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Torts—Minnesota's Civil Damages Act: Unanswered Questions

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I. INTRODUCTION

A man is visiting with friends and family at his sister's home. The next door neighbor is gone for the night, but the neighbor's teenage daughter is home having a party, serving alcohol to other minors. The man goes outside to check on his truck, and three of the partygoers confront him. He is punched in the face, knocked to the pavement, and as a rude.
result of head injuries, ultimately suffers short-term memory, balance, vision, hearing, and sense of smell deficiencies; treatment expenses exceed $100,000. His plans to one day manage the family-owned business are destroyed; a rehabilitation expert concludes he no longer is capable of that job. He is an innocent victim who has suffered extensive damages. Unfortunately for him, the teenage "host's" actions are encompassed within the Minnesota Civil Damages Act, the Minnesota Supreme Court interprets the Act to preclude such victim's rights to compensation.

Minnesota courts have precluded social hosts from liability under the Minnesota Civil Damages Act since 1982. In Koehnen v. Dufuor, the Minnesota Supreme Court had the opportunity to confine its interpretation of the Act to apply only to commercial vendors. However, the court failed to do so, basing its decision simply on precedent. By its holding, the court ignored the obvious difficulties in applying the Act exclusively to commercial vendors. The Koehnen case raised salient questions that the Minnesota Supreme Court refused to address in its interpretation of the case. Thus, other cases like Koehnen will continue to arise.

Part II of this note will begin by briefly describing how other states approach the issue of social host liability, and whether courts have interpreted various civil damage statutes consistently with Minnesota courts. Part II will continue with a discussion of the judicial and legislative history of Minnesota's Civil Damages Act. Part III of the note will closely examine the facts of Koehnen, and the court's opinion. Part IV will argue two main points. First, that the decision in Koehnen, although consistent with state precedent, leaves many questions unanswered with respect to the Civil Damages Act's language and true meaning. Second, that legitimate public policy concerns justify some degree of social host liability.

5. See id.
7. See Cole v. City of Spring Lake Park, 314 N.W.2d 836, 837 (Minn. 1982).
8. 590 N.W.2d 107 (Minn. 1999). Please note that the proper spelling of Dufuor is Dufour. See Appellant's Brief, Koehnen (No. C7-97-1820).
9. See Koehnen, 590 N.W.2d at 108.
10. See infra Part II.A.
11. See infra Part II.B.
12. See infra Part III.
13. See infra Part IV.A.
II. BACKGROUND

A. Social Host Liability on a National Level

Recently, numerous articles have surfaced addressing the applicability of dram shop laws to social hosts. While at least one commentator suggests that the majority of states do not recognize a statutory form of social host liability, this observance is not entirely accurate. Indeed, the majority of state legislatures have enacted some form of dram shop law. The language of the statutes varies by state. Some of the statutes specifically...
cally identify licensees as the party against whom an action can be brought. In contrast, other statutes, presuming the actual drinking of alcohol to be the problem, penalize alcohol consumption, rather than the sale. In any event, many states have established limited causes of action against parties who knowingly serve alcohol to either a minor or an adult who is obviously intoxicated. Therefore, one could argue that statutory social host liability does exist in limited circumstances.

Generally, however, courts have not recognized a third party, statutory cause of action against social hosts for the acts of intoxicated guests.

shop act unless alcohol is served to a person under the legal drinking age, a person who is obviously intoxicated, or a person who is forced or coerced to consume).

20. See Black's Law Dictionary 921 (6th ed. 1990) (defining "licensee" as "a person who has a privilege to enter upon land arising from the permission or consent, express or implied, of the possessor of land but who goes on the land for his own purpose rather than for any purpose or interest of the possessor.").


23. See Fla. Stat. Ann. § 768.125 (1997) (stating that a person who sells alcoholic beverages shall not be held liable unless that person willfully and unlawfully serves to minors); Idaho Code § 23-808, subd. 3 (1995) (stating that no liability will attach to any person who sold or otherwise furnished alcoholic beverages, unless they did so to a minor or a person who was obviously intoxicated); Ind. Code Ann. § 7.1-5-10-15.5 (West Supp. 1999) (stating that no liability will be attached to a "furnisher" unless that furnisher had actual knowledge of intoxication and the intoxication was a proximate cause of damages set forth in the complaint); Mont. Code Ann. § 27-1-710 (1999) (stating that a person or entity is not liable unless the person being served is a minor, obviously intoxicated, or the party forces a person into consuming alcohol).

24. See Beeson v. Scotes Cadillac Corp., 506 So. 2d 999, 1000-01 (Ala. 1987) (stating that social host liability directly contradicts legislative intent and judicial precedent); Andre v. Ingram, 210 Cal. Rptr. 150, 155 (Cal. Ct. App. 1985) (holding that a social host is not legally accountable for damages resulting from the consumption of alcohol); Johnston v. KFC Nat'l Management Co., 788 P.2d 159, 163 (Haw. 1990) (stating that no statutory cause of action exists for social host liability under Hawaii law); Heldt v. Brei, 455 N.E.2d 842, 844 (III. App. Ct. 1983) (holding an "uncompensated social host" not liable); Baxter v. Galligher, 604 N.E.2d 1245, 1246-47 (Ind. Ct. App. 1992) (affirming summary judgment for defendant in part because Indiana's Dram Shop Law shields individuals who provide alcoholic beverages from suit, unless the person drinking is obviously intoxicated and the intoxication is the proximate cause of the accident); D'Amico v. Christie, 71 N.Y.2d 76, 83-84 (N.Y. App. Div. 1987) (holding that no liability exists to third party where there was no expectation of profit from the sale of alcohol); Smith v. Merritt, 940 S.W.2d 602, 605-07 (Tex. 1997) (holding that to allow social host liability for serving persons over age 18 would be contrary to legislative intent). See
While a number of courts have recognized either a common law cause of action or liability based on the violation of liquor control statutes, courts have remained insistent upon applying their respective dram shop acts solely to commercial vendors.  

There are a number of reasons for courts’ reluctance to create social host liability pursuant to a particular dram shop law. First, courts argue that the determination of who will be held liable under a dram shop law is a legislative role, not a judicial one.  

Second, courts have identified alcohol consumption and not hosts’ furnishing of alcohol as the cause of injuries.

A third reason courts avoid social host liability is the inherent differences between social hosts and licensees. One difference is the licensee’s ability to spread the cost of liability, or alternatively, the cost of an

generally Raymond, supra note 14, at 47-60 (discussing the various methods of bringing a cause of action against social hosts in this context).

25. See Clendening v. Shipton, 196 Cal. Rptr. 654, 657-58 (Cal. Ct. App. 1983); Ashlock v. Norris, 475 N.E.2d 1167, 1169 (Ind. Ct. App. 1985); Kelly v. Gwinnell, 476 A.2d 1219, 1224 (N.J. 1984); Walker v. Key, 686 P.2d 973, 978 (N.M. Ct. App. 1984); see also Kenneth F. Lewis, Pennsylvania’s Limitations on Social Host Liability: Adding Insult to Injury?, 97 DICK. L. REV. 753, 759-60 (1993) (stating that most courts believe liability should be imposed by legislative action); Spring J. Walton et al., The High Cost of Partying: Social Host Liability for Fraternities and Colleges, 14 WHITTIER L. REV. 659, 662-64 (1993) (stating that dram shop acts have been enacted to impose liability on commercial vendors). The authors acknowledge that the possibility is remote for social hosts to be held statutorily liable to injured third parties for furnishing adult guests alcohol. See id. However, a social host will be far more likely to be held liable for furnishing alcohol to a minor through a liquor control statute. See id. at 664. See generally Weiner v. Gamma Phi Chapter of Alpha Tau Omega Fraternity, 485 P.2d 18, 23 (Or. 1971) (allowing a common law cause of action against a social host).

26. See Dowell v. Gracewood Fruit Co., 559 So. 2d 217, 218 (Fla. 1990); Koehnen v. Dufuor, 590 N.W.2d 107, 111-13 (Minn. 1999); D’Amico 71 N.Y.2d at 84; see also Lowe v. Rubin, 424 N.E.2d 710, 712-13 (III. App. Ct. 1981) (citing De Moulin & Whitcomb, Social Host’s Liability in Furnishing Alcoholic Beverages, 27 FED’N. INS. COUNSEL Q. 349, 357 (1977)). DeMoulin and Whitcomb state that the historic rationale in applying a dram shop law to taverns rather than social hosts has been the pecuniary gain that taverns receive by providing alcohol. See id. The authors continue by stating that while a commercial vendor may be required by statute to have insurance for dram shop liability, the social host does not have that requirement, and if the social host were found liable that person would have to absorb the cost that insurance or a bond would presumably cover if insurance or a bond were obtained by social hosts. See id.

27. See Lewis, supra note 25, at 759 (acknowledging that indeed, one of the recurring arguments against social host liability is that it is a legislative role, and not a judicial one, to deviate from the accepted norms of social host preclusion from liability).

28. See Johnson v. Helary, Inc., 342 N.W.2d 146, 148 (Minn. 1984); Robinson v. Lamott, 289 N.W.2d 60, 64 (Minn. 1979).

29. See Kelly, 476 A.2d at 1233 (Garibaldi, J., dissenting).
insurance policy, among its customer base. A social host on the other hand would be forced to bear the burden of liability alone. Second, a licensee has more experience with the effects of alcohol on customers and therefore is better able to deal with intoxicated persons. This argument suggests that the bartender, who presumably deals with the alcohol-consuming public every day, is more experienced than the social host in determining levels and degrees of intoxication. A final difference focuses on the control licensees and social hosts exercise in furnishing alcohol. In a bar or restaurant setting, a bartender or the wait-staff serve alcohol to the customer. Contrarily, in a social setting, guests serve themselves, and often, the social hosts drink with their guests. Consequently, the social host may be unaware of those who are intoxicated.

One final argument against social host liability posits that litigation will increase if the cause of action is recognized. To be sure, the notion of a potential lawsuit creates a struggle for social hosts to determine what safeguards must be maintained to avoid liability. For example, citizens may begin to search for homeowner’s insurance policies that cover liability for incidents that result from a social gathering. Additionally, social hosts might have to refrain from drinking, or closely monitor the furnishing and consumption of alcohol. These arguments present policy concerns that courts must consider prior to making decisions on social host liability pursuant to a dram shop law.

1. Utah’s Social Host Liability—Stephens v. Bonneville

While the current legal attitude denying adult social host liability seems to be clear, this sentiment has not always been reality. Recently, Utah departed from the norm, recognizing adult social host liability pursuant to its dram shop law.

30. See id. at 1234.
31. See id.
32. See id. at 1233.
33. See id. at 1234.
34. See id.
35. See id.
36. See id.
37. See id.
39. See id. at 304.
40. See Ross v. Ross, 294 Minn. 115, 122, 200 N.W.2d 149, 153 (1972) (holding that indeed there was statutory social host liability); see also Williams v. Klemesrud, 197 N.W.2d 614, 615-16 (Iowa 1972) (holding that statutory social host liability exists).

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In *Stephens v. Bonneville*, the Utah Supreme Court held that the state dram shop law imposes potential liability on "any person" who provides "liquor" to any person enumerated in the act at prescribed locations. While Utah has not extended social host liability to those that serve beer in a social setting, the court's rationale in applying the limited social host liability to those who serve liquor is important. In rendering its decision, the court cited the clear and unambiguous language of the statute as the main reason for applying social host liability. In particular, the court identified two aspects of the statute that were dispositive. First, the court cited the words "give" and "otherwise provide" as words that apply to social hosts and commercial establishments alike. Not surprisingly, the Utah Supreme Court adopted the same rationale as the Minnesota Supreme Court in *Ross v. Ross*. The court stated that the words "give" and "otherwise provide" are actions that would apply to social hosts, while words like "sell" would most likely implicate a commercial establishment. Second, the Utah Supreme Court recognized clearly and unambiguously that "any person" might be liable. The language does not specifically limit the statute's application to commercial establishments. Therefore,

42. See id.
44. See *Stephens*, 935 P.2d at 522. The Utah Supreme Court did make a distinction between "any person" that sold liquor and "any person" that sold beer. See id. at 520-21. The court used the definitions given to the terms "liquor" and "alcoholic beverages" by the Alcoholic Beverage Control Act (ABCA) when analyzing its dram shop law. See id. The court stated that "alcoholic beverages" were statutorily defined to include both "liquor" and "beer," and that the term "liquor" was defined to exclude "beer." In *Sneddon v. Graham*, the court of appeals rejected the plaintiff's claim for social host liability because the defendant had served beer rather than alcohol, and the plain language of the statute did not permit social host liability with respect to the service of beer. See *Sneddon*, 821 P.2d 1185, 1188 (Utah Ct. App. 1991).
45. See *Stephens*, 935 P.2d at 522.
46. See id. at 521-22. This portion of the decision was articulated in response to the defendant's claim that Utah's dram shop act was intended to apply strictly to those in commercial establishments because the word dram shop (which means a drinking establishment where beer is sold, i.e., bar or saloon) appears in the title of the statute. See id. at 521. The court stated that only in the wake of ambiguous language should it take into consideration what the title of the statute states. See id. at 521-22. The court stated that since the language is not ambiguous and the plain language of the statute is clear, the court found it "inappropriate" to apply the statute to just bars and saloons. See id. at 522.
47. See id. at 522.
48. See id.
49. 294 Minn. 115, 121, 200 N.W.2d 149, 153 (1972); see also *Stephens*, 935 P.2d at 522.
50. See *Stephens*, 935 P.2d at 522.
51. See id.
52. See id.
the court held that the statute was not restricted to commercial vendors. 53

In contrast to Utah, the current trend in other states has been, and continues to be, social host preclusion from liability pursuant to dram shop laws. However, courts that follow precedent, without addressing ambiguous statutory language or policy concerns, leave third parties ignorant of their rights and social hosts unaware of their obligations. With its holding in Koehnen, the Minnesota Supreme Court made this contention reality in Minnesota.

B. Legislative History of the Minnesota Civil Damages Act

The Act currently states: "[a] spouse, child . . . or other person injured . . . has a right of action . . . against a person who caused the intoxication of that person by illegally selling alcoholic beverages." 54 The legislative history leading up to this language features a number of significant developments.

Minnesota's Civil Damages Act was first enacted in 1911. 55 Originally, the statute stated that any person who provided liquor to another might be liable for damages to a third party. 56 The statute never specifically defined "any person," and gave no indication that the intent of the statute was to apply to any particular group or entity. 57

For the next sixty years, the Act remained virtually unchanged. By 1972 in the Ross decision, when the court faced its first real challenge 58 to the statute's language, the statute stated specifically that "[e]very person who is injured . . . by any intoxicated person . . . has a right of action . . . against any person who, by illegally selling, bartering or giving intoxicating liquors, caused the intoxication of such person, for all damages

53. See id. It is important to also note that the defendant asserted a public policy argument against applying liability to social hosts. See id. The defendant argued that the increase in litigation should be avoided unless the legislature is unmistakably clear of its intentions to do so. See id. Conversely, the author of the concurrence stated that it seems a more coherent social policy to apply dram shop sanctions equally to all alcoholic beverages instead of just liquor. See id. at 523 (Zimmerman, C.J., concurring).


55. See Act of Apr. 18, 1911, ch. 175, 1911 Minn. Laws 221; Ross v. Ross, 294 Minn. 115, 119, 200 N.W.2d 149, 151 (1972); Michael K. Steenson, With the Legislature's Permission and the Supreme Court's Consent, Common Law Social Host Liability Returns to Minnesota, 21 WM. MITCHELL L. REV. 45, 53 n.38 (1995) (recognizing that the Civil Damages Act gave a cause of action against persons as well as liquor businesses).

56. See Ch. 175, 1911 Minn. Laws at 221.

57. See id. After researching the circumstances surrounding the adoption of the 1911 Civil Damages Act, the Minnesota Supreme Court concluded that the Act applied to "every violator whether in the liquor business or not." See Ross, 294 Minn. at 121, 200 N.W.2d at 152-53.

58. See infra notes 74-77 and accompanying text.
sustained. In 1977, five years after the Ross decision, the legislature amended the Act. The amendment removed the word “giving” from the statute. As a result, the Act stated, “[e]very . . . person who is injured . . . by any intoxicated person . . . has a right of action against any person who, by illegally selling or bartering intoxicating liquors, caused the intoxication of such person.” At lease one commentator has suggested that the removal of the word “giving” released social hosts from liability pursuant to the Act.

In 1985, the legislature repealed and replaced the 1977 Civil Damages Act with a new Act. In that same year, the legislature amended the Act. The new Act no longer included the word “barter,” and instead, stated that only a person that “illegally sold” alcoholic beverages could be liable. The pertinent section of the statute then read, “[a] spouse, child . . . or other person injured . . . by an intoxicated person . . . has a right of action . . . for all damages sustained against a person who caused the intoxication of that person by illegally selling alcoholic beverages.” This change stemmed from a case involving the specific meaning of the word “barter.” As a result of the amendment, there was no longer a need for the court to define “barter” in this context.

In 1990, the legislature made a last major amendment to the Act. The legislature added subdivision six to the statute, which allows a party to bring a common law cause of action against “any person 21 years old or older who knowingly provides or furnishes alcoholic beverages to a person under the age of 21 years.” The 1990 amendment is an important change to the statute. A commentator has suggested that “[s]ubdivision 6 should be interpreted to bring back social host liability, at least in the case

60. The Ross decision interpreted the statute to say that social hosts will be liable under the Act. See Ross, 294 Minn. at 117, 200 N.W.2d at 150.
62. See id.
63. Id.
64. See Kathy T. Graham, Liability of the Social Host for Injuries Caused by the Negligent Acts of Intoxicated Guests, 16 Willamette L. Rev. 561, 568 (1980) (suggesting that the removal of the word “giving” from Minnesota’s dram shop act makes it clear that the Act only applies to the seller of alcoholic beverages and not to a social host).
66. See id.
67. See id.
68. Id.
69. See Cady v. Coleman, 315 N.W.2d 593, 596 (Minn. 1982) (holding that the Act applied only to those in the business of providing liquor, and not those social hosts who happened to receive consideration for providing alcohol to guests).
70. Minn. Stat. § 340A.801, subd. 6 (1990) (emphasis added).
of minors . . . .”71 Similarly, another commentator has stated that the legislature’s amendment is abruptly different from its previous actions regarding civil liability for injuries arising from the sale of alcohol.72 Irrespective of theories regarding the 1990 amendment’s purpose, it has provided a tool for innocent third parties to recover from the party that provided the alcohol whether or not that party had a license to sell alcohol.

C. Judicial History of the Minnesota Civil Damages Act

The statutory amendments, and their subsequent judicial interpretations, were important aspects of the Koehnen court’s decision.73 Of particular significance was the court’s interpretation regarding social hosts, minors, and the words and phrases “giving,” “barter,” “illegal sale” and “other persons.” Previously, the Minnesota Supreme Court in Ross v. Ross74 had held that “any person” who illegally gave or sold liquor to another person could be liable under the Minnesota Civil Damages Act for damages resulting from the transaction.75 The court noted that the Act applied only to illegal transactions, therefore it was not unreasonable to assume the legislature’s intentions were to include persons other than commercial vendors.76 The Ross decision marked the first time the court held a “social host” liable for damages to another person pursuant to the Act.77

Since then, the court has been reluctant to apply the Act to “any person” other than a commercial vendor.78 In Cole v. City of Spring Lake Park,79 the court held that the 1977 amendment removing the word “giving” was legislative activity indicating that social hosts were immune from liability under the Act.80 In rendering its decision, the Cole court considered the

72. See Steenson, supra note 55, at 46 (commenting that subdivision six is yet another attack on the narrow scope of the Act).
73. See Koehnen v. Dufuor, 590 N.W.2d 107, 109-13 (Minn. 1999) (citing judicial history as precedent for its decision).
74. 294 Minn. 115, 200 N.W.2d 149 (1972).
75. See id. at 119, 200 N.W.2d at 151 (emphasis added).
76. See id. at 121, 200 N.W.2d at 153 (emphasis added).
77. See id. The Ross opinion stated that the only Minnesota case which had dealt with an action against a defendant that was not in the liquor business was Dahlin v. Kron, 232 Minn. 312, 45 N.W.2d 833 (Minn. 1950). See Ross, 294 Minn. at 119, 200 N.W.2d at 152. The Ross opinion also discussed the fact that the language of the Act, which included “any person,” meant that the legislature intended to include other persons outside of the liquor business. See id. at 121, 200 N.W.2d at 153.
78. See Cady v. Coleman, 315 N.W.2d 593, 596 (Minn. 1982); Cole v. City of Spring Lake Park, 314 N.W.2d 836, 840 (Minn. 1982).
79. 314 N.W.2d 836 (Minn. 1982).
80. See id. at 840.
The court concluded that the Senate language indicated that the legislature was cognizant of the \textit{Ross} decision, and purposefully proposed the amendment, abrogating the court's interpretation in \textit{Ross}. Three weeks after the \textit{Cole} decision, in \textit{Cady v. Coleman}, the court stated that the legislative intent to restrict liability only to commercial vendors was clear based on the deletion of the word "giving." This holding furthered the \textit{Cole} court's interpretation of the Act.

Further, in \textit{Holmquist v. Miller}, while addressing the issue of providing minors with alcohol, the court held that a social host was not liable in a common law action for negligently serving alcohol to a minor. The court stated that the Act preempted the field of social host liability.

In 1989, the court, in response to the 1985 amendment that removed the word "barter" from the statute, articulated a test for determining what constitutes an illegal sale. However, the court never defined the word "illegal." This is an important distinction since the illegal sale test applies generally to Chapter 340 of the Minnesota statutes, and not specifically to the Civil Damages Act.

Recently, the Minnesota Supreme Court again revisited the Civil Damages Act. Unlike the previously discussed judicial interpretations,
this time the court was asked to interpret the initial clause of the Act, specifically, “what persons” can bring a third-party claim pursuant to the Act. In *Lefto v. Hoggsbreath Enterprises, Inc.*, the court held that a fiancée fell into the category of “other person,” and therefore was entitled to bring a cause of action for damages. The court used two arguments to reach its decision. 

First, the court defined the meaning of the words “other person” in the Act. In this particular section of the Act, “other person” is defined as any other person injured by the intoxication of another and who played no role in causing the intoxication. The court then concluded that since the fiancée and her daughter were clearly innocent third parties that played no role in causing the accident, they fit into the category of “other person,” and therefore, could bring a cause of action.

More important, however, was the court’s discussion regarding the Act’s overall purpose and meaning. The court stated, “the intent and purpose [of the Act] are clear. The mischief to be suppressed is the illegal furnishing of liquor causing a person’s intoxication and the remedy to be advanced is the protection of innocent third persons injured as a result by providing those persons a claim of civil damage.”

The *Lefto* and *Ross* decisions are consistent with the true meaning of the Act. Both decisions focused on construing the Act liberally. However, with the exception of *Lefto*, the cases interpreting the Act after the *Ross* decision seem to do so conservatively. As a result, social hosts

92. See id.
93. 581 N.W.2d 855 (Minn. 1998).
94. See id. at 857-58.
95. See id.
96. See id. at 857. The court refused to embrace the Appellant’s argument that suggested the court utilize the concept of *ejusdem generis* from the canons of construction to define “other person.” See id. at 856-57 (quoting MINN. STAT. § 645.08, subd. 3 (1996) (stating that general words are construed to be restricted in their meaning by preceding particular words)). Since the court found that the terms in the statute were not ambiguous, there was no need to apply *ejusdem generis*. See id.
97. See id.
98. See id.
99. See id.
100. Id.
101. See id; Ross v. Ross, 294 Minn. 115, 120, 200 N.W.2d 149, 152 (1972) (recognizing that the construction of the Act should be liberal, to suppress the mischief and advance the remedy); see also Hahn v. City of Ortonville, 238 Minn. 428, 436, 57 N.W.2d 254, 261 (1953) (stating that “person” applied to municipalities under the Act).
102. See *Lefto*, 581 N.W.2d at 857; *Ross*, 294 Minn. at 120, 200 N.W.2d at 152.
103. See Cady v. Coleman, 315 N.W.2d 593, 596 (Minn. 1982) (stating that the legislature’s intent to restrict liability under the Act to commercial vendors was sufficiently clear with their removal of the word “giving”); Cole v. City of Spring
remain immune from statutory liability under the Minnesota Civil Damagest Act. Koehnen v. Dufuor, another example of conservative interpretation of the Act, is the most recent case to preclude social host liability pursuant to the Act.

III. THE KOEHNEN CASE

A. The Facts

Rachel Paul, at the age of seventeen, hosted a party at her father's house on September 20, 1991. An adult bought a keg of beer for Paul's party. Paul charged each person that came to her party between $2 and $4 for a glass. The guests were then allowed unlimited refills of beer using their glasses. Although Paul invited some of her friends, there were many uninvited guests in attendance.

On the same evening, Joseph Koehnen was visiting his sister at her house, which was near Rachel Paul's home. During the evening, Koehnen went outside to check on his truck parked in his sister's driveway. Three of Paul's uninvited guests were leaving the party and confronted Koehnen. One of the guests punched Koehnen in the face, causing him to hit his head on the pavement. As a result, Koehnen sustained severe injuries.

Joseph Koehnen sued Rachel Paul alleging a violation of the Minnesota Civil Damages Act. The district court granted Paul's motion for

Lake Park, 314 N.W.2d 836, 840 (Minn. 1982) (stating that the removal of the word "giving" is legislative activity that mandates an interpretation precluding social hosts from liability under the Act and refusing to address the underlying purpose of the statute articulated in Ross and Hahn); see also Koehnen v. Dufuor, 590 N.W.2d 107, 112-13 (Minn. 1999) (holding generally that the court must follow precedent based on the Cole and Cady decisions and the court’s interpretation of the legislative intent surrounding the Act).

104. See Koehnen, 590 N.W.2d at 113.
105. See id.
106. See id. at 108.
107. See id.
108. See id.
109. See id.
110. See id.
111. See id.
112. See id.
113. See id. The names of the three uninvited guests were David Ray Anderson, Gil Bukrinsky and Daniel R. Dufour. See id.
114. See id.
115. See id.
116. See id. Joseph Koehnen also sued Rachel Paul's parents, Daniel Dufour and his parents, Gil Bukrinsky and his father, and David Ray Anderson on various theories of negligence. See id. All of these suits were settled except the claims
summary judgment holding that the statute only applied to “commercial vendors,” and that since Paul was a social host, she was immune from liability. The court of appeals affirmed the district court’s judgment.

B. The Minnesota Supreme Court’s Analysis

The Minnesota Supreme Court affirmed the decision of the court of appeals. The court stated that precedent and the principle of the separation of powers dictated the result. The court declined to further interpret the Act, stating that the legislature, not the court, should decide whether to revisit the Act. To a certain extent, the court also discussed the historical interpretation of the Act. While the court recognized subdivision six, the court stated that the subdivision was a creature of the legislature, and reemphasized its reliance on the Cady decision. The court stated that Cady “unequivocally” limited the Act’s application to commercial vendors. It continued by stating that since there has been no legislative response to the Cady decision, there is no doubt that the Civil Damages Act is limited to commercial vendors. Additionally, the court confirmed the district court’s position that since Paul was a social host, she was immune from liability under the Act.

IV. ANALYSIS

A. The True Spirit of the Act

While Koehnen arguably follows precedent, the reach of the court’s

117. See id.
118. See id.
119. See id. at 113 (referring to Ross as the basis for stating that it is the legislature’s job to determine the reach of the Act); see also Cady v. Coleman, 315 N.W.2d 593, 596 (Minn. 1982) (explaining that the Act applies to any “person in the business of providing liquor, and not a social host who happens to receive some consideration from his guests in return for drinks he provides”); Cole v. City of Spring Lake Park, 314 N.W.2d 836, 837 (Minn. 1982) (holding that the Act “preempted any action against social hosts who give liquor to guests”).
120. See Koehnen, 590 N.W.2d at 113.
121. See id.
122. See id. at 109-12.
123. See id. at 111-12.
124. See id. at 112.
125. See id.
126. See id. at 113.
127. See id. at 112 (stating that when a court of last resort has construed the language of a law the legislature in subsequent laws on the same subject matter intends the same construction to be placed upon such language). The legislature thus presumptively adopted the Cole and Cady rulings since there has been no
analysis is insufficient; it ignores the true spirit of the Act, namely, protecting innocent third parties from injury.\(^{128}\)

The court’s reliance on the Cole and Cady decisions triggered the Koehnen result.\(^{129}\) The Cole court held that the Act preempted any action against social hosts.\(^{130}\) However, the Cole court refused to embark on the subject of whether a social host who sold alcohol could be held liable.\(^{131}\) This subject is an important concept since Rachel Paul did sell alcohol, and did not merely give it away. The Cady holding stated that liability applied to any person in the business of providing liquor, not a social host who happens to receive consideration.\(^{132}\) Unlike Koehnen however, the Cady holding is mired in the facts of a barter between an attorney and his client.\(^{133}\) Furthermore, the holding in Cady addresses the issue of consideration, not social host liability.\(^{134}\)

In addition to relying on Cole and Cady, the Koehnen court relied heavily on the legislative history of the Act.\(^{135}\) However, the court’s reticence regarding subdivision six and the fact that adult “social hosts” now can be liable under a theory of common law negligence,\(^{136}\) is disconcerting at best.

The principle of “separation of powers” dictates that the role of the amendment to the contrary. See id.

128. See e.g., Lefto v. Hoggsbreath Enters., Inc., 581 N.W.2d 855, 857 (Minn. 1998) (stating that the intent and purpose of the Act is the protection of innocent third persons).

129. See Koehnen, 590 N.W.2d at 110, 113.

130. See Cole v. City of Spring of Spring Lake Park, 314 N.W.2d 836, 837 (Minn. 1989) (relying on the analysis of the history of the Act, including the 1977 amendment); see also Graham, supra note 64, at 568 (suggesting that the legislature did not intend social host liability).

131. See generally Cole, 314 N.W.2d at 839 (stating that the majority of cases involve the sale of alcohol). But see Ross v. Ross, 294 Minn. 115, 220, 200 N.W.2d 149, 152 (1972) (explaining that it was not the court’s prerogative to amend the Act to include those not in the liquor business in their pre-1977 amendment ruling).

132. See Cady v. Coleman, 315 N.W.2d 593, 596 (Minn. 1982) (stating that the legislative intent clearly restricts the Act to apply only to commercial vendors).

133. See id. at 594-96. The facts of the case involve an attorney who began buying drinks for his client after a round of golf. See id. at 594. The attorney claimed to have purchased the drinks in exchange for continued client referrals. See id. at 595. The court stated in dicta that it would be illogical to impose liability under the Act because it would be difficult in a social setting to determine whether a sale or barter was consummated. See id.

134. See id. at 596.

135. See Koehnen, 590 N.W.2d at 112 (stating that where the legislature has perceived the court’s holding to stray from the actual intent of the statute, the legislature has reacted in the past by amending the Act).

136. See id. (stating that the 1990 amendment to the Act did not alter the Cady holding).
legislative body is to create and adopt laws; the judicial branch's role is to interpret laws based on legislative intent and legal precedent. Following this principle, based on the plain language of the statute as well as the true intent of the Act, Rachel Paul should have been held liable for her actions. Case law is clear in professing that if the statute is ambiguous; it is the court's job to utilize legislative intent to determine the meaning of the provision of the statute. However, the case law also holds that if the statute is unambiguous, it is not the court's role to challenge the wisdom of the legislature. In this case "illegal sale" is unambiguous, and the meaning does not apply to merely commercial vendors. It is illogical, based on the clear, unambiguous language of the statute, to conclude that the removing the word "giving" precludes unlicensed individuals who illegally sell alcohol from liability under the statute. If the legislature wants to make the statute applicable to only commercial vendors, that intent should be expressly stated, and the courts should interpret accordingly.

While the Koehnen court relied heavily on the Cole and Cady decisions in rendering judgment, it completely ignored Rambaum v. Swisher, and its "illegal sale" test. The Rambaum court developed a four-prong test to determine whether a liquor sale is illegal. The first prong asks whether the liquor sale was a violation of Minnesota Statute section 340A. If so, the court then asks whether the violation was substantially related to the mischief sought to be suppressed, and the remedy sought to be advanced, by the Act. The final two prongs involve causation questions not relevant to this analysis. The Rambaum court applied the test to a fraternal club's liquor sale to a non-member or non-guest, who subsequently in-

137. See MINN. CONST. art. III, § 1.
138. See In re Fairview-Univ. Med. Ctr., 590 N.W.2d 150, 153 (Minn. Ct. App. 1999) (stating that the court's role is to discover and effectuate the legislature's intent); see also State v. R.S.J., Inc., 552 N.W.2d 695, 701 (Minn. 1996) ("[i]f the legislature's intent is clearly manifested by [the] plain and unambiguous language of the statute, statutory construction is neither necessary nor permitted.").
139. See MINN. STAT. § 430A.801, subd. 1 (1998).
140. See Olson v. Ford Motor Co., 558 N.W.2d 491, 496 (Minn. 1997) (stating that the court's role is not to challenge the wisdom of the legislature, but "to give effect to its will as expressed in the unambiguous language of the statute"). But see Stawikowski v. Collins Elec. Constr. Co., 289 N.W.2d 390, 395 (Minn. 1979) (stating that when the language of the statute is ambiguous, the court's role is to "ascertain and effectuate the intention of the legislature").
141. See Stawikowski, 289 N.W.2d at 395.
142. See Olson, 558 N.W.2d at 496.
143. See Rambaum v. Swisher, 435 N.W.2d 19, 21 (Minn. 1989); see also supra text accompanying notes 88-90.
144. See Rambaum, 435 N.W.2d at 21 (holding that a club sale to a non-member or non-guest was an illegal sale for dram shop purposes).
145. See id.
146. See id.
147. See id; see also supra note 88.
jured a third person. However, in articulating this standard, the court did not specifically limit the test's application solely to commercial vendors, despite the Koehnen court's contention in this regard. The test's first prong is evidence that the "illegal sale" test may be applied to persons other than commercial vendors. It asks whether the sale violates Minnesota Statute chapter 340A generally, and is not specific to a particular section of the chapter. Despite this precedent, the Koehnen court refrained from applying that case's facts to the Rambaum test. Furthermore, the court chose not to define "illegal" or "illegal sale" in this context (assuming the court believed that the Rambaum test applied only to commercial vendors), despite the fact that those definitions are at the crux of the debate.

Rachel Paul committed an illegal act. She was a minor. She sold alcohol without a license. She sold alcohol to other minors. Such behavior is, by definition, illegal.

148. See Rambaum, 435 N.W.2d at 20.
149. See id. at 22.
150. See Koehnen v. Dufuor, 590 N.W.2d 107, 111 (Minn. 1999).
151. See Rambaum, 435 N.W.2d at 21. The court held that its application of the test is limited to club licenses under Minnesota Statute section 340A.404, subdivision one, clause three. See id. at 22.
152. See Holmquist v. Miller, 367 N.W.2d 468, 471-72 (Minn. 1985); see also BLACK'S LAW DICTIONARY 747 (6th ed. 1990) (defining "illegal" as "[a]gainst or not authorized by law").
153. See Koehnen, 590 N.W.2d at 108.
154. See id.
155. See id.
156. See MINN. STAT. § 340A.503, subd. 2(1) (1998) (stating that it is unlawful for any person to sell, barter or furnish alcoholic beverages to a person under the age of 21); see also MINN. STAT. § 340A.701 (1998) (amended 1999) (making it a felony to sell alcoholic beverages to an underage purchaser who becomes intoxicated and causes or suffers death or harm). Subdivision one, clause four now states that it is a felony, "for a person other than a licensed retailer... to violate the provisions of 340A.503, subdivision two, clause one, if the underage person to whom the alcoholic beverage was sold, bartered, given, or furnished becomes intoxicated and causes or suffers death or great bodily harm as a result of the intoxication." MINN. STAT. § 340A.701 (effective Aug. 1, 1999) (emphasis added). The proposed bill, which eventually became law, was a response to a 1997 New Year's Eve incident. See Furnishing Alcohol to a Minor: Hearing on H.F. 261 Before the Crime Prevention Committee, 81st Sess., 21st Meeting (Minn. 1999). That incident involved an adult who provided alcohol to minors, one of who left the party and died in an automobile crash. See id. The Ramsey County Attorney's Office was frustrated by the fact that under current law it could only prosecute the adult for a gross misdemeanor since he did not charge the minor for the alcohol. See id. Persons testifying in support of the bill [House File 261], included a father whose daughter died of alcohol poisoning and the father of the minor who died in the 1997 New Year's Eve automobile accident. See id. The fathers' testimony centered on the tragedy of losing a child and the emotional immaturity of teenagers. See id. Although the bill was not a M.A.D.D. initiative, it was supported by the organization.
Recently, the Minnesota Legislature amended Minnesota Statute section 340A.701 making it a felony to sell alcoholic beverages to an underage purchaser who becomes intoxicated and causes or suffers death or harm. The legislature broadened the language of subdivision one, clause four to include the words "barter," "give" and "furnish." Given current Minnesota precedent with regard to the word "give," its inclusion means a social host can now be charged with a felony rather than a gross misdemeanor for providing alcohol. With this new amendment as well as the 1990 subdivision six amendment of the Act, the legislative branch of government is becoming more aware of social host responsibility with respect to furnishing alcohol. The Minnesota Legislature is slowly approaching the day when it must embark upon a meaningful discussion of another extension of social host liability pursuant to Minnesota Statute section 340A.801, subdivision six.

As already mentioned, the court recently interpreted the meaning of the phrase "other person," referencing who can bring a cause of action pursuant to the Act. The court stated that the repeated view regarding the interpretation of the Act is one of liberal construction to suppress mischief and advance the remedy. Despite the cases that identify with the Lefto opinion, the Koehnen court chose a different, much more conservative approach. The court's conscious choice of narrowly construing the Act so as to impliedly define "illegal sale" as one that applies only to commercial vendors contradicts the Act's purpose as well as the canons of construction. Further, the court's holding does not comport with its recent interpretation of the Act in Lefto, which was rendered merely one year prior to Koehnen.

An additional problem with the court's analysis is the supposition that Rachel Paul was in fact a social host. Without defining the term, the court presumably concluded that since Paul was seventeen at the time of the party, and that some of the guests were her friends, she automati-

See id. At the Committee hearings, there was some debate as to the meaning of the word "furnish" in the statute's context. See id. It is also interesting to note that on the same day House File 261 (the bill that ultimately became law) was being heard, House File 1004, a bill proposing lowering the per se level for alcohol impairment from .10 to .08 was heard. See id.

158. See id.
160. See id. (stating that the Act was intended solely to protect innocent third parties); see also Herrly v. Muzlik, 374 N.W.2d 275, 278 (Minn. 1985) (espousing the same sentiment as the Lefto court in that the interpretation of the Act should be constructed liberally).
161. See Ross v. Ross, 294 Minn. 115, 120, 200 N.W.2d 149, 152 (1972); MINN. STAT. § 645.16 (1998) ("[T]he letter of the law shall not be disregarded under the pretext of pursuing the spirit.").
162. See Koehnen v. Dufuor, 590 N.W.2d 107, 114 (Minn. 1999).
The court justified its position on this issue by specifying that Paul made only $70. However, the fact that Paul profited (even if only by $70) from the event should not have been a factor in the court’s decision. The plain text of the statute states, “illegally selling alcoholic beverages.” Paul illegally sold alcoholic beverages. Thus, the Act applies to her conduct.

The legislature’s amendment after the Ross decision removed only the word “giving.” The court’s subsequent decisions have reflected the intent of the legislature by denying recovery in instances where alcohol is simply given away. But in this case, the occurrence of a sale is indisputable. Rachel Paul did not simply give away the beer, and, as a result, she could not have been considered a social host.

Finally, the court placed an enormous amount of weight on the fact that the legislature has not reacted to its interpretation of the statute for seventeen years. However, the legislature’s inaction, even though the Cady and Cole decisions remain law, may be evidence that the term “person” cannot mean or refer only to commercial vendors.

The court’s inaction is indicative of two possible realities. The first is that the legislature is content with the way in which the court has interpreted this portion of the Act. As a result, the Minnesota Supreme Court likely is comfortable relying on lower courts to recognize legal precedent for a consistent interpretation of the Act in the future. Contrarily, the legislature’s inaction could mean that to this point in the statute’s history, neither the court nor the legislature has been confronted with a factual situation where a person other than a commercial vendor could be held liable.

163. See id. See generally Cole v. City of Spring Lake Park, 314 N.W.2d 836, 837 (Minn. 1982) (applying the term “social host” to a sister who gave her brother beer, to an individual who gave guests free beer, to a guest at a party where a few people contributed to the cost of the beer, and to an individual who served alcohol at a wedding reception). The Cole case is distinguishable from Koehnen in that Paul sold the cups of beer to every person that came to the party. See Koehnen, 590 N.W.2d at 108. In fact, she designated another person to handle the cups and sell them at either $2 or $4. See id. The facts in Cole and Cady demonstrate the difficulty in determining whether an illegal sale has occurred in a social setting. However, in this case it is uncontroverted that Paul sold cups to every person at the party, thus making it quite easy for the court to determine whether a sale actually occurred. See id.

164. See Koehnen, 590 N.W.2d at 112 n.38.

165. See id. at 113 (Page, J., dissenting) (“[A]n illegal sale is an illegal sale is an illegal sale . . . .”).

166. See MINN. STAT. § 340A.801, subd. 1 (1990).

167. See MINN. STAT. § 340.95, subd. 1 (1978).

168. See Koehnen, 590 N.W.2d at 108.

169. See id. at 112 (citing to the legislature’s response after the Ross decision, and distinguishing that decision with the realization that the legislature has yet to react to the court’s holding in Cady, which was decided 17 years before).
If the prior is the case, the legislature could put an end to future uncertainty and litigation by merely changing the wording of the Act to apply specifically to “any commercial vendor.” If the latter is the case, the legislature’s silence on this point may be that “a person” does not necessarily mean “a commercial vendor.” We know from the *Lefto* decision that the term “person,” in clause one was given a liberal interpretation to mean any other person injured by intoxication.170 Logically, a word cannot have two different meanings in the same document. However, according to the *Lefto* and *Koehnen* interpretations of the Act, the court gives dual meaning to the same term within the statute.

In short, there are a number of steps that both the Minnesota Legislature and Minnesota Supreme Court could take to ensure predictability with respect to the Act’s interpretation. That is, the legislature could define the term social host specifically for purposes of the Act’s interpretation and/or amend the Act to apply solely to “commercial vendors.” Likewise, the supreme court could limit the *Rambaum* court’s definition of “illegal sale” to the Act specifically. Until the legislature or court takes the suggested action cases similar to *Koehnen* will continue to emerge.

B. Public Policy Rationale for an Expansion of Social Host Liability

There are legitimate public policy concerns that support an expansion of social host liability. The first portion of this section will discuss some of the important concerns that must be weighed when considering expansion. The second section addresses the “floodgates of litigation” argument that critics continuously assert when an expansion of social host liability is considered.171 The final portion of this section proposes an amendment to Minnesota’s Civil Damages Act that would expand social host liability. The discussion will articulate why an adoption of this proposal, or one similar to it, would be effective.

1. The Statistics

Traffic accidents involving alcohol are highly publicized and most often linked to discussions of toughening alcohol-related laws. Traffic accidents are the single greatest cause of death for persons between the ages of five and twenty-seven.172 Of those crashes, nearly half are alcohol-related.173 It is estimated that 2.6 million drunken driving-related offenses

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171. *See* Charles v. Seigfried, 651 N.E.2d 154, 160-61 (Ill. 1995) (recognizing that if social host liability were to exist, the court would be asked to answer far too many questions with respect to the Illinois dram shop law’s scope).
173. *See id.*
victimize 4 million people either by personal injury or property damage yearly. Proportionately, drivers aged twenty-one through twenty-nine drive the greatest number of their miles while drunk. These statistics are unfortunate realities concerning drinking and driving. Despite the grave situation these statistics suggest, state legislatures seem content with current solutions.

The enactment and enforcement of various dram shop laws indicates a legislative judgment that alcohol vendors should bear a portion of the responsibility for providing safety from alcohol-related incidents. In addition, more than 2300 anti-drunk driving laws have been passed in the nation since 1980. Despite these perceived panaceas, alcohol-related fatalities and injuries continue to occur. The recent decline of alcohol-related deaths is laudable. Nonetheless, improvement in gruesome statistics should not suggest that the fight to save more lives should end. On the contrary, any decrease in lives lost should serve as a catalyst for state legislatures to take an even more proactive role in reducing fatalities and protecting injured third parties.

Minnesota is one of the leading states in terms of the lowest percentage of alcohol-related fatalities on the highways. Of the 600 traffic fatalities in Minnesota in 1997, 193, or 32.2% of those were alcohol-related. That number is down from the 1996 total, when 218 alcohol-related fatalities were reported on Minnesota highways. Again, the decrease in the numbers of alcohol-related fatalities is commendable. However, the improved numbers are of little comfort to families that have suffered losses.

One intention behind an expansion of social host liability is deterrence. If stringent penalties are enforced regarding social host liability,

174. See id.
175. See id.
176. See supra note 18.
180. See id.
182. This author is not suggesting that the institution of social host liability to those that serve alcohol to adults will solve all alcohol-related problems. Merely, that it can serve as a useful deterrent to people hosting social gatherings where drinking is involved.
more people may act responsibly because of the threat of liability. However, the social policy concerns involved run much deeper. Indeed, many believe that the law must address the innocent victims' need to be adequately compensated for losses resulting from alcohol-related injuries.\textsuperscript{183} As Chief Justice Wilentz appropriately stated in \textit{Kelly v. Gwinnell}:\textsuperscript{184}

[W]hile we recognize the concern that our ruling will interfere with accepted standards of social behavior; will intrude on and somewhat diminish the enjoyment, relaxation, and camaraderie that accompany social gatherings at which alcohol is served . . . we believe that the added assurance of just compensation to the victims of drunken driving as well as the added deterrent effect of the rule on such driving outweigh the importance of those other values.\textsuperscript{185}

Deterrence and compensation for loss are at the heart of the considered expansion of social host liability. The Minnesota legislature must have concluded that these public policy concerns were truly significant or presumably, subdivision six\textsuperscript{186} would not exist. The social policies that motivated the legislature in creating subdivision six are no less important when applied to an adult. Therefore, since the legislature has expressed its concern over these social policy factors, it should act once again, and expand social host liability to ensure that \textit{all} injured parties are fully compensated.

\section*{2. Refuting the Floodgates of Litigation Argument}

One of the main challenges to social host liability pursuant to dram shop laws has been the "floodgates of litigation" argument.\textsuperscript{187} Critics suggest that implementing civil liability pursuant to a dram shop law will open a "Pandora's Box" to a wide range of defendants.\textsuperscript{188} This argument provokes concern for state legislatures that wish to implement social host liability. However, the same argument has been made against other causes of action even though these causes of action remain viable reme-

\begin{itemize}
  \item \textsuperscript{183} See Lewis, \textit{supra} note 25, at 760.
  \item \textsuperscript{184} 476 A.2d 1219 (N.J. 1984) (holding that statutory social host liability exists in New Jersey).
  \item \textsuperscript{185} \textit{Id.} at 1224.
  \item \textsuperscript{186} See \textsc{Minn. Stat.} § 340.801A, subd. 6 (1998).
  \item \textsuperscript{187} See Miller v. Owens-Illinois Glass Co., 199 N.E.2d 300, 306 (Ill. App. Ct. 1964) (stating that if social host liability were recognized under Illinois' dram shop law, having a drink with a neighbor could presumably become a hazardous act, thus potentially triggering litigation); Lewis, \textit{supra} note 25, at 759-60.
  \item \textsuperscript{188} See Miller, 199 N.E.2d at 306.
\end{itemize}
Additionally, courts are conscious of the abuse in litigation with respect to these particular causes of action, and have structured parameters for attorneys to follow when litigating a case such as Koehnen. For example, not until recent decades has negligent infliction of mental distress been recognized as a cause of action. The strongest reason against the recognition of negligent infliction of mental distress being recognized as a cause of action has been the "floodgates of litigation" argument. However, "[i]t is the business of the law to remedy wrongs that deserve it, even at the expense of a 'flood of litigation,' and it is a pitiful confession of incompetence on the part of any court of justice to deny relief on such grounds." Minnesota courts have developed stringent requirements to recover on claims of negligent infliction of emotional distress. These stringent requirements have silenced...
the arguments that the tort will open the floodgates of litigation. Minnesota courts require plaintiffs to meet an objective standard, ensuring predictability and stability in an area of the law that has a potential for abuse. Likewise, the "floodgates of litigation" argument against social host liability will cease by virtue of court-imposed guidelines similar to those present in negligent infliction of emotional distress cases.

3. A Proposed Cause of Action

As previously discussed, subdivision six is a recent addition to the Civil Damages Act and is an expression of the legislature’s concerns regarding innocent victims of alcohol related torts. Subdivision six allows injured parties to bring a common law cause of action against persons who furnish or provide alcohol to minors. Arguably, the amendment was the legislature’s response to the Minnesota Supreme Court’s dicta in Holmquist v. Miller. In Holmquist, the court stressed the importance of addressing the problem of providing alcohol to minors, but ultimately concluded that only the legislature could expand social host liability. Nonetheless, after subdivision six’s creation, legitimate questions surfaced regarding who would be entitled to recover, who would be liable, and what defenses would be available. Since 1990, Minnesota courts have begun to answer some of the questions with respect to its scope.

In VanWagner v. Mattison, the court of appeals gave Minnesota citizens a sense of the subdivision's breadth. The court of appeals in Van-
Wagner noted that Minnesota does not allow a common law cause of action against commercial vendors for the illegal sale of alcohol. It also recognized that from 1977 to 1990, Minnesota social hosts were not liable either by statute or common law for illegally furnishing alcohol to others. However, in VanWagner, the court of appeals reestablished a common law cause of action against social hosts who illegally serve alcohol to minors. The crux of the case concerned the applicability of Minnesota’s comparative fault provision in the subdivision six context. The court of appeals held that the comparative fault statute applied and inferred that it was not the legislature’s intent to place a higher standard on social hosts than on commercial vendors.

VanWagner answered the important question of who may recover in relation to subdivision six. The court allowed an intoxicated minor to bring a claim for damages against a social host. Unlike subdivision one of the Civil Damages Act, subdivision six allows any party, not just innocent third parties, to bring an action. Furthermore, VanWagner infers that the defense of contributory negligence is alive. Since the court of appeals held that the comparative fault statute is applicable to these common law claims, contributory negligence is an obvious defense in this context. However, other questions concerning subdivision six’s scope remain.

The legislature could further address the already recognized social policy concern regarding innocent victims of alcohol-related torts by making a simple, additional amendment to subdivision six. Subdivision six currently states:

205. See id. at 77; see also Robinson v. Lamott, 289 N.W.2d 60, 65 (Minn. 1979) (holding that an intoxicated person was barred from bringing a common law cause of action against a commercial vendor).
206. See VanWagner, 533 N.W.2d at 77.
207. See id. at 80-81 (affirming the district court’s ruling on the question of comparative fault, but effectively allowing a common law claim for social host liability to stand).
208. See id. at 77 (stating that the question is one of first impression for the courts).
209. See id. at 80.
210. See id.
211. See generally VanWagner, 533 N.W.2d at 80 (holding that common law actions permitted by subdivision six of the Act are subject to comparative fault).
213. See § 340A.801, subd. 6.
214. See VanWagner, 533 N.W.2d at 80.
215. See id.
216. See supra notes 201-203 and accompanying text. Also, questions about what other defenses may be available for defendants outside of contributory negligence remain.
[N]othing in this chapter precludes common law tort claims against any person 21 years or older who knowingly provides or furnishes alcoholic beverages to a person under the age of 21 years.\textsuperscript{217}

To expand social host liability, the legislature could change two small, yet important, sections of the current provision: "any person 21 years or older" could be replaced with "any person;" and "person under the age of 21 years" could be replaced with "visibly intoxicated person."

While this proposal might spark criticism, it would be easily instituted for two reasons. First, the current language of subdivision six is nearly identical to this proposed amendment. Second, Minnesota courts are interpreting subdivision six's scope.\textsuperscript{218} Consequently, the transition for courts, attorneys, and other interested parties to understand the breadth of this proposed amendment's scope would be easier. Minnesota courts could continue to interpret this proposed amendment consistently with previous interpretations. That is, contributory negligence would still apply as a defense, and an intoxicated person could still bring a cause of action against the host for negligently providing alcohol. Additionally, courts should look to other states that have allowed common law claims against social hosts for interpretations that extend beyond current subdivision six analyses.\textsuperscript{219}

The one major difference between subdivision six and the proposed amendment's language is the element of "visible" intoxication. Although Minnesota courts do not deal with this particular element in the social host context, other states do. Indeed, Indiana and New Jersey are two states whose dram shop laws involve the element of "visibly intoxicated" persons.\textsuperscript{220} Furthermore, Indiana allows common law negligence claims against social hosts irrespective of its dram shop law. Minnesota

\textsuperscript{217} See § 340A.801, subd. 6.
\textsuperscript{218} See VanWagner, 553 N.W.2d at 80.
\textsuperscript{219} See Gariup Const. Co., Inc. v. Foster, 519 N.E.2d 1224, 1227-28 (Ind. 1988) (stating that Indiana law requires judicial determination of a duty on the part of the defendant to the plaintiff).
\textsuperscript{220} This author has suggested this element to place a higher burden on plaintiffs suing social hosts. This heightened burden may preclude liability for those social hosts who act responsibly.
\textsuperscript{221} See IND. CODE ANN. § 7.1-5-10-15.5(a) (West 1987); N.J. STAT. ANN. §§ 2A:22A-1 to -7 (West 1987). See generally Thompson v. Ferdinand Sesquicentennial Comm., Inc., 637 N.E.2d 178, 180 (Ind. Ct. App. 1994) (stating a person may not be held civilly liable under Indiana's Act for 'furnishing' an alcoholic beverage to a person, including a minor, unless the person who furnishes the alcohol had actual knowledge that the person served was visibly intoxicated); Dower v. Gamba, 647 A.2d 1367 (N.J. Super. Ct. App. Div. 1994) (analyzing the applicability of New Jersey's dram shop act).
\textsuperscript{222} See Gariup Const. Co., 519 N.E.2d at 1227-28.
courts can look to these states' interpretations of common law claims as well as the "visibly intoxicated" requirement of dram shop laws for defining its parameters. The transition of establishing an expansive amendment for social host liability will be easier than most critics would allow. Indeed, existing interpretations of subdivision six would provide guidance for Minnesota courts.

V. CONCLUSION

The current trend regarding social host liability pursuant to dram shop laws seems to be clear; notwithstanding the state of Utah, there is no complete, statutory social host liability. Nonetheless, many states, including Minnesota, recognize either common law claims, or allow statutory social host liability claims on a very limited basis. The Koehnen case presented the Minnesota Supreme Court with another opportunity to visit the issue of statutory social host liability. Unfortunately, the court's holding remained consistent with the current trend in the United States; it rejected Minnesota's Civil Damages Act application to social hosts.

Despite numerous past amendments reacting to judicial interpretation, the legislature has remained silent on the issue of social host liability since 1982. The Koehnen decision strays from the legislature's intent, and thus it is necessary once again for the legislature to respond to case law.

By its holding, the Minnesota Supreme Court impliedly defined the words "illegal sale" to apply only to commercial vendors, even though what Rachel Paul did was to illegally sell alcohol. Furthermore, the court narrowly defined "a person" to mean only a commercial vendor even though the definition of "person" is unambiguously broader. Additionally, the court chose not to address two relevant questions concerning the Act. First, the court never defined a "social host." Perhaps more importantly, however, the court then discounted the true purpose of the Act, and the genuine intent of the legislature, that is, to protect innocent third parties.

Irrespective of whether the legislature changes the language of the Civil Damages Act, the legislature has shown signs of progression toward an expansion of social host liability and the Minnesota Supreme Court should act accordingly. In addition to increasing the criminal penalty for those that serve minors, the legislature has allowed a common law cause of action against social hosts who serve minors. The policies behind these common law suits are no different than those supporting social host liability regardless of the age of the consumer. If states like Minnesota want to continue to increase their effectiveness in reducing the number of alcohol-related deaths and injuries, an expansion of social host liability is cer-

223. See id.
224. See supra text accompanying notes 157-158.
tainly a step in the right direction. The legislature must act accordingly, and adopt a statute that provides for complete social host liability.