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WHAT A LONG STRANGE TRIP IT'S BEEN: COURT-CREATED LIMITATIONS ON RIGHTS OF ACTION FOR NEGLIGENTLY FURNISHING ALCOHOL

Sheldon H. Jaffe

Abstract: Under the traditional view of the common law, drinking alcohol rather than providing alcohol acted as the proximate cause of any resulting harm, and therefore furnishers of alcohol had no duty to the people served or those injured by the persons served. The Washington Supreme Court has held that negligently furnishing alcohol can be a proximate cause in tort but has severely limited rights of action: vendors who serve minors or obviously intoxicated adults may be sued by subsequently injured innocent third parties, and all people who serve alcohol to minors may face suit if the minor is subsequently injured because of drinking. The court, however, has held that, except for the duty owed to minors who injure themselves, there is no social host liability in Washington. In addition vendors, like social hosts, are immune from suit by adults who injure themselves. This Comment contends that these distinctions and limitations are neither inherently logical nor mandated by legislative action. It argues that liability should be uniform for all classes of potential plaintiffs and potential defendants, and that questions of contributory negligence and foreseeability of harm are properly delegated to the trier of fact.

The inn that shelters for the night is not the journey’s end. The law, like the traveler, must be ready for the morrow. It must have a principle of growth.¹

Justice Benjamin N. Cardozo

The Washington Supreme Court never has been a shrinking violet when it has come to finding rights of action within tort law. If anything, the opposite is the case.² Historical interpretations of the common law, and even legislative command, have been swept aside by the court acting in its role as the protector of nonstatutory rights.

In determining the scope of duty owed by furnishers of alcohol, the court has likewise moved beyond traditional restrictions, modifying the historical common law rule under which it was not a tort either to sell or

². See Cornelius J. Peck, Constitutional Challenges to the Partial Rejection and Modification of the Common Law Rule of Joint and Several Liability Made by the 1986 Washington Tort Reform Act, 62 Wash. L. Rev. 681, 681 n.2 (1987) (“The Washington Supreme Court has played a leading role in developing tort law.”); see also Burkhart v. Harrod, 110 Wash. 2d 381, 394 n.6, 755 P.2d 759, 765 n.1 (1988) (Utter, J., concurring) (“When over-arching principles of justice are not accommodated by traditional theories of tort recovery, we do not hesitate to take measured steps to advance more just theories . . . .”).
give intoxicating liquor.\(^3\) In Washington, commercial hosts and vendors\(^4\) who serve either a minor or an obviously intoxicated adult may be liable to innocent third parties who are injured as a result of this "negligent" service. In addition, both commercial and social hosts owe a duty of care to minors whose drinking may result in injury to themselves. The court so far has denied a right of action to any other persons injured as a result of negligently furnishing alcohol. For example, a third party injured by a drunk driver who became intoxicated at a friend's house may not sue the social host. Nor may adult bar patrons who injure themselves as a result of their drinking bring suit against the bar. This is true regardless of the level of egregiousness of the vendor or the social host's negligence.\(^5\) As a result of a confusing assortment of holdings, lower courts have been unclear as to exactly what the rules are for both social hosts and vendors.\(^6\)

In November 1996, the Washington Supreme Court heard oral argument in three cases that raise further questions about liability for negligent service of alcohol.\(^7\) Decisions in these cases were pending as

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3. \(\text{See 45 Am. Jur. 2d Intoxicating Liquors } \S\ 553 (1969); \text{see also Halvorson v. Birchfield Boiler, 76 Wash. 2d 759, 762, 458 P.2d 897, 899 (1969) (accepting comparable definition as existing common law standard for Washington). But see Purchase v. Meyer. 108 Wash. 2d 220, 225, 737 P.2d 661, 664 (1987) (citing Halvorson, oldest among list of cases, for proposition that "it has long been the common law of this state that a commercial purveyor of alcohol ... may be held liable for damages caused by furnishing intoxicating beverages to an 'obviously intoxicated' person" (citations omitted)).}

4. Commercial hosts and vendors, who have the same liability, are those people who furnish alcohol as part of business undertakings, such as bars, liquor stores, and food stores that sell beer and wine. The court also recognizes the "quasi-commercial" host whose potential liability is the same as a commercial host. \(\text{See infra notes 52--62 and accompanying text.}

5. Negligence is not used here to mean a legal duty, as the court has held that such a duty does not exist in these instances. \(\text{See infra Part I.A. Rather, it is used in the spirit of the Restatement of Torts: providing alcohol to someone who is likely to use it in a manner involving unreasonable risk. See Restatement (Second) of Torts } \S\ 390 (1965). The case law, as does this Comment, generally considers service negligent in this sense of the word when the alcohol is given to a minor or a person "obviously intoxicated." A more detailed analysis of the applicability of section 390 is provided \(\text{infra Part II.D.2.}

6. As one practitioner has noted:

[T]he scope of duty owed by providers of alcohol is one in which [the Washington Supreme] court has drawn increasingly fine distinctions ... [which] create an unusual amount of uncertainty about the court's ruling[s] ... in this area and ... a greater degree of inconsistency and unpredictability in the rulings of the lower courts.


7. Schooley v. Pinch's Deli Market, Inc., argued November 19, 1996, seeks to determine if a vendor who sold alcohol to minor \(A\) can be sued by another minor with whom \(A\) shares the liquor. \(\text{See Washington State Courts, Supreme Court Calendar for November 19, 1996 (last modified Jan.}

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this Comment went to press, but it is unlikely that the court will use them as an opportunity to provide the major changes the law requires. Further refinements may answer specific questions, but new permutations will likely arise, each requiring the court to decide the rule of law for that fact pattern.

The illogic and inconsistency that is at the heart of the court's holdings in the area of tort liability for furnishers of alcohol will not be dissipated by increased refinement. The severe restrictions the court has placed on actions for negligently furnishing alcohol flow neither from the logic of the court's earlier holdings nor from legislative mandate. In determining that there is no social host liability, the court has decided that social hosts can never reasonably foresee the outcome of their service of alcohol as a matter of law, when the question of foreseeability is one of fact that should be determined in each case. By holding that adults who injure themselves can never bring suit against those who have negligently provided them with liquor, the court has reinstated the strict bar of contributory negligence, despite the existence of a legislatively-created system of comparative fault.

This Comment argues that the court should eliminate the illogical distinctions it has drawn, and instead engender a uniform standard of liability for all furnishers of alcohol, whether commercial or social. Every person should be expected to behave in a reasonable manner so as to avoid foreseeable harms. Similarly, everyone should have an opportunity to establish that a tortfeasor's actions were unreasonable, even if the injured party has contributed to the harm. Part I reviews the current status of civil liability for negligently furnishing alcohol and the holdings that established this status. Part II discusses how a court can properly guarantee individual rights of action while still considering inconsistent holdings, apparent legislative inaction, and conflicting...
interpretations of the common law. Part III examines the rationales offered by the court for its limitations on liability for furnishers of alcohol. Finally, this Comment argues that the court should return determinations of foreseeability and comparative negligence to the finder of fact.

I. THE ROAD TO HOST LIABILITY: WHO CAN SUE WHOM?

A. Current Status of the Law in Washington

In Washington, all who furnish alcohol have at least some legal duty to others. The duty varies depending upon whether the furnisher is a "commercial establishment" that sells alcohol or a purely social host. Commercial vendors have a duty not to provide minors with alcohol, and they may be sued by a third party or by the injured minor for injuries resulting from the minor's intoxication. In addition, innocent third parties may bring a negligence action against a commercial vendor for serving an obviously intoxicated adult. Commercial hosts, however, are not legally liable for an intoxicated adult patron's self-inflicted injuries. A social host is not liable for accidents that result from a guest's intoxication, but social hosts are potentially liable to minors who injure themselves.

The court has effectively granted one class of potential defendants immunity and has denied recovery to another. The limitations on liability imposed by the court flow neither from the logic of the court's earlier holdings nor legislative mandate. In finding that adults who injure themselves can never bring suit against those who have negligently provided them with liquor, the court has installed a system of contributory negligence in place of the legislatively-mandated system of comparative fault. By holding social hosts free of liability except when serving minors who injure themselves, the court has made an

10. Id. at 37, 896 P.2d at 1247.
13. See Kelly, 127 Wash. 2d at 37, 896 P.2d at 1247.
16. See Hansen v. Friend, 118 Wash. 2d 476, 485, 824 P.2d 483, 488 (1992). The question of whether a social host may be sued by an innocent third party who is injured by a minor served by the social host is among the cases now before the Washington Supreme Court. See supra note 7.
unwise and expansive decision on foreseeability, a question best left to the trier of fact.

B. The Dramshop Act

Prior to 1955, Washington’s Dramshop Act governed the duty owed by a furnisher of alcohol. The Act allowed anyone injured, in person or property, by an intoxicated person to sue anyone who by selling or giving alcohol caused the intoxication. Comparable Dramshop Acts governed liability in many other states.

The Dramshop Act was enacted in 1881, eight years before Washington became a state. The Act remained in force until its 1955 repeal. The Washington Supreme Court has cited this repeal as indicative of the Legislature’s disapproval of social host liability, but most states repealed their Dramshop Acts in the years following the end of prohibition. Despite its seemingly limitless liability, only four published decisions regarding furnisher liability cite the Dramshop Act, all before 1917, and all dealing with commercial vendors. It was not until 1955 that the Washington Supreme Court faced the issue of whether the Dramshop Act covered gifts, as opposed to sales, of liquor, but in light of the Act’s repeal, the court held that the case was moot.

25. See Norlund v. Pearson, 91 Wash. 358, 157 P. 875 (1916); Woodring v. Jacobino, 54 Wash. 504, 103 P. 809 (1909); Judson v. Parry, 38 Wash. 37, 80 P. 194 (1905); Delfel v. Hanson, 2 Wash. 194, 26 P. 220 (1891).
27. Id. at 827, 289 P.2d at 720.
C. The Washington Supreme Court’s Holdings Since the Dramshop Act’s Repeal

1. Duty when Serving—the Beginning

In 1969 the court decided Halvorson v. Birchfield Boiler,28 holding that a company hosting a Christmas party could not be liable for an accident caused by a homebound employee who allegedly got drunk at the event.29 The court based its decision on a finding that, in the absence of the now-repealed Dramshop Act, liability for those who furnish alcohol must be based on a “theory” of common law negligence.30 The court, relying upon out-of-state precedents and the American Jurisprudence,31 found no host liability to innocent third parties, adopting the traditional view of the common law that the act of selling alcohol can never be a proximate cause of any harm that might arise from drinking it.32 The court noted that the same rationale applied to the “donor who gives intoxicating liquor,”33 while also indicating a willingness to find some liability for vendors.34 In this case, the court held that the defendant company could in no way be a vendor35 and deferred to the Legislature the “policy decision” of liability for negligently furnishing alcohol.36

2. Duty when Serving the Obviously Intoxicated

The 1975 case, Shelby v. Keck,37 involved an intoxicated bar patron, Keck, who accidentally shot and killed another customer.38 The court found that Keck was not “obviously intoxicated”39 and, therefore, upheld a directed verdict for the vendor without deciding the question of

29. Id. at 759–60, 765, 458 P.2d at 897–98, 900.
30. Id. at 762, 458 P.2d at 899.
31. Id. at 762–65, 458 P.2d at 899–900.
32. Id. at 762, 458 P.2d at 899.
33. Id. at 762–63, 458 P.2d at 899.
34. Id. at 764, 458 P.2d at 900 (noting aptly recognized difference between commercial vending of intoxicants and social or quasi-social furnishing of liquor).
35. Id. at 765, 458 P.2d at 900.
36. Id.
37. 85 Wash. 2d 911, 541 P.2d 365 (1975).
38. Id. at 912, 541 P.2d at 367.
39. In Washington, obvious intoxication is proven not by a blood alcohol test, but by a person’s appearance. See, e.g., id. at 915, 541 P.2d at 369.
commercial host liability when serving someone obviously intoxicated.\textsuperscript{40} The court indicated in dicta, however, that one theory of the common law would allow suit where liquor was sold to a person so intoxicated as to be effectively deprived of willpower.\textsuperscript{41}

Despite a lack of any holding on the subject of commercial host liability, the court accepted the potential for this liability as established in two cases decided in the early 1980s. In \textit{Young v. Caravan Corp.}\textsuperscript{42} the court reversed a summary judgment because sufficient facts existed to present a question as to the decedent's sobriety.\textsuperscript{43} In \textit{Wilson v. Steinbach}\textsuperscript{44} the court held that the hosts were not liable to an intoxicated minor who subsequently died in a driving accident because insufficient evidence existed to show that the decedent had been obviously intoxicated at the time of service.\textsuperscript{45} \textit{Wilson} involved a social engagement;\textsuperscript{46} \textit{Young} dealt with a minor served at a bar.\textsuperscript{47} In both cases the court, almost in passing, referenced \textit{Halvorson} for the proposition that potential liability exists when a commercial host serves someone obviously intoxicated.\textsuperscript{48} In 1987, the court again cited \textit{Halvorson} for the proposition that "it has long been the common law of this state" that vendors may be liable for damages caused by furnishing alcohol to the obviously intoxicated.\textsuperscript{49} Yet this is not what the \textit{Halvorson} court said,\textsuperscript{50} as the court has acknowledged in other cases.\textsuperscript{51} The traditional common law view had been changed by the court with neither legislative action nor a word of explanation. Thus, in the 1986 case of \textit{Dickinson v.}

\textsuperscript{40} Id. at 917, 541 P.2d at 370.
\textsuperscript{41} Id. at 916, 541 P.2d at 369.
\textsuperscript{42} 99 Wash. 2d 655, 663 P.2d 834 (1983). Although the basis for the holding in this case has been superseded technically by statute, the Washington Supreme Court continues to cite \textit{Young}. This is discussed in more detail infra notes 78–93 and accompanying text.
\textsuperscript{43} Id. at 659, 663 P.2d at 837.
\textsuperscript{44} 98 Wash. 2d 434, 656 P.2d 1030 (1982).
\textsuperscript{45} Id. at 438, 656 P.2d at 1032.
\textsuperscript{46} \textit{Wilson}, 98 Wash. 2d at 436, 656 P.2d at 1031.
\textsuperscript{47} \textit{Young}, 99 Wash. 2d at 657, 663 P.2d at 835–36.
\textsuperscript{48} \textit{Young}, 99 Wash. 2d at 658, 663 P.2d at 836; \textit{Wilson}, 98 Wash. 2d at 438, 656 P.2d at 1032.
\textsuperscript{50} 51. \textit{Halvorson} v. Birchfield Boiler, Inc., 76 Wash. 2d 759, 764, 458 P.2d 897, 900 (1969) (finding that vendor liability was something court "need not consider").
\textsuperscript{51} See, e.g., Dickinson v. Edwards, 105 Wash. 2d 457, 461, 716 P.2d 814, 816 (1986) ("In \textit{Halvorson}, the court recognized that some exceptions . . . might exist . . ."); Shelby v. Keck, 85 Wash. 2d 911, 916, 541 P.2d 365, 369 (1975) (citing \textit{Halvorson} for proposition that there is no right of action in consequence of sale or gift of intoxicating liquor); see also Halligan v. Pupo, 37 Wash. App. 84, 89, 678 P.2d 1295, 1298 (1984) (arguing that \textit{Wilson} and \textit{Young} courts have changed \textit{Halvorson} "sub silentio").
Edwards the court acknowledges that Halvorson did not establish an exception to the traditional common law rule of vendor immunity, while citing Young and Wilson as establishing such a rule. Yet Young and Wilson relied on Halvorson.

In Dickinson the court defined a new class of potential defendants: the “quasi-commercial” host who served someone obviously intoxicated. Although the facts—an employee who had allegedly gotten drunk at a company-sponsored banquet at a hotel and injured a third party on his way to work—seem nearly identical to Halvorson, the court remanded this case to find out if the employer fit into their new category, a holding that raised at least one pair of judicial eyebrows.

Liability, the court held, accrues to those hosts who furnish alcohol and have the “authority to deny further service” of alcohol. The court added that its opinion did not even offer a “comment” on the potential liability of social hosts. The illogic of using this definition while at the same time excluding social hosts is pointed out in a strong dissent.

Moreover, both the standard and legal dictionary definitions of “furnish,” which include giving, support this point.

Two years after Dickinson, the court held that there was no social host liability for serving someone obviously intoxicated, finding that such a
change in the law should come from the Legislature. The opinion did not answer the question raised in the Dickinson dissent: why does Dickinson’s definition of furnisher not mandate social host liability?

The most recent court-imposed limitation on liability came in 1995, when the court held a commercial establishment not liable for injuries sustained by an obviously intoxicated patron. Again, the court noted its belief that the Legislature should address issues of host liability. The court reached this holding despite the fact that dangerous driving “was a foreseeable consequence” of serving an obviously intoxicated patron, and foreseeability is generally the boundary of negligence.

In Washington, innocent third parties may bring suit against a vendor who has served an intoxicated adult, but not against a social host who has done the same. An adult who drinks and is injured thereby may not sue either a social host or a vendor, no matter to what extent the host may have contributed to the subsequent harm.

3. Duty when Serving Minors

The court has been far more firm with those who provide alcohol to minors than it has with those who serve obviously intoxicated adults. Vendors not only face suit from innocent third parties, but from the minors themselves. In addition, social hosts are potentially liable when they serve a minor who subsequently is injured.

in the area of social host liability was the disinclination to impose such liability . . . ”). The court’s view on social hosts and minors is discussed infra text accompanying notes 87–97.

64. Burkhart, 110 Wash. 2d at 385, 755 P.2d at 761.
65. Id. at 398, 755 P.2d at 767 (Utter, J., concurring) (“I must now agree with Justice Durham’s statement in her dissent in Dickinson [that] . . . the majority rationale dictates a finding of liability for a social host.”) (citation omitted).
67. Id. at 38, 896 P.2d at 1248.
68. Id. at 47, 896 P.2d at 1253 (Guy, J., dissenting).
69. In Washington, it is unlawful to sell, give, or otherwise supply liquor to people under 21, or to permit the consumption of alcohol by minors on premises under your control. Wash. Rev. Code § 66.44.270(1) (1996). It also is unlawful for a minor to possess, consume, or otherwise acquire liquor. Wash. Rev. Code § 66.44.270(2)(a) (1996).
The 1983 case *Young v. Caravan Corp.* and the 1987 case *Purchase v. Meyer* both held that violation of the statute regarding sale of alcohol to minors amounted to negligence per se. The potential for liability is limited in two ways: first, if a vendor takes “reasonable precautions” to determine if customers are over twenty-one, negligence per se will not be imposed as a matter of law; second, tort victims who violate a statute designed for their protection, for example minors who drink, are contributorily negligent as a matter of law. The question of proximate cause and damages is left to the trier of fact.

*Young* and *Purchase* continue to be cited by the court for the proposition that vendor liability exists following the sale of alcohol to minors despite the legislative abolition of negligence per se in most actions. Additionally, the court’s holdings on negligence and minors contain other anomalies.

In the 1989 case of *Christen v. Lee,* the court held that the sale of alcohol to an obviously intoxicated minor, an act that violated two state statutes, was not negligent per se because the minor in this case assaulted the plaintiff. The court held that in banning sales to minors and intoxicated adults the Legislature’s concern was drunk driving, not assault.

This reading of legislative intent is not supported by the statute itself, which now limits negligence per se to cases involving electrical fire safety, smoke alarms, and driving while intoxicated. The Legislature thus implicitly recognized that, unencumbered, negligence per se encompasses more risks than drunk driving. The *Christen* court knew the Legislature’s revised definition of negligence per se and that it was

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74. *Purchase*, 108 Wash. 2d at 228, 737 P.2d at 666; *Young*, 99 Wash. 2d at 660, 663 P.2d at 837.
75. *Young*, 99 Wash. 2d at 660–61, 663 P.2d at 837–38.
76. *Id.* at 661, 663 P.2d at 838.
77. *Id.* at 662, 663 P.2d at 838.
80. 113 Wash. 2d 479, 780 P.2d 1307 (1989). This case was filed before the August 1, 1986 limitation on negligence per se cases. *Id.* at 501, 780 P.2d at 1317.
82. *Christen*, 113 Wash. 2d at 501, 780 P.2d at 1318.
83. *Id.* at 503–04, 780 P.2d at 1318–19.
not subject to the statute's limitations. Consequently, the court's holding makes no sense. A physical assault is a foreseeable harm of negligently providing someone with intoxicating liquor.

The abolition of negligence per se has not noticeably affected the liability standard for serving minors alcohol in Washington as seen in the court's 1992 decision in Hansen v. Friend. Hansen held that social hosts who provide alcohol to minors may be liable to those minors if they subsequently injure themselves. Washington law, while prohibiting negligence per se in a case like this, allows a trier of fact to consider a violation of statute as evidence of negligence. The court held that, in the case of providing minors with alcohol, the statute defined the standard of conduct "required" of a reasonable person, a determination the court made by applying the negligence per se test. The only "practical effect" of the Legislature's elimination of negligence per se, said the court, was to eliminate its "strict liability" character. The finder of fact could determine that a statutory violation is not negligence when the violation is due to some cause beyond the violator's control. But the negligence per se doctrine as generally applied always allows such a finding of excuse, and this had been the rule in Washington long before the Legislature limited the doctrine.

85. Christen, 113 Wash. 2d at 502, 780 P.2d at 1318 (noting both statutory abolition of most negligence per se actions and fact that case at bar was filed prior to statute's effective date).

86. See Hattie Ruttenberg, The Limited Promise of Public Health Methodologies to Prevent Youth Violence, 103 Yale L.J. 1885, 1898 (1994) (noting "pharmacological connection... between aggressive behavior and consumption of... alcohol"); see also Don B. Kates et al., Guns and Public Health: Epidemic of Violence or Pandemic of Propaganda?, 62 Tenn. L. Rev. 513, 584 (1995) (noting that men who kill their domestic partners are prone to alcohol abuse); Christine Taylor, Northern Ireland: The Policing of Domestic Violence in Nationalist Communities, 10 Wis. Women's L.J. 307, 311 n.22 (1995) (citing 1979 Northern Ireland study that found intoxication second most reported cause of wife battering).


88. Id. at 482, 824 P.2d at 486.


90. See Hansen, 118 Wash. 2d at 480-81, 824 P.2d at 485 (quoting "negligence per se" test of Young to determine if criminal statute defines standard of conduct "required" of reasonable person).

91. Id. at 483, 824 P.2d at 487.


The Hansen case is also interesting for the court’s treatment of foreseeability, the traditional boundary of liability in tort cases. In this case, a fifteen-year-old drowned after receiving liquor from two twenty-one-year-old friends. The question of whether a minor’s drowning is a foreseeable consequence of drinking is not a question of law, but “a question for the trier of fact.” The Hansen court relied on Christen’s language on “foreseeability,” but not its holding that the only legally foreseeable consequence of providing alcohol to minors is drunk driving.

4. The Journey’s End

Since the repeal of the Dramshop Act, the court has journeyed from Halvorson, where a company hosting a party cannot be liable to innocent third parties, to Dickinson, where a company hosting a party can be liable to innocent third parties. The court has gone from citing Halvorson for the proposition that the common law does not recognize any liability for suppliers of alcohol to the idea that Halvorson established vendor duty to innocent third parties. The court established a negligence per se duty towards minors and kept that standard after the Legislature effectively abolished negligence per se in this context. The court has urged that foreseeability be the touchstone of duty, yet the court has exempted what may be the most foreseeable of all possible outcomes—that intoxicated adults are likely to injure themselves.

In the end, the court has taken from the finder of fact its most basic prerogative: determining whether unreasonable behavior has resulted in a foreseeable harm, and if it has, how much of the harm resulted from the plaintiff’s contributory negligence.

94. See Keeton et al., supra note 92, § 43, at 280; see also Christen v. Lee, 113 Wash. 2d 479, 492, 780 P.2d 1307, 1313 (1989) (“The concept of foreseeability limits the scope of the duty owed.”).

95. Hansen, 118 Wash. 2d at 478–79, 824 P.2d at 484–85.

96. Id. at 484, 824 P.2d at 487.

97. Id. at 483–84, 824 P.2d at 487.
II. THE ROAD NOT TAKEN

The Washington Supreme Court has split potential plaintiffs into two groups: the "innocent" who may sue (third parties and minors) and the "guilty" who may not (intoxicated adults). The court has likewise divided possible defendants into those who may be sued by any "innocent" plaintiff (vendors and commercial hosts) and those who may not (social hosts liable only to minors). Because these distinctions are neither logical nor consistent, the court should take the road to the right destination: a uniform standard of care requiring all who furnish alcohol to do so reasonably to avoid foreseeable harms. The confusion of the lower courts, and the need for continuing explanation by the Washington Supreme Court, can be eliminated by holding all alcohol furnishers to the same standard of reasonable care that is expected in other endeavors. At the same time there would be consistency both within the subset of civil litigation involving alcohol and in tort law in general.

To reach this point, the court will need to overcome its view of the common law, its view of the Legislature's role, and its view of its own role. The court also must bypass the road block it erected with its holdings in Burkhart v. Harrod, that there is no social host duty in the

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98. I shall be telling this with a sigh
   Somewhere ages and ages hence:
   Two roads diverged in a wood, and I—
   I took the one less traveled by,
   And that has made all the difference.


99. See Hansen, 118 Wash. 2d at 485, 824 P.2d at 488 (finding that social hosts owe duty to minor guests); Dickinson v. Edwards, 105 Wash. 2d 457, 466, 716 P.2d 814, 819 (1986) (holding that commercial hosts owe duty to innocent third parties); Young v. Caravan Corp., 99 Wash. 2d 655, 660, 663 P.2d 834, 837 (1983) (holding that commercial hosts owe duty to minors they serve).

100. See Kelly v. Falin, 127 Wash. 2d 31, 34, 896 P.2d 1245, 1246 (1995) (finding commercial establishments not liable to intoxicated adults who injure themselves).

101. See, e.g., Dickinson, 105 Wash. 2d at 466, 716 P.2d at 819.

102. See Hansen, 118 Wash. 2d at 487, 824 P.2d at 488 (finding that social hosts are liable to minors); Burkhart v. Harrod, 110 Wash. 2d 381, 383, 755 P.2d 759, 760 (1988) (holding that "there is no social host liability" in Washington).

103. Such a uniform standard of care need not abrogate all differences between commercial and social hosts. Rather, as is customary in tort law, the finder of fact will hold the social host to that level of care expected of social hosts, which will generally be lower than the level of care expected of a commercial host. A jury might find a social host who failed to check a 20-year old's identification not negligent, whereas a vendor, in an otherwise identical fact pattern, might be negligent. See generally Keeton et al., supra note 92, § 32, at 173-74.
state, and *Kelly v. Falin*, that there is no commercial host duty when intoxicated adults injure themselves.

**A. The Court and Its Decisions**

*The obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit.*

Stare decisis is an important doctrine, though not an insurmountable one. But it is also a rule not departed from lightly. It would be nice if, as one Washington Supreme Court Justice has argued, the restriction on social host liability did not exist. But it does. Social host immunity is the clear rule in this state, as is vendor immunity to the already intoxicated, and both rules need to be abolished.

Although any rule may be overturned if it is incorrect and harmful, the holdings on liability for furnishers of alcohol appear especially susceptible to reconsideration. The point of the doctrine of stare decisis is to avoid law that turns on the “whims of current holders of judicial office.” The court’s holdings in this area—companies being liable and not liable when they host parties; furnisher being defined so as to include social hosts, yet social hosts not being legally furnishers; and foreseeability being a question of law, a question of fact, or a question not even asked—has not lived up to the principle of the doctrine.

109. *See Burkhart*, 110 Wash. 2d at 391, 755 P.2d at 764 (Utter, J., concurring) (determining to his own satisfaction that driver in this case was not “obviously intoxicated” at time he was served, and writing that majority opinion’s holding that there is no social host liability was “dicta and not controlling”).
110. *See, e.g.*, *Hansen v. Friend*, 118 Wash. 2d 476, 482, 824 P.2d 483, 486 (1992) (finding it necessary to distinguish *Burkhart* in order to impose liability). Justice Utter signed onto this opinion without comment. *Id.* at 486, 824 P.2d at 488; *see also Recent Cases, Negligence—Social Host Liability—Social Hosts Not Liable for Accidents Caused by Intoxicated Guests—Burkhart v. Harrod*, 102 Harv. L. Rev. 549 (1988) [hereinafter *Negligence—Social Host Liability*] (“[T]he Washington Supreme Court . . . became the latest court to reject common law social host liability.”).
112. *Id.*
113. The nature of the court’s holdings has not gone unnoticed by the Justices’s themselves. *See, e.g.*, *Kelly v. Falin*, 127 Wash. 2d 31, 45, 896 P.2d 1245, 1252 (1995) (“If the majority means what it says [no vendor liability to those who drink], both *Christen* and *Dickinson* were wrongly
B. The Washington Supreme Court and the Washington State Legislature

That American courts make law is no longer a debatable proposition.\textsuperscript{114}

Since \textit{Halvorson}, its first decision on the subject, the Washington Supreme Court has recognized that changes in society wrought by the automobile might well require increased liability for those who furnish alcohol.\textsuperscript{115} In decision after decision the court has acknowledged the possible need for increased host liability and in decision after decision they have deferred action to the Legislature.\textsuperscript{116}

This seeming fidelity to the concept of deference to legislative intent appears stunning in light of the court's treatment of the Legislature's repeal of negligence per se,\textsuperscript{117} and would likely come as a surprise to the members of the legislative class of 1975, who were the victims of what has been described as "the classic example of a court circumventing remedial tort legislation."\textsuperscript{118} In 1974 in \textit{Helling v. Carey},\textsuperscript{119} the court rejected a defense of standard of the profession, and held that the court and not the ophthalmology profession would determine whether glaucoma tests should be given to persons under forty.\textsuperscript{120} In 1975 the Legislature responded by requiring that plaintiffs in civil actions against medical practitioners prove that defendants failed to exercise the skill possessed by other persons in the same profession.\textsuperscript{121}

In the 1979 case of \textit{Gates v. Jensen},\textsuperscript{122} the court, offering a "patently non-cooperative interpretation of the . . . statute,"\textsuperscript{123} keyed in on the decided.")(Guy, J., dissenting); \textit{Hansen}, 118 Wash. 2d at 487, 824 P.2d at 489 ("This is an odd way to maintain continuity in the law and surely does little to engender respect . . . [G]iven the action of the court today, I do not believe it can any longer, with integrity, maintain its previous position [of no social host liability].") (Dolliver, J., dissenting).


\textsuperscript{117.} \textit{See supra} notes 87–93 and accompanying text.


\textsuperscript{119.} 83 Wash. 2d 514, 519 P.2d 981 (1974).

\textsuperscript{120.} \textit{Id.} at 519, 519 P.2d at 983.


\textsuperscript{122.} 92 Wash. 2d 246, 595 P.2d 919 (1979).

\textsuperscript{123.} Henderson & Eisenberg, \textit{supra} note 118, at 488 n.46.
word "possessed," which had been changed during the legislative process from "practiced," and held that the new law clearly "allows ample scope for the... Helling rule." This difference between the Legislature's clear intent and the court's interpretation of it has been noted by numerous commentators.

The seeming contradiction between the court's holdings on the standard of care for optometrists as opposed to its holdings regarding providers of alcohol is a microcosm of a battle over tort reform, a battle that often comes down to a debate over when a court must act to fulfill its common law obligations, and when it must wait for legislative mandate.

On one side is the argument that judge-made law is fundamentally antidemocratic. On the other side is the contention that legislatures have "no stomach" for tort reform. In fact, the conflict is an illusion and the process is in no way undemocratic. Courts and legislatures interact, the former taking on politically unappealing or uninteresting reforms that the latter shun, with legislatures retaining the right to change a court's holdings. Courts then may be active in some areas,

124. Gates, 92 Wash. 2d at 254, 595 P.2d at 924.
128. Thomas A. Cowan, Rule or Standard in Tort Law, 13 Rutgers L. Rev. 141, 159 (1958); see also Peck, supra note 126, at 268.
129. See generally Robert N. Clinton, Judges Must Make Law: A Realistic Appraisal of the Judicial Function in a Democratic Society, 67 Iowa L. Rev. 711, 718-19 (1982) ("[J]udicial lawmaking through statutory interpretation arises out of the necessity to determine the applicable law in the absence of clear direction from the democratically-elected legislative body.").
deferential in others. The proper question is when should a court act? The answer is when the Legislature, for reasons of political reality such as resistance from large parts of the population, does not. This is the case with social host liability.

The court is aware of this argument in favor of judicial activism, but has indicated that it is relevant only when the Legislature has been lax. The court added that the Legislature has been highly active in the area of drunk driving, and noted a flurry of legislative action.

This argument is unpersuasive as it relies upon a characterization of legislative action that fails for two reasons. First, as the court itself has acknowledged, although it is a "characteristic" of drunk driving statutes that they are "continually being changed by the Legislature," the overall rules and regulations remain the same.

Second, and more important, the issue is not drunk driving: it is furnishing alcohol to people who subsequently drive drunk. There is no question that drunk drivers are liable to those they injure. In fact, drunk drivers are one of the few classes of tortfeasors who are negligent per se. In the area of negligent alcohol provision, the Legislature has been at a near standstill. The law on selling liquor to the obviously intoxicated has not changed since its inception in 1933. Although the law on furnishing liquor to minors was rewritten in 1987 and modified in 1993, the basic premise, that only parents, guardians, and medical professionals may provide minors with alcohol, has been consistent since 1955. Determining the duty owed by those who furnish alcohol is exactly the type of area where the court must act in the face of legislative inaction.

131. For example, the Washington Supreme Court has deferred to the Legislature on the question of social host liability and been proactive in the area of medical standards of care. See supra text accompanying notes 118–125.

132. See generally Peck, supra note 114, at 8–9, 45.


134. Id. at 389, 755 P.2d at 763.

135. Id.


137. Id. at 224, 737 P.2d at 663.


141. See Burkhart v. Harrod, 110 Wash. 2d, 381, 400, 755 P.2d 759, 758 (1988) (Utter, J., concurring) ("The majority would be correct in deferring to the Legislature if the Legislature had in fact spoken.").
The court has relied not only on legislative inaction, but on tangential actions that they read as indicative of the Legislature’s intent. For example, the court said that repeal of the Dramshop Act showed a disapproval on the part of the Legislature for social host liability.\textsuperscript{142} But does it? “When the Legislature seeks to destroy a common law right of action, it generally does so explicitly.”\textsuperscript{143} Yet the legislative history does not support the court’s extensive reading. The published records of the House contain only two notations that “debate [on the repeal] ensued.”\textsuperscript{144} The Senate history also contains no debate on the merits.\textsuperscript{145} The court’s finding that the repeal of the Dramshop Act is support for a finding of legislative disapproval of social host liability is highly presumptive.\textsuperscript{146} Prior to the Dramshop Act’s repeal the court never held the Act applicable to social hosts.\textsuperscript{147} As the court had not construed the Act to give a right against social hosts, how could its repeal show disapproval of such a right?

To explain why both commercial and social hosts can be liable for furnishing alcohol to minors, whereas only commercial hosts must refrain from serving the obviously intoxicated, the court has relied upon the fact that it is a criminal act to sell or give alcohol to a minor,\textsuperscript{148} while it is only illegal to sell alcohol to an intoxicated adult.\textsuperscript{149} This grafting of criminal liability onto a civil action ignores a basic rule of law: A tort is not the same thing as a crime.\textsuperscript{150}

And, when a vendor violates the law by selling to a person obviously intoxicated, the court has held that the vendor has no liability to that

\textsuperscript{142} Id. at 387–88, 755 P.2d at 762.
\textsuperscript{143} Halvorson v. Birchfield Boiler, Inc., 76 Wash. 2d 759, 766, 458 P.2d 897, 901 (1969) (Finley, J., dissenting).
\textsuperscript{144} Wash. House J. at 786 (1955).
\textsuperscript{145} Wash. Senate J. at 892–94 (1955).
\textsuperscript{146} See Halvorson, 76 Wash. 2d at 766, 458 P.2d at 901 (Finley, J., dissenting) (“In my opinion, the majority has drawn extremely dubious conclusions . . . from a most insubstantial legislative history.”).
\textsuperscript{147} See supra notes 25–27 and accompanying text.
\textsuperscript{148} Hansen v. Friend, 118 Wash. 2d 476, 482, 824 P.2d 483, 486 (1992) (citing Wash. Rev. Code § 66.44.270(1)).
\textsuperscript{150} Keeton et al., supra note 92, § 2, at 7 (1984) (“The civil action for a tort . . . is commenced and maintained by the injured person, and its primary purpose is to compensate for the damage suffered at the expense of the wrongdoer.”); see also Leon Green, Judge and Jury 224 (1930) (“Nothing is clearer than that these factors [that direct and control judicial decisions] differ from case to case . . . and vary even more from torts to crimes. There are frequently difficulties of administration on the criminal side . . . where there are none on the civil side, or vice versa.”).
intoxicated person. Not because of anything in the statute itself, but because it "belies common sense" to suggest that the law intended to shield drunk drivers from responsibility for their own actions. The court found that the statute was passed to protect the welfare and safety of the people of the state, but the court also asked the injured patron to offer evidence that the Legislature intended the act to protect "the drunk driver." This request appears to be in direct conflict with the court's earlier holding that the Liquor Control Act "is to be liberally construed, to the end that its purposes may be accomplished." If the purpose of the Act is to protect the people of the state, it can best be effectuated by providing the maximum disincentives to vendors who might negligently serve the obviously intoxicated. A liberal construction should also include those who drink within the class of people protected by the statute.

In addition to not indicating disapproval of social host liability, the Legislature has conveyed support for the right of intoxicated adults to sue vendors and social hosts who serve them negligently, as shown by the enactment of Washington Revised Code section 5.40.060 in 1986. Section 5.40.060 provides a complete defense for any personal injury or wrongful death action if the victim was (1) under the influence of intoxicating liquor, and that this condition was a proximate cause of injury or death, and (2) the trier of fact finds such person to have been more than fifty percent at fault. The standard Washington contributory fault statute has no such complete defense provision.

By both allowing for a defense and placing a limitation on that defense in the hands of the jury, the Legislature clearly indicated a preference for permitting causes of action to go forward where a reasonable jury could find that intoxicated victims were not more than half responsible for their fates. There is nothing in the statute to indicate any limitation on an inebriated person's right of action other than the clear requirement of falling at or below the fifty percent fault

152. Id. at 39, 896 P.2d at 1249.
153. Id. (citing Wash. Rev. Code § 66.08.010).
154. Id.
159. See generally Kelly, 127 Wash. 2d at 48-49, 896 P.2d at 1253-54 (Guy, J., dissenting).
mark. "In interpreting a statute, the court should assume that the Legislature meant exactly what it said."  

Certainly the Legislature in 1986, before the Washington Supreme Court placed its own limitations on rights of action by intoxicated persons who injure themselves, could have placed an additional limitation in this section had they wanted to. In the absence of such an additional limitation the canon of construction of *expressio unius est exclusio alterius*, recognized by the Washington Court, should apply: "[W]here a form of conduct, the manner of its performance and operation, and the persons and things to which it refers are designated, there is an inference that all omissions should be understood as exclusions."  

In the field of tort law, courts, including the courts of Washington, have overwhelmingly been the maker of the law. Although statutes influence this development, the court, as the guarantor of constitutional rights, may even overturn a statute where the Legislature has denied a right of action for recognized wrongful conduct.  

The limitations that the court has placed on the liability of those who negligently furnish alcohol are not explicit, nor even implicit, in the acts of the Legislature. If anything, the Legislature has indicated that, in the case of intoxicated people who injure themselves, a right of action should exist. At the same time, the traditional role of the court argues for activism in this field of tort law.

C. The Court and Society  

*A timid judge, like a biased judge, is intrinsically a lawless judge.*  

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162. 2A Norman J. Singer, *Sutherland Statutory Construction* § 47.23 (5th ed. 1992).  
164. Keeton et al., *supra* note 92, § 3, at 19.  
165. *Id.*  
166. Peck, *supra* note 2, at 683 (arguing that some tort actions come within rights of due process clause of 14th Amendment of U.S. Constitution and article I, section 3 of Washington Constitution).  
As the court has noted, a strong argument can be made for social host liability and against it. In fact, numerous comments have been written on the subject, both pro and con. In declining to decide this issue, the court has described the debate as one of “competing social interests” best left to the Legislature. Similarly, the subject of liability when an intoxicated person is injured, has been the subject of its own field of legal scholarship, albeit a smaller expanse. Again, the court has held that the Legislature should determine accountability.

But to not decide is to decide. To not find a class subject to potential liability is to find that class immune from suit, as is the case with social hosts who serve intoxicated adults. To find that a group requires specific legislative mandate to be within the protection of the law is to find that group outside the realm of the law, as is the case with intoxicated adults who injure themselves.

1. Social Host Liability

Once the court accepted that commercial hosts have a duty to innocent third parties, it abrogated the traditional common law analysis that drinking alcohol, not furnishing it, is the proximate cause of any resulting injury. Today, negligently furnishing alcohol may be

168. See Burkhart, 110 Wash. 2d at 384, 755 P.2d at 760.


170. Burkhart, 110 Wash. 2d at 385, 755 P.2d at 761.


173. See supra note 48 and accompanying text.

174. See supra note 3.
a proximate cause of resulting harms.\textsuperscript{175} From this doctrine and from the court's definition of "furnishing" as controlling a guest's access to alcohol,\textsuperscript{176} comes the logical conclusion that social hosts should have potential liability.\textsuperscript{177} Currently, they do not.\textsuperscript{178}

The basis for the court's holding on social host immunity is that such an issue of "public policy usually is declared by the Legislature, and not by the courts."\textsuperscript{179} Yet, in other contexts, the court has acknowledged that it makes the "policy decision" of determining when legal liability exists.\textsuperscript{180} Duty and legal causation are also policy decisions of the court.\textsuperscript{181}

The court also offers what are policy justifications for its decision not to impose social host liability. Social hosts are not as capable of handling the responsibility of knowing when a guest has had too much to drink,\textsuperscript{182} and it would raise too many "problematic questions" for them.\textsuperscript{183} Furthermore, social hosts are a numerous population, whose response to a court-imposed duty cannot be predicted.\textsuperscript{184}

The court's fear that social hosts will be unable to know when to say no is unfounded. Determining that social hosts owe a duty when unreasonable behavior results in foreseeable harm is merely an application of standard tort doctrine.\textsuperscript{185} The very fact that the majority of adults in this state do have experience as social hosts\textsuperscript{186} will mean that juries, and most if not all judges, will be better able to determine when a social host's furnishing of alcohol is unreasonable.


\textsuperscript{176} Id. at 466, 716 P.2d at 819.

\textsuperscript{177} See Burkhart v. Harrod, 110 Wash. 2d 381, 398, 755 P.2d 759, 767 (1988) (Utter, J., concurring) ("There is no logical reason to deny recovery to victims injured as a proximate result of equally unreasonable actions by social hosts.").

\textsuperscript{178} Id. at 383, 755 P.2d at 760.

\textsuperscript{179} Id. at 385, 755 P.2d at 761.


\textsuperscript{181} See, e.g., Hartley v. State, 103 Wash. 2d 768, 779, 698 P.2d 77, 83 (1985).

\textsuperscript{182} Burkhart, 110 Wash. 2d at 387, 755 P.2d at 761.

\textsuperscript{183} Id. at 384, 755 P.2d at 760.

\textsuperscript{184} Id. at 387, 755 P.2d at 761.

\textsuperscript{185} See Keeton et al., supra note 92, § 43, at 280 ("If one could not reasonably foresee any injury as the result of one's act . . . there would be no negligence, and no liability."); see also Ochampough v. City of Seattle, 91 Wash. 2d 514, 519, 588 P.2d 1351, 1354 (1979) (quoting Restatement of Torts regarding "ordinary negligence basis of a duty of reasonable care not to inflict foreseeable harm").

\textsuperscript{186} See Burkhart, 110 Wash. 2d at 387, 755 P.2d at 761.
2. The Self-Inflicted Injury

By denying rights of action to the intoxicated who injure themselves, the court has decided that duty varies by the victim, a finding in direct conflict with earlier Washington case law and the will of the Legislature. In *Kelly v. Falin*, the court took from the jury the right to determine comparative negligence, and avoided the issue of foreseeability, by finding that there was no duty owed to intoxicated patrons. Duty, however, is bound up with foreseeability, and actors are responsible for the foreseeable consequences of their acts. In *Christen v. Lee* the court took from the jury the right to determine whether a harm was foreseeable by holding that, as a matter of law, a violent assault would not foreseeably arise from serving drinks to a minor absent a specific reason to anticipate violence. Yet, violence can be a foreseeable outcome of drunkenness even absent the specificity the court requires.

The result of the court’s decisions is to limit severely the traditional role of the finder of fact, which is to determine negligence. In truth it

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189. See supra notes 157–162 and accompanying text.
190. *Kelly*, 127 Wash. 2d at 42, 896 P.2d at 1250.
191. *Burkhart*, 110 Wash. 2d at 395, 755 P.2d at 766 (Utter, J., concurring); see also *Wells v. Vancouver*, 77 Wash. 2d 800, 802, 467 P.2d 292, 295 (1970) (“[T]he duty to use ordinary care is bounded by the foreseeable range of danger. It is for the jury to decide whether a general field of danger should have been anticipated.”).
193. See supra note 86; see also *Christen*, 113 Wash. 2d at 512, 780 P.2d at 1323 (Utter, J., concurring in part, dissenting in part) (finding majority’s reasons for limiting jury decision on foreseeability “unpersuasive”).
194. See, e.g., *Bodin v. City of Stanwood*, 130 Wash. 2d 726, 741, 927 P.2d 240, 248 (1996) (“Negligence is generally a question of fact for the jury, and should be decided as a matter of law only ‘in the clearest of cases and when reasonable minds could not have differed in their interpretation’ of the facts.”) (citations omitted); *Kelly*, 127 Wash. 2d at 43, 896 P.2d at 1250 (Guy, J., dissenting) (“[A] jury, not this court, should decide . . . comparative fault.”); *Burkhart*, 110 Wash. 2d at 395, 755 P.2d at 766 (Utter, J., concurring) (“[N]aturally, it is for the finder of fact to determine if the host [has breached a duty].”); *Bemethy v. Walt Failor’s, Inc.*, 97 Wash. 2d 929, 933, 653 P.2d 280, 282 (1982) (“[I]n deciding questions of duty we evaluate public policy considerations . . . the jury’s function is to decide the foreseeable range of danger . . . ”); *McLeod v. Grant County Sch. Dist.*, 42 Wash. 2d 316, 324, 255 P.2d 360, 365 (1953) (“We have held that it
seems the Washington Supreme Court has increased its policy-making role at the expense of the traditional deference due to the finder of fact.\footnote{195}

By denying rights of action to those injured due to negligence on the part of those who furnish alcohol, because of who the plaintiff is (the intoxicated person), or who the defendant is (a social host), the court is taking on the very mantle of judicial legislator that it so strongly decries. The general rule in Washington is that all people are liable for the foreseeable consequences of their unreasonable behavior.\footnote{196} Although there are times when a court must act, the court’s holdings, which immunize the large class of social hosts\footnote{197} and stigmatize drunk drivers, are the antithesis of the principle that the primary time for court activism is when politically unpopular decisions are needed.\footnote{198}

In refusing to afford a right of action to an intoxicated adult or, in the case of social hosts, all but the minors they serve, the court places great reliance on the fact that its restrictions on liability are the same as those of a majority of other states.\footnote{199} But this “everybody-else-is-doing-it” reasoning is insufficient to support the court’s making poor policy and ignoring established legal principles. If the Legislature seeks to limit liability, as long as it does not violate due process,\footnote{200} it may.

By eliminating these two court-drawn restrictions on furnisher liability, the court will provide consistency both within the area of intoxicating liquors and within overall tort doctrine in Washington. By returning to the finder of fact the question of fault, reasonable behavior, foreseeability, and contributory negligence, the court will better effectuate both its own traditions and legislative intent. By developing

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\footnote{195}{See Schooley v. Pinch’s Deli Mkt., Inc., 80 Wash. App. 862, 871, 912 P.2d 1044, 1049 (finding that Kelly has established that protected class is defined not by foreseeability alone, but according to social policy), \textit{review granted}, 129 Wash. 2d 1025, 922 P.2d 98 (1996)}

\footnote{196}{See supra note 185; see also Burkhart, 110 Wash. 2d at 398, 755 P.2d at 767 (Utter, J., concurring).}

\footnote{197}{See supra notes 127–133 and accompanying text.}

\footnote{199}{See Kelly, 127 Wash. 2d at 42, 896 P.2d at 1250 (1995) (noting that majority of jurisdictions have rejected rule that commercial vendors have duty to intoxicated patrons); Burkhart, 110 Wash. 2d at 389 n.3, 755 P.2d at 763 n.3 (noting that most jurisdictions that have considered question of social host liability have rejected it); see also Negligence—Social Host Liability, supra note 110, at 552 (stating that only New Jersey, Massachusetts, and Iowa have found common law duty of care for social hosts, and that Iowa’s finding has since been legislatively overturned).}

\footnote{200}{See supra note 166.}
the common law of tort liability, the court will be following its established role.

Although some may fear that this extension of liability could lead to increased litigation, Washington law prevents any explosion by denying a right of action to a person whose intoxication is found to be more than fifty percent responsible for the subsequent injury. Washington law also provides complete civil and criminal indemnification for vendors who take specified precautions to insure that they are not serving minors.

It may be true that at one time it made sense to hold the drinker responsible for the outcome of drinking, but "the freeway, the high-compression gasoline engine . . . the high-speed automobile . . . the social dangers resulting from the lackadaisical mixture of alcohol and gasoline" were "unknown to the common law . . . Times change, and the common law changes with the times . . ." The "contrary necessity" required to overturn precedent clearly exists. The court should overrule its holding in Kelly v. Falin that intoxicated patrons who injure themselves cannot bring suit; the court should further abolish the distinction it made in Burkhart v. Harrod and hold social hosts liable for all negligent service of alcohol.

D. The Court and the Common Law

With the common law comes our obligation to interpret the law in each case.

1. The Solace of the Common Law

From the beginning to the end of its journey, the court has always sought the stabilizing force of the common law in its limiting of liability. In 1969 they quoted extensively from secondary sources and other state courts to establish that the common law would find no liability for an alcohol provider. In 1995 they again stated this "common law rule"
and noted their repeated refusals to go beyond the limited exceptions they have made. This reliance on an historical formulation would wrongly freeze the law in place. To paraphrase Justice Cardozo, such reliance would mistake the evening's lodge for the journey's end.

Although it is true that the traditional interpretation of the common law did not recognize causes of action against a furnisher of alcohol, the court has seen fit to move beyond these historical limitations. Liability for commercial vendors first came into being in 1959. And it was the Washington court in Hansen that became the first to use an evidence of negligence test in absence of either negligence per se or a civil action law to find social host liability.

The court has already gone a long way toward dismantling the historic vestiges of the common law rule, and it need only follow the road to the proper end. The Washington Supreme Court has shown time and again that it is a major source of rights in tort. And the rights it now should insure are those of all who are injured as the result of negligently furnishing alcohol, no matter who has provided the liquor, no matter if they are the person who drank the drink.

2. A Common Law Source of Liability

Even as historically interpreted, the common law did not deprive all injured parties of a right of recovery against a furnisher of alcohol. It recognized that liability might ensue if a person had lost all will power, or if liquor had been sold to a known alcoholic.

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207. See Kelly, 127 Wash. 2d at 36-37, 896 P.2d at 1247-48.
208. See Cardozo, supra note 1.
209. See supra note 3.
210. See Seminara, supra note 169, at 194 (citing Rappaport v. Nichols, 156 A.2d 1 (N.J. 1959)).
212. See Kelly, 127 Wash. 2d at 37, 896 P.2d at 1248.
The solution to the question of adherence to the "common law" is provided within those documents that were created to insure a certainty of law genuine, broad, and just: the Restatements. Section 390 of the *Restatement (Second) of Torts* states a common law source of duty that includes all people and gives protection to all those harmed by a violation of that duty. Supplying a chattel, by sale or gift, to people who are likely to use it in a manner involving unreasonable risk to themselves or others, makes the supplier subject to liability for resulting physical harm. The court has adopted section 390 as the summation of the duty owed by the people of Washington. As far back as 1922 the court recognized that automobile owners could be liable for loaning their cars to one known to be reckless or incompetent. Allowing a driver one has put in such a reckless or incompetent condition to get into that driver's own vehicle is just as negligent.

In illustrating section 390, the *Restatement* offers the example of someone who rents a boat to obviously intoxicated people: the lessor is liable to them and anyone they injure. As the Washington Supreme Court has noted, the kinds of actions forbidden by section 390 are set forth in its illustrations. There is a clear common law duty upon all who furnish alcohol, a duty that extends to those who drink the liquor and any innocent third parties they may injure.

III. WHY THIS DESTINATION?

Under the guise of judicial restraint, the court has exempted social hosts, a significant class of potential defendants, from liability; the court has denied intoxicated adults, a significant class of plaintiffs, a

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216. See Halvorson, 76 Wash. 2d at 767, 458 P.2d at 901 (Finley, J., dissenting).
217. See Cardozo, supra note 1, at 17.
219. See Bemethy v. Walt Failor's Inc., 97 Wash. 2d 929, 933, 653 P.2d 280, 283 (1982) ("In weighing the policy considerations, we hold that the duty owed by respondent [who sold a gun to an intoxicated man] is best summarized by *Restatement (Second) of Torts* § 390 (1965) which we now adopt.").
220. See Jones v. Harris, 122 Wash. 69, 74, 210 P. 22, 24 (1922).
221. *Restatement (Second) of Torts* § 390 illus. 7.
224. See supra notes 63–65 and accompanying text.
right of action. The court relies on the traditional view of the common law, but the court has already moved beyond that view. The court relies on legislative inaction, but when the Legislature is not protecting rights is exactly the moment when a court must act. The court alternatively relies on what actions the Legislature has taken, even though the court is actually countering the will of the Legislature. The court has also seriously diminished, in some cases eliminated, the fact finder’s role in determining comparative negligence and foreseeability. What really seems to be happening is nothing less than an old fashioned negative attitude towards drinkers, as can be seen in the court’s opinions.

There is certainly a sense in the Kelly decision that intoxicated adults are to be denied recovery as punishment for their sins. Such a concept is the essence of the contributory negligence bar to recovery that has been replaced by a comparative negligence system in Washington.

The reason for the existence of comparative negligence is to counteract the hardship engendered by the doctrine of contributory negligence.

In one sense, the court is adhering to one of the oldest traditions in this area of the law: the drinker is at fault. But, as discussed above, this is a doctrine that the court has in many cases abandoned. This abandonment is a logical step both because of what we now know about alcoholism, and because as people drink their abilities decrease, and the furnisher’s duty obviously should increase.

225. See supra notes 66–68 and accompanying text.

226. See, e.g., Kelly v. Falin, 127 Wash. 2d 31, 41, 896 P.2d 1245, 1250 (1995) (“A rule that allows an intoxicated adult to hold a commercial vendor liable fosters irresponsibility and rewards drunk driving.”); Dickinson v. Edwards, 105 Wash. 2d, 457, 499, 716 P.2d 814, 836 (Durham, J., dissenting) (“I do not believe we should sacrifice the concept of individual responsibility as part of a crusade against furnishers of alcohol.”).

227. See Kelly, 127 Wash. 2d at 41, 896 P.2d at 1250.

228. See Keeton et al., supra note 92, § 65, at 452; see also 45 Am. Jur. 2d Intoxicating Liquors § 554 (1969) (stating that denial of recovery to consumers of alcohol is based on decedent’s contributory negligence).


230. See supra note 3.

231. See supra notes 173–175 and accompanying text.

IV. CONCLUSION

In abrogating the traditional common law rule that drinking alcohol and not furnishing it is the proximate cause of any harms caused by the drinker, the Washington Supreme Court has recognized that it is possible to furnish alcohol in a manner legally negligent. But by placing strict limits on both the class of potential plaintiffs, which can never include intoxicated adults who injure themselves, and the potential defendants, which can never include social hosts unless they have provided alcohol to a minor, the court has drawn an improper distinction. The court's grafting of a legal duty onto a civil action has blurred the distinction between tort and crime. By abdicating its policy making role, the court has made poor policy. In not acting, the court has acted.

The issue of whether a plaintiff's harm is self-inflicted is one of contributory negligence; the question of whether a defendant acted in an manner unreasonable under the circumstances is one of foreseeability. Both of these are properly left to the trier of fact.