1995

With the Legislature's Permission and the Supreme Court's Consent, Common Law Social Host Liability Returns to Minnesota

Michael K. Steenson
Mitchell Hamline School of Law, mike.steenson@mitchellhamline.edu

Publication Information

Repository Citation
http://open.mitchellhamline.edu/facsch/65
With the Legislature's Permission and the Supreme Court"s Consent, Common Law Social Host Liability Returns to Minnesota

Abstract
In 1990, the Minnesota Legislature amended the Civil Damage Act to allow for common law tort claims against persons 21 years old or older who knowingly provide alcohol to a person under 21 years of age. The 1990 amendment is unique because the legislature in effect appears to be releasing its stranglehold on liquor liability law, permitting the courts to apply common law negligence principles under the defined circumstances, but without providing any guidelines as to how the common law remedy should be formulated. The interpretive problems the amendment creates will eventually have to be resolved by the courts. The purpose of this Article is to examine those interpretive problems, and proceeds in four parts. Part II provides a backdrop for the examination of common law claims arising out of furnishing or providing alcohol to another and discusses the legislative intent in adopting subdivision 6. Part III analyzes the statutory window the legislature used to open up common law liability. Because common law negligence principles may be imposed only where a person twenty-one years of age or older has knowingly provided or furnished liquor to a person under the age of twenty-one, questions will arise concerning the interpretation of the term “knowingly,” and the meaning of the terms “provided or furnished.” Part IV focuses on the potential constitutional problems that may be created by the 1990 amendment because it permits the imposition of liability against social hosts according to standards that are different from those that apply to commercial vendors of alcohol. More specifically, the issue is whether the split in standards will give rise to an equal protection claim of the same strength that caused the Minnesota Supreme Court in Wegan v. Village of Lexington to hold that the split standards that were the product of its decision in Trail were unconstitutional, or whether the split is the result of a reasoned decision that will withstand a potential constitutional attack. Finally, Part V recaps the analysis of the common law liability and statutory window issue in a brief conclusion.

Keywords
Alcohol liability law, statutory interpretation, social host liability, torts, Minnesota alcohol, Minnesota civil damages act, negligence

Disciplines
Civil Law | Torts

This article is available at Mitchell Hamline Open Access: http://open.mitchellhamline.edu/facsch/65
WITH THE LEGISLATURE'S PERMISSION AND THE
SUPREME COURT'S CONSENT, COMMON LAW
SOCIAL HOST LIABILITY RETURNS TO MINNESOTA

Michael K. Steenson†

I. INTRODUCTION ........................................... 45
II. THE BACKDROP OF SOCIAL HOST AND COMMON LAW
LIABILITY IN MINNESOTA ................................. 48
   A. The Backdrop: Common Law Claims Against Commercial
      Liquor Vendors and Social Host Liability under the Civil
      Damage Act ........................................... 49
   B. Legislative Intent In Creating The 1990 Amendment 61
      1. Who is Entitled to Recover? ......................... 64
      2. Who is Liable? ..................................... 74
      3. Defenses ............................................ 76
         a. Contributory Negligence ......................... 77
         b. Complicity and Comparative Fault ................. 82
         c. Summary ......................................... 87
III. THE STATUTORY WINDOW .............................. 88
   A. The “Knowingly” Requirement ......................... 88
   B. The “Under Twenty-One” Requirement ................. 96
   C. Summary ............................................ 100
IV. A CONSTITUTIONAL DILEMMA? ......................... 101
V. CONCLUSION .............................................. 108

I. INTRODUCTION

In 1990, the Minnesota Legislature amended the Civil
Damage Act by adding subdivision 6, which reads as follows:

Nothing in this chapter precludes common law tort claims
against any person 21 years old or older who knowingly
provides or furnishes alcoholic beverages to a person under
the age of 21 years.¹

† Margaret H. and James E. Kelley Professor of Law, William Mitchell College
of Law, Saint Paul, Minnesota. B.S. 1967, University of Minnesota; J.D. 1971, University
of Iowa. Thanks are due to the excellent research assistance provided by Todd
Cavanaugh, Mary Ritter, and Markus Yira.
¹ MINN. STAT. § 340A.801, subd. 6 (1994).
This amendment is the legislature's most recent foray into civil liquor liability. It is abruptly different from the legislature's previous actions regulating civil liability for injuries arising out of the sale or furnishing of alcohol.²

The amendment was part of a tort reform package that was recommended by a commission appointed by the Minnesota Legislature in 1989 to study tort law and make appropriate recommendations for changes.³ In its 1990 report to the legislature, the Commission recommended several changes in Minnesota personal injury law.⁴ Among the recommendations was a proposed amendment to the Civil Damage Act⁵ that would permit imposition of liability on persons twenty-one or older who knowingly furnish or provide alcohol to persons under the age of twenty-one.⁶ That recommendation, along with others, was adopted by the legislature in 1990.

The 1990 amendment is unique because the legislature in effect released its stranglehold on liquor liability law, permitting the courts to apply common law negligence principles, but without providing any guidelines as to how the common law remedy should be formulated. Prior to the 1990 amendment, the Minnesota Legislature was concerned about the Minnesota Supreme Court's decisions in Ross v. Ross,⁷ which imposed liability under the Civil Damage Act on social hosts,⁸ and Trail

². See id. § 340A.801 (providing historical and statutory notes tracing the various sources of law).
⁴. The Commission made recommendations in the areas of comparative fault, statutes of limitations damages, no fault, seat-belt and helmet liability, insurance, medical liens, alternative dispute resolution, municipal liability, and attorney fees. Id. at 4-10. The Commission focused its tort reform on both statutory and common law. Id. The report to the legislature considered the goals of accountability, compensation, predictability, consistency, risk prevention, spread resolution, accessibility, fairness and reasonableness of costs. Id.
⁵. MINN. STAT. § 340A.801, subd. 6.
⁷. 294 Minn. 115, 200 N.W.2d 149 (1972).
⁸. A social host is one who provides alcohol to others for no cost and with no future business specification. Laura Hoexter, A Minor Hazard: Social Host Liability in Washington After Hansen v. Friend, 68 WASH. L. REV. 227, 227 n.3 (1993) (citing Halvorson v. Birchfield, Inc., 458 P.2d 987 (1969)). The issue of social host liability has been the subject of increasing debate. See, e.g., id. at 227 (analyzing social host liability in Washington and arguing that actions should be permitted by third parties, but with liability limited to injuries in automobile accidents); Kenneth F. Lewis, Pennsylvania's
v. Christian, which imposed liability on the basis of common law negligence principles on sellers of 3.2 beer. The legislature abrogated those decisions through amendments to the Civil Damage Act that made the Act the sole source of recovery, and permitting recovery under the Act only against commercial vendors of alcohol. The amendments appeared to preclude the imposition of either social host liability under the Civil Damage Act or common law liability against commercial vendors of alcohol.

The 1990 amendment is unique because the legislature in effect appears to be releasing its stranglehold on liquor liability law, permitting the courts to apply common law negligence principles under the defined circumstances, but without providing any guidelines as to how the common law remedy should be formulated. The interpretive problems the amendment creates will eventually have to be resolved by the courts. The purpose of this Article is to examine those interpretive problems.

This Article proceeds in four parts. Part II first provides a backdrop for the examination of common law claims arising out of furnishing or providing alcohol to another. Second, it discusses the legislative intent in adopting subdivision 6. It seeks to answer the question of whether the legislature anticipated that the courts would in fact impose common law liability on persons twenty-one years of age or older who knowingly provide or furnish alcohol to persons under the age of twenty-one, or simply intended to leave it up to the courts to decide the question, and if the legislature intended to leave it to the courts, whether Minnesota precedent in fact sustains the common law liability theory. The remainder of the section proceeds under the theory that the courts will in fact hold that common law negligence principles are consistent with Minnesota precedent and policy. It addresses three remaining questions. The first is

_Limitations on Social Host Liability: Adding Insult to Injury?, 97 DICK. L. REV. 753, 754-64 (1993) (arguing that a claim should be against a social host who serves an intoxicated adult who then injures another); Andrew D. Shore, Social Host Liability in North Carolina: Did the Supreme Court Get it Right in Hart v. Ivey, 71 N.C. L. REV. 2149, 2153-56 (1993) (examining social host liability and concluding that liability should be limited to social hosts serving minor guests); Spring J. Walton, et al., The High Cost of Partying: Social Host Liability for Fraternities and Colleges, 14 WHITTIER L. REV. 659, 662-68 (1993) (examining the impact of social host liability in fraternities at colleges and universities).

who is entitled to recover under the common law theory, the second is who is liable, and the third is the structure of potential defenses to the common law claim.

Part III analyzes the statutory window the legislature used to open up common law liability. Because common law negligence principles may be imposed only where a person twenty-one years of age or older has knowingly provided or furnished liquor to a person under the age of twenty-one, those elements have to be satisfied before the common law claim may proceed. There are interpretive problems concerning the meaning of the window. More specifically, questions will arise concerning the interpretation of the term "knowingly," and the meaning of the terms "provided or furnished."

Part IV focuses on the potential constitutional problems that may be created by the 1990 amendment because it permits the imposition of liability against social hosts according to standards that are different from those that apply to commercial vendors of alcohol. More specifically, the issue is whether the split in standards will give rise to an equal protection claim of the same strength that caused the Minnesota Supreme Court in Wegan v. Village of Lexington to hold that the split standards that were the product of its decision in Trail were unconstitutional, or whether the split is the result of a reasoned decision that will withstand a potential constitutional attack. Finally, Part V recaps the analysis of the common law liability and statutory window issue in a brief conclusion.

II. THE BACKGROUND OF SOCIAL HOST AND COMMON LAW LIABILITY IN MINNESOTA

The first section of this part examines cases that interpret the Civil Damage Act as well as questions involving common law claims asserted independently of the Civil Damage Act. A look at both is necessary in order to answer the question of whether there is a basis in Minnesota case law for justifying the first-time adoption of a common law rule imposing liability on a person twenty-one or older who provides or furnishes alcohol to a person under the age of twenty-one.

The standard common law view of personal injury claims based on the sale or provision of alcoholic beverages to another

has been that the cause of any injuries arising out of the person's intoxication is their voluntary intoxication, rather than the sale or provision of the alcohol. The common law rule served to insulate the person selling or providing the alcohol from common law liability. The second section examines the legislative intent and Minnesota precedent in more detail with a view to answering three questions: (1) who is entitled to recover; (2) who is liable; and (3) what defenses may be asserted to the common law claim.

A. The Backdrop: Common Law Claims Against Commercial Liquor Vendors and Social Host Liability under the Civil Damage Act

In 1955, in *Beck v. Groe*, the Minnesota Supreme Court said in dictum that there is no common law action against a liquor vendor:

> The cases are overwhelmingly to the effect that there is no cause of action at common law against a vendor of liquor in favor of those injured by the intoxication of the vendee.

> The common-law rule is based on the premise that the proximate cause of the injury is the act of the buyer in drinking the liquor and not the act of the vendor of intoxicating liquor in selling it. Since a civil damage law is one highly penal in its nature introducing a remedy unknown to the common law, it is to be strictly construed in the sense that it cannot be enlarged beyond its definite scope but yet may be interpreted, where the language is clear and explicit, so that its true intent and purpose is given full meaning, having in view the evil to be remedied and the object to be attained. Its provisions, where clear as to intent and purpose, will be liberally construed so as to suppress the mischief and advance the remedy. The rule at common law was that no civil action would lie for causing the death of a human being.  

---

11. *See infra* notes 15-17 and accompanying text.
12. 245 Minn. 28, 70 N.W.2d 886 (1955). This wrongful death case arose out of the negligent operation of a vehicle driven by a minor who had been consuming alcohol. *Beck v. Groe*, 245 Minn. 28, 30, 70 N.W.2d 886, 890 (1955). The minor obtained the alcohol through an unlawful sale by a licensed liquor vendor. *Id.* at 30, 70 N.W.2d at 890. The plaintiff brought a wrongful death action against the minor who drove the car and against the establishment that sold the liquor. *Id.* at 30, 70 N.W.2d at 890.
13. *Id.* at 34, 70 N.W.2d at 891 (citations omitted).
Beck sets out the baseline for consideration of common law claims against liquor vendors, but the supreme court attacked Beck's "bedrock principle" of no common law liability in Trail v. Christian. In Trail, the court recalled its statement in Beck that there is no common law liability claim against a liquor vendor, but labeled the statement as dictum and limited it in light of two factors. The first was that the court's own ostensible rule of nonliability of tavern keepers was never absolute, as indicated by cases permitting the imposition of liability on tavernkeepers for negligence where patrons intentionally caused injuries to others. The second was a recent trend in the law altering the common law rule of nonliability.

The court then described the beginning of the major assault by the courts on the common law doctrine of nonliability in some detail. The assault began with the Seventh Circuit's decision in Waynick v. Chicago's Last Department Store, which

14. *Id.* As the opinion points out, at the time that Beck was decided the majority of cases held that no common law cause of action existed against a vendor of liquor in favor of those injured by the vendee. *Id.* at 33-34, 70 N.W.2d at 891. The premise of this rule is that the proximate cause of any injuries sustained by plaintiffs was due to the voluntary intoxication of the buyer. *Id.* The vendor's act of selling the liquor was not a "superseding cause" sufficient to break the chain of causation between the buyer and the injured party. *Id.* at 34, 70 N.W.2d at 891.

15. 298 Minn. 101, 213 N.W.2d 618 (1973). The defendant in Trail, a tavern owner, sold 3.2 beer to minor. *Trail v. Christian,* 298 Minn. 101, 103, 213 N.W.2d 618, 620 (1973). The minor, driving at speeds in excess of 90 miles per hour, collided with an automobile in which the plaintiff was a passenger. *Id.* at 103, 213 N.W.2d at 620. The plaintiff severed her spine in the collision. *Id.* at 103, 213 N.W.2d at 620. The plaintiff brought suit against the tavern owner seeking to recover for the injuries she sustained as result of the negligence of the intoxicated minor. *Id.* at 103, 213 N.W.2d at 620. The district court granted summary judgment in favor of the tavern owner and dismissed plaintiff's complaint. *Id.* at 102, 213 N.W.2d at 618. The plaintiff appealed. *Id.* at 102, 213 N.W.2d at 618.

16. 245 Minn. at 93, 70 N.W.2d at 891. In Beck, the court stated that "[t]here [is] no redress at common law against persons selling, furnishing, or giving intoxicating liquor, or their sureties, for resulting injuries or damages due to acts of intoxicated persons." *Id.* at 33, 70 N.W.2d at 891.

17. *Trail,* 298 Minn. at 105, 213 N.W.2d at 620-21.

18. *Id.* at 108-09, 213 N.W.2d at 622-23.

19. See, e.g., Klingbeil v. Truesdell, 256 Minn. 360, 362-63, 98 N.W.2d 134, 137-38 (1959) (affirming a jury verdict against a tavern operator for injuries suffered by a patron during an assault by another patron who frequented the establishment); Windorski v. Doyle, 219 Minn. 402, 406, 18 N.W.2d 142, 145 (1945) (noting that an operator of a liquor establishment is required to use reasonable care to protect its guests from injury by vicious or lawless persons knowingly permitted on the premises).

20. 269 F.2d 322, 326 (7th Cir. 1959), *cert. denied,* 362 U.S. 903 (1960). In applying common law principles to the facts in this case, the court of appeals reversed the
was then followed by what the Minnesota Supreme Court characterized as the leading case in the area, Rappaport v. Nichols.21 In Rappaport, the New Jersey Supreme Court held that liability could be imposed on the seller of alcoholic beverages, even in absence of a dram shop act in the state.22

The Trail court noted that Rappaport relied on the Minnesota Supreme Court’s decision in Anderson v. Settergren23 by way of analogy.24 In Anderson the defendant unlawfully sold ammunition and loaned a rifle to a minor who shot the rifle, injuring the plaintiff.25 The supreme court recognized that the statute that prohibited the use of firearms by minors was also for the benefit of the general public,26 and that the minor’s firing of the rifle did not constitute a superseding cause that broke the chain of causation.27

Having found a root in Minnesota law, which had been used by other jurisdictions as a basis for limiting traditional defenses to common law actions, the Trail court applied the
district court’s dismissal of the complaint for negligence against the tavern, tavern keeper, and liquor store owner. Waynick v. Chicago’s Last Dep’t Store, 269 F.2d 322, 326 (7th Cir. 1960), cert. denied, 362 U.S. 903 (1960).

21. 156 A.2d 1, 9 (N.J. 1959). In Rappaport, the court noted that if a tavern keeper knows or should have known that a patron is a minor or is intoxicated, then his service to a minor may constitute common law negligence. Rappaport v. Nichols, 156 A.2d 1, 9 (N.J. 1959).

22. Id.

23. 100 Minn. 294, 111 N.W. 279 (1907).

24. Trail, 298 Minn. at 109, 213 N.W.2d at 623.

25. Id. at 109, 213 N.W.2d at 623.

26. Anderson v. Settergren, 100 Minn. 294, 295, 111 N.W. 279 (1907) (referring to section 6946, General statute 1894, which makes it unlawful for a minor under the age of 14 years old to handle or possess a firearm).

27. Id. at 295, 111 N.W. 2d at 279. By concluding that the plaintiff was within the class of persons meant to be protected by the statute (i.e., the general public) the court was able to find that violation of the statute was essentially negligence per se. Id. at 297, 111 N.W. at 280. The defendant claimed that the proximate cause of the injury was not the violation of the statute, but the reckless acts of the minor, which constituted a superseding cause between the unlawful act and the injury. Id. at 297, 111 N.W. at 280. The court rejected this argument, stating: “In almost every case of this class there has been a corresponding intervening act contributing as a condition, it not as a cause, to the injury complained of.” Id. at 298, 111 N.W. at 280.

An intervening act is not “superseding,” unless four circumstances are present: (1) its harmful effects occurred after the original negligence; (2) it has not been brought about by the original negligence; (3) it actively worked to bring about a result which would not otherwise have followed from the original negligence; and (4) it was not reasonably foreseeable by the original wrongdoer. Kroeger v. Lee, 270 Minn. 75, 78, 132 N.W.2d 727, 729-30 (1965).
Anderson rationale,28 using it to reject the orthodox no-causation defense to common law claims.29 The court also acknowledged that other jurisdictions were reevaluating the issue whether common law liability should be imposed on commercial liquor vendors.30 After evaluating those decisions, the supreme court, focusing in particular on the causation problem, held that the plaintiff in Trail properly pleaded a common law negligence action.31

The Trail opinion is confined to the common law liability of liquor vendors.32 The supreme court has not yet held that common law liability may be imposed on social hosts for

28. See Anderson, 100 Minn. at 298-99, 111 N.W. at 280-81.
29. Id., 298 Minn. at 109-10, 213 N.W.2d at 623.
30. Id. at 110, 213 N.W.2d at 623. When Trail was decided, a substantial number of jurisdictions had determined that the sale or furnishing of intoxicating beverages could be the proximate cause of injuries resulting from an intoxicated individual's tortious conduct. In those jurisdictions, liability was imposed upon the vendor or other person furnishing intoxicants in favor of an innocent third-party injured as a result of the intoxicated individual's negligence. See, e.g., Deeds v. United States, 306 F. Supp. 348, 361 (D. Mont. 1969) (ruling that the sale and service of liquor was the proximate cause of an auto accident and resulting injuries to minor plaintiff); Veseley v. Sager, 95 Cal. Rptr. 629, 631 (1971) (holding that furnishing alcoholic beverages to intoxicated person may be the proximate cause of injuries inflicted by that person upon a third person); Prevatt v. McClenann, 201 So. 2d 780, 781 (Fla. Dist. Ct. App. 1967) (holding that the sale of alcohol, rather than its consumption, is the proximate cause of an alcohol-related injury); Elder v. Fisher, 217 N.E.2d 847, 853 (Ind. 1966) (finding a common law action against those unlawfully selling or furnishing alcohol in favor of third persons injured by the intoxicated purchasers); Pike v. George, 434 S.W.2d 626, 629 (Ky. Ct. App. 1968) (holding that there are circumstances where the seller of alcoholic beverages may be held responsible for intoxication-related injuries); Adamian v. Three Sons, Inc., 233 N.E.2d 18, 20 (Mass. 1968) (holding that the sale of liquor may be the proximate cause of injuries); Berkeley v. Park, 262 N.Y.S.2d 290, 293 (N.Y. 1965) (determining that findings of fact could be presented that the sale of alcoholic beverages to intoxicated person was the proximate cause of injuries); Mason v. Roberts, 294 N.E.2d 884, 887-88 (Ohio 1973) (holding that a cause of action was stated where the sale of liquor allegedly caused the death of a bar patron); Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity, 485 P.2d 18, 23 (Or. 1971) (holding that a cause of action exists against a fraternity for serving alcohol to a minor in favor of a third party injured in an automobile accident where the minor was driving); Jardine v. Upper Darby Lodge No. 1973, Inc., 198 A.2d 550, 553 (Pa. 1964) (finding that the sale of alcohol to an intoxicated motorist was the proximate cause of injuries to plaintiff); Mitchell v. Ketner, 393 S.W.2d 755, 759 (Tenn. Ct. App. 1964) (finding that the sale of intoxicants in some circumstances may become the proximate cause of injury).

31. Id., 298 Minn. at 111, 213 N.W.2d at 624.
32. Id. at 108, 213 N.W.2d at 619 (deciding that common law rule of nonliability of vendors for statutorily defined non-intoxicating beverages is unsound and should no longer control).
negligently furnishing alcohol to minors. *Trail* itself was short-lived. The procedural differences between common law negligence claims against sellers of 3.2 beer and Civil Damage Act claims against sellers of strong liquor\(^35\) led to the court's holding in *Wegan v. Village of Lexington*,\(^34\) that the Civil Damage Act's notice and statute of limitations provisions violated the equal protection provision of the Minnesota Constitution.\(^35\) In response to *Wegan*, the Minnesota Legislature then amended the statute to include 3.2 beer within the definition of "alcoholic beverage" to make the sale of any alcoholic beverage a violation of the Civil Damage Act, rendering the common law claim unnecessary and clarifying the legislative intent to regulate civil liability for the sale of alcoholic beverages under the Civil Damage Act.\(^36\)

In *Ross v. Ross*,\(^37\) decided nearly twenty years before the 1990 amendment, the supreme court held that the Civil Damage Act applied to social hosts who bought alcohol for a nineteen-year-old brother of the defendants.\(^38\) *Ross* was based on the specific wording of the Civil Damage Act, which imposed liability against "any person" who illegally sells, barters or *gives* intoxicating liquor causing the intoxication of the person for whose injuries damages are sought.\(^39\) Although *Ross* was a social host

---

\(^{33}\) For a discussion of the differing standards that applied under the common law and under the Civil Damage Act, see *infra* Part IV.

\(^{34}\) 309 N.W.2d 273 (Minn. 1981).

\(^{35}\) *Wegan v. Village of Lexington*, 309 N.W.2d 273, 281 (Minn. 1981). The court held unconstitutional legislative distinctions between claims against sellers of 3.2 beer and similar claims against venders of strong liquor. According to the *Wegan* court:

> There is no rational basis for distinguishing between persons injured by those intoxicated from drinking 3.2 beer and those intoxicated as a result of consuming stronger liquor. An injured person cares little whether the driver who causes his injuries became intoxicated as a result of consuming 3.2 beer or stronger liquor.

*Id.* at 280.

\(^{36}\) *MINN. STAT.* § 340.001, subd. 2 (1978), *repealed* by *Minn. Laws* 1985 art. 13 § 1 (current version at *MINN. STAT.* § 340A.101, subd. 2 (1994)).

\(^{37}\) 294 Minn. 115, 200 N.W.2d 149 (1972).

\(^{38}\) *Ross v. Ross*, 294 Minn. 115, 119, 200 N.W.2d 149, 151 (1972). The 1911 statute created a cause of action against "any person" who illegally gave or sold liquor to another person causing intoxication which resulted in damage to plaintiff. *Id.* at 119, 200 N.W.2d at 151. The court held that the circumstances surrounding the adoption of the Civil Damage Act in 1911 compelled a finding that the legislature intended to restrict prosecution for liquor violations only to those in the liquor business.

\(^{39}\) *Id.* at 121, 200 N.W.2d at 152-53. The legislature seemed preoccupied with strengthening and tightening the liquor laws by using the words "any person" instead
decision, unlike *Trail*, it did not involve common law liability, but rather the court's construction of the Civil Damage Act. In *Fitzer v. Bloom*, the supreme court considered a contribution claim by a negligent driver, Bloom, against the owner of a liquor store that sold liquor to a minor, who then negligently caused an automobile accident resulting in the death of Fitzer. Bloom consumed alcohol and then drove the car. The Civil Damage Act limited the liquor store owner's contribution liability. The common law claim, based on an attempted extension of *Trail*, was asserted to broaden the liquor store owner's contribution liability. The court, however, rejected the argument, noting that *Trail* applied only to the illegal sale of 3.2 beer, which at that time was not covered under the Civil Damage Act. According to the court:

[because] the legislature has provided a remedy for the illegal sale of intoxicating liquor in the Civil Damage Act, the legislature has preempted the field and has provided the exclusive remedy in the act. A common-law cause of action for negligence will only be allowed where the act does not apply.

The supreme court's opinion in *Fitzer* suggests that the common law supplements, rather than is preempted by, the Civil Damage Act. However, the legislature subsequently amended the statute in 1977 to exclude the word "giving" to remove any possible implication that the Act applied to anyone other than a commercial vendor of liquor.

In cases decided after the 1977 amendment, the appellate courts have consistently held that common law claims are preempted by the amendment. The court has considered the

of persons in the liquor business. *Id.* at 121, 200 N.W.2d at 152-53.
40. *Id.* at 117-22, 200 N.W.2d at 151-53.
41. 253 N.W.2d 395 (Minn. 1977).
43. *Id.* at 398.
44. *Id.* at 403.
45. *Id.*
46. *Id.*
47. *Id.*
48. *See id.*
50. *See infra* Part II.B.
common law claims in a variety of settings, but has uniformly concluded that common law claims may not be asserted against commercial liquor vendors nor social hosts.\textsuperscript{51}

In \textit{Robinson v. LaMott},\textsuperscript{52} the Minnesota Supreme Court considered the issue of voluntary intoxication in a claim by an alcoholic against a bar for illegally selling him alcohol in violation of the Civil Damage Act.\textsuperscript{53} The court rejected the plaintiff's argument that recovering under the Civil Damage Act was appropriate.\textsuperscript{54} The court first recognized the familiar statement, in dictum, that there is no common law cause of action against a liquor vendor for the illegal sale of liquor because it is the consumption of alcohol by the intoxicated person that is the cause of any subsequent injuries, rather than the illegal sale of alcohol.\textsuperscript{55} The court followed the progression of common law liquor liability in \textit{Trail} to its preemption by the legislature in \textit{Fitzer} and further in \textit{Blamey v. Brown},\textsuperscript{56} which permitted a common law claim against a nonresident liquor vendor.\textsuperscript{57} The court concluded that, notwithstanding \textit{Trail}, common law liability was preempted because the Civil Damage

\begin{itemize}
\item \textsuperscript{51} See, e.g., Holmquist v. Miller, 367 N.W.2d 468, 472 (Minn. 1985) (rejecting common-law liability for a social host's furnishing of alcohol to a minor); Cole v. City of Spring Lake Park, 314 N.W.2d 836, 840 (Minn. 1982) (rejecting common-law liquor liability of a social host); Cady v. Coleman, 315 N.W.2d 593, 595 (Minn. 1982) (holding that the legislature has insulated social hosts from liability); Robinson v. LaMott, 289 N.W.2d 60, 65 (Minn. 1979) (rejecting a common law claim against a liquor vendor for the sale of intoxicating liquor), \textit{overruled on other grounds}, Johnson v. Helary, Inc., 342 N.W.2d 146 (Minn. 1984).
\item \textsuperscript{52} 289 N.W.2d 60 (Minn. 1979) (holding that the license bond filed under § 340.12 of the Minnesota Statutes does not provide additional recovery to persons who have been fully compensated for damages caused by violation of the state's liquor laws).
\item \textsuperscript{53} Robinson v. LaMott, 289 N.W.2d 60, 61 (Minn. 1979).
\item \textsuperscript{54} \textit{Id.} at 63. The plaintiff cited three reasons why recovery was appropriate: (1) It would serve as a deterrent for illegal sales of alcohol by liquor vendors; (2) it would promote the Act's remedial, penal and compensatory purposes; and (3) the cost of compensation is best undertaken by the liquor vendor's insurer. \textit{Id.}
\item \textsuperscript{55} \textit{Id.} at 64.
\item \textsuperscript{56} 270 N.W.2d 884 (Minn. 1978), cert. denied, 444 U.S. 1070 (1980).
\item \textsuperscript{57} In \textit{Blamey}, a Minnesota resident sued a non-resident tavern owner under the Civil Damage Act for injuries resulting from the sale of liquor from a Wisconsin tavern. \textit{Blamey v. Brown}, 270 N.W.2d 884, 885-86, cert. denied, 444 U.S. 1070 (1980). The court held that the Civil Damage Act could not be applied to a non-resident vendor when the liquor was sold outside of Minnesota. \textit{Id.} at 889-90. However, the court permitted the common law negligence claim so that the Minnesota court has in personam jurisdiction. \textit{Id.} at 890.
\end{itemize}
Act provided the exclusive remedy against social hosts under the circumstances.\textsuperscript{58}

Similarly, in \textit{Cole v. City of Spring Lake Park},\textsuperscript{59} the court held that the 1977 amendment precluded social host liability. The court stated:

We cannot conclude that the absence of the word “giving” from the Civil Damages Act amounts to legislative silence, which we said in \textit{Trail} we would “not promote . . . to legislative preemption.” The legislature has been anything but silent; the specific removal of the word “giving” is legislative activity which we interpret here as intent to preempt a Civil Damages Act or common law remedy against social hosts. There was, as the legislature knew, no right of action at common law against social hosts in this jurisdiction, only the statutory cause of action under the Dram Shop Act, which was eliminated with the word “giving.”

Only two jurisdictions have created liability for the social host utilizing a common law theory of negligence outside of the dram shop acts. \textit{Coulter v. Superior Court of San Mateo County}, 21 Cal.3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978); \textit{Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity}, 258 Or. 632, 485 P.2d 18 (1971). Both states have since amended their statutes to preclude such a result. The majority of jurisdictions deciding the issue have refused to hold social hosts liable for harm caused by intoxicated guests.

The two cases in which this court has recognized common law actions for liquor violations are distinguishable from the cases at bar. In \textit{Trail} we held that the vendor who sold 3.2 beer to a minor could be liable at common law for the minor’s subsequent tortious conduct. In \textit{Blamey} we held that a common law remedy was the only remedy available, since the Civil Damages Act was intended to apply only to Minnesota vendors. In the instant cases we have neither a vendor, a minor, 3.2 beer [not an intoxicating liquor under the statute], nor an out-of-state vendor. Furthermore, we specifically “limit[ed the \textit{Trail}] opinion to sales of 3.2 beer to minors or those already intoxicated and the ensuing civil liability of the commercial vendor whose sale under these

\textsuperscript{58} \textit{Robinson}, 289 N.W.2d at 65.

\textsuperscript{59} 314 N.W.2d 836 (Minn. 1982).
circumstances results in injuries to an innocent third party not a patron of the vendor."60

In Cady v. Coleman,61 the issue was "whether social hosts who barter or sell liquor to their guests may be held liable under the Civil Damages Act."62 The court held that "the legislature intended to insulate social hosts from liability regardless of the terms under which they provide their guest with liquor."63 The court reasoned that it would be illogical to impose liability on someone who dispenses free liquor, but not to impose such liability on someone who sells or barters liquor.64 Also, the court found that the deletion of the word "giving" from the Civil Damage Act made clear the legislative intent to restrict liability to commercial vendors.65

In Walker v. Kennedy,66 David Walker, the decedent, died when his snowmobile ran into a car that was left stranded in a ditch.67 A minor, Welin, who had been drinking at a party at the defendant's home drove the car into the ditch.68 The defendant, John Kennedy, was on vacation at the time of accident.69 The party was held by his children.70 The minor who negligently drove the car into the ditch had been drinking, including one or two beers at the Kennedy house.71 He brought the beers himself.72 A claim for social host liability was asserted against John Kennedy.73

The supreme court did not decide the social host issue, finding that it was unnecessary because "[a]n essential element for social host liability is that the guest is 'given or furnished' alcoholic beverages by the person from whom recovery is

60. Cole v. City of Spring Lake Park, 314 N.W.2d 836, 839-40 (Minn. 1982) (citations omitted).
61. 315 N.W.2d 593 (Minn. 1982).
62. Cady v. Coleman, 315 N.W.2d 593, 595 (Minn. 1982).
63. Id.
64. Id.
65. Id. at 596.
66. 338 N.W.2d 254 (Minn. 1983).
68. Id.
69. Id. at 254.
70. Id.
71. Id. at 255.
72. Id.
73. Id. at 254.
sought." Further, because the minor was not "given or furnished" liquor by any member of the Kennedy family, the court concluded that "social host liability is inappropriate . . . regardless of the fact that Welin was a minor." In Holmquist v. Miller, the supreme court considered the issue of whether common law social host liability could be imposed on adults who provided alcoholic beverages to a minor. The court of appeals had held that common law negligence claims could be asserted against a social host who provides intoxicating liquor to a minor in violation of section 340.73 of the Minnesota Statutes, which prohibited the selling or furnishing of liquor to a minor. The supreme court reversed the court of appeals.

The Holmquist court noted that the public policy supporting social host liability recognized in Ross v. Ross is still valid. The court nonetheless rejected the common law liability claim,

---

74. Id. at 255.
75. Id. The majority opinion focused on the fact that the plaintiff was not "given" alcohol by the hosts of the party, and that he did not have a "special relationship" with any of the hosts. Id. The majority seemed to suggest that, had either of these two factors existed, liability would have resulted.

This is particularly confusing in light of the court's earlier decisions in Cady v. Coleman, 315 N.W.2d 595 (Minn. 1982) and Cole v. City of Spring Lake Park, 314 N.W.2d 886 (Minn. 1982), in which the court held that the legislature had clearly eliminated social host liability by its 1977 amendments to the Civil Damage Act. Cady, 315 N.W.2d at 595; Cole, 314 N.W.2d at 889.

In a concurring opinion, Justice Scott, joined by Justices Simonett, Kelly and Coyne, upbraided the majority, stating that the case should have been decided solely upon the social host exemption. Walker, 338 N.W.2d at 256.

76. 367 N.W.2d 468 (Minn. 1985).
77. Holmquist v. Miller, 367 N.W.2d 468, 469 (Minn. 1985).
78. MINN. STAT. § 340.73 (1984), repealed by Laws 1985, ch. 905, art. 13, § 1. At the time, subdivision 1 of § 340.73 read as follows:

It is unlawful for any person, except a licensed pharmacist to sell, give, barter, furnish, deliver, or dispose of, in any manner, either directly or indirectly, any intoxicating liquors or nonintoxicating malt liquors in any quantity for any purpose, to any person under the age of 19 years, or to any obviously intoxicated.

Id.

80. Holmquist, 367 N.W.2d at 470-72.
81. 294 Minn. 115, 116, 200 N.W.2d 149, 150 (1972). The Ross court, in searching for the legislative intent behind the statute believed that the policy behind social host liability was to impose liability on every violator, regardless of whether or not that person is in the liquor business. Id. at 115, 200 N.W.2d at 150.
82. Holmquist, 367 N.W.2d at 471.
noting the preceding cases in which it had made it clear that social host liability was preempted by the legislature. The court put to rest the lingering possibility of social host liability left open in *Walker*, and then considered the policy arguments advanced to support social host liability in cases involving the furnishing of liquor to a minor, including statistical evidence of teenage accidents that were alcohol related. The supreme court noted the court of appeals' conclusion that "social policy dictates that individuals who procure alcohol for minors should be held liable for damages caused by the intoxicated minors" because the imposition of liability would discourage the illegal furnishing of liquor to minors and would serve "to promote our strong public policy of preventing our youth from causing senseless damage to themselves and the public." The supreme court seemed to agree: "[N]o one would seriously disagree with this, or suggest that minors should be encouraged to drink illegally, or not be protected from drinking alcohol. We incorporated that policy in both *Ross* and *Trail*, only to have their full impact nullified by legislative amendments." 

Based on the history of the court's social host and common law liability decisions, and the legislature's evisceration of those decisions, the court said that "a serious question arises now as to whether the Minnesota judicial branch presents a proper forum to be called upon to make a decision such as was rendered by the court of appeals in this matter." The court suggested that the decision concerning social host liability was one that should be made by the legislature, after due consideration of the matter.

In *Meany v. Newell*, decided the same day, the court addressed the issue of whether social host liability could be

83. *Id.*; see Cady v. Coleman, 315 N.W.2d 593, 595 (Minn. 1982) (commenting that the legislature's intent to restrict liability to only commercial vendors is evident from the omission of the word "giving" from the Civil Damage Act); Cole v. City of Spring Lake Park, 314 N.W.2d 836, 840 (Minn. 1982) ("[T]he specific removal of the word 'giving' is legislative activity which we interpret here as intent to preempt a Civil Damage Act or common law remedy against social hosts.").
84. *Holmquist*, 367 N.W.2d at 471.
85. *Id.* at 470 (citing with approval the public policy announced in *Ross*).
86. *Id.* at 471 (quoting *Holmquist*, 352 N.W.2d at 52).
87. *Id.* at 471-72.
88. *Id.* at 472.
89. *Id.*
90. 367 N.W.2d 472 (Minn. 1985).
imposed on an employer of a person who became intoxicated at an office holiday party and was later involved in a car accident, where the employer furnished alcoholic beverages to the employees who attended.\textsuperscript{91} The employer had served an obviously intoxicated employee on company premises during working hours.\textsuperscript{92} The court held that liability could not be imposed on the "employer-social host who negligently serves alcohol to an employee."\textsuperscript{93}

Two court of appeals cases, \textit{Stevens v. Thielert}\textsuperscript{94} and \textit{Beseke v. Garden Center, Inc.},\textsuperscript{95} also rejected common law liability claims in two different settings. In \textit{Stevens}, two parents purchased two kegs of beer for their daughter's unsupervised sixteenth birthday party, resulting in the death of a minor.\textsuperscript{96} The court, relying on \textit{Holmquist},\textsuperscript{97} stated: "The supreme court has made it clear that the Act preempts any common law negligence action against a social host which is even remotely related to the negligent furnishing of alcohol."\textsuperscript{98}

In \textit{Beseke}, the issue was whether a school district and individual faculty members could be held liable for the negligent supervision of a student who became intoxicated during a school-sponsored event and negligently caused an accident injuring his passenger, also a student at the school.\textsuperscript{99} The claim was not a typical social host claim, but was based on negligent supervision of intoxicated students.\textsuperscript{100} The court of appeals nonetheless held that the claim was preempted by the Civil Damage Act.\textsuperscript{101} Despite the plaintiff's negligent supervision theory, the court concluded that the claim "is necessarily based on the school district's allowing an intoxicated person to

\begin{footnotesize}
\begin{enumerate}
\item Id. at 473.
\item Id. at 474-75.
\item 394 N.W.2d 834 (Minn. Ct. App. 1986).
\item 401 N.W.2d 428 (Minn. Ct. App. 1987).
\item Stevens v. Thielert, 394 N.W.2d 834, 835 (Minn. Ct. App. 1986).
\item Holmquist, 367 N.W.2d at 468.
\item Stevens, 394 N.W.2d at 837 (citing Holmquist, 367 N.W.2d at 471-72).
\item Id. at 429.
\item Id. at 431.
\end{enumerate}
\end{footnotesize}
drink and arises out of injuries inflicted by an intoxicated person."\textsuperscript{102}

In summary, after the 1977 amendment\textsuperscript{103} deleting the word "giving" from the Civil Damage Act and the 1985 enactment\textsuperscript{104} including 3.2 beer within the definition of "alcoholic beverage" the appellate courts in Minnesota have consistently concluded that liability under the Act is limited to commercial vendors of alcoholic beverages. Common law or social host liability has been precluded in virtually any setting where an alcoholic beverage is provided to another and the intoxication of the other person results in injuries to that person or an innocent third person.\textsuperscript{105} Those decisions are products of the legislative preemption of civil liquor liability. With the 1990 amendment, however, the legislature loosened its grip, permitting the imposition of social host liability under limited circumstances.

\textbf{B. Legislative Intent In Creating The 1990 Amendment}

The critical question now is whether the legislature, by amending the Civil Damage Act in 1990, intended to create a common law negligence claim or intended to leave the issue to the courts’ discretion, based on the history of common law claims for furnishing or providing liquor to a minor in Minnesota. The current legislation reads as follows: "Nothing in this chapter precludes common law tort claims against any person 21 years old or older who knowingly provides or furnishes alcoholic beverages to a person under the age of 21 years."\textsuperscript{106}

On its face, the legislation simply says that nothing in the Civil Damage Act precludes the imposition of common law tort liability in situations where a person twenty-one years of age or older "knowingly provides or furnishes alcoholic beverages to a

\textsuperscript{102} Id.
\textsuperscript{104} Minn. Stat. § 340A.101, subd. 2 (1986) (repealing Minn. Stat. § 340.07, subd. 2 (1984)).
\textsuperscript{105} See, e.g., Besche, 401 N.W.2d at 430-31.
\textsuperscript{106} Minn. Stat. § 340A.801, subd. 6 (1994).
person under the age of 21 years."\textsuperscript{107} It does not mandate the imposition of common law liability. The legislature did not enact a positive statute that clearly gives rise to either an express or an implied cause of action. Because the legislation is permissive, and not mandatory, it remains for the supreme court to determine whether there is a common law cause of action, who may assert that cause of action, against whom the cause of action may be asserted, and what defenses, if any, may be asserted against the common law claim.

The glib response is that the supreme court has never imposed common law liability in situations where alcohol is furnished to a person. \textit{Beck}\textsuperscript{108} and \textit{Holmquist}\textsuperscript{109} can be cited to that effect. In \textit{Holmquist}, for example, the court explained that "[a]t common law, no cause of action existed against one who furnished, whether by sale or gift, intoxicating liquor to a person who became voluntarily intoxicated and consequently injured another."\textsuperscript{110} Because the court has never held that common law liability exists in cases where an adult furnishes intoxicating liquor to a minor and injury results, either to the minor or a third person, no liability can now exist. Therefore, the supreme court would be quite free to simply say to the legislature: "Thanks for the chance, but we don’t think we can impose common law liability. If you want to impose liability on people who provide liquor to minors, in addition to existing dram shop liability, then you should say so more clearly."

The second response to the amendment is that the supreme court really has laid the foundation for social host liability, and that the legislature is simply letting the court follow to a logical conclusion the implications of its analysis of common law claims in cases involving liquor liability. The logic train is as follows.

\textit{Trail} clearly establishes that common law liability can exist for injuries arising out of the illegal sale of intoxicating liquor, notwithstanding the general common law rule of nonliability.\textsuperscript{111} The causation problem\textsuperscript{112} and the social poli-

\begin{itemize}
  \item 107. Id.
  \item 108. Beck v. Groe, 245 Minn. 28, 70 N.W.2d 886 (1955).
  \item 109. Holmquist v. Miller, 367 N.W.2d 468 (Minn. 1985).
  \item 110. Id. at 470.
  \item 111. Trail v. Christian, 298 Minn. 101, 111, 213 N.W.2d 618, 624 (1973).
  \item 112. The common law rule of nonliability for the furnisher of intoxicating beverages was based on the theory that the cause of the injury or injuries was not the
cy reasons\textsuperscript{115} have been dealt with by the supreme court in \textit{Trail}\textsuperscript{114} and \textit{Ross}.\textsuperscript{115} \textit{Trail} indicates that the supreme court, applying comfortable and tested causation principles, has no problem in determining that the providing of intoxicating liquor to a minor or person who is already intoxicated may be a direct cause of an injury.\textsuperscript{116} In \textit{Ross}, although it was a Civil Damage Act case, the court expressed comfort with the policy of imposing social host liability on persons who provide liquor to minors.\textsuperscript{117} The supreme court recognized the legitimacy of this policy as late as 1985, in \textit{Holmquist}.\textsuperscript{118} Given the problems the legislative study commission referred to in its report,\textsuperscript{119} it is obvious that the primary concern was cases such as \textit{Stevens}, which involved adults furnishing alcohol to minors.\textsuperscript{120} The legislature saw a clear problem and provided a clear remedy for it: social host liability.

There are counter-arguments. It is absolutely true that the court has said that \textit{Trail} was limited to cases involving the sale of 3.2 beer by a commercial vendor.\textsuperscript{121} Those were the facts. It is also true that \textit{Ross}, a social host case, was predicated on the act of furnishing the intoxicating beverages, but their consumption by the tort-feasor. \textit{Id}. at 105, 213 N.W.2d at 620.

\textsuperscript{115} The \textit{Ross} court noted that the statute created a cause of action against "any person" who illegally furnished intoxicating beverages to another person causing intoxication which resulted in damages. \textit{Ross} v. \textit{Ross}, 294 Minn. 115, 119, 200 N.W.2d 149, 151 (1972). In concluding that the legislature intended to include persons other than licensed vendors, Justice Otis explained that in social settings it is expected that the donor will take precautions to determine the age of the recipient and his state of intoxication. \textit{Id}. at 121, 200 N.W.2d at 153.

Justice Rogosheske's concurrence observed that while the statute's purpose was penal and remedial, the "host of public policy considerations" should be kept in mind in deciding whether a remedy should be in addition to or as a substitute for the liability imposed by the Civil Damage Act. \textit{Id}. at 126, 200 N.W.2d at 155 (Rogosheske, J., concurring).

\textsuperscript{114} 298 Minn. 101, 213 N.W.2d 618 (1973).
\textsuperscript{115} 294 Minn. 115, 200 N.W.2d 149 (1972).
\textsuperscript{117} Ross v. Ross, 294 Minn. 115, 121, 200 N.W.2d 149, 152-53 (1972).
\textsuperscript{118} Holmquist v. Miller, 367 N.W.2d 468, 471-72 (Minn. 1985).
\textsuperscript{120} Stevens v. Thielen, 394 N.W.2d 834 (Minn. Ct. App. 1986) (holding that the Civil Damage Act permitted a common law negligent supervision action against social hosts who provided strong beer for a minor who was later struck and killed by a car while walking down a two-lane highway at 12:45 a.m., even though the hosts were not present, but simply purchased the alcohol).
\textsuperscript{121} \textit{Holmquist}, 367 N.W.2d at 471.
Civil Damage Act.\textsuperscript{122} That leaves a gap. \textit{Trail}, the common law negligence case, applied only to a commercial vendor of alcohol and \textit{Ross}, the social host case, clearly involved social host liability but only under the Civil Damage Act. There is no holding of the Minnesota Supreme Court that specifically applies common law negligence principles to a social host who furnishes or provides alcohol to another person, minor or otherwise.

But the common law rationale of \textit{Trail}\textsuperscript{123} coupled with the social policy of \textit{Ross}\textsuperscript{124} should readily enable the court to plug the gap and impose social host liability under the limited circumstances set out in the 1990 amendment of the Act.\textsuperscript{125} Of course, the courts clearly could refuse to permit common law liability against social hosts, subject to the constraints of the 1990 amendment, but only at the expense of ignoring the strong foundation for the imposition of liability established by the supreme court itself, and the clear legislative intent to address a social problem.

If the first hurdle is cleared and the court is to hold that a common law cause of action exists in Minnesota in cases where a person twenty-one years of age or older knowingly furnishes or provides an alcoholic beverage to a person under the age of twenty-one, then three other issues will have to be addressed concerning the common law claim. The first is whether the common law cause of action exists in favor of innocent third persons only, or whether persons under the age of twenty-one will also be entitled to recover for their own injuries, even where the injuries are the product of their own intoxication. The second concerns the classes of persons against whom the claim may be asserted. The third concerns the potential defenses to the common law claim.

\begin{itemize}
\item\textsuperscript{122} \textit{Ross}, 294 Minn. at 121-22, 200 N.W.2d at 152-55.
\item\textsuperscript{123} The common law rationale enunciated in \textit{Trail} is that violation of a statute prohibiting sale of malt liquors to a minor or intoxicated person is negligence per se. \textit{See} \textit{Trail}, 298 Minn. at 115, 213 N.W.2d at 626.
\item\textsuperscript{124} The policy behind the \textit{Ross} holding was that, unless the legislative enactment is explicit and its meaning is clear, the court will impose social host liability. \textit{See} \textit{Ross}, 294 Minn. at 118, 200 N.W.2d at 151.
\item\textsuperscript{125} \textit{See} MINN. STAT. § 340A.801, subd. 6 (1994).
\end{itemize}
1. Who Is Entitled To Recover?

The 1990 amendment allows for a common law claim for knowingly furnishing or providing alcoholic beverages to a person under the age of twenty-one, but does not define the class of plaintiffs who should be entitled to recover.\textsuperscript{126} The hard issue in interpreting the amendment is whether the common law remedy may be asserted only by innocent third persons, or whether it also exists in favor of a voluntarily intoxicated person under the age of twenty-one who was furnished or provided alcohol by a person twenty-one years of age or older.

The Minnesota Supreme Court has consistently repeated in dicta that the cause of any injuries arising out of the sale of liquor is the voluntary intoxication of the person consuming the alcohol rather than the illegal sale.\textsuperscript{127} The voluntary intoxication limitation has carried over to the court's construction of the Civil Damage Act, as indicated by three cases spanning forty years in Minnesota.\textsuperscript{128}

\textit{Sworski v. Colman,}\textsuperscript{129} decided in 1939, arose out of a wrongful death cause of action brought by the administrator of the estate of Clifford Sworski.\textsuperscript{130} Sworski, age nineteen, died as a result of injuries he allegedly sustained when he was beaten by private citizens who were transferring him to a jail at the behest of a police officer who had arrested Sworski.\textsuperscript{131} The defendant, Colman, illegally sold liquor that caused Sworski's intoxication.\textsuperscript{132} After easily concluding that the absence of any connection between the beating and the sale of the liquor negated any possibility of tort liability, the court discussed what

\begin{itemize}
\item \textsuperscript{126} \textit{Id.} The statute states that a spouse, child, parent, guardian, employer, or other person injured by an intoxicated person has a right to action for damages. \textit{Id.} § 340A.801, subd. 1. The statute refers to third parties and does not address whether an intoxicated minor who causes injury or damage may recover from the person who provided the minor with alcohol. \textit{Id.}
\item \textsuperscript{127} \textit{See, e.g.}, Robinson \textit{v. Lamott}, 289 N.W.2d 60, 64 (Minn. 1979), \textit{overruled on other grounds} \textit{Johnson v. Helary, Inc.}, 342 N.W.2d 146, 148 (Minn. 1984).
\item \textsuperscript{128} \textit{See, e.g.}, Beck \textit{v. Groe}, 245 Minn. 28, 36, 70 N.W.2d 886, 892-93 (1955).
\item \textsuperscript{129} 204 Minn. 474, 283 N.W. 778 (1939).
\item \textsuperscript{130} Sworski \textit{v. Colman}, 204 Minn. 474, 475, 283 N.W. 778, 779 (1939).
\item \textsuperscript{131} \textit{Id.} at 476, 283 N.W. at 779.
\item \textsuperscript{132} \textit{Id.} at 476, 283 N.W. at 779.
\end{itemize}
it thought to be a better reason for denying the plaintiff's claim. In order for the plaintiff to sustain a wrongful death action, it was necessary that he prove that the decedent would have been able to maintain a cause of action, had he lived. The question, then, was whether a common law cause of action for the illegal sale of liquor would lie in favor of the intoxicated person himself. The court first noted that the cases overwhelmingly took the position that there was no common law cause of action against a liquor vendor by the third person who is injured by the intoxication of the liquor vendee. The court then considered whether the Civil Damage Act provided such a remedy:

Is the quoted statute one giving to the individual who partakes of intoxicating liquors unlawfully furnished by another in such a position that he may maintain an action for the harm resulting to him from such intoxication, absent as here any allegation of assault, force, deceit, or other like means used by the alleged wrongdoer to bring about his intoxication? The quoted statute negatives any such notion. The cause giving rise to recovery of damages has for its foundation injury 'in person or property, or means of support, by any intoxicated person or by the intoxication of any person, . . . .' Under this statute, if there was any wrong done by Colman the cause accrued to the parents of Clifford in which event the action should have been brought by them, not by Clifford's administrator. There are several cases sustaining that view and our attention has not been directed to any holding otherwise.

The court's conclusion was that the Civil Damage Act did not provide a remedy in favor of the person who is intoxicated. In Randall v. Village of Excelsior, the supreme court took the same position, concluding in direct terms that the Civil Damage Act "does not create a cause of action in favor of one injured by his own intoxication."

133. Id. at 476-77, 283 N.W. at 779-80.
134. Id. at 477, 283 N.W. at 780.
135. Id. at 477, 283 N.W. at 780.
136. Id. at 477, 283 N.W. at 780 (citing Demge v. Feierstein, 268 N.W. 210, 212 (Wis. 1936)).
137. Id. at 477-78, 283 N.W. at 780.
138. Id. at 477-80, 283 N.W. at 780-81.
139. 258 Minn. 81, 103 N.W.2d 131 (1960).
140. Randall v. Village of Excelsior, 258 Minn. 81, 83, 103 N.W.2d 131, 133 (1960).
In *Robinson v. LaMott*,141 decided forty years later, the Minnesota Supreme Court considered a case that raised the issue of voluntary intoxication in a claim by an alcoholic against a bar for illegally selling him alcohol in violation of the Civil Damage Act.142 The court first addressed whether the Civil Damage Act created a cause of action in favor of a person who is injured because of his own intoxication.143 Relying on *Sworski*, the court held that a person who is injured because of his own intoxication is not entitled to recover under the Civil Damage Act.144 This position was consistent with earlier positions taken by the court.145

In *Robinson*, the plaintiff did not dispute *Sworski*, but rather argued that his intoxication was not voluntary because of his alcoholism.146 The court rejected the argument, concluding

141. 289 N.W.2d 60 (Minn. 1979), overruled on other grounds, *Johnson v. Helary, Inc.*, 342 N.W.2d 146, 148 (Minn. 1984).


143. *Id.* at 61.

144. *Id.* at 63. *Robinson* claimed that because he was a chronic alcoholic, he was a member of the class of persons to be protected by the statute. *Id.* at 61. The court stated that those who are voluntarily intoxicated are not among the class of persons intended to be protected by the Civil Damage Act. *Id.* at 63.

145. *See, e.g.*, *Randall*, 258 Minn. at 81, 103 N.W.2d at 131. The *Randall* court held and reasoned as follows:

The Civil Damage Act does not create a cause of action in favor of one injured by his own intoxication. Only an innocent third person who is injured as a result of the intoxication of another is entitled to its benefits. . . .

It is immaterial whether the sale was made to plaintiff personally or to a third person. It is the fact of his voluntary intoxication which bars recovery.

. . . Had the legislature intended to give a person whose voluntary intoxication is the proximate cause of his injury a remedy unknown to the common law, it may be expected that it would have clearly done so.

*Id.* at 83-84, 103 N.W.2d at 133-34; *see also* *Martinson v. Monticello Mun. Liquors*, 297 Minn. 48, 52-54, 209 N.W.2d 902, 905-06 (1973) (stating in dictum that a person who voluntarily becomes intoxicated may not recover for injuries received as a result of his own intoxication); *State Farm Mut. Auto. Ins. Co. v. Village of Isle*, 265 Minn. 360, 365, 122 N.W.2d 36, 40 (1963) (holding that voluntary intoxication bars a plaintiff's cause of action under the Civil Damage Act); *Stabs v. City of Tower*, 229 Minn. 552, 565, 40 N.W.2d 562, 571 (1949) (holding that a vendor is not liable for harm resulting from a patron's intoxication).

146. *Robinson*, 289 N.W.2d at 62.
that his intoxication was voluntary within the meaning of Sworski. The court reasoned:

A contrary result would constitute a usurpation of legislative power. The legislature undoubtedly concurs in our longstanding construction of § 340.95, since it has not seen fit to reverse the Sworski decision by subsequent legislative action . . . . Just as significant is the legislature's failure to provide an exception to the Sworski principle. The legislature has had numerous opportunities to modify the law to allow an alcoholic to recover damages, yet it has not seen fit to do so. In light of this legislative silence, we must presume the legislature intended that the Sworski rule be applied, without qualification, to an intoxicated individual suffering from alcoholism. This conclusion merely recognizes that the question involved in this case is a legislative one and thus a change in the law must be effected by a clear manifestation of legislative intent. Since we find no such expression of statutory intent, we must reject plaintiff's contention.

Robinson makes it clear that the prohibition against recovery under the Civil Damage Act by a voluntarily intoxicated person has become a hardened rule because of legislative silence on the issue through various amendments to the Act. Because in amending the Civil Damage Act the legislature acted under the apparent assumption that voluntary intoxication would be a bar to recovery, the court no longer feels free to tamper with the tacit legislative assumption that voluntarily intoxicated persons will not be entitled to recover. The issue is whether the same result should apply in common law claims permitted under the 1990 amendment. The voluntary intoxication limitation in Civil Damage Act cases, coupled with the court's dictum in Beck, may provide support for applying the voluntary intoxication limitation, as interpreted in Robinson and other cases, to common law claims brought under the 1990 amendment. As the following discussion shows, however, there

147. Id. at 63.
148. Id.
149. MINN. STAT. § 340A.801, subd. 6 (1994).
150. See Robinson, 289 N.W.2d at 63. But see Trail v. Christian, 298 Minn. 101, 213 N.W.2d 618 (1973). The court in Trail stated that it "will not promote legislative silence to legislative preemption." Id. at 112, 213 N.W.2d at 625. The court refused to allow the absence in a statute to create an exception in the law. Id. at 112, 213 N.W.2d at 625.
may be good reason to assume that the circumstances involved in *Robinson* were sufficiently different that an automatic application of its rationale would be improper. The argument in favor of the voluntary intoxication limitation might also be supported by the *Beck* argument that voluntary intoxication derails the chain of causation. However, the court’s decision in *Trail*,\(^{152}\) case law in other jurisdictions,\(^{155}\) and the legislative study commission report may support a contrary result.\(^{154}\)

*Trail* certainly says that innocent third persons should be entitled to recover for the statutory violation of liquor liability laws prohibiting the sale of intoxicating liquor to a minor, but it notes that the same statute is also for the protection of minors themselves.\(^{155}\) If the *Trail* reasoning is followed, then minors injured by their own intoxication should be entitled to recover.

---

152. *Trail*, 298 Minn. at 111, 213 N.W.2d at 618.

153. See, e.g., *Nazareno v. Urie*, 638 P.2d 671, 673-74 (Alaska 1981) (holding that the sale of alcoholic beverages may be the proximate cause of a third person’s injury); *Lewis v. Wolf*, 596 P.2d 705, 708 (Ariz. 1979) (criticizing the common law rule that a third party cannot recover because the sale of alcohol is not the proximate cause of the injuries); *Largo Corp. v. Crespin*, 727 P.2d 1098, 1102 (Colo. 1986) (concluding that furnishing alcohol to the drinker presents a risk to the health and well being of both the drinker and those with whom he comes in contact; therefore, both a common-law and negligence per se claim were sustained); *Nelson v. Steffens*, 365 A.2d 1174, 1177 (Conn. 1976) (holding that no cause of action exists against the furnisher of intoxicating beverages by one who is voluntarily intoxicated); *Lewis v. State of Iowa*, 256 N.W.2d 181, 189-90 (Iowa 1977) (holding the sale of intoxicating liquor to a minor in violation of a statute can be the proximate cause of an accident); *Aanenson v. Bastien*, 438 N.W.2d 151, 161 (N.D. 1989) (holding that a plaintiff’s complicity in contributing to his intoxication is not a bar to recovery); *Sorensen v. Jarvis*, 350 N.W.2d 108, 117 (Wis. 1984) (holding that a negligence cause of action exists against a vendor who sold intoxicating beverages to a person that the vendor knew or should have known was a minor if such negligence is a substantial factor in causing harm to a third party).


155. *Trail*, 298 Minn. at 114, 213 N.W.2d at 625-26. The court quoted a New Jersey case which stated:

> Where a tavern keeper sells alcoholic beverages to a person who is visibly intoxicated or to a person he knows or should know from the circumstances to be a minor, [the tavern keeper] ought to recognize and foresee the unreasonable risk of harm to others through action of the intoxicated person or the minor . . . . "When alcoholic beverages are sold by a tavern keeper to a minor . . . the unreasonable risk of harm not only to the minor . . . but also to members of the traveling public may readily be recognized and foreseen . . . ."

*Id.* at 108-09, 213 N.W.2d at 622-23 (quoting Rappaport v. Nichols, 156 A.2d 1, 8 (N.J. 1959) (first set of ellipsis in original)).
Other states have made this connection and permitted recovery by the injured minor. In *Hansen v. Friend*, the Washington Supreme Court addressed the issue of whether adult social hosts could be held liable for negligently furnishing alcohol to a minor, which led to his death by drowning. The court held that the appropriate standard of care in the case was the reasonably prudent person standard, which may be prescribed by legislative enactment. Washington law makes it a criminal act for both commercial providers of alcohol and social hosts to furnish alcohol to a minor. Applying the standard statutory purpose analysis from section 286 of the *Restatement (Second) of Torts*, the court found that the plaintiff’s decedent was a member of the protected class and that the statute protected the specific interest that was invaded. According to the court: “[t]he purpose behind the Washington State Liquor Act is to protect ‘the welfare, health, peace, morals and safety of the people of the state.’” The

---

158. *Id.* at 485.
159. *WASH. REV. CODE ANN.* § 66.44.270(1) (West 1995). The statute reads as follows:

It is unlawful for any person to sell, give, or otherwise supply liquor to any person under the age of twenty-one years or permit any person under that age to consume liquor on his or her premises or on any premises under his or her control.

*Id.* There are exceptions under the statute:

(3) Subsections (1) and (2)(a) of this section do not apply to liquor given or permitted to be given to a person under the age of twenty-one years by a parent or guardian and consumed in the presence of the parent or guardian. . . . (4) This section does not apply to liquor given for medicinal purposes to a person under the age of twenty years by a parent, guardian, physician, or dentist. (5) This section does not apply to liquor given to a person under the age of twenty-one years when such liquor is being used in connection with religious services and the amount consumed is the minimal amount necessary for the religious service.

*Id.* § 66.44.270(3).
160. *RESTATEMENT (SECOND) OF TORTS* § 286 (1965). Section 286 provides in pertinent part:

[T]he court may adopt as the standard of conduct of a reasonable [person] the requirements of a legislative enactment . . . whose purpose is found to . . . protect a class of persons which includes the one whose interest is invaded, and . . . to protect the particular interest which is invaded . . .

*Id.*
162. *Id.* (citing *WASH. REV. CODE ANN.* § 66.08.010 (West. 1985)).
court concluded that the statutory purpose was to protect "a minor's health and safety interest from the minor's own inability to drink responsibly."163

The third issue was whether the statute was intended to guard against the kind of harm that resulted — the minor's death by drowning.164 The court concluded that the purpose of the statutory prohibition was to protect minors from suffering physical harm because of alcohol abuse.165 Because the physical harm to the decedent was the product of alcohol abuse, the court held that the requirement was satisfied.166

The final issue was whether the statutory purpose was to protect the minor from the specific hazard that occurred.167 Because the particular hazard the statute regulates was alcohol in the hands of minors, the court concluded that the final element was satisfied, and that the statutory standard could therefore be used as the standard of care for a reasonably prudent person.168

In *Burkhart v. Harrod*,169 the Washington Supreme Court had previously held that social host liability could not be imposed on social hosts who serve liquor to adult guests. The court in *Hansen* distinguished *Burkhart* because of the presence of the statute prohibiting the furnishing of alcohol to minors, a factor not present in *Burkhart*, and held that the statute "imposes a duty of care on social hosts not to serve liquor to minors," and that "[a] minor may maintain an action against a social host where this duty is breached, and the injuries sustained by the minor are proximately caused by this breach."170

The Michigan Supreme Court in *Longstreth v. Genset*171 took the same position. Interpreting a statute that prohibited the furnishing of alcohol to persons under the age of twenty-one,172 the court concluded that minors were entitled to recover for their own injuries since they clearly are "within the

164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.*
class of persons which the statute intends to protect."\textsuperscript{173} In Sage v. Johnson,\textsuperscript{174} the Iowa Supreme Court followed the Longstreth analysis and held that an intoxicated minor is entitled to maintain a direct action against the social host furnishing him with alcohol.\textsuperscript{175} The court noted similar policy reasons in the Iowa statute forbidding the sale of alcohol to minors.\textsuperscript{176}

While there is strong support in other jurisdictions for permitting the intoxicated person under twenty-one years of age to recover against the furnisher or provider of alcohol, it has to be acknowledged that Trail was decided in the context of an injury to an innocent third party.\textsuperscript{177} Trail also indicates that minors fall within the protected class of persons and should be entitled to recover,\textsuperscript{178} but the court did not specifically decide that issue.\textsuperscript{179}

The Report of the 1990 Legislative Study Commission may provide some insights into the question. The Commission's report on social host liability reads in pertinent part as follows:

More recently, in Stevens v. Thielen, and Beske v. Garden Center, Inc., the Court of Appeals . . . held that the Civil Damage Act preempts any common law negligence action against a social host if the host's action is even remotely related to the negligent furnishing of alcohol to another . . .

\textsuperscript{174} 437 N.W.2d 582 (Iowa 1989).
\textsuperscript{175} Sage v. Johnson, 437 N.W.2d 582, 584-85 (Iowa 1989).
\textsuperscript{176} Id. at 583. The Sage court held that "a minor injured as a result of furnishing alcoholic beverages furnished in violation of [the state statute] is not necessarily precluded from pursuing a claim against the person furnishing the alcohol, but that such a claim is subject to the comparative fault statute." Id. at 584-85. The court noted at that time Georgia was the only jurisdiction to have held that a minor could not assert a direct action against the social host. Id. at 583 (citing Sutter v. Hutchings, 327 S.E.2d 716 (Ga. 1985)). The Georgia Supreme Court reasoned that:

as between provider and consumer, the consumer has the last opportunity to avoid the effect of the alcohol, by not drinking or not driving, and thus as between the two, the negligence of the consumer is the greater. Hence, notwithstanding the fact that the provider as well as the consumer should foresee the possibility of injury to the consumer, the consumer cannot recover for his injuries from the provider.

Sutter, 327 S.E.2d at 719-20 n.7.
\textsuperscript{177} Trail v. Christian, 298 Minn. 101, 103, 213 N.W.2d 618, 620 (1973).
\textsuperscript{178} Id. at 115, 213 N.W.2d at 626.
\textsuperscript{179} Id. at 104, 213 N.W.2d at 620.
As it currently stands, Minnesota law clearly prohibits actions against social hosts who furnish intoxicating liquor to guests, whether the guests are adults or minors. Liability under the Civil Damage Act is precluded because the Act applies only to commercial vendors of intoxicating liquor and preempts the common law. As the Court of Appeals stated in Stevens, [a]ny change in the law . . . should come from the legislature.

Nationally, the courts have been reluctant to impose social host liability on those who negligently serve alcohol to others. The primary reason for that reluctance is the difficulty involved in establishing reasonable standards of conduct for people in a social setting and the uncertainty that would result from any attempts to impose liability for all social hosts in the variety of situations where the issue would arise. The result differs when the issue is whether social host liability should be imposed on a social host who negligently furnishes alcohol to a minor. In that situation the courts are much more willing to impose liability on social hosts.

The Commission therefore recommends that social host liability be permitted in cases where a person knowingly provides or furnishes alcoholic beverages to a person under the age of 21 years. The Commission recommends that this be accomplished by an amendment to the Civil Damage Act, adding a new subdivision 5, permitting common law actions in such cases. The proposed amendment reads as follows:

Subd. 5. Nothing in this chapter precludes common law tort claims against any person 21 years old or older who knowingly provides or furnishes alcoholic beverages to a person under the age of 21 years.\(^\text{180}\)

The Commission report and recommendation prominently features a discussion of the Stevens case,\(^\text{181}\) which involved a wrongful death claim arising out of the death of a minor, Craig Stevens, who became intoxicated at a birthday party at which there was beer supplied by an adult.\(^\text{182}\) The wrongful death claim was predicated on the negligence of the adults in providing the alcohol, but the claim was rejected because of the legislative block against social host liability.\(^\text{183}\) Stevens presents

\(^{182}\) Id. at 895.
\(^{183}\) Id. at 897.
at least one of the problems the Commission sought to remedy through its recommendation for statutory change,\textsuperscript{184} which the legislature subsequently adopted verbatim.\textsuperscript{185} Having defined the problem, it is arguable that it also defined the prospective remedy.

2. Who Is Liable?

The 1990 amendment permits the application of common law principles to persons twenty-one years of age and older who knowingly furnish or provide alcohol to a person under the age of twenty-one.\textsuperscript{186} That much is clear from the face of the legislation. Questions may arise, however, as to whether common law claims may also be asserted against persons under the age of twenty-one who also knowingly provide or furnish alcohol to other persons under the age of twenty-one, and against commercial vendors of alcohol who sell alcohol to persons under the age of twenty-one. The clear language of the statute and legislative history of the amendment should resolve both problems, establishing that the legislature intended to limit social host liability to the cases defined in the amendment. That includes persons twenty-years of age or older who knowingly provide or furnish alcohol to persons under the age of twenty-one. The legislature considered the possibility of lowering the age to eighteen and rejected the idea.\textsuperscript{187} Had the legislature


\textsuperscript{185} See Minn. Stat. § 340A.801, subd. 6 (1994).

\textsuperscript{186} Id.

\textsuperscript{187} See Civil Actions Reform Act: Hearings on S.F. 1827 Before the House and Senate Judiciary Comms., 76th Legis., 1990 sess. (1990). On February 1, 1990, before the bill was introduced, the Injury Compensation Study Commission reported to the House and Senate Judiciary Committees during a joint meeting of both committees. Id. During the recitation of the Commission's recommendations regarding the Civil Damage Act, Joan Morrow, the Chairperson of the Commission, specifically described the content of Minnesota Statute section 340A.801, subdivision 6. Id. She stated that this new subdivision would create a cause of action by an injured third person against an adult who "knowingly provides or furnishes alcoholic beverages to a person under the age of 21 years." Id.

In addition, Chairperson Morrow stated that "knowingly" implies an intentional provision of alcohol, a "knowing" provision of alcohol. Id. The Chairperson stated that a causal connection has to be proven — that the minor's intoxication caused the injury to the innocent third person. Id. She conclusively stated that "knowingly provides or furnishes" connotes an intentional act. Id.
intended to override the amended limitations on recovery against commercial vendors of alcohol, it would specifically have said so.

_Siltman v. Tulenchik_, an unpublished opinion of the court of appeals, supports both conclusions. In _Siltman_, the plaintiffs brought separate personal injury actions against two persons under the age of twenty-one who provided them with alcohol. The plaintiffs made two arguments based on the 1990 amendment. The first was that the amendment indicated a legislative intent to hold all natural persons liable according to common law principles, irrespective of whether they are commercial vendors of alcohol. The court rejected that argument for three reasons:

1. The legislature did not change or otherwise amend subdivision 1, (2) a reading of the plain language of both

On Thursday, February 15, 1990, Senators Reichgott (author), Luther, Spear, Knaack, and Merriam introduced S.F. 1827. _Id._ The subsequent committee hearings and testimony dealt primarily with punitive damages questions, virtually ignoring the proposed subdivision to the Civil Damage Act. _Id._ At one point, testimony was going to be heard about the subdivision, but the Judiciary Committee adjourned. Testimony was supposed to be heard when the Judiciary Committee reconvened that evening. _Id._ No such testimony was ever given regarding subdivision 6. _Id._

Even so, Senator Reichgott moved to amend her bill during a Judiciary Committee meeting on March 8, 1990. Specifically, Senator Reichgott wanted to amend the bill to create a cause of action against any person 18 years old or older who knowingly provides or furnishes alcohol to a minor, if the intoxicated minor injures a third party. The motion was predicated on the thought that some liability should be placed on minors who furnished alcohol to other minors to curb the problem of minors using false identification to obtain alcohol. _Id._ Senator Reichgott's motion was met with considerable opposition from Senators Spear and Merriam. _Id._ Both believed that criminal sanctions handled the false identification situation and stated that it would be illogical to hold a minor liable for serving a minor. _Id._ Criminal sanctions already modify this type of behavior. _Id._ In addition, Chairperson Morrow testified that it would be too difficult to identify a standard in the social setting if Senator Reichgott's motion would pass. The Chairperson stated that a reasonableness standard of care is created when adults are held liable for knowingly providing alcohol to minors. _Id._ It is legally reasonable to hold an adult liable for knowingly furnishing alcohol to a minor who later injures another. _Id._ Chairperson Morrow emphasized that social-host liability would only be extended to an adult who knowingly provides alcohol to a minor. _Id._ After this testimony, Senator Reichgott withdrew her motion. The language of the bill relating to subdivision 6 remained unchanged and the bill passed in its entirety. See 1990 Minn. Laws, ch. 555, sec. 10 (codified at MINN. STAT. § 340A.801, subd. 6 (1992)).

190. _Id._ at *1-2.
191. _Id._ at *1.
subdivisions 1 and 6 does not support such an interpretation, and (3) years of case law interpret subdivision 1 as allowing a cause of action only against commercial vendors.\textsuperscript{192}

The plaintiffs also argued that they were entitled to assert a cause of action against persons under the age of twenty-one because it is not specifically prohibited by subdivision 6 of section 340A.801.\textsuperscript{193} The court rejected the argument as "inconsistent with the clear language of the statute. Had the legislature intended to create a separate cause of action against persons under 21, it would have so stated."\textsuperscript{194}

Thus, there is no indication that the legislature intended to permit the imposition of common law liability on a commercial liquor vendor who is subject to the Civil Damage Act. The legislative history shows that the problem the legislature intended to address was the problem of the social host who is not covered by the Civil Damage Act, not liquor vendors who are covered. Cases such as \textit{Meany},\textsuperscript{195} \textit{Holmquist},\textsuperscript{196} and \textit{Stevens}\textsuperscript{197} define the problem. If these cases accurately define the problem the legislature intended to address, they should have also defined the scope of the intended legislative remedy in subdivision 6. There is no indication that the legislature intended to disrupt its own legislative scheme that is already in place for purposes of determining the civil liability of commercial vendors of alcohol.

3. \textit{Defenses}

Regardless of whether the statutory violation is negligence per se, as in \textit{Trail}, or whether the person under the age of twenty-one is entitled to recover against the furnisher or provider of alcohol, a question remains as to whether any defenses may be asserted against the person bringing the claim. Also, the scope of the complicity defense, which was initially a

\textsuperscript{192} \textit{Id.}

\textsuperscript{193} \textit{Id. at *2.}

\textsuperscript{194} \textit{Id.} The plaintiffs' third argument was that subdivision 2(1) of § 340A.503 created a cause of action against any persons under the age of twenty-one who violate the statute by furnishing alcohol to another person under the age of twenty-one. The court rejected that argument based on the preemption rationale of \textit{Holmquist}. \textit{Id.}

\textsuperscript{195} \textit{Meany v. Newell}, 367 N.W.2d 472, 474-75 (Minn. 1985).

\textsuperscript{196} \textit{Holmquist v. Miller}, 367 N.W.2d 468, 470 (Minn. 1985).

\textsuperscript{197} \textit{Stevens v. Thielen}, 394 N.W.2d 834, 885 (Minn. Ct. App. 1986).
complete bar to recovery in Civil Damage Act claims, but now is one facet of fault under the Comparative Fault Act, remains a question to be answered.

a. **Contributory Negligence**

The person under the age of twenty-one is, of course, a person to be protected by the statute that makes furnishing alcohol to a minor illegal. While the general rule is that in cases involving statutory breaches, contributory negligence is a defense to the claim, in cases involving the violation of statutes intended for the protection of a specific class of persons, contributory negligence may not be a permissible defense. The argument hinges on cases such as *Zerby v. Warren* which hold that the breach of certain statutes intended for the protection of a special class of individuals precludes the use of the defense of contributory negligence against a person who is the member of the protected class. In *Zerby*, suit was brought for the death of a fourteen-year-old who died as a

---

198. Herrly v. Muzik, 374 N.W.2d 275, 278 (Minn. 1985) (holding that the complicity of a passenger in a car, who purchased drinks for the driver and bought off-sale beer which both he and the driver consumed while traveling between bars, absolutely barred the passenger's recovery); Heveron v. Village of Belgrade, 288 Minn. 395, 401, 181 N.W.2d 692, 695 (1970) (denying recovery where persons injured by the intoxication of a minor had actively participated in furnishing the liquor without knowing or inquiring as to his age); Turk v. Long Branch Saloon, 280 Minn. 438, 442, 159 N.W.2d 903, 906 (1968) (denying recovery to an injured person who actively and knowingly participated in the process of "illegally selling, bartering, or giving" liquor to a minor).

199. Complicity no longer will bar recovery, but is subject to comparative fault. See MINN. STAT. § 604.01 (1994). Passive participation, such as accompanying the intoxicated person or knowing that the person is consuming liquor, is insufficient to establish complicity. Spragg v. Shuster, 398 N.W.2d 683, 687 (Minn. Ct. App. 1987).

200. See Zerby v. Warren, 297 Minn. 134, 143, 210 N.W.2d 58, 64 (1973) (finding absolute liability for the violation of a statute designed to protect minors from their own inexperience, lack of judgment, and tendency toward negligence); see also Dart v. Purt Oil Co., 233 Minn. 526, 536, 27 N.W.2d 555, 560 (1947) (protecting minors by prohibiting sale of dangerous articles to minors); Dusha v. Virginia & Rainy Lake Co., 145 Minn. 171, 175, 176 N.W. 482, 483 (1920) (protecting minors by prohibiting child labor).

201. See, e.g., Scott v. Indep. Sch. Dist. No. 709, 256 N.W.2d 485, 489 (Minn. 1977) (supporting the trial court ruling that the legislature did not intend absolute liability for the school district and permitting the issue of contributory negligence to go to the jury).

202. See Zerby, 297 Minn. at 139-40, 210 N.W.2d at 62.

203. 297 Minn. 134, 210 N.W.2d 58 (1973).

204. Id. at 140, 210 N.W.2d at 62.
consequence of sniffing glue sold by a hardware store in violation of a statute that prohibited the sale of toxic glue to minors. The supreme court had recognized that violation of what the court calls "exceptional" statutes — those intended for the "protection of a limited class of persons from their inability to protect themselves" — will result in the imposition of "absolute liability" on the defendant who violates the statute. The court reasoned:

In order to create absolute liability, it must be found that the legislative purpose of such a statute is to protect a limited class of persons from their own inexperience, lack of judgment, inability to protect themselves or to resist pressure, or tendency toward negligence. In instances such as the present case, this legislative intent can be deduced from the character of the statute and the background of the social problem and the particular hazard at which the statute is directed.

205. The governing statute in Zerby was § 145.38 of the Minnesota Statutes. Subdivision 1 of § 145.38 provided as follows:

No person shall sell to a person under 19 years of age any glue or cement containing toluene, benzene, zylene, or other aromatic hydrocarbon solvents, or any similar substance which the state board of health has . . . declared to have potential for abuse and toxic effects on the central nervous system. This section does not apply if the glue or cement is contained in a packaged kit for the construction of a model automobile, airplane, or similar item.

Minn. Stat. § 145.38 (1972). Section 145.39 prohibited the possession or use of the substances by persons under 19:

Subdivision 1. No person under 19 years of age shall use or possess any glue, cement or any other substance containing toluene, benzene, zylene, or other aromatic hydrocarbon solvents, or any similar substance which the state board of health has . . . declared to have potential for abuse and toxic effects on the central nervous system with the intent of inducing intoxication, excitement or stupefaction of the central nervous system, except under the direction and supervision of a medical doctor. No person shall intentionally aid another in violation of subdivision 1.

Id. § 145.39. Section 145.40 made the violation of the statutory provisions a misdemeanor. Id. § 145.40.

206. Zerby, 297 Minn. at 139, 210 N.W.2d at 62 (citing Dart v. Pure Oil Co., 223 Minn. 526, 535, 27 N.W.2d 555, 560 (1947)). Dart and its discussion of the impact of statutory violations, is the usual starting point for any discussion of the impact of the "exceptional" statutes, even though the statute at issue in Dart was not an exceptional statute. Dart, 223 Minn. at 535, 27 N.W.2d at 560. The statutory violation involved the sale of a mixture of gasoline and kerosene in violation of a statute intended for the protection of the general public. Id. at 540, 27 N.W.2d at 562.

207. Zerby, 297 Minn. at 140, 210 N.W.2d at 62.

208. Id. at 139-40, 210 N.W.2d at 62.
The court concluded that the statute was one of the exceptional statutes that imposes absolute liability or liability per se on the violator, and that neither contributory negligence nor assumption of risk were permissible defenses.\textsuperscript{209}

The defendants in the case argued that devices such as the "exceptional" statute theory were developed to avoid the harshness of the all or nothing rule of contributory negligence, and that the adoption of a comparative negligence statute in Minnesota rendered resort to the exceptional statute theory unnecessary.\textsuperscript{210} The court rejected the argument stating that:

the adoption of a comparative negligence statute did not create liability where none existed before. Because there can be no contributory negligence as a matter of law when the statute is designed to protect persons from their inability to protect themselves, the adoption of comparative negligence did not alter the exclusion of defenses.\textsuperscript{211}

\textit{Zerby} is one of a sequence of Minnesota cases that adhere to the basic principle limiting the use of the defense of contributory negligence in cases involving the so-called "exceptional" statutes.\textsuperscript{212} The cases seem to be of two types. In one, the

\begin{enumerate}
\item \textit{Id.} at 140, 210 N.W.2d at 62.
\item \textit{Id.} at 141, 210 N.W.2d at 63.
\item \textit{Id.} The court also concluded that the defendants could not assert a contribution claim against the other minor who furnished glue to his friend. \textit{Id.} at 142, 210 N.W.2d at 63. The court reasoned that the contribution claim was improper because the conduct of the other minor "was merely a reaction to the original wrongful act of defendants and therefore not a proximate cause." \textit{Id.} at 142, 210 N.W.2d at 64.
\item \textit{See, e.g.,} Doe v. Brainerd Int'l Raceway, Inc., 514 N.W.2d 811 (Minn. Ct. App. 1994) (finding that § 617.246, which prohibits the use of a minor in a sexual performance, is an exceptional statute), \textit{rev. granted}, (Minn. June 15, 1994); Thelen v. St. Cloud Hosp., 379 N.W.2d 189 (Minn. Ct. App. 1985) (ruling that a Vulnerable Adult Act violation results in absolute liability); \textit{see also} Scott v. Indep. Sch. Dist. No. 709, 256 N.W.2d 485 (Minn. 1977). \textit{Scott} involved an injury to a seventh grader while using a drill in an industrial arts class. The issue was whether the defendant school district's violation of a statute, § 126.20, which required students in those classes to wear protective eye gear, precluded the district's assertion of contributory negligence. The court concluded that it did not:

The legislative intent here does not appear to make liability absolute on the part of the school district. Such a construction would place a nearly impossible burden on a school supervisor. For example, even if the supervisor instructed a student every day in the use of safety glasses, but while the instructor left the room or was working with another student a student lifted off the glasses temporarily and was injured, liability would follow. We do not think the legislature intended that the school district be strictly liable in such a situation.

\textit{Id.} at 489.
\end{enumerate}
person who brings suit has engaged in conduct that is itself violative of a statute prohibiting the conduct. *Zerby* is a good example. In that case the minor who inhaled the glue was himself in violation of a statute prohibiting the use or possession of glue. 213 In the other type of case, the person who brings suit has not committed a statutory violation. A good example is *TheLEN v. ST. CLOUD HOSpITAL*, 214 in which the plaintiff, a patient at St. Cloud Hospital, was sexually abused by an employee of the hospital. 215 The defendant was absolutely liable for violation of the Vulnerable Adult Act. 216

The Minnesota statutory analysis, while standard in tort law, has played out differently in social host liability cases involving claims by persons under twenty-one against adult social hosts who furnish them with alcohol. The discussion of the Washington and Michigan cases that follow illustrates the difference.

Recall that in *Hansen v. FRIEND*, 217 the Washington Supreme Court held that adult social hosts could be held liable for negligently furnishing alcohol to a minor, which led to the minor's death by drowning. 218 Finding that the standard of care to be applied was defined by a statute making it a crime for commercial liquor vendors and social hosts to furnish alcohol to minors, the court further held that the minor to whom the alcohol was furnished could maintain an action against the social hosts. 219 The court then faced the contributory negligence issue.

In Washington, in an action against a social host based on a violation of the statute, the statutory breach is evidence of negligence, rather than negligence per se due to the fact that the Washington Legislature abolished the negligence per se

---

213. *Zerby*, 297 Minn. at 138, 141-42, 210 N.W.2d at 61, 68.
216. *MINN. STAT.* § 626.557 (1982 & Supp. 1983). The purpose of the statute "is to protect adults who, because of physical or mental disability or dependency on institutional services, are particularly vulnerable to abuse or neglect." *Id.* at subd. 1. The court agreed with the trial court's finding that subdivision 1 reflects a clear intention of protecting a limited class and a violation imposes absolute liability. *TheLEN*, 379 N.W.2d at 193-94.
219. *Id.*
doctrine.\textsuperscript{220} Notwithstanding the impact of the statutory violation on the liability of a social host who furnishes alcohol to a minor, the court concluded that a negligent social host's liability could be limited by a minor's contributory negligence.\textsuperscript{221} The contributory negligence defense would be based on the minor's statutory violation.\textsuperscript{222} Washington law provides that: "It is unlawful for any person under the age of twenty-one years to possess, consume, or otherwise acquire any liquor."\textsuperscript{223}

In \textit{Longstreth v. Gensel},\textsuperscript{224} the Michigan Supreme Court followed the same statutory analysis, holding that a common law social host claim could be asserted against social hosts furnishing alcohol to persons under the age of twenty-one.\textsuperscript{225} The court went on to conclude that "application of comparative negligence principles may lessen any perceived hardships of this rule."\textsuperscript{226}

The same argument could be made in Minnesota, based on Minnesota's statutory prohibition against consumption of alcohol by minors, which states as follows:

It is unlawful for a person under the age of 21 years to possess any alcoholic beverage with the intent to consume it at a place other than the household of the person's parent or guardian. Possession at a place other than the household of the parent or guardian creates a rebuttable presumption of intent to consume it at a place other than the household of the parent or guardian. This presumption may be rebutted by a preponderance of the evidence.\textsuperscript{227}

\textsuperscript{220} \textit{Id.} at 487.
\textsuperscript{221} \textit{Id.}
\textsuperscript{222} \textit{Id.} Minors can be contributorily negligent for violating the Washington State Liquor Act. See \textit{WASH. REV. CODE ANN.} § 66.44.270(2) (West 1995).
\textsuperscript{223} \textit{WASH. REV. CODE ANN.} § 66.44.270(2)(a) (West Supp. 1995). In Washington the issue of contributory negligence for minors from age six to sixteen is usually a jury issue. \textit{Hansen}, 824 P.2d at 487. In Washington a minor's recovery may also be limited by Washington Revised Code § 5.40.060, which reads as follows:

[I]t is a complete defense to an action for damages for personal injury or wrongful death that the person injured or killed was under the influence of intoxicating liquor... at the time of the occurrence causing the injury or death and that such condition was a proximate cause of the injury or death and the trier of fact finds such person to have been more than fifty percent at fault. . . .

§ 5.40.060(1).
\textsuperscript{224} 377 N.W.2d 804 (Mich. 1985).
\textsuperscript{226} \textit{Id.}
\textsuperscript{227} \textit{MINN. STAT.} § 340A.503, subd. 3 (1994).
It is arguably harsh to impose full liability on a social host twenty-one years of age or older when the person who sustained injury has voluntarily engaged in action that is itself the product of a statutory violation. *Longstreth* strengthens the argument from an equitable standpoint. The harshness of a rule that seems to impose absolute liability on a social host may be ameliorated by the application of comparative fault principles that permit the negligence of the voluntarily intoxicated person to be taken into consideration.

If the *Hansen-Longstreth* analysis is followed, then there is a strong argument that comparative fault principles should apply. On the other hand, if the *Zerby* analysis is adhered to, then the defense of contributory negligence cannot be asserted by the social host because it is inconsistent with the statutory responsibility to keep a dangerous substance out of the hands of a person under the age of twenty-one. Allowing the defense would impermissibly reduce the defendant's duty under the exception the statute intended for the protection of persons under the age of twenty-one. Whether toxic glue or alcohol, the argument is that the principle is the same and the results should be the same.

b. *Complicity and Comparative Fault*

Irrespective of how the issue of the intoxicated person's negligence is treated, a remaining question concerns whether the structure of defenses in Civil Damage Act cases has any application in cases involving common law claims. That involves a consideration of two questions, one concerning the defense of complicity and the other concerning the impact of the court of appeals decision in *Bushland v. Corner Pocket Billiard Lounge of Moorhead, Inc.*,228 which prohibited the imputation of the fault of an intoxicated decedent in a Civil Damage Act claim by his son against the bar that sold his father alcohol that contributed to the father's death.

The defense of complicity, like the prohibition against recovery by a voluntarily intoxicated person, hinged on the view that the Civil Damage Act remedy existed only in favor of

---

228. 462 N.W.2d 615 (Minn. Ct. App. 1990).
“innocent third persons”\textsuperscript{229} injured as a result of the intoxication of another person.\textsuperscript{230} The defense applied in cases where the plaintiff actively participated in the intoxication of another, and that other person’s negligence was a cause of the plaintiff’s injuries.\textsuperscript{231} 

In \textit{Herrly v. Muzik},\textsuperscript{232} the supreme court considered whether the complicity defense was altered by the legislature’s amendments of the Civil Damage Act in 1977 to permit the application of comparative negligence principles and the comparative fault act amendments in 1978, which broadly defined the types of “fault” subject to comparison in suits for damages for personal injury, property damage, and economic loss.\textsuperscript{233} The court concluded that the amendments did not alter the treatment of the defense of complicity for two primary reasons. First, the legislative history did not support a result that would increase the liability of liquor vendors by negating an important defense.\textsuperscript{234} Second, if the complicity defense were negated, the legislature would have created an anomaly by continuing to disallow a claim by a voluntarily intoxicated person, yet permitting a person who participated in that intoxication to recover.\textsuperscript{235} The court concluded that there was no indication that “the legislature intended to create a new cause of action for the benefit of persons not previously within the class of persons protected by the statute.”\textsuperscript{236}

Another amendment to the comparative fault act, this one in 1990, changed that result by including “the defense of

\textsuperscript{229} The Minnesota Supreme Court has defined “innocent third person” as “one who has had nothing to do with the illegal furnishing of liquor to the intoxicated person.” \textit{Herrly v. Muzik}, 374 N.W.2d 275, 278 n.2 (1985) (citing Turk v. Long Branch Saloon, 280 Minn. 438, 442, 159 N.W.2d 909, 906 (1968)).

\textsuperscript{230} \textit{Herrly}, 374 N.W.2d at 278 (citing Randall v. Village of Excelsior, 258 Minn. 81, 83, 108 N.W.2d 131, 133 (1960)).

\textsuperscript{231} See, e.g., \textit{Herrly}, 374 N.W.2d at 275 (finding that where the plaintiff is a participating accessory to the driver’s intoxication, the plaintiff is not entitled to relief); Martinson v. Monticello Mun. Liquors, 297 Minn. 48, 209 N.W.2d 902 (1973) (holding that a passenger was not entitled to recover where the passenger knowingly participated in furnishing liquor to the driver); \textit{Turk}, 280 Minn. at 438, 159 N.W.2d at 903 (holding that a plaintiff who knowingly and actively participates in events leading to the intoxication of a minor who subsequently causes the plaintiff’s injuries cannot recover).

\textsuperscript{232} 374 N.W.2d 275 (Minn. 1985).

\textsuperscript{233} \textit{Herrly}, 374 N.W.2d at 276-79.

\textsuperscript{234} \textit{Id.} at 278.

\textsuperscript{235} \textit{Id.} at 279.

\textsuperscript{236} \textit{Id.}
complicity under section 340A.801” in the definition of “fault” subject to comparison under the comparative fault act. The amendment paved the way for “non-innocent” third parties who contributed to the intoxication of the injury-causing person to recover in Civil Damage Act cases, although their fault would be subject to comparison under the comparative fault act.

If a “non-innocent” third party who contributed to the intoxication of the person under twenty-one is entitled to recover in a common law action, the question is whether the defense of complicity as it is structured in Civil Damage Act cases should be a valid defense, or whether the defendant should simply be able to assert the defense of contributory negligence, unencumbered by the need to establish the specifics of complicity. The proposed special verdict form in the Civil Jury Instruction Guides for the complicity defense asks two questions. The first is whether the person making the claim actively participated in the intoxication of another person. The second is whether that participation was a direct cause of the injuries the claimant sustained. If the answer to both questions is yes, then the jury would be instructed to take the complicity into consideration in deciding what percentage of fault to assess against the claimant. The Comment to the instruction explains what should happen where the plaintiff has been at fault in other respects:

In cases where the plaintiff is potentially guilty of complicity, as well as secondary assumption of risk by, for example,

237. Minn. Stat. § 604.01, subd. 1a (1994). Subdivision 1 of the statute reads as follows:

Fault. “Fault” includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an express consent or primary assumption of risk, misuse of a product and unreasonable failure to avoid an injury or to mitigate damages, and the defense of complicity under section 340A.801. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault. The doctrine of last clear chance is abolished.

Id. (emphasis added).


239. Id.

240. Id.

241. Id.
riding in a car with the intoxicated person, two questions concerning the plaintiff’s fault would have to be submitted. In addition to the complicity issue, the plaintiff’s contributory negligence would also have to be submitted.\textsuperscript{242}

The Civil Jury Instruction Guides make two points about the defense of complicity, and raises one question. The first point is that if complicity is asserted as a defense, the specific elements that initially made it a complete defense must be established if it is to be specifically asserted as a defense in cases after the 1990 amendment to the comparative fault act making it apportionable. The second point is that the defense of complicity is not the exclusive defense that may be asserted against the complicit person. The question this raises is whether the defendant in a Civil Damage Act case should be able to assert the plaintiff’s contributory negligence in contributing to the intoxication of another even if the contribution does not rise to the level of “complicity” as it has been defined by the supreme court. Irrespective of how the question is answered in Civil Damage Act cases, an additional question arises as to whether complicity should have any application in cases involving common law negligence claims. There are good arguments that it should not.

Third persons who have contributed to the intoxication of the person under twenty-one who is furnished alcohol by a person over twenty-one may be entitled to recover against both the provider and the intoxicated person, even where they may have contributed to the intoxication of that person. An example will help to illustrate the potential problem:

A is injured while riding in a car with B, who is eighteen. B is intoxicated. A, who is seventeen, provided B with part of the purchase price for beer, which B bought from C, who is over twenty-one. C knew that B was under twenty-one when C sold B the beer.\textsuperscript{243}

\textsuperscript{242} Id.

\textsuperscript{243} The facts are based loosely on Spragg v. Shuster, 398 N.W.2d 683 (Minn. Ct. App. 1987), rev. denied, (Minn. Mar. 13, 1987). The plaintiff in Spragg was injured in an automobile accident. Id. at 685. She had provided the driver with part of the purchase price of beer that was sold illegally to one of her underage friends. Id. The driver of the car drank some of the beer. Id. The issue was whether the plaintiff’s action constituted complicity under the Civil Damage Act. Id. The case arose at a time when complicity was a complete defense. Id. at 686. The court concluded that the plaintiff’s conduct did not constitute active participation:
A has potential claims against both B and C. The claim against B would be for negligent driving. The claim against C would be based on C’s negligence in knowingly providing alcohol to a person known to be under twenty-one. Both B and C would be able to assert the standard common law defense to A’s claim, the defense of contributory negligence, which includes “acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others.”

There seems to be no reason to tie the defense of contributory negligence to the defense of complicity, whether the defense would be asserted by B or C. If A’s conduct is unreasonable in providing B with the means to purchase alcohol, which subsequently contributes to B’s intoxication, then the trier of fact should be able to evaluate it as just exactly that, and assign an appropriate percentage of fault to A for that conduct as well as A’s conduct in riding with an intoxicated driver, considering the totality of the circumstances.

There are two primary reasons that might be argued for this conclusion. The first turns on the history of the complicity defense. The intent to limit Civil Damage Act recoveries to “innocent” third parties may not have application in common law negligence claims against the person twenty-one or older who provides alcohol to a person under the age of twenty-one. If “non-innocent” third parties are entitled to recover, it will rest on a repudiation of the standard proximate cause impediment to such claims and on a legislative failure to embrace that rationale when it adopted subdivision 6 of the Civil Damage Act.

Active participation includes furnishing drinks which caused the intoxication. Plaintiff’s participation must be affirmative. Passive participation standing alone, such as merely accompanying the intoxicated person, is insufficient to find complicity. Mere knowledge that the party consuming the alcohol is a minor is passive, not active participation. The determining factor is the “physical nature of [the person’s] participation.”

*Id.* at 687 (citations omitted).

244. MINN. STAT. § 604.01, subd. 1a (1994).

245. See, e.g., Springrose v. Willmore, 292 Minn. 23, 192 N.W.2d 826 (1971) (merging the defenses of contributory negligence and secondary assumption of risk into a single defense where the plaintiff was a passenger in a car owned by one defendant and driven by his daughter, another defendant).

246. See *id.* at 28, 192 N.W.2d at 829.

247. *Id.* § 340A.801.
Damage Act, the defense of contributory negligence hinges on the simple question of whether the plaintiff acted unreasonably. There should be no need to further define or limit any aspect of that defense, whether it is the defense of "complicity" or "secondary assumption of risk."²⁴⁸

If there are no restrictions on the assertable defenses, then there also seems to be no reason to apply the reasoning of *Bushland*²⁴⁹ in cases involving common law claims. *Bushland* involved the court of appeals' construction of the relationship between the Civil Damage Act and the comparative fault act.²⁵⁰ The result is radically different from the result in ordinary civil litigation involving wrongful death claims, where the fault of the decedent is relevant in determining whether recovery will be allowed. If the decedent is more at fault than the person against whom recovery is sought, then there is no recovery in the wrongful death claim. Although it is arguable that the legislature intended the same result in Civil Damage Act cases, the court of appeals in *Bushland* concluded that the fault of the decedent could not be imputed to innocent third persons seeking recovery for pecuniary loss.²⁵¹ But, because claims against social hosts are governed by the common law, there seems to be no reason to apply *Bushland* to those claims.

c. Summary

In a common law action against a defendant who knowingly furnishes or provides alcohol to a person under twenty-one, it appears that the defendant should be able to assert the standard defense of contributory negligence against the plaintiff who is in any measure negligent in causing his own injuries. The result should arguably be the same in cases involving the possibility of

²⁴⁸. See MINNESOTA DIST. JUDGES ASS’N COMM. ON CIVIL JURY INSTRUCTIONS, MINNESOTA JURY INSTRUCTION GUIDES (CIVIL) JIG III 105-08, in MINNESOTA PRACTICE 1, at 62-65 (3d ed. 1986) [hereinafter JURY INSTRUCTION GUIDES]. The theory is that the defenses that are specifically enumerated in the comparative fault act are in actuality merged into the single defense of contributory negligence and the sole question for jury consideration should be whether the plaintiff exercised reasonable care for his own safety.


²⁵⁰. *Id.* at 616.

²⁵¹. *Id.* at 616-17.
complicity on the plaintiff's part. The issue is whether the plaintiff exercised reasonable care under all the circumstances.

If the plaintiff is the person under the age of twenty-one who voluntarily consumed the alcohol furnished or provided by the defendant, and the supreme court ultimately holds that the plaintiff is entitled to recover, the first question is whether the defense of contributory negligence should be permitted. That turns on the application of Zerby.\textsuperscript{252} If Zerby is inapplicable, then the plaintiff's conduct in consuming the alcohol and the plaintiff's subsequent conduct leading up to the accident and injuries he and/or a third person sustained would be relevant in determining whether the plaintiff and/or third person should be entitled to recover, or whether a wrongful death claim should succeed in the event of their deaths.

III. THE STATUTORY WINDOW

Subdivision 6 of section 340A.801 states that “[n]othing in this chapter precludes common law tort claims” if three prescribed conditions are met. The common claim may be asserted:

(1) against a person 21 years of age or older, if that person
(2) knowingly provides or furnishes alcoholic beverages,
(3) to a person under the age of 21 years.

These elements form the window through which common law liability may be imposed. They are necessary but not sufficient conditions for the imposition of liability. The claimant, in addition, should have to prove the basic elements of a negligence claim in order to recover. That will require proof that the alcohol was negligently furnished to a person under twenty-one, and that the necessary causal relationship exists between the negligence and the injuries sustained by the plaintiff.\textsuperscript{253}

A. The “Knowingly” Requirement

The requirement that the alcoholic beverage be “knowingly” furnished or provided to the person under the age of twenty-one

\textsuperscript{252} Zerby v. Warren, 297 Minn. 134, 210 N.W.2d 58 (1973).

\textsuperscript{253} In Civil Damage Act claims the plaintiff must prove that the defendant’s illegal sale of alcohol contributed to or caused the intoxication of a person and that the intoxication was a direct cause of the plaintiff’s damages. See JURY INSTRUCTION GUIDES, supra note 249, JIG III 449 at 316 & 316-20.
is likely to create interpretive problems. There are at least two questions that are likely to arise. One concerns the breadth of the requirement, and whether in application it will be interpreted to require proof that the defendant specifically furnished the alcohol to the person under twenty-one, or whether it will be enough to prove that the defendant "should have known" that a person under twenty-one might have access to alcohol under the defendant's control. The range of scenarios that exist will create problems in applying the standard.

The second question is whether the "knowingly" requirement also applies to the defendant's knowledge of the age of the person who is furnished or provided the alcohol. The issue is whether the defendant must know that the person is under the age of twenty-one, or whether the defendant is to be held to a strict liability standard for providing alcohol to a person under twenty-one, even if the defendant does not know that person's age.

There are several cases on the question of what knowingly furnished or provided might mean, both in Minnesota and elsewhere. Walker v. Kennedy,254 the primary Minnesota Supreme Court case on the issue, is reinforced by decisions in Colorado and Pennsylvania and by an unpublished Minnesota Court of Appeals decision that returns to Walker's theme. Linked together, the decisions provide at least some semblance of a potential standard for resolving questions concerning the degree of knowledge and control necessary to fix liability on a person pursuant to subdivision 6 of section 340A.801.

In Walker, the supreme court was faced with a wrongful death claim that arose out of the consumption of alcohol by a minor, Welin, at a party that was held at the Kennedy house while the Kennedys were on vacation.255 No alcohol was provided to the minor and the minor had not in fact been invited to the party.256 The court first concluded that it was unnecessary to decide whether social host liability could exist for injuries sustained as the result of injuries inflicted by a minor guest because the circumstances would not sustain the elements necessary for social host liability, even if it did exist:

254. 338 N.W.2d 254 (Minn. 1983).
256. Id.
An essential element for social host liability is that the guest is "given or furnished" alcoholic beverages by the person from whom recovery is sought. Since it is undisputed that Welin was not "given or furnished" liquor by any member of the Kennedy family, social host liability is inappropriate in the present case, regardless of the fact that Welin was a minor. 257

Simply providing the premises where the alcohol is consumed is an insufficient basis for liability. 258

Walker is reinforced by the Colorado Court of Appeals' decision in Forrest v. Lorrigan. 259 In Forrest, the court was faced with interpreting Colorado's dram shop act, which imposes civil liability for the sale, service, or provision of alcohol to minors or intoxicated persons. 260 Under the Colorado statute, social host liability is not imposed unless the social host "willfully and knowingly served" alcohol to a guest under the age of twenty-one. 261 The court stated that the legislature intended that liability usually would not be imposed on the vendor or the social host because "it is 'the consumption of alcoholic beverages . . . rather than the sale, service, or provision thereof' which is the 'proximate cause of injuries or damages inflicted upon another by an intoxicated person . . . ." 262

To find liability, the court needed to interpret the phrase "willfully and knowingly." According to the court:

[T]he statutory requirement of willfully and knowingly serving is met only when a social host has control over or takes an active part in supplying a minor with alcohol, and

257. Id. (citations omitted).
261. COLO. REV. STAT. ANN. § 12-46-112.5(4)(a)(I) (West 1990). The statute reads in part:

No social host who furnishes any alcoholic beverage, including fermented malt beverages, is civilly liable to any injured individual or his estate for any injury to such individual . . . including any action for wrongful death, because of the intoxication of any person due to the consumption of such alcoholic beverages, including fermented malt beverages except when:

(f) It is proven that the social host willfully and knowingly served any fermented malt beverage to such person who was under the age of twenty-one years . . . .

262. Forrest, 833 P.2d at 874.
that providing a home at which alcohol is consumed by minors, without more, does not create liability under our statutes.\footnote{263}

Two factors appear to be important in \textit{Forrest}: actively participating in supplying a minor with alcohol and exercising control over the alcohol supply to the minor.\footnote{264} Actually giving alcohol to a minor would be treated on a plane with controlling the supply of alcohol to a minor.\footnote{265}

If the "willfully and knowingly serving" requirement under Colorado law is equivalent to the Minnesota requirement of "knowingly provides or furnishes" under the Minnesota Civil Damage Act,\footnote{266} then there will have to be some active involvement on the part of the social host before liability may be imposed. \textit{Walker v. Kennedy}\footnote{267} is a good example of a case where the facts were insufficient to establish this necessary element.\footnote{268} \textit{Stevens v. Thielen},\footnote{269} where a father provided his

\begin{footnotes}
\item[263] \textit{Id.} at 875.
\item[264] \textit{Id.}
\item[265] \textit{Id.}
\item[266] \textsc{Minn. Stat.} § 340A.801, subd. 6 (1994).
\item[267] 338 \textsc{N.W.2d} 254 (Minn. 1983).
\item[268] \textit{Walker v. Kennedy}, 338 \textsc{N.W.2d} 254, 255 (1983). In \textit{Walker}, the social host was not liable because he was not home, and therefore, did not knowingly furnish alcohol. \textit{Id.}
\item[269] 394 \textsc{N.W.2d} 834 (Minn. Ct. App. 1986). The undisputed facts as recited by the court in \textit{Stevens} were as follows:
Karen Crane was granted permission by her parents to have a sixteenth birthday party on December 12, 1981, at a quonset hut located on the Crane's property. Karen Crane planned the party and her father supplied two kegs of strong beer. Lawrence and Betty Crane did not attend or supervise the party, nor were any other parents present.
Karen Crane charged and collected money from those wishing to drink beer. The party was attended by minors ranging in age from 14 to 18 and by adults ranging in age from 19 to 21. Craig Stevens arrived at the party at approximately 8 p.m. with two friends. One borrowed $5 and used the money to pay for himself and Craig Stevens.
During the course of the evening, Craig Stevens drank beer and became extremely intoxicated. He was belligerent and argumentative, and fought with several other party goers who forced him to leave the party on foot at about 12:45 a.m. He walked alone down the Crane driveway and onto a two-lane highway. About 500 feet from the Crane residence, he was struck and killed by motor vehicles driven by Gregory Thielen and Richard Goecke. Analysis of a blood sample taken from Craig Stevens after the accident revealed he had a blood alcohol concentration of .18.
\textit{Stevens v. Thielen}, 394 \textsc{N.W.2d} 834, 835 (Minn. Ct. App. 1986). Craig Stevens was a minor. \textit{Id.} at 834.
\end{footnotes}
daughter a keg of beer for her birthday party, is an example of a case that would appear to meet the "knowingly provides or furnishes" standard because there is both control, the missing element in \textit{Walker}, and active furnishing of alcohol to a minor.\textsuperscript{270}

The Pennsylvania courts have also had experience in dealing with the term "knowingly" in social host cases. In \textit{Congini v. Portersville Valve Company},\textsuperscript{271} the Pennsylvania Supreme Court adopted social host liability in cases where an adult knowingly furnishes alcohol to a minor. \textit{Congini} is distinguishable from \textit{Klein v. Raysinger}.\textsuperscript{272} In \textit{Klein}, the supreme court held that no common law duty existed that would justify imposing liability on a social host who served alcohol to a guest when the guest's intoxication resulted in injury either to himself or a third party.\textsuperscript{273} The court based its decision on the conclusion that it is the voluntary intoxication of the person rather than the furnishing of alcohol that is the proximate cause of any injury.\textsuperscript{274} The court in \textit{Congini} distinguished \textit{Klein} and arrived at a contrary conclusion.\textsuperscript{275}

The minor plaintiff in \textit{Congini} became intoxicated at his employer's Christmas party.\textsuperscript{276} The plaintiff was subsequently involved in an automobile accident in which he rear-ended another vehicle, suffering injuries that left him permanently and totally disabled.\textsuperscript{277} Although \textit{Congini} does not clearly incorporate the requirement that the defendant "knowingly furnish" alcohol to a minor, the Pennsylvania Supreme Court has made

\textsuperscript{270} \textit{Id.} at 835.

\textsuperscript{271} 470 A.2d 515, 517-18 (Pa. 1983) (holding a social host negligent per se for serving alcohol to a minor on the basis of legislative judgement that minors are incompetent to handle alcohol).

\textsuperscript{272} 470 A.2d 507 (Pa. 1983).


\textsuperscript{274} \textit{Id.} at 510.

\textsuperscript{275} \textit{Congini}, 470 A.2d at 517. The court in \textit{Congini} stated that the "legislative judgment compels a different result than \textit{Klein}, for here we are not dealing with ordinary able bodied men. Rather, we are confronted with persons who are, at least in the eyes of the law, incompetent to handle the affects of alcohol." \textit{Id.}

In Pennsylvania, it is a crime for an adult to furnish liquor to a minor. 18 PA. CONS. STAT. ANN. § 6310.1 (West Supp. 1994) (relating to the selling or furnishing liquor or malt or brewed beverages to minors).

\textsuperscript{276} \textit{Congini}, 470 A.2d at 516.

\textsuperscript{277} \textit{Id.}
it clear in subsequent cases that the standard is “knowingly furnished.”\textsuperscript{278}

In \textit{Alumni Association v. Sullivan},\textsuperscript{279} suit was brought by the owners of the Lambda Chi Alpha Fraternity against a Bucknell student, Ronald C. Unterberger, and a companion, alleging that the owners of the fraternity had negligently “caused or failed to control a fire” in the Lambda Chi Alpha fraternity house.\textsuperscript{280} The fire resulted in more than $400,000 in property damage.\textsuperscript{281} Unterberger, a freshman at Bucknell University, had been drinking earlier at a party in his dormitory and a second party at the Sigma Chi Fraternity.\textsuperscript{282} Alcohol was served at both parties and Unterberger openly consumed the alcohol.\textsuperscript{283} Unterberger joined Bucknell University, the Kappa Chapter of Sigma Chi, and Sigma Chi, as additional defendants.\textsuperscript{284} He alleged that because he was a minor, the defendants were negligent in furnishing him with alcohol at the parties.\textsuperscript{285} Unterburger’s argument was based on \textit{Orner v. Mallick},\textsuperscript{286} a case in which the Pennsylvania Supreme Court held that because the defendant was aware that the alcoholic beverages she provided at her daughter’s high school graduation party would be consumed by minors, there was a cause of action against the defendant.\textsuperscript{287}

The plaintiff in \textit{Sullivan} argued that the court’s “knowingly furnished” standard was too restrictive, and that the court should adopt a standard based on whether the adult knew or “should have known” that alcohol was being provided for minors.\textsuperscript{288} The court rejected the argument, distinguishing

\textsuperscript{278} \textit{Id.} at 518. The court stated that “an eighteen year old minor may state a cause of action against an adult social host who has knowingly served him intoxicants.” \textit{Id.}
\textsuperscript{279} 572 A.2d 1209 (Pa. 1990).
\textsuperscript{281} \textit{Id.}
\textsuperscript{282} \textit{Id.} at 1209-10.
\textsuperscript{283} \textit{Id.} at 1210.
\textsuperscript{284} \textit{Id.}
\textsuperscript{285} \textit{Id.} The court held that social host liability extended only to persons who “knowingly furnished” alcohol to a minor. There was no indication that the university or the fraternity was involved in the supplying or serving of the alcohol. \textit{Id.} at 1213.
\textsuperscript{286} 527 A.2d 521 (Pa. 1987).
\textsuperscript{288} \textit{Sullivan}, 572 A.2d at 1210.
along the way two Third Circuit cases the plaintiff cited in support of his position.\textsuperscript{289}

In \textit{Fassett v. Delta Kappa Epsilon},\textsuperscript{290} the Third Circuit stated that in order to be held liable, a social host must render substantial assistance in providing the alcohol the minor consumes.\textsuperscript{291} In \textit{Macleary v. Hines},\textsuperscript{292} the Third Circuit built on \textit{Fassett} and concluded that the social host must have "intentionally and substantially aided and encouraged the consumption of alcohol by a minor guest . . ."\textsuperscript{293}

The Pennsylvania Supreme Court in \textit{Sullivan} thought those standards simply restated its "knowingly furnished" standard:

The "knowingly furnished" standard requires actual knowledge on the part of the social host as opposed to imputed knowledge imposed as a result of the relationship. In both cases the Third Circuit held as potential social hosts individuals who had participated in the planning and the funding of social events where alcohol was consumed by minors. In each instance the social host was aware of the degree of consumption by the minors . . . . The Third Circuit correctly determined in both instances that we would not restrict the application of the social host theory to solely those instances where the defendant was alleged to have \textit{physically handed} an alcoholic beverage to a minor.\textsuperscript{294}

Applying this standard to the facts, the court found that in the absence of any allegations that the fraternity or university "was involved in the planning of these events or the serving, supplying, or purchasing of liquor" there could be no liability.\textsuperscript{295} Accordingly, the court concluded that neither the

\textsuperscript{289} \textit{Id.} at 1212-13. The court distinguished this case based on the fact that neither the fraternity or university was involved in planning the event or serving alcohol. \textit{Id.} at 1213; see also \textit{Fassett v. Delta Kappa Epsilon}, 807 F.2d 1150 (3d Cir. 1986) (holding that social host must have intention to promote or facilitate consumption and must have aided or attempted to aid consumption to be liable); \textit{Macleary v. Hines}, 817 F.2d 1081 (3d Cir. 1987) (holding that the social host must intentionally and substantially aid and encourage the consumption of alcohol).

\textsuperscript{290} 807 F.2d 1150 (3d Cir. 1986).

\textsuperscript{291} \textit{Id.} at 1164.

\textsuperscript{292} 817 F.2d at 1081.

\textsuperscript{293} \textit{Id.} at 1084 (relying on \textit{Congini}, 470 A.2d at 515 and \textit{Fassett}, 807 F.2d at 1150).

\textsuperscript{294} \textit{Sullivan}, 572 A.2d at 1212-13.

\textsuperscript{295} \textit{Id.} at 1213.
university nor the fraternity knowingly furnished alcohol to a minor.296

A variety of situations will arise that will fit in the seams of the law. For example, cases will arise where parents keep alcohol in the house and their minor children may have access to it. Even if the parents expressly tell minors to keep away from the supply, these situations create the potential for social host liability claims under the statute. Stronger circumstances exist where the parents in fact know that their alcohol supply has been taken in the past by their children and do nothing about it. Situations will also arise where adults have parties and minors can obtain alcohol at those parties, but without knowledge on the part of the adults that they are minors. Still other potential problems abound, as in the case where adults, unrelated to the minor, have control over a supply of alcoholic beverages under circumstances where a minor may gain access to the supply. If the requirement is that the person twenty-one years of age or older play an active part in supplying the minor, the hypothetical cases seem to fall short. The general vein of inquiry will be whether the defendant's negligent creation of circumstances where a person under the age of twenty-one has potential access to a supply of alcoholic beverages is sufficient to hold the defendant responsible for injuries that result from the minor's intoxication.

Although the essence of negligence law is foreseeability and the ability to prevent a risk, the statutory window in the 1990 amendment297 restricts liability to a greater extent. The amendment requires actual knowledge of involvement in furnishing alcohol to a person under twenty-one.298 This more rigid standard should provide relatively clear guidelines to resolve cases similar to Sullivan that surely will arise in Minnesota.

In Opay v. Howard Lake Liquor Store,299 an unpublished opinion, the Minnesota Court of Appeals construed the 1990 amendment to the Civil Damage Act for only the second time. Opay was the first decision to apply the "knowingly provided or

296. Id.
297. MINN. STAT. § 340A.801, subd. 6 (1994).
298. Id.
furnished" standard. One of the issues in the case concerned the application of the amendment in a case where a minor later died from carbon monoxide poisoning after drinking alcohol at a party that was held at an abandoned farm house on property owned by Connie Krause. A wrongful death action was asserted against Connie Krause on several bases, one of which was that she furnished alcohol to minors. There was no indication that she sold alcohol to the minor who later died from monoxide poisoning and no showing that she "knowingly provided or furnished" alcoholic beverages to the minor.

The court of appeals first noted that "[a]ctual notice is synonymous with knowledge." The court then referred to the Minnesota Supreme Court's decision in Walker v. Kennedy, for the proposition that a social host will have actual knowledge when the social host "actually provides or furnishes alcohol to a minor." The court concluded that Krause was unaware that her son had purchased beer at a liquor store, nor did she purchase the beer. She was not at the farm house and she did not encounter the minor who died at any time earlier in the evening. The court held that the evidence failed to establish that she knowingly provided or furnished alcohol to the decedent. The appellants in the case argued that the amendment permitted the imposition of liability in cases where she "should have known" what was occurring on her

301. Id.
302. Id. at *4.
303. Id.
304. Id. (quoting Jefferson County Bank v. Erickson, 188 Minn. 354, 357, 247 N.W. 245, 247 (1933) (quoting 5 DUNNELL MINN. DIGEST § 7230 (2d ed.))
305. 338 N.W.2d 254, 255 (Minn. 1983) (specifying that an "essential element for social host liability" is a showing that the person who is being sued either gave or furnished the guest with alcohol).
307. Id.
308. Id.
309. Id.
property. The court rejected the argument, concluding that she could be held liable only for what she "knowingly" did.

B. The "Under Twenty-One" Requirement

A second inquiry is whether the "knowingly" requirement also applies to the provider's or furnisher's knowledge that the person to whom the alcohol is given is under the age of twenty-one. In Dickman v. Jackalope, Inc., the issue was whether Colorado's social host statute requires proof that a liquor licensee knew the person served was under the age of twenty-one. The Colorado statute provides that in order for a licensee to be civilly liable, the licensee must "willfully and knowingly" sell or serve alcohol to a person under the age of twenty-one.

The plaintiffs, Kraeg Dickman and Samantha Hunt, were drinking at the defendant's bar. Hunt was under the age of twenty-one. Neither Hunt nor Dickman was checked for identification. The bar employees and the plaintiff thought that Hunt was over twenty-one. Dickman and Hunt left the bar together later in the evening, and drove away in Hunt's car. Hunt lost control of the car and was involved in an accident injuring Dickman. Hunt was cited for driving under the influence of alcohol.

---

310. Id.
311. Id.
314. COLO. REV. STAT. ANN. § 12-47-128.5(a)(I) (West 1990). Subdivision 3 of § 12-47-128.5 of the Colorado Revised Statutes provides in part:

No licensee is civilly liable to any injured individual or his estate for any injury to such individual or damage to any property suffered because of the intoxication of any person due to the sale or service of any alcoholic beverages to such person, except when:

(I) It is proven that the licensee willfully and knowingly sold or served any malt, vinous, or spirituous liquor to such person who was under the age of twenty-one years who was visibly intoxicated . . . .

315. Dickman, 870 P.2d at 1262.
316. Id.
317. Id.
318. Id.
319. Id.
320. Id.
321. Id.
The trial court and court of appeals concluded that the plain language of the social host statute permitted the imposition of civil liability on a licensee only if the licensee "knows that he or she is serving alcohol to a person under 21 years of age and willfully does so." A different interpretation, the court said, would make the "willful and knowing" language meaningless since it is difficult to imagine any sales or service of alcohol by a licensee which are not deliberate.

The court found it significant that there is a difference in treatment between the statute governing the legality of sales to minors and the statute governing civil liability for those sales. Under section 12-47-128(5)(a)(1) of the Colorado Revised Statutes, "it is unlawful to sell alcohol to a person under 21," but there is no requirement that the sale be willful and knowing. The social host statute adds that requirement. In addition, section 12-47-128(5)(a)(1) provides: "If a person who, in fact, is not twenty-one years of age exhibits a fraudulent proof of age, any action relying on such fraudulent proof of age shall not constitute grounds for the revocation or suspension of any license issued under this article." The social host liability statute does not provide for a similar good-faith defense.

These facts led the Colorado Court of Appeals to conclude that the "knowingly" requirement also applied to the alcohol provider's knowledge of the age of the person to whom the alcohol was given. The court stated:

The addition of the words "willfully and knowingly" to the statute relating to imposition of civil liability, together with the fact that the civil liability section does not include the good-faith defense contained in § 12-47-128(5)(a)(I), buttresses our conclusion that the General Assembly did not intend that this be a strict liability provision, but rather one requiring a plaintiff to prove knowledge and intention on the part of the vendor.

---

322. Id.
323. Id.
324. Id. at 1262-63.
325. Id. at 1263.
327. Dickman, 870 P.2d at 1263 (citing COLO. REV. STAT. ANN. § 12-47-128(5)(a)(I)).
328. Dickman, 870 P.2d at 1263.
329. Id.
The court also concluded that "[a] vendor may be held civilly liable only if the vendor knows that he or she is serving alcohol to a person under 21 years of age and willfully does so." The trial court's dismissal was affirmed because of the absence of evidence that the defendant's employees had actual knowledge that Hunt was under twenty-one.

If the reasoning in Dickman is followed, then there is a good argument that the "knowingly" requirement in the 1990 amendment to the Civil Damage Act — subdivision 6 of section 340A.801 of the Minnesota Statutes — applies both to the defendant's providing and furnishing of alcohol, as well as to the defendant's knowledge of the age of the person to whom the alcohol is furnished or provided.

Section 340A.503, subdivision 2(1) of the Minnesota Statutes makes it unlawful for any person "to sell, barter, furnish, or give alcoholic beverages to a person under 21 years of age." Subdivision 6 of that section provides a defense to the violation. That section reads as follows:

(a) Proof of age for purchasing or consuming alcoholic beverages may be established only by one of the following:

(1) a valid driver's license or identification card issued by Minnesota, another state, or a province of Canada, and including the photograph and date of birth of the licensed person;

(2) a valid military identification card issued by the United States Department of Defense; or

(3) in the case of a foreign national, from a nation other than Canada, by a valid passport.

(b) In a prosecution under subdivision 2, clause (1), it is a defense for the defendant to prove by a preponderance of the evidence that the defendant reasonably and in good faith relied upon representations of proof of age authorized in paragraph (a) in selling, bartering, furnishing, or giving the alcoholic beverage.

---

330. Id.
331. Id.
333. Id. § 340A.503, subd. 6.
334. Id.
Following the *Dickman*\textsuperscript{335} rationale, it can be argued that the "knowingly" requirement of section 340A.801, subdivision 6, is a reflection of the legislature's intent not to impose strict liability, since the statute does not directly refer to or include the good-faith defense even after a common law window was created.\textsuperscript{336}

The contrast between the criminal statute, section 340A.503, subdivision 2, and the limited form of social host liability permitted in section 340A.801, subdivision 6, is in fact reinforced by the incorporation of the "good faith" defense in Civil Damage Act claims. Section 340A.801, subdivision 3a, provides that "[t]he defense described in section 340A.503, subdivision 6, applies to actions under this section."\textsuperscript{337} Had the legislature intended to incorporate the defense in subdivision 6, when it created the window to common law liability, it could readily have done so.

C. Summary

The "knowingly" requirement may apply to both the furnishing and providing of alcohol and to the defendant's knowledge that the person who is provided with the alcohol is under the age of twenty-one. *Walker* and *Opay* seem to establish limits on the construction of the term. Ownership of property where alcohol is consumed is insufficient. On the other hand, *Stevens* appears to present a situation where social host liability would be appropriate because of the direct furnishing of alcohol to a person known to be under the age of twenty-one, even though that specific person was not the minor who was killed as a result of alcohol consumption.

Yet, the requirement that the defendant "knowingly provides or furnishes" alcohol to a person under twenty-one is not necessarily limited to cases where the person twenty-one or older physically hands the alcohol to the minor. It is arguable that actively participating in providing a person under twenty-one with alcohol or exercising control over the supply to the minor may be sufficient.

\textsuperscript{335} 870 P.2d 1261 (Colo. Ct. App. 1994).
\textsuperscript{336} MINN. STAT. § 340A.503, subd. 6 (1994).
\textsuperscript{337} Id. § 340A.801, subd. 3a.
The "knowingly" requirement also appears to be applicable to the defendant's knowledge of the age of the person who receives alcohol. That conclusion depends on the differential language in sections 340A.503, subdivision 2 and 340A.801, subdivision 1, on the one hand, and section 340A.801, subdivision 6, on the other. The law regulating sales of alcohol and the Civil Damage Act does not impose a requirement that a sale to a person under twenty-one be made "knowingly," while subdivision 6 of section 340A.801 does. The defense provided for in section 340A.503, subdivision 6, which is imported to Civil Damage Act claims, lets the commercial vendor off the hook in cases where there is a good faith reliance on a person's representation of proof of age. That defense is not incorporated nor does it appear to be applicable in cases involving common law claims that are filtered through subdivision 6 of section 340A.801, which makes the "strict liability" standard of the Civil Damage Act appear to be inapplicable in cases involving claims by minors.

V. A CONSTITUTIONAL DILEMMA?

In *Trail v. Christian*, the Minnesota Supreme Court created a constitutional problem when it held that common law liability could be imposed on the vendor of 3.2 beer. At the time, as today, common law negligence actions were governed by a six-year statute of limitations, rather than the one-year statute that applied to vendors of stronger liquor. In addition, while the Civil Damage Act had a notice of claim provision for suits against sellers of stronger liquor, no such requirement existed for common law negligence actions. In 1981, those

338. 298 Minn. 101, 213 N.W.2d 618 (1973).
340. *Minn. Stat.* § 541.05, subd. 1(5) (1994). Subdivision 1(5) provides that "for criminal conversation, or for any other injury to the person or rights of another, not arising on contract, and not hereinafter enumerated" the action must be commenced within six years. *Id.*
342. Compare § 340A.802, subd. 1 (requiring written notice of claim to licensee or municipality) *with* Beck v. Groe, 245 Minn. 28, 70 N.W.2d 886 (1955) (excluding notice requirement) *and* *Trail v. Christian*, 298 Minn. 101, 213 N.W.2d 618 (1973) (excluding notice requirement) *and* Wegan v. Village of Lexington, 309 N.W.2d 273, 277 ("[N]o notice of claim is required as a condition precedent to suit.").
differences were raised in *Wegan v. Village of Lexington*.\textsuperscript{343} In *Wegan*, the supreme court held that the statute of limitations and notice of claim provisions violated the equal protection guarantee of the Minnesota Constitution and were therefore unconstitutional.\textsuperscript{344} Justice Amdahl, concurring specially, would have held that the entire Civil Damage Act was unconstitutional.\textsuperscript{345}

In evaluating the constitutionality of the distinctions under the equal protection clause, the court applied a rational basis standard of review.\textsuperscript{346} The Minnesota version of rational basis review consists of a three-factor balancing test the court formulated in earlier cases. The test is as follows:

1. The distinctions which separate those included within the classification from those excluded must not be manifestly arbitrary or fanciful but must be genuine and substantial, thereby providing a natural and reasonable basis to justify legislation adapted to peculiar conditions and needs;
2. the classification must be genuine or relevant to the purpose of the law; that is, there must be an evident connection between the distinctive needs peculiar to the class and the prescribed remedy;
3. the purpose of the statute must be one that the state can legitimately attempt to achieve.\textsuperscript{347}

The court concluded that the third factor, the legitimate state purpose factor, was satisfied.\textsuperscript{348} Providing dramshops with an early chance to investigate claims, facilitating settlement, and

\textsuperscript{343} 309 N.W.2d 273 (Minn. 1981).

\textsuperscript{344} *Wegan* involved four actions that were consolidated for purposes of appeal. *Wegan v. Village of Lexington*, 309 N.W.2d 273, 274-77 (Minn. 1981). The length of the Civil Damage Act statute of limitations applicable to the cases depended on when the injuries occurred. *Id.* at 277-78. For two of the claimants, the applicable statute of limitations was three years. *Id.* at 275-76; see also *Minn. Stat.* § 340.951 (1974).

The statute of limitations provision was amended in 1977, when the legislature shortened the statute to one year. *See Minn. Stat.* § 340.951 (1978). The claims of the other claimants were subject to the one year statute of limitations. *See Wegan*, 309 N.W.2d at 275 n.1.

\textsuperscript{345} *Wegan*, 309 N.W.2d at 281 (Amdahl, J. concurring)

\textsuperscript{346} *Id.* at 280-81.

\textsuperscript{347} *Id.* at 280 (citing Guiliams v. Commissioner of Revenue, 299 N.W.2d 138, 142 (Minn. 1980) (quoting Miller Brewing Co. v. State, 284 N.W.2d 353, 356 (Minn. 1979)); see also Ann L. Ijima, *Minnesota Equal Protection in the Third Millennium: "Old Formulations" or "New Articulations?*”, 20 WM. MITCHELL L. REV. 357 (1994) (analyzing the equal protection clause of the Minnesota Constitution).

\textsuperscript{348} *Wegan*, 309 N.W.2d at 280.
correcting problems that might avoid further injury were all legitimate reasons for the notice of claim and statute of limitations provisions in the Civil Damage Act. However, the court held that the statute was constitutionally defective because it failed to meet the first two prongs of the equal protection test.349

The court held that “[t]he classifications, [sale of 3.2 beer versus sale of intoxicating liquor], are not genuine or relevant to the purpose of the law.”350 The court further held that “the distinctions separating those included within the classification from those excluded are manifestly arbitrary and fanciful.”351

The court’s reasoning was as follows:

Because prohibition was repealed almost half a century ago, the legislative distinctions between 3.2 beer and intoxicating liquor are based, at best, upon historical anachronisms. There is no rational basis for distinguishing between persons injured by those intoxicated from drinking 3.2 beer and those intoxicated as a result of consuming stronger liquor. An injured person cares little whether the driver who causes his injuries become intoxicated as a result of consuming 3.2 beer or stronger liquor. Indeed, a lay person unable to obtain just compensation because of the peculiarities of Minnesota’s Dram Shop Law could justifiably conclude that he was the victim of artificial legal word games.352

The court also concluded that the continuing legislative reference to 3.2 beer as “non-intoxicating” liquor “results in a number of anomalies and absurdities that become apparent in the context of a lawsuit alleging both 3.2 negligence and [Minnesota Statute] § 340.95 liability,” and that the problem is exacerbated in contribution actions between 3.2 beer vendors and liquor vendors.353 The court explained those problems in footnotes to its opinion:

The irrationality of the legislative classifications is well illustrated by the facts in Ecker. In that case the same establishment allegedly served a patron responsible for Ecker’s injury 3.2 ‘non-intoxicating’ beer and ‘intoxicating liquor.’ Although the district court dismissed Ecker’s dram

349. Id.
350. Id.
351. Id.
352. Id.
353. Id. (footnotes omitted).
shop claim, it left pending Ecker's 3.2 negligence action against the same bar. In the common law negligence action, Ecker will attempt to submit into evidence exactly the same proof that he would have submitted in an action based on Minn. Stat. § 340.95. The dram shop defendant, no doubt, will object to any evidence that the alleged intoxicated person consumed intoxicating liquor because that cause of action was dismissed. The resulting confusion regarding what testimony pertains to 3.2 beer versus intoxicating liquor in itself raises perplexing constitutional issues. 354

The contribution problems existed because of a cap on damages in the Civil Damage Act. 355

The issue is whether the difference in standards applies to liquor vendors under the Civil Damage Act and social hosts under common law theory raises similar constitutional questions. There are a number of differences between claims under the Civil Damage Act and the common law claim against persons over the age of twenty-one who furnish or provide alcohol to persons under the age of twenty-one.

First, the persons subject to liability are different and the standards of liability differ. Only commercial vendors of alcohol are subject to liability under the Civil Damages Act, 356 while any adult who furnishes or provides alcohol to a person under the age of twenty-one is subject to common law liability for negligence. 357 Second, the Civil Damage Act subjects commercial liquor vendors to liability for the illegal sale of alcoholic beverages. 358 The common law theory appears to include, but does not require, an illegal sale of alcohol. 359 Third, the defenses to the claims may be different. Voluntary intoxication

354. Id. at 280 n.11 (citations omitted).
355. Id. at 280 n.12.
356. Meany v. Newell, 367 N.W.2d 472, 474 (Minn. 1985); Cady v. Coleman, 315 N.W.2d 593, 595-96 (Minn. 1982); Cole v. City of Spring Lake Park, 314 N.W.2d 836, 840 (Minn. 1982).
357. MINN. STAT. § 340A.801, subd. 6 (1994).
358. Id. § 340A.801, subd. 1 (1994).
359. See Waynick v. Chicago's Last Dep't Store, 269 F.2d 322, 325-26 (7th Cir. 1959) (finding a common law negligence claim to lie against a vendor in favor of a third person who suffers injury at hands of a vendee proximately resulting from an illegal sale); see also Note, The Common Law Liability of Minnesota Liquor Vendors For Injuries Arising From Negligent Sales, 49 MINN. L. REV. 1154, 1168-73 (1965) (discussing the justifications for according an innocent third-party a common law cause of action against a liquor vendor for injuries resulting from illegal sales).
may constitute a bar to a claim by the intoxicated person, including a minor, under the Civil Damage Act, but it may not constitute a bar under the common law claim.\footnote{360}

Fourth, there may be different damages awarded under the Civil Damage Act under some circumstances. Section 340A.801 of the Civil Damage Act provides as follows:

A spouse, child, parent, guardian, employer, or other person injured in person, property, or means of support, or who incurs other pecuniary loss by an intoxicated person or by the intoxication of another person, has a right of action in the person's own name for all damages sustained against a person who caused the intoxication of that person by illegally selling alcoholic beverages.\footnote{361}

Depending on the case, recovery is permitted for personal injuries, property damage, loss of means of support, and "other pecuniary loss." In \textit{Coolidge v. St. Paul Fire and Marine Insurance Company},\footnote{362} the court of appeals held that the right to recover for "pecuniary loss" extended to cases other than death cases, permitting children to recovery for the pecuniary loss they suffered as a result of injury to their parents.\footnote{363} The result seems inconsistent with the supreme court's holding in \textit{Salin v. Kloempken},\footnote{364} in which the supreme court held that a child could not recover for loss of parental consortium.\footnote{365} If \textit{Coolidge} is not reversed by the Minnesota Supreme Court, an anomaly will be created in which the right of recovery in Civil Damage Act cases will be broader than the right of recovery in common law actions. However, even assuming that \textit{Coolidge} is sustained, there is no indication that the same result would exist.

\footnotesize{\begin{itemize}
\item \textit{See} Sworski v. Colman, 204 Minn. 474, 477, 283 N.W. 778, 780 (1939) (holding that a person injured by reason of his own intoxication was not entitled to recovery under the Civil Damage Act); Randall v. Village of Excelsior, 258 Minn. 81, 83, 105 N.W.2d 131, 133 (1960); Empire Fire & Marine Ins. Co. v. Williams, 265 Minn. 383, 385, 121 N.W.2d 580, 582 (1963); \textit{see also} 1 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 65 (1984) (explaining the common law approach of permitting evidence of voluntary intoxication to be admitted to show that the accused was incapable of forming the specific intent). \\
\item \textit{Minn. Stat.} § 340A.801, subd. 1 (1994). \\
\item 523 N.W.2d 5 (Minn. Ct. App. 1994), \textit{rev. granted}, (Minn. Dec. 21, 1994). \\
\item 322 N.W.2d 736 (Minn. 1982). \\
\item \textit{Salin v. Kloempken}, 322 N.W.2d 736, 737 (Minn. 1982).
\end{itemize}}
in common law actions unless the supreme court would overrule 
Salin.

Fifth, there are notice and commencement of action 
provisions applicable to Civil Damage Act claims that are 
inapplicable to common law claims.366 There is no notice 
provision for the common law claim and the six-year statute367 
of limitations for common law claims is longer than the current 
two year statute for Civil Damage Act368 claims. Finally, there 
are proof of financial responsibility requirements for retail 
liquor licensees that require an applicant for a retail license to 
provide "proof of financial responsibility with regard to liability 
imposed by section 340A.801."369 There is no equivalent 
requirement for persons who may be subject to liability under 
the common law claim.

If common law liability is imposed on social hosts pursuant 
to the 1990 amendment, then the legislature will have created 
a scheme that permits the imposition of liability on commercial 
liquor vendors under standards that differ from those that apply 
to claims against social hosts. The same arbitrariness inherent 
in the scheme that resulted from Trail370 however, is arguably 
not present in the current situation. The legislature has 
carefully defined the situations where commercial vendors are 
liable, but has decided to subject social hosts to different 
standards371.

In 1990, the legislature acted with full awareness of the 
division that would be created by permitting social host liability 
on the basis of common law negligence principles to be imposed 
on persons twenty-one years of age or older who furnish alcohol 
to a person under twenty-one. The constitutional issue is 
whether the legislature created an impermissible classification in 
doing so.

There could be a potential problem if common law claims 
can be asserted against liquor vendors who have previously been 
subject to liability under the Civil Damage Act, with the single

366. See Minn. Stat. § 340A.801, subd. 6 (1994).
367. See id. § 541.05, subd. 1(5).
368. Id. § 340A.802, subd. 2.
369. Id. § 340A.409, subd. 1.
371. See, e.g., Holmquist v. Miller, 367 N.W.2d 468, 471 (Minn. 1985); Cady v. 
Coleman, 315 N.W.2d 593, 595-96 (Minn. 1982).
exception of *Trail*. However, there is no indication that the legislature intended to permit the imposition of common law liability on a liquor vendor subject to the Civil Damage Act. The legislative history shows that the problem the legislature intended to address was the problem of the social host who is *not* covered by the Civil Damage Act, not the liquor vendors who are covered. Cases such as *Meany*, $^{372}$ *Holmquist*, $^{373}$ and *Stevens* $^{374}$ define the problem. If these cases accurately define the problems the legislature intended to address, they should also have defined the scope of the intended legislative remedy in subdivision 6. The legislature intended to provide for limited social host liability, not to expand the liability of commercial liquor vendors.

The supreme court has already supplied the policy justifications for social host liability. $^{375}$ In *Holmquist*, the supreme court noted a number of strong public policy justifications for imposing liability on persons procuring alcohol for minors. $^{376}$ The supreme court then acknowledged the logic of those justifications: "no one would seriously disagree with this, or suggest that minors should be encouraged to drink illegally, or not be protected from drinking alcohol. We incorporated that policy in both *Ross* and *Trail*, only to have their full impact nullified by legislative amendments." $^{377}$

The 1990 amendment simply gives the court the power to implement the remedy the legislature earlier rejected when it was formulated by the supreme court, at least as to persons who are not commercial vendors of alcohol. The public policy the supreme court has noted in its earlier cases defines the legislative objective — to protect minors from injuring themselves or others because of alcohol consumption. The objective seems legitimate. Without belaboring the point, it is also arguable that the first two prongs of the court’s now standard three-prong equal protection analysis are satisfied. Given the legislative and judicial history underlying the Civil Damage Act and social host liability in Minnesota, it is arguable that there is a reasonable

---

$^{373}$ *Holmquist*, 367 N.W.2d at 470.
$^{376}$ *Holmquist*, 367 N.W.2d at 471-72.
$^{377}$ *Id.* at 471-72.
basis for the 1990 social host legislation to remedy the problem of alcohol consumption by persons under the age of twenty-one and persons twenty-one and older who provide it to them. And, given the nature of the problem, it appears that the legislature's classification is relevant to that specific purpose. If so, then there should be no problem in sustaining the legislation against an equal protection attack.

VI. CONCLUSION

The 1990 amendment to the Civil Damage Act opens a statutory window and, once the window is cleared, leaves to the judiciary the authority to define the scope of the common law claim for liquor liability. Where a person over the age of twenty-one knowingly provides or furnishes alcohol to a person under the age of twenty-one, common law principles may be applied. The preliminary requirements embedded in the amendment are subject to interpretation, of course, including the construction of the requirement that alcohol be "knowingly" provided or furnished. The term invites case by case analysis, although the general guidelines that appear applicable should exclude cases where, for example, a person twenty-one or older fails to investigate the possibility that alcohol will be consumed on his or her property. There is also a question as to whether the defendant will have to have actual knowledge that the person served is under the age of twenty-one, or whether a good faith belief that the person being provided or furnished with alcohol is twenty-one or older is a defense to social host liability. There is also support for the conclusion that the statute requires actual knowledge of the age of the person. Both decision points are subject to debate, however.

When the window is cleared, other problems will have to be addressed by the courts. The courts will have to decide who is entitled to recover, against whom, and what defenses, if any, are available to common law claims brought against the providers or furnishers of alcohol. All three questions are potentially controversial, but resolvable based on the supreme court's own precedent, the legislative history underlying the 1990 amendment and the Civil Damage Act in general, and precedent from other jurisdictions. In time, the common law claim may permit recovery by only innocent third persons, or the courts may
decide that intoxicated persons under the age of twenty-one should also be entitled to recover.

The job of limiting the scope of the common law claim seems somewhat less complicated than the first question. The absence of any legislative intent to permit common law claims against either commercial vendors of alcohol or persons under the age of twenty-one limits liability to persons who are twenty-one and older.

The question of defenses presents problems, particularly if the courts decide that the person under twenty-one who becomes intoxicated and sustains injury, at least in part because of that intoxication, is entitled to recover. Contributory negligence may or may not be a permissible defense, depending on how closely the courts adhere to the teaching of Zerby v. Warren\textsuperscript{378} and the so-called “exceptional” statutes.

Irrespective of how these questions are decided, it is apparent that the differences between claims that are brought against commercial vendors of alcohol under subdivision 1 of section 340A.801, and social hosts under subdivision 6, may give rise to claims that the statutory scheme is unconstitutional because it creates an unreasonable classification. Wegan points to the problem, although it does not necessarily mandate the same conclusion that the legislative distinction appears to be the product of rational thought. If the legislation stands, it will permit a remedy for a long neglected social problem in Minnesota.

\textsuperscript{378} 297 Minn. 134, 210 N.W.2d 58 (1973).