Judicially Imposed Liquor Liability and Developments in West Virginia Negligence Actions

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JUDICIALLY IMPOSED LIQUOR LIABILITY AND DEVELOPMENTS IN WEST VIRGINIA NEGLIGENCE ACTIONS

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I. INTRODUCTION

At common law, the sale or gift of intoxicating beverages to ordinary able-bodied men did not give rise to a cause of action against a licensed vendor, social host or employer for the torts of the intoxicated customer or guest.¹ The reasoning for the general rule at common law was that the consumption of the intoxicating liquor, and not the furnishing of it, was the proximate cause of any subsequent alcohol-related injury.²

In response to this hardship in the common law, many states enacted statutes known as "dram shop acts,"³ giving a right of action to injured third parties against licensed vendors who supply

² See cases cited supra note 1.
³ Dram shop acts are also sometimes referred to as "civil liability" acts or "civil damage" acts.
intoxicating beverages to minors and obviously intoxicated persons. Many other states have not enacted dram shop acts, but have judicially imposed liability on licensed vendors, social hosts and employers under one of three theories of liability: (1) negligence per se for the violation of alcohol beverage control statutes; (2) common law negligence principles based upon the violation of a statutory duty; and (3) pure negligence principles.

West Virginia currently does not have a dram shop act or social liability legislation. West Virginia does, however, judicially recognize a tort cause of action, under common law negligence principles, against licensed vendors for injuries proximately resulting from a violation of an alcohol beverage control statute.

This note first examines the three primary theories used nationwide to judicially impose civil liability on licensed vendors, social hosts and employers. Secondly, this note focuses on the changes in civil liquor liability in West Virginia. The Supreme Court of Appeals of West Virginia recently recognized causes of action against licensed

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4. Fourteen states and the District of Columbia have dram shop acts currently in force:

5. For a discussion of liability under the theory of negligence per se for violations of alcohol beverage control statutes, see infra notes 18, 19, 32 and accompanying text. Alcohol beverage control statutes prohibit the sale of intoxicating liquor to specified individuals and impose fines and/or criminal penalties for their violations and should be distinguished from dram shop acts.

6. For a discussion of liability under the theory of common law negligence, see infra notes 20-22, 33 and accompanying text.

7. For a discussion of liability under the theory of pure negligence, see infra notes 25, 26, 35-37 and accompanying text.

8. West Virginia enacted a civil damage act by 1872-73 W. Va. Acts ch. 99, § 6, which was codified in the 1906 code at ch. 32, § 26 and in the 1931 code at § 60-1-22. The provision, however, was repealed by 1935 W. Va. Acts ch. 4.

9. For an example of current social host liability legislation, see N.J. REV. STAT. ANN. §§ 2A:15-5.5 to 5.8 (West 1988).

venders under the theory that the violation of an alcohol beverage control statute is prima facie evidence of negligence.\textsuperscript{11} In \textit{Bailey v. Black},\textsuperscript{12} the Supreme Court of Appeals of West Virginia recognized a cause of action against tavern owners for the violation of a statute making it illegal for a licensed vendor to sell alcohol to intoxicated persons.\textsuperscript{13} Additionally, in \textit{Anderson v. Moulder},\textsuperscript{14} the Supreme Court of Appeals of West Virginia recognized a cause of action against a beer distributor for the violation of a statute making it illegal for a licensed vendor to sell beer to a person under twenty-one years of age.\textsuperscript{15} The Supreme Court of Appeals, however, in \textit{Overbaugh v. McCutcheon},\textsuperscript{16} would not recognize civil liability on the part of a social host or employer who gratuitously furnished alcohol to a guest who subsequently injured third parties as a result of the guest's intoxication.\textsuperscript{17} Finally, this note concludes by synthesizing the present West Virginia case law to determine when a licensed vendor will be held liable and whether such liability could be extended to social hosts and employers.

II. NEGLIGENCE THEORIES USED TO IMPOSE CIVIL LIABILITY ON LICENSED VENDORS, SOCIAL HOSTS AND EMPLOYERS

A. Licensed Vendors

The first of the three primary theories state courts have used to impose civil liability upon licensed vendors is that the violation of an alcohol beverage control statute constitutes negligence per se.\textsuperscript{18}

\begin{thebibliography}{9}
\bibitem{12} 394 S.E.2d 58.
\bibitem{13} \textit{Id.} at 59 (violation of W. Va. \textsc{Code} § 60-7-12 (1986)).
\bibitem{14} 394 S.E.2d 61.
\bibitem{15} \textit{Id.} at 66-67 (violation of W. Va. \textsc{Code} § 11-16-18(a)(3) (1986)).
\bibitem{17} \textit{Id.} at 158-59.
\bibitem{18} See Burke v. Superior Court, 129 Cal. App. 3d 570, 181 Cal. Rptr. 149 (1982) (violation of statute prohibiting sale of liquor to minor could form basis for negligence per se if proximate cause can be proved); Barson v. Gate Petroleum Co., 401 So. 2d 922, (Fla. App. 1981) (negligence per se results from violation of statute); Trail v. Christian, 298 Minn. 101, 213 N.W.2d 618 (1973) (tavern sold alcohol to minors in violation of beverage control statute); Munford, Inc. v. Peterson, 368 So. 2d 213 (Miss. 1979) (market sold alcohol to minors in violation of beverage control statute); Baatz v. Arrow Bar, 426 N.W.2d 298 (S.D. 1988) (violation of statute prohibiting sale of liquor to an intoxicated person was negligence as a matter of law); Purchase v. Meyer, 108 Wash. 2d 220, 737 P.2d 661 (1987) (restaurant was negligent per se for having served alcoholic beverages to minor in violation of statute).
\end{thebibliography}
Under the negligence per se theory, once a plaintiff establishes that the licensed vendor has violated an alcohol beverage control statute, any inquiry into the standard of care of the licensed vendor is foreclosed.\textsuperscript{19}

Secondly, based on common law negligence principles, state courts have imposed civil liability on licensed vendors when an alcohol beverage control statute has been violated.\textsuperscript{20} These courts have reasoned that the statutes impose a duty on the licensed vendor to protect the general public from intoxicated customers.\textsuperscript{21} Therefore, when a vendor serves a person in violation of a statute, that is a breach of the minimum statutory standard of care establishing a common law negligence cause of action. Under the common law negligence theory, violation of an alcohol beverage control statute is prima facie evidence of negligence.\textsuperscript{22}

Some jurisdictions refuse to impose civil liability upon licensed vendors even when a beverage control statute has been violated, reasoning that it is up to the legislature to create a cause of action against licensed vendors through enactment of dram shop acts.\textsuperscript{23}


\textsuperscript{21} See Waynick v. Chicago's Last Dep't Store, 269 F.2d 322 (7th Cir. 1959) (a common law negligence action existed under a duty imposed by alcoholic beverage control statute); Cuevas v. Royal D'Iberville Hotel, 498 So. 2d 346 (Miss. 1986) (the public is protected under statute prohibiting sale of alcoholic beverages to visibly intoxicated persons from negligence acts of such intoxicated persons, and has claim against vendor violating statute); Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1 (1959) (vendors served a minor in violation of beverage control statutes that created a duty to the general public); Lopez v. Maez, 98 N.M. 625, 651 P.2d 1269 (1982) (tavern owner served an intoxicated patron in violation of the beverage control statutes that created a duty to the general public); Campbell v. Carpenter, 279 Or. 237, 566 P.2d 893 (1977) (tavern owner who sold intoxicants to an intoxicated person in violation of a penal statute owed a duty to the travelling public).

\textsuperscript{22} Courts prefer to recognize common law negligence actions, rather than negligence per se actions so to avoid placing the presumption of negligence on vendors. See Easterday, \textit{The Indiana Comparative Fault Act: How Does It Compare With Other Jurisdictions?}, 17 Ind. L. Rev. 883 (1984).

\textsuperscript{23} See Lewis v. Wolf, 122 Ariz. 567, 596 P.2d 705 (Ct. App. 1979) (no liability for vendor violating beverage control statute in absence of dram shop act); Keaton v. Kroger Co., 143 Ga. App. 23, 237 S.E.2d 443 (1977) (in absence of legislation, a licensed vendor is not liable for selling to minor in violation of beverage control statute); Holmes v. Circo, 196 Neb. 496, 244 N.W.2d 65 (1976) (in absence of legislation, a licensed vendor is not liable to third parties injured by intoxicated persons who received alcohol from vendor in violation of beverage control statutes).
Additionally, some courts refuse to impose civil liability for the violation of a statute so as not to deviate from the common law.24

Finally, a few state courts impose liability on licensed vendors based upon pure negligence principles.25 These courts recognize that a licensed vendor owes a duty to others when his or her acts create a foreseeable and unreasonable risk of harm to third parties, and do not rely on a violation of a statutory duty. Negligence is established by showing the licensed vendor knew or should have known he was serving intoxicating beverages to a minor or an intoxicated person who would be driving, and the resulting accident would not have occurred but for the intoxication.26

B. Social Hosts and Employers

Courts have not been as aggressive in imposing civil liability on social hosts or employers for serving intoxicating beverages to guests or employees who thereafter injure third parties as a result of the intoxication. Generally, employers are categorized by courts as social hosts and therefore have been treated similarly.27 Most state courts have been reluctant to use violations of statutes28 or pure negligence

24. See Yancey v. Beverage House of Little Rock, Inc., 29 Ark. 217, 723 S.W.2d 826 (1987) (the court would not deviate from common law and impose liability on licensed vendors for injuries caused by those who drink intoxicants); Fudge v. Kansas City, 239 Kan. 369, 720 P.2d 1093 (1986) (no cause of action against a licensed vendor, since common law dispensers of alcohol are not liable to victims of intoxicated tortfeasors, even if they violate the beverage control statute).

25. These courts have found licensed vendors civilly liable using pure negligence principles and common law negligence principles based upon the violation of an alcohol beverage control statute, reasoning that the licensed vendor owes a duty to the general public recognized by common law and statute. Brannigan v. Raybuck, 136 Ariz. 513, 667 P.2d 213 (1983); El Chico Corp. v. Poole, 732 S.W.2d 306 (Tex. 1987).


28. For examples of courts that do not recognize a cause of action against a social host or employer for violation of a statute, see Bass v. Pratt, 177 Cal. App. 3d 129, 222 Cal. Rptr. 723 (1986); Slicer v. Quigley, 180 Conn. 252, 429 A.2d 855 (1980) (no liability for host despite statutory violation); Fuhrman v. Total Petroleum, Inc. 398 N.W.2d 807 (Iowa 1987); Boutwell v. Sullivan, 469 So. 2d 526 (Miss. 1985) (beverage control statute does not apply to situation in which a social host allegedly serves beer to an individual who was intoxicated); Runge v. Watts, 180 Mont. 91, 589 P.2d 145 (1979) (no liability for social hosts serving intoxicating liquors to minors); Manning v. Andy, 454 Pa. 237, 310 A.2d 75 (1973) (employers are not liable for violations of a statute applicable only to licensed vendors); Hulse v. Driver, 11 Wash. App. 509, 524 P.2d 255 (1974) (no liability for social companion who violated statute by furnishing alcohol to minors).
principles\textsuperscript{29} to extend civil liability to social hosts or employers, reasoning that such hosts are unlikely to have extensive liability insurance, the expertise to judge the degree of intoxication of the guests, or the control and supervision necessary to protect their guests or employees.\textsuperscript{30} Some courts have refused to impose liability reasoning that the legislature is best equipped to resolve the competing considerations implicated by such a cause of action.\textsuperscript{31}

Some courts, however, have imposed civil liability on social hosts and employers for injuries caused by their intoxicated guests and employees, based on the same three theories used to impose liability on licensed vendors. First, a few jurisdictions have imposed liability on social hosts under the negligence per se theory for violations of alcohol beverage control statutes, but have done so only in the limited situations where an adult host has served intoxicants to a minor.\textsuperscript{32}

Secondly, some courts have chosen not to place the presumption of negligence on the social host or employer for violations of alcohol

\textsuperscript{29} For examples of courts that do not recognize a pure negligence cause of action against a social host or an employer, see Cartwright v. Hyatt Corp., 460 F. Supp. 80 (D.C.D.C. 1978) (no common law negligence action against employers buying drinks for employees after hours); DeLoach v. Mayer Elec. Supply Co., 378 So. 2d 733 (Ala. 1979) (no cause of action for employers furnishing alcohol to employees); Behnke v. Pierson, 21 Mich. App. 219, 175 N.W.2d 303 (1970) (no cause of action against employers who furnish intoxicants to employees at a company party); Harriman v. Smith, 697 S.W.2d 219 (Mo. App. 1985) (no common law liability on the part of a social host who serves alcohol in his home to an intoxicated guest who subsequently injures a third party); Klein v. Raysinger, 504 Pa. 141, 470 A.2d 507 (1983) (Pennsylvania law does not recognize a cause of action against a nonlicensed, social host who furnishes alcohol to intoxicated guests); Garren v. Cummings & McCrady, Inc., 289 S.C. 348, 345 S.E.2d 508 (1986) (social hosts have no common law or statutory liability to third parties injured as a result of a guest's intoxication).


\textsuperscript{31} See Bankston v. Brennan, 507 So. 2d 1385 (Fla. 1987) (refusing to recognize a common law cause of action against a social host, reasoning that the state legislature was best equipped to resolve the competing considerations implicated by such a cause of action); Chidress v. Sams, 736 S.W.2d 48 (Mo. 1987) (the legislature must decide whether there is a common law negligence action against a social host).

\textsuperscript{32} See Burke v. Superior Court, 129 Cal. App. 3d 570, 181 Cal. Rptr. 149 (4th Dist. 1982); Brattain v. Herron, 159 Ind. App. 663, 309 N.E.2d 150 (1974) (furnishing alcohol to a minor in violation of statute constitutes negligence per se); Thaut v. Finley, 50 Mich. App. 611, 213 N.W.2d 820 (1973) (violation of a penal statute prohibiting the furnishing of alcoholic beverages to minors, by the host of a wedding reception, would constitute negligence per se); Sorensen v. Jarvis, 119 Wis. 2d 627, 350 N.W.2d 108 (1984) (finding a social host negligent per se for violating the criminal law by furnishing beer and liquor to a minor, because the statutes apply not only to licensed vendors, but to those who furnish alcoholic beverages).
beverage control statutes, but have used common law negligence principles to find a violation of an alcohol beverage control statute as prima facie negligence.\textsuperscript{33} The broad language of most alcohol beverage control statutes signals the intent of legislatures to impose liability not only on licensed vendors, but on social hosts and employers as well.\textsuperscript{34} Therefore, if a court uses a violation of a broad language statute to impose liability on a licensed vendor, it follows that the same violation may be used to impose liability on social hosts and employees. Additionally, the courts that extend liability to social hosts should logically extend liability to employers.

Finally, the third theory courts have used to establish civil liability for social hosts\textsuperscript{35} and employers\textsuperscript{36} furnishing intoxicants is pure

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{34} The broad language usually used includes the terms "any person" instead of just licensee or permittee, and "give" in conjunction with "sell."
\item \textsuperscript{35} For examples of courts that use pure negligence theories to impose civil liability on social hosts, see Gordon v. Alaska Pacific Bancorporation, 753 P.2d 721 (Alaska 1988) (finding a host liable for injuries to a guest, for the host had a duty to provide protection, knowing that, among other things, intoxicated people would be on the premises); Clendening v. Shipton, 149 Cal. App. 3d 191, 196 Cal. Rptr. 654 (1983); McGuigian v. New England Tel. & Tel. Co., 398 Mass. 152, 496 N.E.2d 141 (1986); Kelly v. Gwinnell, 96 N.J. 538, 476 A.2d 1219 (1984) (finding a host who serves liquor to an adult, knowing both that the guest is intoxicated and will thereafter be driving, liable for injuries inflicted on a third party by the guest, because a host has a duty to the public not to create foreseeable, unreasonable risks); Baird v. Roach, Inc., 11 Ohio App. 3d 16, 462 N.E.2d 1229 (1983) (holding that a host can be held liable where the host knew the guest was intoxicated and would probably create an unreasonable risk of harm to third persons); Solberg v. Johnson, 306 Or. 484, 760 P.2d 867 (1988); Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity, 258 Or. 632, 485 P.2d 18 (1971) (a cause of action exists against a host on the theory that the host ought to have known that guest was a minor and that he would be driving after the party, and therefore serving alcohol to the minor was unreasonable); Kobaek v. Crook, 123 Wis. 2d 259, 366 N.W.2d 857 (1985) (finding that hosts could be held liable on common law negligence grounds for failing to exercise ordinary care in supplying intoxicating beverages).
\item \textsuperscript{36} For examples of courts that use pure negligence theories to impose civil liability on employers, see Chaistain v. Litton Systems, Inc., 694 F.2d 957 (4th Cir. 1982), cert. denied, 462 U.S. 1106 (1983) (under pure negligence principles, an employer is liable for the torts of an intoxicated employee, even though a statute was not violated); Brockett v. Kitchen Boyd Motor Co., 24 Cal. App. 3d 87, 100 Cal. Rptr. 752 (1972) (a cause of action exists where a minor's intoxication was
negligence. The courts reason that a host creates a duty when his or her acts create a foreseeable, unreasonable risk of harm to third parties. Additionally, the theory of respondeat superior, has also been used to impose civil liability on an employer who furnishes intoxicating beverages to an employee who subsequently injures a third party.

III. WEST VIRGINIA LIQUOR LIABILITY

A. Legislative History

West Virginia does not have a dram shop act or social host liability legislation, but has enacted four statutes controlling the selling, furnishing or giving of alcoholic liquors, nonintoxicating beer

induced as a result of an employer's Christmas party and the employer knew the minor would thereafter be driving); Garip Constr. Co. v. Foster, 519 N.E.2d 1224 (Ind. 1988) (a relationship exists between a host employer, an intoxicated employee, and a third-person motorist which as a matter of law gives rise to a duty on the part of an employer to exercise ordinary and reasonable care); Romeo v. VanOtterloo, 117 Mich. App. 333, 323 N.W.2d 693 (1982) (employer could be liable for the tort of an employee who hosted a business related party, reasoning that the employment relationship created a duty for the employer to supervise the party and provide intoxicated guests with safe transportation home).


38. For a comprehensive discussion of the theory of respondeat superior and its use to impose civil liability on employers who furnish intoxicating beverages to employees who subsequently injure third parties, see Comment, Employer Liability for a Drunken Employee's Actions Following an Office Party: A Cause of Action Under Respondeat Superior, 19 CAL. W.L. REV. 107 (1982).

39. The former West Virginia Civil Damages Act of 1873 provided in part that:
Every husband, wife, child, parent, guardian, employer, or other person who shall be injured in person or property, or of means of support by any intoxicated person, or in consequence of intoxication, habitual or otherwise, of any person, shall have a right of action in his or her name, severally or jointly, against any person shall by selling or giving intoxicating liquors, have caused the intoxication, in whole or in part, of such person or persons.


Theoretically, the former West Virginia civil damage act could have been construed against social hosts or employers, because it provided for a cause of action when intoxicating liquors were "given" to a person causing intoxication.

40. The State Retail Liquor License Act, W. VA. CODE § 60-3A-1 to -31 (Supp. 1990); The Liquor Control Act regarding Licenses to Private Clubs, W. VA. CODE § 60-7-1 to -17 (1989).


The term “nonintoxicating” is used to distinguish between beer and liquor, for the purpose of regulating and controlling its sale and facilitating the enforcement and collection of the license taxes imposed on beer and liquor, as well as to distinguish a beer from a nonintoxicating intoxication.
and wine. These four beverage control statutes were intended to provide for the, "protection of the public safety, welfare, health, peace and morals and . . . to eliminate, or to minimize to the extent practicable, the evils attendant to the unregulated . . . and unlawful . . . sale, distribution . . . and consumption of such beverages." These beverage control statutes are the same type as those used by other state courts to impose civil liability when violated, based upon the theory of negligence per se and common law negligence principles. Considering that West Virginia courts recognize a violation of a standard of care established by a statute constitutes prima facie evidence of negligence, there is a foundation in West Virginia law for imposing civil liability based upon violations of the state's alcohol beverage control statutes. West Virginia Code § 55-7-9 also expressly recognizes a cause of action in tort for the violation of any statute.

West Virginia Code § 60-7-12 prohibits licensees of private clubs to, "sell, [or] . . . give away any alcoholic liquors, for or to any person less than twenty-one years of age, . . . any mental incompetent, or to a person who is physically incapacitated due to the consumption of alcoholic liquor or the use of drugs," or to "permit the consumption by, or serve to, on the premises any alcoholic liquors . . . to any person who is less than twenty-one years of age."

44. For examples of courts which impose civil liability upon a violation of an alcohol beverage control statute as constituting negligence per se, see infra notes 18 and 32.
45. For an example of courts which impose civil liability based on common law negligence principles for violations of alcohol beverage control statutes, see infra notes 20, 21 and 33.
47. W. Va. CODE § 55-7-9 (1981) provides that:
Any person injured by the violation of any statute may recover from the offender such damages as he may sustain by reason of the violation, although a penalty or forfeiture for such violation be thereby imposed, unless the same be expressly mentioned to be in lieu of such damages.
49. Id. § 60-7-12(a)(4) (1989).
50. Id. § 60-7-12(a)(6) (1989).
West Virginia Code § 60-3A-25 prohibits licensees of state liquor stores to sell alcoholic beverages to a person who is less than twenty-one years of age,\(^{51}\) or visibly intoxicated.\(^{52}\)

West Virginia Code § 60-8-20 makes it unlawful for, "a licensee, his servants, agents or employees to sell, furnish or give wine to any person less than twenty-one years of age, or to a mental incompetent, or to a person who is physically incapacitated due to the consumption of alcoholic liquor or the use of drugs."\(^{53}\)

West Virginia Code § 11-16-18 makes it unlawful "for any licensee, his, her, its or their servants, agents or employees, to sell, furnish or give any nonintoxicating beer . . . to any person visibly or noticeably intoxicated, or to any person known to be insane or known to be a habitual drunkard,"\(^{54}\) or to, "any person who is less than twenty-one years of age."\(^{55}\)

West Virginia Code §§ 60-7-12a, 60-3A-24(b), and 60-8-20a also contain provisions entitled "[u]nlawful acts by persons."\(^{56}\) These sections make it unlawful for "any person" to knowingly buy for, give or furnish to anyone under the age of twenty-one, to whom they are not related by blood or marriage, any nonintoxicating beer or alcoholic liquors purchased from a licensee\(^{57}\) or from whatever source,\(^{58}\) or wine or other alcoholic liquors from any source.\(^{59}\) These provisions suggest that a cause of action could be maintained against a social host or an employer who violates a statute by knowingly furnishing alcoholic beverages to persons less than twenty-one years of age.

B. Case Law

1. Licensed Vendors

In Bailey v. Black,\(^{60}\) a case of first impression, the Supreme Court of Appeals of West Virginia addressed whether a licensed vendor,

52. Id. § 60-3A-25(a)(3) (Supp. 1990).
53. Id. § 60-8-20(c) (1989).
56. W. Va. Code § 60-7-12a (1989); id. § 60-3A-24(b) (Supp. 1990); id. § 60-8-20a (1989).
57. W. Va. Code § 60-7-12a(b).
58. Id. § 60-3A-24(b).
who sells alcohol to an intoxicated person in violation of a statute,\textsuperscript{61} was liable for the damages suffered by others as a result of the illegal sale.\textsuperscript{62} In Bailey, the widow and executrix of Mr. Bailey brought a wrongful death action against the Blacks, individually and as owners of the Stoney Brook Inn, for damages caused by Ms. Sells, an intoxicated patron of the Black’s Inn. On October 16, 1986, Ms. Sells purchased and consumed several beers at the Black’s tavern over a period of almost four hours, until ejected from the Inn by the Blacks after having a heated argument with other patrons of the Inn.

The Blacks responded by filing a third-party indemnity complaint against Ms. Sells, who in turn counter-claimed against the Blacks to recover damages for her own injuries. The trial court entered summary judgment in favor of the Blacks, holding as a matter of law that the Blacks, as licensed vendors, were not liable either to Mrs. Bailey or Ms. Sells.\textsuperscript{63}

On appeal, the Supreme Court of Appeals of West Virginia reversed and remanded the case, holding that a licensed vendor who sells alcohol to an intoxicated person, in violation of a statute, was liable for damages suffered by others as a result of the illegal sale.\textsuperscript{64} The Court based its decision on two statutes, West Virginia Code § 55-7-9, which provides that any person injured by the violation of a statute may recover damages from the offender,\textsuperscript{65} and West Virginia Code § 60-7-12, making it illegal for a licensee to sell alcohol to any person “physically incapacitated due to consumption of alcoholic liquor.”\textsuperscript{66} The Bailey Court adopted the common law negligence theory of civil liability based upon a violation of an alcohol beverage control statute, citing Lopez v. Maez\textsuperscript{67} and Ono v. Applegate\textsuperscript{68} as examples of cases where courts used the same approach to impose civil liability.\textsuperscript{69}

\begin{thebibliography}{99}
\bibitem{61} W. VA. CODE § 60-7-12(a)(6) (1989).
\bibitem{62} Bailey, 394 S.E.2d at 59.
\bibitem{63} Id.
\bibitem{64} Id.
\bibitem{65} W. VA. CODE § 55-7-9 (1981), supra note 47.
\bibitem{66} Bailey, 394 S.E.2d at 59. Violation of W. VA. CODE § 60-7-12 is a misdemeanor. Id.
\bibitem{67} 98 N.M. 625, 651 P.2d 1269 (1982) (violation of N.M. STAT. ANN. § 60-7A-16 (1981)).
\bibitem{68} 62 Haw. 131, 612 P.2d 533 (1980) (violation of HAW. REV. STAT. § 281-78 (1985)).
\bibitem{69} For a review of the Restatement (Second) of Torts § 408 to the breach of alcohol beverage control statutes as a cause of action under common law negligence principles, see infra notes 20, 21 and 33.
\end{thebibliography}
The court established the standard of care for licensed vendors by interpreting the "physically incapacitated" language of West Virginia Code § 60-7-12 to mean that the licensed vendor must be capable of knowing that the buyer was drunk. Therefore, the buyer must have exhibited physical signs of drunkenness or multiple drinks must have been served over a comparatively short period of time such that a reasonably prudent server of alcohol should have known that the buyer was drunk. The court also determined that the scope of the statutory duty extended to those whom § 60-7-12 was intended to protect and those who suffered the sort of harm the statute was meant to prevent. As for third persons, the court concluded West Virginia Code § 55-7-9 protected "any person injured by the violation of any statute" and thus injured third parties could recover for damages proximately caused by the violation of § 60-7-12(a)(4).

In Anderson v. Moulder, Mr. Keesee, an employee and agent of the Mercer Wholesale Company, a licensed beer distributor, allegedly sold a keg of beer to seventeen year old Sean Anderson. Three days later, Anderson died in an automobile accident. He was a passenger in a vehicle driven by eighteen year old David Moulder. Both Anderson and Moulder were allegedly intoxicated due to their consumption of the beer Anderson purchased from Keesee. The estate of the decedent brought a wrongful death action against Moulder, Kee see, and Mercer Wholesale Company.

The Anderson court acknowledged the common law precedent that the sale of liquor to ordinary able-bodied men did not give rise to any civil liability against the licensed vendor for injuries caused by intoxication. The court recognized, however, that many juris-

70. Bailey, 394 S.E.2d at 60.
71. Id.
72. Id.
73. Id.
74. Id.
76. Id. at 65, n.1 ("Moulder also filed a third-party complaint against Mercer Wholesale Company and a cross-claim against Mercer Wholesale Company and Keesee").
77. Id. at 66.
dictions have adopted dram shop acts to ameliorate the hardship at common law, 78 that West Virginia Code § 55-7-9 expressly authorizes civil liability based on a violation of a statute, 79 and that there is a growing trend in other jurisdictions to predicate licensed vendor liability on violations of alcohol beverage control statutes. 80 The court reasoned that the prohibition against selling beer to individuals under the age of twenty-one represents the legislative intent to protect both the underage purchaser and the public in general from the consequences of such illegal sales. 81 The legislative recognized the danger that the underage drinkers presented to themselves and others because of their immaturity and lack of capability to handle the intoxicative and addictive effects of alcohol. 82

The Supreme Court of Appeals of West Virginia concluded therefore, that the sale of beer in violation of West Virginia Code § 11-16-18(a)(3), 83 making it unlawful for a licensee to sell beer to a person under the age of twenty-one, gives rise to a cause of action against a licensed vendor in favor of a purchaser or a third party injured as a proximate result of the unlawful sale. 84 The court noted, however, that the violation of a statute in West Virginia is only prima facie evidence of negligence. 85 Accordingly, a licensee who sells beer to a person under the age of twenty-one may rebut the showing of negligence by proving that the purchaser appeared to be of age and that the licensed vendor used reasonable means of identification to ascertain his age. 86

With respect to proximate cause, the court determined that when a licensed vendor negligently sells alcoholic beverages to a person

78. Id.
82. Anderson, 394 S.E.2d at 68.
83. For the purpose of this statute, a licensee includes brewers or manufacturers, distributors, and retailers. See W. Va. Code §§ 11-16-3, -5, -18 (1987).
84. Anderson, 394 S.E.2d at 68. Cf. Johnson v. Kotval, 369 N.W.2d 584 (Minn. App. 1985) (finding no cause of action against a wholesale distributor that violated an alcohol beverage control statute, because sale was too far removed from injury to constitute proximate cause).
85. Anderson, 394 S.E.2d at 68.
86. Id.
under twenty-one years of age, the vendor can reasonably foresee that such minor will consume all or part of such beverages, become intoxicated, and as a result, injure himself or a third party.\textsuperscript{87} Additionally, the court ruled that a licensed vendor in certain circumstances can reasonably foresee that the underage purchaser will share such beverages with other minors, who will, in turn, become intoxicated and cause injury to themselves and others.\textsuperscript{88}

The \textit{Anderson} court, having determined that a common law cause of action existed against a licensed vendor based upon the violation of an alcohol beverage control statute, found it unnecessary to address whether a pure negligence cause of action\textsuperscript{89} existed against a licensed vendor,\textsuperscript{90} but noted such a trend in other jurisdictions.\textsuperscript{91}

In finding a cause of action for the plaintiffs in \textit{Bailey} and \textit{Anderson} on a common law negligence theory, West Virginia joins a growing number of jurisdictions that impose civil liability on licensed vendors for violations of alcohol beverage control statutes.\textsuperscript{92} Although the Supreme Court of Appeals of West Virginia uses pure negligence principles concerning the creation of a foreseeable risk of harm to the third parties, the duty found to have been breached in each of the cases had its origin in statutes that prohibited the sale of alcoholic beverages to an intoxicated person or a minor.

Accordingly, under the court's analysis, a violation of an alcohol beverage control statute constitutes prima facie evidence of negligence, which is sufficient to give rise to a cause of action.\textsuperscript{93} To impose civil liability, however, the plaintiff must allege and prove

\textsuperscript{87} Id. at 72.

\textsuperscript{88} The \textit{Anderson} court adopted the following factors to be considered in determining whether the licensed vendor might reasonably foresee that someone other than the underage purchaser would consume the beverages: (1) the quantity and character of beverages; (2) the time of the sale; (3) the licensed vendor's observation of other persons with underage purchaser; (4) the purchaser's statements; and (5) any other relevant circumstances of the sale or vendor's knowledge. Id. at 73.

\textsuperscript{89} The Supreme Court of Appeals of West Virginia refers to a cause of action based upon pure negligence principles as a common law cause of action independent of a statutory violation.

\textsuperscript{90} Id. at 69.

\textsuperscript{91} Id.

\textsuperscript{92} For examples of jurisdictions that allow common law negligence actions for violations of alcohol beverage control statutes, see \textit{supra} note 21.

\textsuperscript{93} \textit{Bailey v. Black}, 394 S.E.2d at 59.
that the purchaser was a person to whom the statute prohibited the licensed vendor to sell alcoholic beverages, that the licensed vendor knew or should have known the purchaser was such a person, and that the violation of the statute was the proximate cause of the injuries. The court concluded that the questions of negligence, due care, proximate cause, and any contributory or intervening negligence of the injured party were questions to be considered by the jury.\textsuperscript{94} The controlling factor in the court's decision to create a civil cause of action against licensed vendors, under a common law negligence theory based on a statutory violation, was the belief that the alcohol beverage control statutes established a minimum standard of care and a duty not to sell alcoholic beverages to specified persons in order to protect those persons and the safety of the general public.\textsuperscript{95}

2. Social Hosts and Employers

In \textit{Overbaugh v. McCutcheon},\textsuperscript{96} defendants Brady Cline Coal Company, Gauley Coal Sales Company, and Holly Coal Company hosted a Christmas party for employees and friends. McCutcheon\textsuperscript{97} attended the party and consumed alcohol that was available on a self-serve basis, and became noticeably drunk. Defendant Jack Cline knew McCutcheon was intoxicated\textsuperscript{98} and intended to operate a motor vehicle. Cline told McCutcheon not to drive and that he would arrange a ride home for him. After leaving the party on his own volition, McCutcheon was involved in an accident, killing himself and Elizabeth Overbaugh, and injuring the plaintiffs Franklin, Tony, Stacey and Kevin Overbaugh. The plaintiffs brought an action for wrongful death and personal injuries incurred as a result of the accident. The trial court denied the defendants' motion for summary judgment, holding that there were certain duties imposed on defendants which, if breached, could result in civil liability.

\textsuperscript{94} Id. at 61; \textit{Anderson}, 394 S.E.2d at 74.
\textsuperscript{95} \textit{Bailey}, 394 S.E.2d at 60; \textit{Anderson}, 394 S.E.2d at 67-68.
\textsuperscript{96} 396 S.E.2d 153 (W. Va. 1990).
\textsuperscript{97} There is some question as to whether Donald McCutcheon was an employee of any of the defendants. See \textit{id.} at 154, n.1.
\textsuperscript{98} Id. at 155. McCutcheon's blood alcohol level was .22 percent at the time of his death. \textit{Id.}
The case was placed before the Supreme Court of Appeals of West Virginia to answer the following certified questions: (1) whether a social host who gratuitously furnishes intoxicating beverages to an adult guest, knowing both that the guest is intoxicated and plans on driving, is liable for injuries caused by the intoxicated guest?; and (2) whether an employer, who gratuitously furnishes intoxicating beverages to an intoxicated adult employee and subsequently exercises control over the employee, has a duty to prevent the employee from creating an unreasonable risk of harm to others? The lower court answered both questions in the affirmative. The Supreme Court of Appeals of West Virginia disagreed and refrained from creating new causes of action which could hold a social host liable to third parties, and employers liable where there was a lack of affirmative conduct that created an unreasonable risk of harm to others.

i. Social Host Liability

The Supreme Court of Appeals of West Virginia acknowledged that there were two primary theories under which courts in other jurisdictions have imposed social host liability. The first is a violation of a statute and the second is under pure negligence principles. The Overbaugh court found no legislation applicable to social hosts and ruled that West Virginia Code § 60-3-22 applied only to licensed vendors. Therefore, in the absence of legislation, the court held there was no common law negligence cause of action for violation of a statute.

99. Id. at 154.
100. Id. at 158.
101. Id. at 159.
102. The Supreme Court of Appeals of West Virginia did not distinguish a violation of an alcohol beverage control statute as either negligence per se or prima facie evidence of negligence.
103. This Note uses the terminology “pure negligence” to refer to the same theory that the Supreme Court of Appeals of West Virginia refers to as “common law negligence.” See Overbaugh, 396 S.E.2d at 155.
104. For a discussion of the new State Retail Liquor License Act, W. Va. Code § 60-3A-25 (Supp. 1990) repealing § 60-3-22 (1989), see supra notes 51, 52 and 56, and accompanying text. Section 60-3A-25(3) drops the language prohibiting the sale of alcoholic liquors to mental incompetents and habitual drunkards and simply prohibits a licensee from selling, giving away or permitting the sale of, gift of, or the procurement of any liquor for or to any person visibly intoxicated.
105. Overbaugh, 396 S.E.2d at 156.
In regard to a cause of action under pure negligence principles, the plaintiffs argued the court should establish a new cause of action under the theory used in Price v. Halstead\(^{107}\) that, "[o]ne who engages in affirmative conduct, and thereafter realizes or should realize that such conduct has created an unreasonable risk of harm to another, is under a duty to exercise reasonable care to prevent the threatened harm."\(^{108}\) In Price, the Supreme Court of Appeals of West Virginia recognized a new cause of action when passengers of a vehicle provided and encouraged the visibly intoxicated driver to consume alcohol and smoke marijuana.\(^{109}\) The driver ultimately lost control of his vehicle and collided into another vehicle, killing the other driver and seriously injuring the passengers in the other vehicle.\(^{110}\) The Supreme Court of Appeals of West Virginia held that a passenger may be found liable for injuries to a third party caused by the intoxication of the driver of the vehicle in which he is riding, if the passenger’s conduct substantially encouraged or assisted the driver’s intoxication and the intoxication was the proximate cause of the accident.\(^{111}\)

Additionally, the plaintiff argued the court should use the logic that the New Jersey Supreme Court used in Kelly v. Gwinnell,\(^{112}\) to hold:

a host who serves liquor to an adult social guest, knowing both that the guest is intoxicated and will thereafter be operating a motor vehicle, is liable for injuries inflicted on a third party as a result of the negligent operation of a motor vehicle by the adult guest when such negligence is caused by the intoxication.\(^{113}\)

The Supreme Court of Appeals of West Virginia distinguished Overbaugh from Kelly and Price by concluding that they involved a far more egregious set of facts. In Kelly, the host was in a one-

\(^{108}\) Id.
\(^{109}\) Id. at 389.
\(^{110}\) Id. at 383.
\(^{111}\) Id. at 389.
\(^{113}\) Id. at 548, 476 A.2d at 1224.
on-one situation with a noticeably intoxicated guest;\(^{114}\) the host con-
tinued to serve him drinks and then walked him to his car. Here, however, McCutcheon was one of a number of guests who served himself intoxicating beverages, and when Cline noticed McCutcheon was intoxicated he asked McCutcheon twice to wait for a ride home.\(^{115}\) The court distinguished Overbaugh from Price by concluding the facts did not support a finding that any of the defendants in any way were engaged in the affirmative conduct of serving alcohol to McCutcheon or actively encouraging its consumption and therefore did not meet the standards for liability set forth in Price.\(^{116}\) Therefore, the court refrained from creating a new cause of action, and held "there is generally no liability on the part of a social host who gratuitously furnishes alcohol to a guest when an injury to an in-
occent third party occurs as a result of the guest's intoxication."\(^{117}\)

The court concluded there was good reason for following the general rule at common law,\(^{118}\) reasoning that social hosts: (1) should not be expected to exercise the same amount of supervision over guests as licensed vendors; (2) are not as organized or have the financial wherewithal to control guests; and (3) do not have the expertise to judge a person's capacities.\(^{119}\) Additionally, the court adhered to the principle that the legislature was better able to assess such a cause of action.\(^{120}\)

ii. Employer Liability

The second certified question before the Overbaugh court was whether a cause of action existed against an employer for furnishing alcoholic beverages to an adult employee who subsequently injured third parties as a result of intoxication. The plaintiffs, relying heavily on the holdings in Robertson v. LeMaster\(^{121}\) and Otis Engineering,

\(^{114}\) At the time of the accident, the guest's blood alcohol level was .286%.
\(^{115}\) Overbaugh, 396 S.E.2d at 158.
\(^{116}\) Price, 355 S.E.2d at 387.
\(^{117}\) Overbaugh, 396 S.E.2d at 158.
\(^{118}\) Id. at 8. For a discussion on the general rule at common law, see supra notes 1, 2 and accompanying text.
\(^{119}\) Overbaugh, 396 S.E.2d at 157.
\(^{120}\) Id.
\(^{121}\) 301 S.E.2d 563 (W. Va. 1983).
Corporation v. Clark,122 argued the employer had a duty to prevent an employee from operating a motor vehicle which could cause an unreasonable risk of harm to others. The Supreme Court of Appeals of West Virginia found in Robertson that a duty to exercise reasonable care to prevent the threatened harm existed where an employer required an employee to work continuously for over twenty-seven hours and then escorted the employee to his car and instructed him to go home.123 In Otis, the Texas Supreme Court relied on Robertson to hold an employer liable for damages resulting from an employee’s automobile accident which killed two people.124 The employer, in Otis, knew the employee had a drinking problem, a history of drinking on the job, and had been drinking, and yet suggested he go home and escorted him to his automobile.

The Supreme Court of Appeals of West Virginia distinguished the facts of this case from Otis, concluding, first, that the employer had no knowledge McCutcheon had a drinking problem or a history of drinking.125 Secondly, Cline did not instruct McCutcheon to leave or take him to his car, but instructed him to remain at the party.126 The court, therefore, held there was a lack of affirmative conduct creating an unreasonable risk of harm on the part of the employer furnishing alcohol to the employee and refused to find the employer liable under the facts of this case.127

In holding there is generally no liability on the part of the social host who gratuitously furnishes alcohol to a guest who subsequently injures third parties as a result of intoxication, West Virginia joins several other jurisdictions that are reluctant to impose civil liability against social hosts.128 The Supreme Court of Appeals of West Virginia did not find a basis in statutory enactment and therefore no cause of action under common law negligence principles for a vi-

122. 668 S.W.2d 307 (Tex. 1983).
123. Robertson, 301 S.E.2d at 567.
124. Otis, 668 S.W.2d at 311.
125. Overbaugh, 396 S.E.2d at 159.
126. Id.
127. Id.
128. For examples of jurisdictions that do not use violations of statutes or pure negligence principles to extend liability to social hosts or employers, see supra notes 28-29.
olation of an alcohol beverage control statute. The court noted, however, if a statute read that alcoholic beverages shall not be "sold or given" and a violation occurred, liability may be found. This suggests that if a statute was applicable to a social host or employer and a violation occurred, the Court would recognize a cause of action under common law negligence principles for violating such a statute. The Court evaluated only West Virginia Code § 60-3-22, and did not acknowledge West Virginia Code §§ 60-7-12(a)(b), 60-3-22a(b), or 60-8-20a(b), which prohibit "any person" to knowingly buy for, give or furnish alcoholic beverages to anyone under twenty-one years of age. These provisions suggest that a cause of action could be maintained against a social host or employer who violates these statutes and would explain why the Court held there is "generally no liability on the part of the social host."

In regard to a cause of action under a pure negligence approach, the Overbaugh Court concluded the facts of this case did not support a finding that any defendants were negligent by engaging in the affirmative conduct of serving alcoholic beverages to McCutcheon or actively encouraging its consumption, nor was there a breach of the duty to protect against the threatened harm. The controlling factors in Overbaugh include: (1) the host was not in a one-to-one situation with a guest but was hosting a number of guests; (2) the host was not serving alcoholic beverages, but provided such beverages on a self-serve basis; (3) the host did not force or actively encourage the guest to imbibe, but rather he did so voluntarily; and (4) the host did not escort the guest to his car and neither requested nor ordered him to drive home. This suggests that in the proper fact situation, civil liability could be imposed upon a social host, although the court implied in its reasoning that a licensed vendor should be held to a higher standard of care than a social host.

129. Overbaugh, 396 S.E.2d at 156.
130. Id. at 156, n.4.
132. For further discussion of these provisions, see supra notes 56-59 and accompanying text.
133. Overbaugh, 396 S.E.2d at 158.
134. Id.
135. Id.
In regard to the second certified question concerning employer liability, the Supreme Court of Appeals of West Virginia, in holding an employer furnishing alcoholic beverages to an employee will not be held liable to a third party where there is a lack of affirmative conduct creating an unreasonable risk of harm to third persons, but implied a cause of action could be maintained under pure negligence principles against an employer.\footnote{Id. at 159.} The court noted, however, its holding was limited to the facts of this case and left unresolved the issue of liability when an employer engaged in affirmative conduct as shown in the \textit{Robertson} and \textit{Otis} cases.\footnote{Id. at 159, n.9.}

The reasoning of the \textit{Overbaugh} court’s decision is not clear for rejecting liability for social hosts because of an absence of a basis in pure negligence principles, while acknowledging a basis in pure negligence principles for employers. The court may have distinguished a social host from an employer hosting a party for employees. Employers, unlike most social hosts, generally have the ability to insure and can better bear the risk of such a loss. Additionally, because of the employer-employee relationship, an employer may also be able to monitor the amount of alcohol consumed, whereas the social host is faced with the awkward situation of denying a guest further access to alcoholic beverages. The court may have used the employer-employee relationship to establish a superior duty for employers. Such a distinction based on the special relationship between employers and employees would explain the inconsistency of the court’s failure to find a basis in pure negligence principles for social hosts.

\section*{IV. Conclusion}

There has been a movement towards holding licensed vendors, social hosts and employers liable for the torts of their intoxicated customers, guests or employees. Three methods have been used to impose such liability: (1) negligence per se for violation of alcohol

\footnotetext[136]{Id. at 159.}
\footnotetext[137]{Id. at 159, n.9.}
beverage control statutes;¹³⁸ (2) common law negligence principles based upon the violation of a statutory duty;¹³⁹ and (3) pure negligence principles.¹⁴⁰

West Virginia has chosen to impose liquor liability on licensed vendors under common law negligence principles based upon a statutory violation.¹⁴¹ A violation of an alcohol beverage control statute constitutes prima facie evidence of negligence, which is sufficient to give rise to a cause of action. To be successful, the plaintiff must prove he and the purchaser are persons protected by the statute, that the licensed vendor knew or should have known the purchaser was such a person protected by a statute, and that the violation of a statute was the proximate cause of the injuries.

However, West Virginia has not yet recognized a cause of action against a social host or employer for the torts of their intoxicated guests, but has alluded to such cause of action existing where a host engages in the affirmative conduct of serving alcohol to a visibly intoxicated guest, actively encourages its consumption, and then takes the guest to her car and instructs her to leave.¹⁴²

The time has come in West Virginia for licensed vendors to realize that they can be held liable for the torts of their intoxicated customers, and the time may be coming for social hosts and employers as well.

R. Scott Summers

¹³⁸ For a discussion of liability under the theory of negligence per se for violations of alcohol beverage control statutes, see supra notes 18, 19, 32 and accompanying text.
¹³⁹ For a discussion of liability under the theory of common law negligence, see supra notes 20-22, 33 and accompanying text.
¹⁴⁰ For a discussion of liability under the theory of pure negligence, see supra notes 25, 35-37 and accompanying text.
¹⁴² Overbaugh v. McCutcheon, 396 S.E.2d at 159.