498, 535, 105 A.2d 545, 566 (1954) (Jacobs, J., dissenting); *see* Gaine v. Burnett, 122 N.J.L. 39, 40, 4 A.2d 37, 38, *aff'd*, 123 N.J.L. 317, 8 A.2d 504 (1939). In the early eighteenth century, tavernkeepers were required to apply to justices of the peace annually in open court for licenses. In addition, the justices fixed the price at which liquor was to be sold. *Id.*

26. *See* Hudson Bergen & Co. v. Hoboken, 135 N.J.L. at 507, 52 A.2d at 671 (1947); *see also* Gaine v. Burnett, 122 N.J.L. at 40, 4 A.2d at 38; N.J. STAT. ANN. 33:1-21 (West 1938) *repealed by* 1942 N.J. Laws ch. 159, § 1 (granting the right to fix fees for liquor licensees to judges of the Court of Common Pleas in sixth-class counties).

27. *See* State v. Treasurer of Beverly, 45 N.J.L. 288, 291-92 (1883) (upholding authority of town council to grant liquor licensees "in like manner as the same may lawfully be done by the Courts of Common Pleas" in New Jersey); State v. Gloucester, 50 N.J.L. 585, 595, 15 A. 272, 276 (1888) (stating that the legislature has the right to delegate to municipal corporations the power to regulate and prohibit the sale of liquor).

28. Meehan v. Board of Excise Comm'r, 73 N.J.L. 382, 64 A. 689 (Sup. Ct. 1906), *aff'd*, 75 N.J.L. 557, 70 A. 363 (1908). The court stated: "The right to regulate the sale of intoxicating liquors by the legislature, or by municipal or other authority under legislative power given, is within the police power of the state, and is practically limitless. . . . A license is not a contract. It is a mere privilege." *Id.* at 386, 64 A. at 690.

See also Franklin Stores Co. v. Burnett, 120 N.J.L. 596, 598, 1 A.2d 25, 26 (1938) (reaffirming the legislature's "practically limitless" power to regulate the sale of liquor); Hudson Bergen & Co. v. Hoboken, 135 N.J.L. at 506, 52 A.2d at 670 (1947) (reaffirming the legislature's "practically limitless" power to regulate the sale of liquor).

29.

There is no inherent power in a citizen to sell intoxicating liquors by retail. It is not a privilege of a citizen of the state or of a citizen of the United States. As it is a business attended with danger to the community, it may . . . be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils.

Crowley v. Christensen, 137 U.S. 86, 91 (1890). *See also* Hudson Bergen & Co. v. Hobo-

The New Jersey courts have always deferred to the legislature's authority to regulate the sale of alcohol. But during the past twenty-six years, the courts have assumed responsibility for defining the existence and scope of civil liability attendant to the sale or service of liquor.[30] This activity proceeded in the face of virtual silence from the New Jersey Legislature on the issue of liability in this area.

2. *The court's role in defining civil liability*

In *Rappaport v. Nichols*,[31] the New Jersey Supreme Court rejected the common law rule, which did not recognize a licensee's duty to protect third parties from injuries stemming from the negligent sale or service of alcohol.[32] During the course of one evening, four taverns served alcoholic beverages to Nichols, an intoxicated minor.[33] Later, while driving his mother's car, Nichols fatally injured the plaintiff, Arthur Rappaport.[34] Rappaport's estate sued Nichols and the four taverns, claiming the taverns had negligently sold and served alcohol to Nichols.[35] The trial court granted the taverns' motion for summary judgment because New Jersey law had never recognized that a licensee had a duty to third parties.[36] On its own certification, the New Jersey Supreme Court unanimously reversed, holding that a licensee who sold alcoholic beverages to either a minor or an intoxicated customer could be liable to third parties for the injuries resulting from the customer's negligence.[37] Although *Rappaport* is recognized as creating a liquor licensee's common law duty to third parties,[38] the court did not analyze the exis-

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ken, 135 N.J.L. at 506-07, 52 A.2d at 670-71.

30. *See* Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1 (1959) (first New Jersey case recognizing the civil liability of a licensee stemming from his negligent service of alcohol).

31. *Id.*

32. *Id.* at 205, 156 A.2d at 10.

33. *Id.* at 192, 156 A.2d at 3.

34. *Id.*

35. *Id.* at 193, 156 A.2d at 3.

36. *Id.*

37. *Id.* at 204-05, 156 A.2d at 9-10.

38. *See* Soronen v. Olde Milford Inn, Inc., 46 N.J. at 587, 218 A.2d at 633 ; *see also Kelly*, 96 N.J. at 545-46, 476 A.2d at 1223-24.

tence of liability as an issue of duty. [39] Rather, it imposed liability on the licensee by defining the standard of conduct he had violated.[40]

Under New Jersey law, duty is a legal obligation to another person to conform to a particular standard of conduct.[41] The question of whether a duty of care exists between specific parties is ultimately a question of fairness. The court weighs various factors: the nature of the risk involved, the relationship between the parties, and the public interest in the proposed solution.[42] Thus, in New Jersey, the scope of duty is not coextensive with the creation of a foreseeable and unreasonable risk but involves a judicial balancing of these factors.[43]

Once a duty of care is recognized, a standard of conduct must be established to give notice of what will constitute actionable negligence.[44] It is generally determined in one of four

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39. The court's failure to differentiate between duty and standard of conduct is most apparent in *Rappaport*. Although the later cases state that *Rappaport* created a liquor licensee's duty to the general public, at no point did the *Rappaport* court actually mention the term "duty" within its opinion. Thus, the *Kelly* court had to imply the duty from the *Rappaport* court's use of standard of conduct. *See Kelly*, 96 N.J. at 545-46, 476 A.2d at 1223. The court clarified its reasoning:

> While observing [in *Rappaport*] that a standard of conduct was contained in the statute prohibiting licensees from serving liquor to minors and in the regulation further prohibiting service to any person actually or apparently intoxicated, our decision that the licensee owed a duty to members of the general public was based on principles of common-law negligence.

Id.

40. *See* Rappaport v. Nichols, 31 N.J. at 200-03, 156 A.2d at 8-9.

41. *See* Wytupeck v. Camden, 25 N.J. 450, 136 A.2d 887 (1957). In holding a city liable for injuries sustained by a boy while he was playing on city wells and water pumps, the court stated:

> Duty is not an abstract conception; and the standard of conduct is not an absolute. . . . In the field of negligence, duty signifies conformance "to the legal standard of reasonable conduct in the light of the apparent risk"; the essential question is whether "the plaintiff's interests are entitled to legal protection against the defendant's conduct." Duty is largely grounded in the natural responsibilities of social living and human relations . . . and fulfillment [of such duty] is had by a correlative standard of conduct.

Id. at 461-62, 136 A.2d at 893 (citation omitted). *See also* W. PROSSER & P. KEETON, *supra* 7, § 30.

42. Goldberg v. Hous. Auth., 38 N.J. 578, 583, 186 A.2d 291, 293 (1962). *See also Kelly*, 96 N.J. at 544, 476 A.2d at 1222.

43. *See* Yetter v. Rajeski, 364 F. Supp. 105, 108 (D.N.J. 1973).

44. *See supra* note 41 and accompanying text.

ways.[45] A statute or administrative regulation may contain provisions that deal specifically with the conduct at issue. Courts may also adopt statutory or administrative standards that govern related but not identical conduct. Judges relying on the doctrine of stare decisis may rely on a standard of conduct that has been established by precedent. Finally, a court may apply the reasonable man standard to establish a standard of conduct on a case-by-case basis if no applicable statute, regulation or precedent exists.[46]

The *Rappaport* court expressly imposed liability on licensees because the tavernkeepers had violated a standard of conduct embodied in the state statute and regulation forbidding the sale of alcohol to minors and to intoxicated persons.[47] Violation of the applicable statute and regulation was viewed as evidence of negligence.[48] In fact, the court placed great emphasis on the unlawful character of the licensee's conduct. The court stated that "[i]f the patron is a minor or is intoxicated when served, the tavernkeeper's sale to him is *unlawful* . . . [and such service] to him may also constitute common law negligence."[49] In addition, the court stressed that the plaintiff's complaint was "expressly confined to tavern keepers' sales and service which [were] unlawful and negligent" and did not apply "to service by persons not engaged in the liquor business."[50] Because liability was based on a violation of a regulation governing tavernkeepers, it was natural that *Rappaport* appeared to limit liability to licensees.[51]

Rappaport did not expressly establish a licensee's duty to the general public, but it can be read to imply the existence of

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45. *See* RESTATEMENT (SECOND) OF TORTS § 285 (1965). Section 285 provides:
The standard of conduct of a reasonable man may be (a) established by a legislative enactment or administrative regulation which so provides, or (b) adopted by the court from a legislative enactment or an administrative regulation which does not so provide, or (c) established by judicial decision, or (d) applied to the facts of the case by the trial judge or jury, if there is no such enactment, regulation, or decision.

46. *Id.*

47. Rappaport v. Nichols, 31 N.J. at 203, 156 A.2d at 9.

48. *Id.*

49. *Id.* at 202, 156 A.2d at 9 (emphasis added).

50. *See id.* at 205, 156 A.2d at 10.

51. *Id.*

such an obligation.[52] In imposing third-party liability on a licensee, *Rappaport* did consider the relationship between a licensee and society.[53] The court stressed that liquor licensees operate their business as a privilege and not as a matter of right.[54] It concluded that imposition of third-party liability would substantially increase a licensee's diligence in honoring his obligations to the public.[55] Furthermore, in analyzing the risks created by a licensee's negligent conduct, the court determined that statutes and regulations pertaining to the sale of alcohol were intended to protect members of the general public as well as to benefit minors and intoxicated persons.[56] The court then declared that a tavernkeeper who sells alcoholic beverages to a person who is either visibly intoxicated or to a person who he knows or should know is a minor creates both an unreasonable and a foreseeable risk of harm to others.[57] The risk is foreseeable because "traveling by car to and from . . . taverns [is] . . . commonplace and accidents resulting from drinking are so frequent."[58]

a. *Liquor licensee's liability to customers*

A licensee's duty to his customers was first recognized by the New Jersey Supreme Court in 1966 in *Soronen v. Olde Milford Inn.*[59] In *Soronen*, a widow brought an action against a bartender and a tavern for the wrongful death of her husband, who had sustained a fatal fall inside the tavern while intoxicated.[60]

The *Soronen* court clearly stated that a licensee has a duty not to serve liquor to a visibly intoxicated customer.[61] Referring to the same regulation construed in *Rappaport*, the court declared that this duty "was firmly embodied in a long-standing regulation of the Division of Alcoholic Beverage Control which

52. *See supra* notes 38-40 and accompanying text.
53. Rappaport v. Nichols, 31 N.J. at 205-06, 156 A.2d at 10.
54. *Id. See also supra* note 29 and accompanying text.
55. Rappaport v. Nichols, 31 N.J. at 205-06, 156 A.2d at 10.
56. *Id.* at 201-02, 156 A.2d at 8.
57. *Id.* at 202, 156 A.2d at 8-9.
58. *Id.* at 202, 156 A.2d at 8.
59. 46 N.J. 582, 218 A.2d 630 (1966).
60. *Id.* at 586-87, 218 A.2d at 632-33.
61. *Id.* at 586, 218 A.2d 633.

explicitly prohibits the service on licensed premises of alcoholic beverages to anyone who is 'actually or apparently intoxicated.' "[62] The *Soronen* court appeared to justify imposing a common law duty upon a licensee because of the existence of an explicit regulation governing his conduct.[63]

Soronen also rejected the defendants' claim that the patron's intoxication constituted contributory negligence.[64] The court indicated that a licensee's relationship to both his customers and society played a significant role in establishing the scope and extent of a tavernkeeper's civil responsibility for injuries that result from his service of alcoholic beverages to an intoxicated person:

> In molding and applying [the] principles [of negligence and proximate cause] we recognize here, as in *Rappaport*, that the balancing of the conflicting interests and the weighing of the policy considerations are the vital factors. Those who enter the licensed liquor business do so with full awareness that it is heavily fraught with dangers and that the members of the general public as well as the individual patron are entitled to receive and do receive high measures of protection from its abuses. The regulatory restrictions imposed on liquor licensees are therefore severe and many and they properly include the flat prohibition against service to a patron who is already intoxicated.[65]

The *Soronen* court concluded that the accountability of a liquor licensee could not be diluted by the fault of the patron because an intoxicated patron could not care for himself.[66] Declaring that it is "right and proper" to recognize that a tavernkeeper has responsibility for his intoxicated customer, the court implied the existence of a special relationship between them.[67]

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62. *Id.*

63. *See id.* The court strengthened this rationale by emphasizing that the licensee's conduct violated a regulation that "[f]or present purposes . . . may be taken to have the full force of law." *Id.* at 590, 218 A.2d at 635.

64. *Id.* at 589-92, 218 A.2d at 634-36.

65. *Id.* at 592, 218 A.2d at 636.

66. *Id.*

67. *See id.*

b. *Liability of social hosts*

Before *Kelly v. Gwinnell*,[68] the liability of an unlicensed party for negligent service of liquor had been considered only twice by the appellate courts in New Jersey and never by the New Jersey Supreme Court.[69] In *Anslinger v. Martinsville Inn*,[70] the appellate division of the superior court rejected the contention that a corporate host who serves liquor at a quasi-business gathering should be held to the same standard of care as a liquor licensee.[71] The plaintiff's decedent had attended two quasi-business gatherings during the course of an evening. At each function, the decedent, Anslinger, was served alcohol by a corporate defendant.[72] Later that evening Anslinger was killed in an auto accident.[73] Anslinger's representative argued that the corporate defendants should be held liable because the risks created by their negligent service of liquor to Anslinger were similar to those risks created by a licensee's negligent service of liquor to an intoxicated customer. In addition, the representative argued that both a corporate defendant and a liquor licensee had the ability to spread the cost of increased liability among their consumers. [74] The court denied liability based on its view that the meetings which the plaintiff had attended were only "*quasi*-business" in nature because they combined good fellowship with the generation of new business.[75] *Anslinger* implied that a licensee's duty to his customer arises from a pure business relationship. [76] The court commented that holding a business enterprise liable for the negligent service of alcohol at the business' social affairs would raise "extremely difficult questions of deciding what is business and what is social."[77] Finally, the court concluded that

68. 96 N.J. 538, 476 A.2d 1219 (1984).

69. *See* Linn v. Rand, 140 N.J. Super. 212, 356 A.2d 15 (App. Div. 1976); Anslinger v. Martinsville Inn, Inc., 121 N.J. Super. 525, 298 A.2d 84 (App. Div. 1972), *cert. denied*, 62 N.J. 334, 301 A.2d 449 (1973).

70. 121 N.J. Super. 525, 298 A.2d 84 (App. Div. 1972), *cert. denied*, 62 N.J. 334, 301 A.2d 449 (1973).

71. *Id.* at 533-34, 298 A.2d at 88.

72. *Id.* at 529-30, 298 A.2d at 86-87.

73. *Id.* at 531, 298 A.2d at 87.

74. *Id.* at 534, 298 A.2d at 88.

75. *Id.* (emphasis in original).

76. *See id.*

77. *Id.*

the "[i]mposition of liability in such a situation would require not merely a considerable extension of the doctrine originated in *Rappaport*, but a departure from the theory which gave rise to the policy expressed therein." [78]

Anslinger raised the additional issue of whether an individual attending a quasi-business function, who takes action to assist or prevent an intoxicated business acquaintance from driving, owes an affirmative duty of care to continue such assistance to the intoxicated individual.[79] In *Anslinger*, the plaintiff noted that an individual defendant, Grier, had accompanied Anslinger on his drunken travels to two separate meetings on the night he was killed. During this time Grier had made several unsuccessful attempts to prevent Anslinger from driving. These efforts included requests not to drive, a suggestion that the decedent rent a room rather than drive, and acts intended to interfere with the decedent's intention to drive.[80] The plaintiff argued that Grier's actions constituted voluntary custody of Anslinger, which gave rise to a duty to prevent Anslinger from driving while intoxicated.[81] The court denied liability declaring that Grier did not qualify as a volunteer and that he did not at anytime maintain the requisite custody over Anslinger's person.[82] In addition, the court stated that imposing an affirmative duty based upon expressions of concern would not serve the public interest because it would encourage individuals to avoid helping others in future cases.[83]

In 1976, a New Jersey appellate court in *Linn v. Rand*[84] held that a social host had a duty to protect a third party from the negligent driving of a minor guest to whom the host had fur-

78. *Id.* The court failed to further elucidate its understanding of the *Rappaport* "doctrine."

79. *Id.* at 534-35, 298 A.2d at 89.

80. *Id.* at 530-31, 298 A.2d at 86-87. In an attempt to put the car's gearshift into a park position, Grier reached into Anslinger's car window while Anslinger was sitting in a drunken stupor in the driver's seat. In addition, when Anslinger left the second business function to drive home, Grier followed in his own car while flashing his lights in an attempt to get Anslinger to exit off the highway. Anslinger, however, continued down the highway, rammed into the rear of a truck, and died as a result of the crash.

81. *Id.*

82. *Id.* at 535, 298 A.2d at 89.

83. *Id.* at 535-36, 298 A.2d at 89.

84. 140 N.J. Super. 212, 356 A.2d 15 (App. Div. 1976).

nished alcoholic beverages.[85] *Linn* was the first instance in which a New Jersey court imposed an affirmative duty of care on a nonlicensee for service of alcoholic beverages. [86] In *Linn*, the victim of an auto accident sued for injuries caused when he was struck by a minor driver.[87] The plaintiff also named a social host as a defendant, alleging that liability arose when the host served alcohol to a minor and allowed her to drive in an intoxicated condition.[88] Citing to *Rappaport*, the *Linn* court declared that "[n]egligence is tested by whether the reasonably prudent person at the time and place should recognize and foresee an unreasonable risk or likelihood of harm or danger to others."[89] The court noted that liability to third parties flowed from the rule that a tortfeasor is liable for injuries that result in the ordinary course of events from his negligent conduct when such conduct is a substantial factor in bringing about injuries.[90] The *Linn* court concluded that a host would be liable for common law negligence if the plaintiff could prove that: (1) the guest was a minor, (2) the host knew the guest was a minor intending to drive, (3) despite such knowledge, the host continued to serve alcoholic beverages to the minor, and (4) it was reasonably foreseeable that the minor might injure himself or others.[91] The court concluded that "[i]t makes little sense to say that the licensee in *Rappaport* is under a duty to exercise care, but give immunity to a social host who may be guilty of the same wrongful conduct merely because he is unlicensed."[92] *Linn* did state, however, that a "plaintiff may have a heavier burden of proof to carry when his suit is against a social host." [93] Although this seems to be an important qualification, *Linn* did not describe the content of this increased burden.

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85. *Id.* at 220, 356 A.2d at 19.

86. *Id. See also Kelly*, 96 N.J. at 546-47, 476 A.2d at 1223.

87. Linn v. Rand, 140 N.J. Super. at 214, 356 A.2d at 16.

88. *Id.*

89. *Id.* at 216-17, 356 A.2d at 18 (citing Rappaport v. Nichols, 31 N.J. at 201, 156 A.2d at 8).

90. *Id.* at 217, 356 A.2d at 18 (quoting Rappaport v. Nichols, 31 N.J. at 203, 156 A.2d at 9).

91. *Id.*

92. *Id.*

93. *Id.*

c. *Proximate cause for negligent sale or service of alcohol*

In *Rappaport*, the New Jersey Supreme Court first recognized a licensee's duty to third parties for the negligent sale of alcohol.[94] In doing so, the court determined that service of liquor to an intoxicated minor customer constituted both a cause-in-fact and the proximate cause of injuries sustained by a third party as a result of the customer's intoxicated driving.[95] The common law position had been that the proximate cause of injuries to a third party was the patron's consumption of liquor, not its service by a licensee.[96] Only the customer who had voluntarily consumed liquor could be held liable for the injuries caused by his intoxication.[97] Rejecting this view, *Rappaport* established the foundation for expansion of the dram shop rule by fixing the legal fault for injuries on the server of the alcohol.

The *Rappaport* court noted the importance of weighing both policy considerations and the conflicting interests of the parties when applying the common law principles of proximate cause.[98] The court concluded that judicial recognition of a licensee's liability placed a justifiable burden on a licensee who operated his business as a matter of privilege.[99] This privilege carried an obligation to protect the public safety. [100]

Soronen reaffirmed *Rappaport's* analysis of proximate cause and extended its application.[101] The *Soronen* court held a licensee liable for injuries sustained by a *customer* because the licensee had continued to serve liquor to the customer beyond the point of visible intoxication.[102] The court concluded that a licensee's relationship to the general public justified the policy of

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94. *See supra* notes 38-40 and accompanying text (indicating that although the *Rappaport* court did not analyze the existence of liability as an issue of duty, it imposed liability by defining the standard of conduct the licensee violated).

95. Rappaport v. Nichols, 31 N.J. at 203-05, 156 A.2d at 9-10.

96. *See supra* notes 6-9 and accompanying text.

97. Rappaport v. Nichols, 31 N.J. at 203-05, 156 A.2d at 9-10.

98. *Id.* at 205, 156 A.2d at 10.

99. *Id.* at 205-06, 156 A.2d at 10. *See also* Soronen v. Olde Milford Inn, Inc., 46 N.J. at 592, 218 A.2d at 636 (noting *Rappaport's* emphasis on the balancing of the conflicting interests of the parties and on weighing policy considerations when applying common-law principles of proximate cause).

100. Rappaport v. Nichols, 31 N.J. at 205-06, 156 A.2d at 10.

101. Soronen v. Olde Milford Inn, Inc., 46 N.J. at 588-89, 218 A.2d at 633.

102. *Id.* at 586-87, 218 A.2d at 632-33.

holding the licensee accountable to his patrons. [103]

Rappaport's analysis of proximate cause was further expanded by the New Jersey Superior Court in *Linn v. Rand*.[104] There a social host was held liable for the first time to a third party who had been injured by a minor guest to whom the host had negligently served alcohol.[105] Because the court did not discuss any considerations that would distinguish the liability of a social host from that of a licensee, this case suggests that the status of the server of alcohol has no intrinsic bearing on an analysis of proximate cause when a third party is injured by one who has been negligently served too much alcohol.[106]

III. *Kelly v. Gwinnell*

A. *Facts and Procedural History*

Donald Gwinnell, after driving Joseph Zak home, was invited into the Zaks' home for drinks.[107] Gwinnell left the Zaks' residence an hour or two later and while driving home, struck the plaintiff's car in a head-on collision.[108] Kelly, who was seriously injured as a result of the accident, filed suit against defendants Gwinnell and Paragon Corporation, Gwinnell's employer.[109] Gwinnell and Paragon Corporation filed a third-party complaint against the Zaks. The plaintiff filed an amended complaint, which added the Zaks as direct defendants.[110] The Zaks' subsequent motion for summary judgment was granted, and an

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103. *Id.* at 592, 218 A.2d at 633.

104. 140 N.J. Super. 212, 216-17, 356 A.2d 15, 17-18 (App. Div. 1976).

105. *Id.* at 220, 356 A.2d at 19. *See also Kelly*, 96 N.J. at 546-47, 476 A.2d at 1223.

106. *See supra* text accompanying note 92 (indicating that the court did not differentiate between the rules or duties of a licensee and a social host).

In addition, the *Linn* court did not indicate whether the fact that the social host had served excessive amounts of liquor to a *minor* guest had any influence upon its decision to recognize the social host's service as being the proximate cause of a third party's injury. Linn v. Rand, 140 N.J. Super. at 217, 356 A.2d at 18.

107. Kelly v. Gwinnell, 96 N.J. 538, 541, 476 A.2d 1219, 1220 (1984).

108. *Id.*

109. *Id. See also* N.Y. Times, Feb. 21, 1985, at A1, col. 1. This article reports that as a result of the accident the bones in Miss Kelly's ankle were fused together, six teeth were removed, and her chin scarred. The article further states that the suit has been settled. The settlement calls for a $100,000 payment by Mr. Gwinnell's automobile insurance company and $72,500 by Mr. Zak's homeowner's insurance company.

110. *Kelly*, 96 N.J. at 541-42, 476 A.2d at 1220.

appeal to the superior court followed.[111]

The Appellate Division of the New Jersey Superior Court unanimously affirmed the trial court's decision[112] and held that a social host who furnishes alcoholic beverages to a guest could not be held liable for injuries sustained by third parties as a result of the guest's intoxication.[113] The court placed particular emphasis on the fact that attempts by other jurisdictions to create a common law cause of action against social hosts had faced subsequent legislative abrogation or restriction. [114] Consequently, the superior court refused to expand the rulings in *Rappaport* or *Linn* to a situation involving a social host who serves liquor to an adult guest.[115]

B. *Opinion of the New Jersey Supreme Court*

1. *The majority*

The New Jersey Supreme Court reversed the decision of the appellate division and declared that the social host and his intoxicated guest could be held jointly liable to the third party who had been injured by the guest.[116] Writing for the majority, Chief Justice Wilentz observed that by refusing to impose liability on a social host, the appellate division had clearly deferred to a national consensus that regarded it unwise to impose tort liability upon a social host.[117] Challenging this consensus, the Chief Justice pointed out that the application of a conventional negligence analysis to the facts of *Kelly* resulted in finding all but one of the four required elements of a negligence action: the defendant host had created an unreasonable risk of harm to the plaintiff by continuing to serve his intoxicated guest; the defendant knew that the guest would thereafter drive; and the risk created was foreseeable and resulted in an equally foreseeable injury. [118] Thus, the court stated that the only remaining ques-

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111. *Id.* at 542, 476 A.2d at 1220-21.

112. Kelly v. Gwinnell, 190 N.J. Super. 320, 463 A.2d 387 (App. Div. 1984), *rev'd*, 96 N.J. 538, 476 A.2d 1219 (1984).

113. *Id.* at 326, 463 A.2d at 391.

114. *Id.* at 325, 463 A.2d at 390.

115. *Id.* at 325-26, 463 A.2d at 390-91.

116. *Kelly*, 96 N.J. at 548, 559, 476 A.2d at 1219, 1230.

117. *Id.* at 542-43, 476 A.2d at 1221.

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

tion was whether a social host had a duty to protect the plaintiff from an unreasonable risk of harm.[119] This inquiry "involves a weighing of the relationship of the parties, the nature of the risk, and the public interest in the proposed solution." [120]

Evaluating the public interest, the court stated that in a society in which thousands of deaths are caused each year by drunken drivers the imposition of a duty upon a social host is consistent with society's goal to reduce drunken driving. [121] To support this contention, the court referred to drunk driving statistics,[122] the strict criminal sanctions that are imposed on drunken drivers in New Jersey,[123] and the fact that New Jersey's liquor licensees are prohibited from serving intoxicated adults.[124] The court then declared that its *own* goal was to fairly compensate victims who were injured as a result of drunken driving.[125]

The court next examined its prior decisions and stated that the decisions clearly pointed in the direction of expanding a social host's liability to third parties.[126] The court placed particular emphasis on *Rappaport v. Nichols*[127] and *Soronen v. Olde Milford Inn, Inc.*,[128] which had established the duties of a licensee to its customers and to third parties injured by intoxicated customers.[129] Although these cases dealt with licensees, the *Kelly* court maintained that they were applicable to the present case because the underlying considerations regarding the fault of the parties were applicable to both licensee and social host.[130] Therefore, just as a licensee was found to be at fault for serving an intoxicated customer in *Soronen* and *Rappaport*, so could a social host be found to be at fault for serving an intoxicated adult guest.[131] The court asserted that *Soronen* and *Rappaport*

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119. *Id.*

120. *Id.* (quoting Goldberg v. Hous. Auth., 38 N.J. 578, 583, 186 A.2d 291, 293 (1962)).

121. *Id.* at 544-45, 476 A.2d 1222.

122. *Id. See also supra* note 5.

123. *Kelly*, 96 N.J. at 545, 476 A.2d at 1222.

124. *Id.*

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

126. *Id.* at 552-53, 476 A.2d at 1226.

127. 31 N.J. 188, 156 A.2d 1 (1959).

128. 46 N.J. 582, 218 A.2d 630 (1966).

129. *See supra* text accompanying notes 47-67.

130. *Kelly*, 96 N.J. at 546, 476 A.2d at 1223.

131. *Id.* at 548, 476 A.2d at 1224.

rejected the premise that, when people get together for a friendly drink, the social relationship thus established should not be intruded upon by a threat of litigation.[132] Finally, the court looked to the superior court's decision in *Linn v. Rand*,[133] which had declared that a social host, who had served alcohol to a minor, could be held liable to third parties who were injured by the minor's drunken driving.[134] The *Kelly* court upheld *Linn*, noting that the superior court had extended *Rappaport* by using common law principles.[135] The majority examined and rejected various challenges to its holding. The court concluded that a social host's potential liability to a third party was not disproportionate to the host's fault because the host's actions are easily corrected. [136] In addition, the court noted that liability insurance could be made available to both host and spouse in order to protect their home or other property.[137] The *Kelly* court also rejected an attempt to distinguish a licensee from a social host on the ground that a licensee, unlike a social host, derives a profit from serving liquor.[138] The court stated categorically that liability stems from the duty of care that accompanies the control of the liquor supply, and thus the motive behind the furnishing of such alcohol is not a matter for the court's consideration.[139]

Finally, the majority countered the dissent's assertion that the issue of a social host's liability should be resolved by the legislature and not the courts. The majority noted that the determination of the scope of duty in negligence cases is traditionally a function of the judiciary.[140] In addition, an examination of New Jersey precedent shows the continuing judicial involvement in the area of civil liability stemming from the negligent sale or

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132. *Id.* at 546, 476 A.2d at 1223.

133. 140 N.J. Super. 212, 356 A.2d 15 (App. Div. 1976).

134. *Id. See supra* text accompanying notes 84-85.

135. *Kelly*, 96 N.J. at 547, 476 A.2d at 1223.

136. *Id.* at 549-50, 476 A.2d at 1225.

137. *Id.* at 550, 476 A.2d at 1225. *See also id.* at 550 n.10, 476 A.2d at 1225 n.10. The *Kelly* court stated: "We need not, and do not, reach the question of which spouse is liable, or whether both are liable, and under what circumstance." *Id.* The court did observe, however, that "it is common for both spouses to be liable in automobile accident cases." *Id.* at 550, 476 A.2d at 1225. Thus the dicta suggests that one spouse could be held liable for the other spouse's negligent service of alcohol to a guest.

138. *Id.* at 547-48, 476 A.2d at 1224.

139. *Id.* at 548, 476 A.2d at 1224.

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

service of liquor.[141] The court cited, as an example, the fact that liability had been imposed upon licensees in New Jersey by the judiciary through the use of common law principles, without the assistance of a legislative dram shop act.[142] The majority further observed that there had been no adverse legislative reaction following the 1976 decision of *Linn v. Rand*.[143] Furthermore, the court concluded that if the legislature should disagree with the court's decision, it has a clear veto remedy.[144]

In addition, the majority agreed with the dissent's assertion that legislative hearings would enable the court to learn more about the consequences of imposing third-party liability upon a social host. The majority, however, balked at the dissent's attempt to characterize the court's own knowledge as "scant":

> to characterize our knowledge as 'scant' or insufficient is to ignore what is obvious, and that is that drunken drivers are causing substantial personal and financial destruction in this state and that a goodly number of them have been drinking in homes as well as taverns. Does a court really need to know more? Is our rule vulnerable because we do not know — nor will the Legislature — how much injury will be avoided or how many lives saved by this rule?[145]

In concluding, the majority stressed the narrowness of its decision, which imposes joint liability upon a social host who, knowing his guest will be operating a motor vehicle, serves him liquor and continues to do so even after the guest becomes visibly intoxicated.[146] Referring to future cases involving more complex social situations, the court stated: "We will face those situations when and if they come before us."[147] The court emphasized its belief that the narrowness of its holding would limit fraudulent and frivolous claims.[148] In addition, the court indicated that

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141. *Id.* at 552-53, 476 A.2d at 1226.

142. *Id.*

143. *Id* at 553, 476 A.2d at 1226 (citing Linn v. Rand, 140 N.J. Super. 212, 356 A.2d 15).

144. *Id.* at 555, 476 A.2d at 1227. The court then went on to list various opinions that had been overruled by the legislature. *See id.* at 555, 476 A.2d at 1227-28.

145. *Id.* at 558, 476 A.2d at 1228.

146. *Id.* at 559, 476 A.2d at 1230.

147. *Id.* at 556, 476 A.2d at 1228.

148. *Id.* at 539, 476 A.2d at 1230.

the availability of objective evidence to establish a driver's intoxication would aid the courts in weeding out baseless claims and would prevent this new cause of action from being used as a tool for harassment.[149]

2. *The dissent*

Justice Garibaldi, as the sole dissenter, stressed that her reluctance to join the majority stemmed not from an exaggerated notion of judicial deference to the legislature, but from the majority's willingness to plunge into an unknown area without full consideration of the possible negative consequences of its decision.[150] In addition, she contended that the majority's intimation that expansion of a host's liability was necessary to protect innocent third parties from drunken drivers was inaccurate.[151] Before the majority holding in *Kelly*, the injured party did have a remedy against the direct tortfeasor, the intoxicated driver.[152]

In support of her decision, Justice Garibaldi looked to a majority of jurisdictions,[153] which maintained the view that the expansion of a social host's duty to third parties is best considered by the legislature.[154] In addition, the dissent noted that the New Jersey Legislature had also been active in attempting to ensure that individuals injured by drunken drivers would be guaranteed remedies.[155] Justice Garibaldi concluded that the legislature, having created alternative remedies, was best able to determine whether the New Jersey statutory insurance scheme provided adequate protection for the victims of drunken drivers.[156]

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149. *Id.*

150. *Kelly*, 96 N.J. at 563, 476 A.2d at 1232 (Garibaldi, J., dissenting).

151. *Id.* at 564, 476 A.2d at 1232.

152. *Id.*

153. *See* Kowal v. Hofher, 181 Conn. 355, 436 A.2d 1 (1980); Miller v. Moran, 96 Ill. App. 3d 596, 421 N.E.2d 1046 (1981); Behnke v. Pierson, 21 Mich. App. 219, 175 N.W.2d 303 (1970); Cole v. City of Spring Lake Park, 314 N.W.2d 836 (Minn. 1982); Runge v. Watts, 180 Mont. 91, 589 P.2d 145 (1979); Hamm v. Carson City Nugget, Inc., 85 Nev. 99, 450 P.2d 358 (1969); Schirmer v. Yost, 60 A.D.2d 789, 400 N.Y.S.2d 655 (4th Dep't 1977); Edgar v. Kajet, 84 Misc.2d 100, 375 N.Y.S.2d 548 (Sup. Ct. 1975), *aff'd*, 55 A.D.2d 597, 389 N.Y.S.2d 631 (4th Dep't 1976); Klein v. Raysinger, 470 A.2d 507 (1983); Halvorsen v. Birchfield Boiler, Inc., 76 Wash. 2d 759, 458 P.2d 879 (1969). *See also supra* notes 3-4 and accompanying text.

154. *Kelly*, 96 N.J. at 561-62, 476 A.2d at 1231 (Garibaldi, J., dissenting).

155. *Id.* at 564, 476 A.2d at 1232-33.

156. *Id.* at 564, 476 A.2d at 1233.

Justice Garibaldi also argued that the role and legal duties of a liquor licensee should be distinguished from those of a social host.[157] She contended that a licensee has experience in determining levels and degrees of intoxication, whereas a social host has little experience in this area.[158] A licensee often maintains stricter control over the service of liquor and often has the assistance of an enforcer when dealing with belligerent drinkers.[159] A social host, on the other hand, often drinks with guests, thus making it more difficult for him to determine the intoxication levels of his guests.[160] In addition, a social host faces special social pressures when dealing with a guest who could be a boss, a friend, a neighbor, or a family member.[161] Justice Garibaldi contended that a host might find it difficult to stop serving liquor to a guest, whereas a licensee, operating in a business environment, can more easily halt service to a customer.[162]

The dissent stressed the differing abilities of a licensee and social host to spread the cost of liability.[163] A commercial establishment can spread the cost of liability insurance among its customers but the social host has to bear the entire burden of such costs alone.[164] Justice Garibaldi noted that the majority had merely assumed that a host's liability would be covered by homeowner's insurance but failed to cite any authority in support of its contention.[165] Thus, she contended that the majority failed to weigh the economic cost of liability insurance before expanding the legal liability of a social host.[166]

The dissent also criticized the majority's failure to define the standard of conduct to which a social host must conform to avoid third-party liability.[167] "Is the host obligated to use physi-

157. *Id.* at 565, 476 A.2d at 1233.

158. *Id.* at 565-66, 476 A.2d at 1233.

159. *Id.* at 566-67, 476 A.2d at 1234.

160. *Id.*

161. *Id.* at 567, 476 A.2d at 1234.

162. *Id.*

163. *Id.* at 568, 476 A.2d at 1234-35.

164. *Id.*

165. *Kelly*, 96 N.J. at 568, 476 A.2d at 1234-35 (Garibaldi, J., dissenting). The defendants' homeowner's insurance did in fact cover their liability to Miss Kelly. *See supra* note 109.

166. *See id.* at 568-69, 476 A.2d at 1234-35.

167. *Id.* at 567-68, 476 A.2d at 1234.

cal force to restrain an intoxicated guest from drinking and then from driving? . . . What is the result when the host tries to restrain the guest but fails?"[168] The dissent then declared that "[t]he majority opinion is silent on the extent to which we must police our guests."[169]

Concluding, Justice Garibaldi noted that the legislature can consider imaginative alternatives to imposing potential liability upon every New Jersey adult.[170] Her suggestions included funding a remedy for the injured party by contributions made by drunken drivers, making the social host secondarily liable contingent on a judgment against the drunken driver, instituting a limitation of liability to a social host, and imposing liability on a social host only if his conduct has been wanton and reckless.[171]

IV. Analysis

Evolution of the New Jersey law of civil liability for the negligent sale or service of alcohol provides historical evidence of the authority of the state's courts to expand liability in this area.[172] Imposition of civil liability has been the sole domain of the judiciary and remains untouched by the New Jersey Legislature.[173] The common law development of the law of civil liability for the negligent sale or service of alcohol began in 1959 when the New Jersey Supreme Court adopted a dram shop rule in *Rappaport v. Nichols.* [174] Another significant step was taken by an intermediate appellate court in *Linn v. Rand*,[175] which recognized the potential liability of a social host who serves alcohol to a minor. [176] Thus, the origin of the law in New Jersey is different from states in which civil liability has been imposed through legislative dram shop acts.[177] It is likely that almost two centuries

168. *Id.* at 567, 476 A.2d at 1234.
169. *Id.* at 568, 476 A.2d at 1234.
170. *Id.* at 569-70, 476 A.2d at 1235-36.
171. *Id.*
172. *See supra* notes 26-30 and accompanying text.
173. *See supra* note 24 and accompanying text.
174. 31 N.J. 188, 156 A.2d 1 (1959). *See supra* text accompanying notes 30-32.
175. 140 N.J. Super. 212, 356 A.2d 15 (App. Div. 1976).
176. *Id.* at 220, 356 A.2d at 19.
177. *See supra* notes 19-21, 24, 30 and accompanying text. *See also* 45 AM. JUR. 2D *Intoxicating Liquors* § 561 (1969).

of judicial control of liquor licensing has, in some way, influenced the legislature's deference to judicial authority to define civil liability.[178] Also, the development of legal principles through common law adjudication is one of the cornerstones of our legal tradition. However, to protect against arbitrariness and to preserve the distinct roles of the judicial and legislative branches of government, courts are required to apply established principles rather than to engage in decisionmaking that is guided solely by social policy considerations. *Kelly v. Gwinnell* reflects a growing public sentiment to prevent drunken driving more effectively. Unfortunately, the court fails to apply common law principles rigorously when defining a social host's liability. This departure from the common law undermines the theoretical basis for imposing civil liability on social hosts and adds to the confusion that has characterized New Jersey law in this area.

A. *Imposition of Liability Requires the Existence of a Duty of Care*

Judicial recognition of civil liability for negligence requires proof that the fundamental elements of a negligence cause of action exist. An easily stated but often complex threshold question is whether the defendant owes a duty of care to the plaintiff. The New Jersey Supreme Court has established three factors that must be examined by the court before an affirmative duty may be imposed. The court must consider the relationship that may exist between the parties, the nature of the risks presented in the case, and the public's interest in the proposed solution.[179]

Announcing that a social host has a duty of care to a third party who is injured by an intoxicated guest, *Kelly* failed to examine the relationships among these parties adequately.[180] Instead, the court relied primarily on a social policy against

178. *See supra* notes 23-30 and accompanying text.

179. Goldberg v. Hous. Auth., 38 N.J. 578, 583, 186 A.2d 291, 293 (1962) (holding that a municipal housing authority had no duty to provide police protection for 6000 residents of a housing project). *See also Kelly*, 96 N.J. at 544, 476 A.2d at 1222 (quoting the three-part duty test in Goldberg v. Hous. Auth., 38 N.J. at 583, 186 A.2d at 293).

180. *See Kelly*, 96 N.J. at 547-48, 476 A.2d at 1224. The court emphasized that liability proceeds from the duty of care that accompanies the control of the liquor supply but did not consider the relationship between the parties. *See id.*

drunken driving to establish this duty.[181] Failure to examine the relationship of the parties was exacerbated by the court's reliance on *Rappaport v. Nichols*[182] and *Soronen v. Olde Milford Inn Inc.*,[183] which involved licensees, and on *Linn v. Rand*,[184] which itself imposed liability on a social host without evaluating the relationship of the parties. [185] The majority in *Kelly* justifiably says that there has been a trend in New Jersey law toward expanding the liability of those who serve alcohol.[186] However, the analysis adopted in earlier cases does not, as *Kelly* suggests, inevitably lead to imposing liability on social hosts.[187]

Before *Kelly*, the New Jersey Supreme Court had imposed liability only on providers of alcoholic beverages who were licensed by the state.[188] Thus, in *Rappaport*, the New Jersey Supreme Court had recognized a licensee's liability for injuries received by third parties as a result of the intoxicated driving of a customer, and in *Soronen* the court had extended liability to the licensee's intoxicated customer. The use of common law principles in *Rappaport* and *Soronen* to establish a duty of care is uncomfortably unclear. For example, in *Rappaport* the court failed to establish explicitly the existence of a duty of care.[189] Instead, *Rappaport* dealt primarily with establishing a standard of conduct that could be used to measure whether a licensee had been negligent in serving or selling alcoholic beverages.[190] It is significant, however, that *Rappaport* adopted the standard of conduct from language of an administrative regulation.[191] It can be inferred that the court was recognizing a duty in favor of those for whose protection the regulation was enacted. A standard of conduct can certainly be established by statutory enact-

181. *Id.*

182. 31 N.J. 188, 156 A.2d 1 (1959).

183. 46 N.J. 582, 218 A.2d 630 (1966).

184. 140 N.J. Super. 212, 356 A.2d 15 (App. Div. 1976).

185. *See id.* at 216-18, 356 A.2d at 17-18.

186. *See Kelly*, 96 N.J. at 558-59, 476 A.2d at 1229-30.

187. *See id.* at 555-56, 476 A.2d at 1228.

188. *See* Rappaport v. Nichols, 31 N.J. 188, 156 A.2d at 1 (1959); Soronen v. Olde Milford Inn, Inc., 46 N.J. 582, 218 A.2d 630 (1966); *see also Kelly*, 96 N.J. at 560, 476 A.2d at 1230 (Garibaldi, J., dissenting).

189. *See supra* note 39 and accompanying text.

190. *See* Rappaport v. Nichols, 31 N.J. at 202-03, 156 A.2d at 8-9.

191. *Id.* at 201-03, 156 A.2d at 8-9.

ment, and it has long been recognized that such statutory provisions give rise to a duty to conform conduct to their prescriptions.[192] Although the existence of duty may flow from a statute or regulation, it is critical to specify to whom such a duty is owed. Generally, statutory duties are owed to those for whom the law or regulation was adopted.[193]

In contrast to the New Jersey Supreme Court's somewhat ambiguous analysis in *Rappaport*, the *Soronen* court did not hesitate to state that a licensee had a duty not to serve liquor to a visibly intoxicated customer.[194] Its analysis clarified the pivotal function of the administrative regulation in defining a tavernkeeper's duty to intoxicated customers. *Soronen* declared that a licensee's duty of care to visibly intoxicated customers was embodied in a longstanding regulation of the Division of Alcoholic Beverage Control.[195] The court placed itself squarely within the accepted tradition of relying on a legislative provision or its attendant regulations to define the existence of a duty of care. *Soronen* does not pose any real difficulty in discerning to whom the duty is owed because the injured plaintiff was an intoxicated customer for whose special benefit the regulation was enacted.

The majority in *Kelly* does not provide any persuasive justification for relying on *Rappaport* or *Soronen* to establish the duty of a social host. Both cases involve only liquor licensees.[196] Furthermore, the existence of a duty is explicitly predicated on standards from a statutory regulation that has no applicability to a private party.[197] Careful common law adjudication would seem to demand that the *Kelly* court thoroughly evaluate a social host's relationship to his guests and to members of the gen-

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192. *See* RESTATEMENT (SECOND) OF TORTS § 285 (1965). *See supra* note 45 and accompanying text.

193. *See* RESTATEMENT (SECOND) OF TORTS § 286 (1965). *See supra* note 45 and accompanying text.

194. Soronen v. Olde Milford Inn, Inc., 46 N.J. at 586, 218 A.2d at 632-33.

195. *Id. See also* text accompanying notes 61-63.

196. *See* Soronen v. Olde Milford Inn, Inc., 46 N.J. 582, 218 A.2d 630 (1966); Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1 (1959); *see also supra* text accompanying note 188.

197. *See* Soronen v. Olde Milford Inn, Inc., 46 N.J. at 586, 218 A.2d at 633; Rappaport v. Nichols, 31 N.J. at 203, 156 A.2d at 9; *see also supra* text accompanying notes 47-51, 61-63.

eral public before expanding liability.[198] In fact, the court avoids precisely this analysis when postulating the duty of the social host.

Given the restricted nature of its prior decisions in *Rappaport* and *Soronen*, the New Jersey Supreme Court in *Kelly* was compelled to expand the rule of *Linn v. Rand*.[199] There, a lower appellate division court held that a social host could be liable to a third party for negligently serving alcohol to a minor who subsequently injured the third party.[200] *Kelly* justified its reliance on *Linn*, saying that "in expanding liability, *Linn* followed the rationale of *Rappaport* that the duty involved is a common law duty, not one arising from the statute and regulation prohibiting sales of liquor to a minor."[201]

Although the court in *Linn* claimed to follow *Rappaport*,[202] it failed to analyze the three elements of duty at least impliedly evaluated by *Rappaport*. Instead, *Linn* emphasized the foreseeable risk created when one serves excessive amounts of alcohol to a minor who will soon be driving a car.[203] Concluding that the task of a court is to do justice rather than to adhere to the technical immunity doctrine, *Linn* decided that a social host who serves too much alcohol to a minor creates an unjustifiable risk. Therefore the courts should not hesitate to impose liability upon the social host. [204]

Although the risks of drunken driving are substantial, risk alone does not substantiate the existence of a duty of care from one party to another. Despite the implications in *Linn*, social

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198. The *Kelly* court itself acknowledges the importance of weighing the relationship which exists between the parties when making a duty analysis. *Kelly*, 96 N.J. at 544, 476 A.2d at 1222 (quoting Goldberg v. Hous. Auth., 38 N.J. at 583, 186 A.2d at 293). *See also infra* text accompanying note 208.

199. *See Kelly*, 96 N.J. at 547, 476 A.2d at 1223.

200. Linn v. Rand, 140 N.J. Super. at 220, 356 A.2d at 19.

201. *Kelly*, 96 N.J. at 547, 476 A.2d at 1223.

202. *See* Linn v. Rand, 140 N.J. Super. at 216, 356 A.2d at 17-18. The court stated:

> There is nothing in Rappaport v. Nichols . . . and its progeny, which specifically bars the suit here involved as a matter of law. The forward looking and far-reaching philosophy expressed in *Rappaport* should also be applicable to negligent social hosts and should not be limited to holders of liquor licenses and their employees.

Id.

203. *See id.* at 219, 356 A.2d at 19.

204. *Id.* at 217-20, 356 A.2d at 18-20.

hosts had not been shielded from liability by an immunity doctrine.[205] Rather, courts had not recognized the existence of a relationship between host and guest sufficient to give rise to liability. *Linn* simply ignores the task of establishing that the requisite relationship exists between a social host and an injured member of the general public. In conclusory fashion *Linn* makes a public policy judgment generally reserved for the legislature. "It makes little sense to say that the licensee in *Rappaport* is under a duty to exercise care, but give immunity to a social host who may be guilty of the same wrongful conduct merely because he is unlicensed."[206]

1. *Are the roles and duties of a liquor licensee similar to those of a social host?*

Kelly appeared to embrace the *Linn* court's assumption that the relationships among a licensee, his customer, and an injured third party are analogous to the relationships among a social host, his guest, and a foreseeably injured third party. [207] At the outset, *Kelly* explicitly stated the importance of evaluating these relationships. The court maintained that the judicial imposition of a duty of care mandates an examination of the relationship of the parties:

> In most cases the justice of imposing . . . a duty is so clear that the cause of action in negligence is assumed to exist simply on the basis of the actor's creation of an unreasonable risk of foreseeable harm resulting in injury. In fact, however, more is needed, "more" being the value judgment, based on an analysis of public policy, that the actor owed the injured party a duty of reasonable care. . . . In *Goldberg v. Housing Authority of Newark*, . . . this Court explained that "whether a *duty* exists is ultimately a question of fairness." The inquiry involves a weighing of the relationship of the parties, the nature of the risk, and the public interest in the

205. *See* Comment, *Social Host Who Furnishes Alcoholic Beverages to Minor May be Held Liable for Minor's Negligent Acts*, 8 RUT-CAM. L. REV. 719 (1977-1978). The *Linn* court incorrectly stated that it was abolishing a common law immunity that shielded social hosts from liability. This approach is analytically unsound because the doctrine of immunity prevents the imposition of liability only where there is an established cause of action. *Id.* at 720-21.

206. *Id.* at 217, 356 A.2d at 18.

207. *See Kelly*, 96 N.J. at 547, 476 A.2d at 1223.

proposed solution.[208]

Having stated the traditional rule, the majority proceeded to ignore it.

The court not only failed to examine the parties' relationships but took the dramatic step of concluding that liability was based on a duty of care predicated on control of the liquor supply irrespective of the status of the party possessing such control.[209]

> The argument is made that the rule imposing liability on licensees is justified because licensees, unlike social hosts, derive a profit from serving liquor. We reject this analysis of the liability's foundation and emphasize that the *liability proceeds from the duty of care that accompanies control of the liquor supply.* Whatever the motive behind making alcohol available to those who will subsequently drive, the *provider* has a duty to the public not to create foreseeable, unreasonable risks by this activity.[210]

This approach is troublesome. Although the legislature may impose liability solely on the basis of social policy, as *Kelly* so aptly observes, courts must base decisions on "more," namely, a careful application of the common law requirements for establishing liability. *Kelly* does not adequately explain how the liability for negligently providing alcohol can be expanded to include a social host whose role in society is so different from that of a licensee. With the exception of *Linn v. Rand*,[211] which is of dubious precedential value, the liability for negligently providing alcohol had been predicated on the special role of a liquor licensee.

The differences between the roles of a social host and a licensee suggest that imposing liability on a social host is not a natural evolution of the judicial doctrine in this area. The act of selling alcohol by a licensee is conduct expressly governed by regulations having the force of law.[212] A social host, by contrast, does not sell alcoholic beverages or hold himself out to the pub-

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208. *Id.* at 544, 472 A.2d at 1222 (quoting Goldberg v. Hous. Auth., 38 N.J. at 583, 186 A.2d at 293).

209. *Id.* at 547-48, 476 A.2d at 1224.

210. *Id.* (emphasis added).

211. 140 N.J. Super. 212, 356 A.2d 15 (App. Div. 1976).

212. Soronen v. Olde Milford Inn, Inc., 46 N.J. at 590, 218 A.2d at 635.

lic as a professional. The dissent in *Kelly* carefully distinguished the role of a social host from the "peculiar position" of a licensee.[213] The social host has far less expertise in gauging levels of intoxication. [214] The private individual, in many instances, cannot control the liquor supply as can a bartender in a commercial business. [215] Significantly, a licensee may spread the cost of liability among his customers while the social host must bear this cost alone.[216] Furthermore, it is reasonable to impose tort liability on licensees based on their violations of explicit statutes and regulations.[217]

The scope of a licensee's duties is based to a large extent on the relationship he maintains with the public. [218] The same duty may not simply be transferred to a social host. Nor, as the *Kelly* court implied, may a court simply impose a licensee's duty of care upon a social host because the risks created by the conduct of each are similar.[219] To do so, violates New Jersey's long-established rule of law that the scope of a party's duty is not coextensive with the risk he creates.[220] Nonetheless, *Kelly* ignores the differences between a social host and a licensee and justifies its holding on public policy considerations: "We impose this duty on the host to the third party because we believe that the policy considerations served by its imposition far outweigh those asserted in opposition."[221]

2. *Recognizing the duty of a social host based on the concept of special relationship*

Although the reasoning of the New Jersey Supreme Court in *Kelly* may be criticized, its conclusion can be justified by applying a slightly different analysis. An examination of the relation-

213. *Id.* at 565, 476 A.2d at 1233 (Garibaldi, J., dissenting).

214. *Id.*

215. *Id.* at 566-67, 476 A.2d at 1234.

216. *Id.* at 568, 476 A.2d at 1234.

217. *Id.* at 565, 476 A.2d at 1233.

218. *See supra* text accompanying notes 18 and 65.

219. *Kelly*, 96 N.J. at 547-48, 476 A.2d at 1224. *See supra* text accompanying notes 209-210.

220. Goldberg v. Hous. Auth., 38 N.J. at 583, 186 A.2d at 293; *see also Kelly*, 96 N.J. at 544, 476 A.2d at 1222.

221. *Kelly*, 96 N.J. at 548, 476 A.2d at 1224.

ship between a social host and his guest indicates that, under many circumstances, a social host may indeed have an obligation to protect foreseeable innocent third parties from the negligent driving of an intoxicated guest.[222] However, this obligation does not arise because the roles of social host and licensee are analogous. Instead, the court must examine the facts of each case in order to determine whether or not a special relationship exists between the host and his guest that would justify imposition of a legal duty on the social host to act for the benefit of his guest or a third party.[223]

Early common law did not recognize any liability for acts of nonfeasance.[224] Although courts have been reluctant to force individuals to aid one another, there has been a trend toward establishing an affirmative duty to act when a special relationship exists between the parties.[225] Imposing a duty based on the quality of the relationship between the parties is preferred to establishing a general rule.[226] It avoids both the difficulty of creating a universal standard of selfless conduct and the problem of defining a workable rule that adequately covers a wide range of factual situations.[227] A duty to aid one who is in peril was first imposed on persons in "public callings" — the carrier and the innkeeper.[228] Expanding notions of liability now support imposing an affirmative duty on a social host to his guest when it is reasonable to know the guest is in peril. A corollary to this rule is that when this duty arises, it may include the obligation to protect third parties from the harm a guest may cause.[229]

Application of these principles to the facts in *Kelly* illustrates their utility. The social host, Zak, and his guest, Gwinnell,

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222. *See* W. PROSSER & P. KEETON, *supra* note 7, § 56.

223. *See* RESTATEMENT (SECOND) OF TORTS § 314A comment b (noting that the special relationship catagories currently recognized under this section may be expanded by the courts on a case-by-case basis).

224. *See* W. PROSSER & P. KEETON, *supra* note 7, § 56; Bohlen, *supra* note 7, at 222; *see also supra* text accompanying notes 10-13.

225. W. PROSSER & P. KEETON, *supra* note 7, at § 56.

226. *Id.*

227. *Id.*

228. *See supra* text accompanying note 18.

229. *See* W. PROSSER & P. KEETON, *supra* note 7, § 56. *See also* RESTATEMENT (SECOND) OF TORTS § 315 (1965) (stating that there is no duty to control the conduct of a third person unless a special relationship is found to exist between the actor and third party).

were business associates.[230] The evidence suggests that Zak should have known that he served his guest a large quantity of alcohol. Furthermore, it is reasonable to conclude that Zak knew his guest was intoxicated. In fact, shortly after Gwinnell drove off, the Zaks called his home to ask if he had arrived safely.[231] Gwinnell was given a blood alcohol test after the accident which showed that Zak had served enough alcohol for Gwinnell to have a blood alcohol concentration of 0.2886 %.[232] Driving with a blood alcohol concentration of 0.10 or more violates the New Jersey drunken driving statute.[233] There was expert testimony that Gwinnell showed unmistakable signs of severe intoxication while he was at the Zaks' home.[234] A court would have been justified in concluding that a special relationship existed in these circumstances. The parties were sufficiently well acquainted for Gwinnell to have socialized with Zak and his wife at their home for a couple of hours after work.[235] The host affirmatively provided a sufficient quantity of alcohol to cause peril. Recognition of a special relationship is particularly justified because the host caused an unreasonable risk of harm when he served alcohol in quantities sufficient to result in a blood alcohol concentration greatly in excess of the legally permitted level. A common law duty could be properly imposed on Zak, requiring that he take reasonable action to prevent his intoxicated guest, Gwinnell, from injuring either himself or an innocent third party.

Recognizing that a social host's duty arises from a special relationship with his guest is consistent with the decision of the New Jersey Supreme Court in *Soronen* in which the court held a licensee liable to an intoxicated customer because the customer could not exercise self-protection.[236] Although the duty of a social host requires that he take precautions similar to those de-

230. Supplemental Brief for Appellant at 4, Kelly v. Gwinnell, 96 N.J. 538, 476 A.2d 1219 (1984) (No. A-3442-81T1) (stating that Gwinnell and Zak had a one and one-half year business realtionship but had never been out socially).

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

232. *Id.*

233. *Id.* at 541 n.1, 476 A.2d at 1220 n.1.

234. *Id.* at 541, 476 A.2d at 1220.

235. Supplemental Brief for Appellant at 4-5, *Kelly* (No. A-3442-81T1); *see also Kelly*, 96 N.J. at 541, 476 A.2d at 1220.

236. *See* Soronen v. Olde Milford Inn, Inc., 46 N.J. at 592, 218 A.2d at 636. *See also supra* text accompanying notes 65-67.

manded of a licensee, the host's duty does not exist by analogy to the duty of a licensee. Rather, the duty of a social host arises as a result of his independent relationship to a particular guest.[237] Thus, liability can be imposed on a social host without sacrificing the traditional principles of common law adjudication.

Although using the special relationship concept permits the court to impose liability through an impartial application of common law principles, the rule derived in this manner also has other practical advantages. It is likely to have more equitable results than a rule that does not require an analysis of the relationship of the parties. A number of legitimate problems identified by the dissent in *Kelly* result from the majority's failure to recognize the existence of a special relationship. Although most social hosts do not have expertise in evaluating another person's level of intoxication,[238] by examining the social relationship between the parties and assessing the host's conduct, one may determine whether it is reasonable to conclude that the host should have known his guest was intoxicated. Moreover, knowledge of the relationship of host and guest and of the circumstances surrounding the service of alcohol will help a court to determine if it is reasonable, in the case of a large group, to decide if the host actually knew how much liquor his guest was drinking and if the host had effective control of the liquor supply.[239]

Furthermore, the concept of a special relationship will enable the court to give content to the duty of a social host. The *Kelly* court merely recognized a social host's duty to stop serving liquor to an intoxicated guest.[240] Judicial recognition of a special relationship will allow the court to consider if a specific social host should have done more — perhaps take reasonable action to prevent his guest from *driving* while intoxicated. This approach may in fact deter the direct cause of highway deaths, that is driving while intoxicated.

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237. *See* RESTATEMENT (SECOND) OF TORTS § 314A (1965).

238. *Kelly*, 96 N.J. at 565, 476 A.2d at 1233 (Garibaldi, J., dissenting).

239. *See id.* at 566-67, 476 A.2d at 1234.

240. *Id.* at 548, 476 A.2d at 1224. *See infra* notes 244-246 and accompanying text.

B. *Determining the Standard of Conduct of a Social Host*

In negligence, once a duty of care is recognized, a correlative standard of conduct must also be established to give notice of the acts that will give rise to liability.[241] *Kelly* did not describe the standard of conduct required of a social host. The majority's failure to indicate what conduct is required of a social host when serving alcohol was noted by the dissent:[242]

> Is the host obligated to use physical force to restrain an intoxicated guest from drinking and then from driving? Or is the host limited to delay and subterfuge tactics short of physical force? What is the result when the host tries to restrain the guest but fails? Is the host still liable? The majority opinion is silent on the extent to which we must police our guests.[243]

The majority, although not establishing a clear standard of conduct, does state that liability arises only when a social host serves alcohol directly to a guest knowing that the guest is intoxicated and will be driving a motor vehicle.[244] Therefore, it appears that under *Kelly*, a social host may avoid liability by stopping service to a guest once he realizes that the guest is intoxicated.[245] The social host will have, at least in theory, satisfied his duty to any third party subsequently injured by the negligent driving of the guest.[246] In practice, however, it is likely that a social host will be required to meet a higher standard of conduct in order to avoid civil liability. Assume a social host refuses to serve his guest more alcohol because he realizes that his guest is intoxicated and will be driving. If the guest leaves the host's home, perhaps in search of more liquor, and injures someone in an automobile accident, it is likely that the host will be subjected to civil liability if objective evidence establishes that the guest had a sufficiently high blood alcohol concentration. Commenting on this ambiguous standard of conduct, the dissent

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241. *See supra* notes 44-46 and accompanying text.

242. *Kelly*, 96 N.J. at 567-68, 576 A.2d at 1234 (Garibaldi, J., dissenting).

243. *Id.*

244. *Kelly*, 96 N.J. at 548, 559, 476 A.2d at 1224, 1230.

245. Thus, the *Kelly* dissent notes that "the majority holds that a host will be liable only if he serves alcohol to a guest knowing both that the guest is intoxicated and that the guest will drive." *Id.* at 565, 476 A.2d at 1233 (Garibaldi, J., dissenting).

246. *See id.*

observes that:

> The majority holds that a host will be liable only if he serves alcohol to a guest knowing both that the guest is intoxicated and that the guest will drive . . . . Although this standard calls for a subjective determination of the extent of the host's knowledge, a close reading of the opinion makes clear that the majority is actually relying on objective evidence. The majority takes the results of Gwinnell's blood alcohol concentration test and concludes from the test that "the Zaks must have known that their provision of liquor was causing Gwinnell to become drunk . . . ."[247]

Having established that the subjective knowledge of the social host is crucial for liability, the majority creates confusion when it points to the importance of using objective evidence to "weed out baseless claims."[248] Objective evidence, it states, will protect against *Kelly's* becoming a tool for harassment.[249] Thus, although *Kelly* speaks only of a social host's duty to control his *own* service of alcoholic beverages, a practical result may be that more is required to avoid liability — even restraint of an intoxicated guest who wishes to drive. Common law principles impose a duty to control the conduct of another only when a special relationship exists between the parties.[250] The court's failure to examine the relationship between the social host and his guest leads to an ambiguous standard of conduct and to a rule based on public policy considerations rather than on an analysis that considers all of the factors for recognizing a duty of care.

If *Kelly* had based a host's duty of care on his relationship with his guest, the court could more easily define the applicable standard of conduct on a case-by-case basis. The degree to which a host should take affirmative action to avoid liability would depend on what conduct is reasonable in view of the host's social relationship with his guest. More, for example, would be expected of a host who has served a large quantity of alcohol to a close relative than would be expected of a host who gave his employer a few drinks. A rule that requires the fact-finder to determine reasonable conduct based on all the circum-

247. *Id.* at 565, 476 A.2d at 1233.
248. *Id.* at 559, 476 A.2d at 1230.
249. *Id.*
250. *See supra* text accompanying notes 225-229.

stances of the case may be more effective in promoting a policy against drunk driving, than a rule that merely requires a host to monitor the provision of alcohol to his guest.[251] Such a rule would not require affirmative conduct from a social host solely because his guest had an unacceptable blood alcohol level. The standard of conduct would derive from all of the salient factors that justifiably flow from the relationship of the parties.

V. Conclusion

The New Jersey Supreme Court held in *Kelly v. Gwinnell* that a social host, who directly serves alcoholic beverages to a guest, knowing that the guest is intoxicated and will thereafter drive, may be held jointly liable to a third party for injuries caused by the guest's negligent operation of a motor vehicle.[252] This holding is based upon an incomplete common law analysis. The court failed to examine the nature of the relationship existing between the defendant social hosts, their guest and the injured third party. Instead, *Kelly* court emphasized the risks created by a social host's service of alcohol to an intoxicated guest. The court concluded that because the risks created by service of alcohol to a guest are similar to those risks created by a liquor licensee serving alcohol to a customer, the liability of a licensee could be properly expanded to a host.

Risk alone, however, does not substantiate the existence of a duty of care from one party to another. In expanding a licensee's liability to a social host, the court failed to acknowledge, as it had in previous cases, that a licensee's common law duty to the public stems from his business relationship with the public. Thus, a licensee's liability for negligent service of alcohol may not simply be transferred to a social host without first examining the relationship that exists between the host and his guest. *Kelly* does not adequately explain how the liability for negligent provision of alcohol can be expanded to include a social host whose role in society is different from a liquor licensee's. This

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251. Whether or not a special relationship exists between parties must be determined by the court on a case-by-case basis and has no fixed definition. It is, therefore, not unlikely that a court might recognize the existence of a relationship between a host and his guests.

252. *Kelly*, 96 N.J. at 548, 559, 476 A.2d at 1224, 1230.

omission weakens the court's decision.

Although the reasoning of the New Jersey Supreme Court may be criticized, its conclusion may be justified by a proper common law analysis. An examination of the relationship between a social host and his guest indicates that under many circumstances a social host may indeed have an obligation to protect third parties from the drunken driving of a guest. However, a duty to control the actions of an adult guest may not, as the *Kelly* court contends, be imposed indiscriminantly upon all social hosts. Instead, the court must first establish that a special relationship exists between the social host and his guest. This relationship will justify imposing a legal duty upon the host, requiring the host to take reasonable action to prevent his intoxicated guest from driving.

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