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Torts—Social Host Duty to Protect Guests: No Meed for the Imposition of a Duty to Protect

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TORTS—SOCIAL HOST DUTY TO PROTECT GUESTS:
NO NEED FOR THE IMPOSITION OF A DUTY TO
PROTECT

Gilbertson v. Leininger, 599 N.W.2d 127 (Minn. 1999)

Jason Asmus†

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I. INTRODUCTION

The existence of a duty is the threshold issue in negligence law. Defining a duty and the scope of its existence and effect is a difficult task that courts routinely must perform. The existence of a duty, especially a person’s duty to protect another person from harm, has been the source of legal debate for over 100 years. Minnesota courts, as well as other state and federal courts, have thus carefully analyzed the duty of one person to protect another person from harm.

The duty to protect exists almost exclusively in situations where the parties stand in some special relationship to one another. Currently, Minnesota only recognizes seven relationships as "special." Thus, the duty to protect has been relatively limited by Minnesota decisions.

The Minnesota Supreme Court, in Gilbertson v. Leininger, limited the duty to protect further by correctly ruling that social hosts have no duty to protect their guests. This decision is not only consistent with existing Minnesota law, but is also supported by strong public policy considerations. Furthermore, this decision allows hosts to continue to entertain guests in their homes without the threat of litigation by injured guests.

This case note examines a social host's duty to protect one's...


2. Donaldson v. Young Women's Christian Ass'n, 599 N.W.2d 789, 792 (Minn. 1995) (recognizing the innkeeper/guest relationship as "special"); Harper v. Herman, 499 N.W.2d 472, 474 (Minn. 1993) (recognizing the common carrier/passenger relationship as "special"); Erickson, 447 N.W.2d at 169-70 (recognizing the parking ramp owner/customer relationship as "special"); Leaon v. Washington County, 397 N.W.2d 867, 873 (Minn. 1986) (recognizing the possessor of land/permissive entrant relationship as "special"); Ponticas v. K.M.S. Inv. Co., 381 N.W.2d 907, 911 (Minn. 1983) (recognizing the landlord/tenant relationship as "special"); N.W. Hosp. of Minneapolis, 236 Minn. 384, 387, 53 N.W.2d 17, 19 (1952) (recognizing the hospital/patient relationship as "special"); Lundman v. McKnown, 530 N.W.2d 807, 820 (Minn. Ct. App. 1995) (citing Harper v. Herman, 499 N.W.2d 472, 474 (Minn. 1993)) (recognizing the custodial relationship as "special").

3. See discussion infra Part II.B.

4. 599 N.W.2d 127 (Minn. 1999).

5. See discussion infra Parts IV.A., IV.B.

6. See discussion infra Part IV.B.
guests. It does not explore social host liability under the Minnesota Civil Damage Act. Part II presents the history of the duty concept in negligence law, specifically the development in England. It also focuses on the development of duty in Minnesota law. Part III details the facts of and the court's decision in the Gilbertson case. Part IV is an analysis of the current law, public policy considerations, and also presents guidelines to follow should the imposition of a duty to protect become necessary in the future. Part V concludes that the Minnesota Supreme Court was correct deciding to not impose a duty to protect on the social hosts in Gilbertson.

II. HISTORY

A. Development Of Duty—English Law

In early English law, there was no concept of duty. Instead, liability was imposed with little or no regard for the defendant's fault. However, as negligence law branched off from other areas of tort liability, courts were forced to develop the notion of duty. Three English cases helped foster the duty concept. Generally, the duty concept stated that a plaintiff could not bring a negligence action unless the defendant owed the plaintiff a duty.

Even though the concept of a duty was thus established, a definition had not yet been formulated. Lord Esher, in Heaven v. Pender, made the first attempt to define the term "duty." Lord Esher's definition stated that whenever people recognize that an—

7. Infra Part II.A.
8. Infra Part II.B, C.
9. Infra Parts III.A., III.B.
10. Infra Parts III.A., III.B., III.C.
11. Infra Part V.
13. Id. In fact, negligence law in early England was more like strict liability in that if the defendant's act was found to be wrongful, then the defendant was absolutely found liable for all damage that resulted from the act. Id.
14. Id. Without some sort of duty on the part of the defendant, there could be no liability and the plaintiff could not recover. Id.
16. KEETON ET AL., supra note 12, § 53, at 357.
17. Id. See also Winterbottom, 152 Eng. Rep. at 402; Langridge, 150 Eng. Rep. at 863; Vaughan, 152 Eng. Rep. at 490 (holding that a plaintiff must be owed a duty).
other person may be injured if they do not use ordinary care, a
duty to act accordingly is created.\footnote{20}{Lord Esher's definition of duty,
while an excellent first attempt, is recognized today as too broad.\footnote{21}{Although no universal test has been formulated, currently, duty
can be defined as "an obligation, to which the law will give recogni-
tion and effect, to conform to a particular standard of conduct to-
wards another.\footnote{22}{Lord Esher's definition of duty, while an excellent first attempt, is recognized today as too broad.\footnote{23}{Although no universal test has been formulated, currently, duty
can be defined as "an obligation, to which the law will give recogni-
tion and effect, to conform to a particular standard of conduct to-
wards another.\footnote{24}{As evidence for this proposition, one need only look at the massive
amount of litigation that has already occurred, and will continue to occur in the
future, regarding the existence of a duty. \textit{E.g.}, Sulik v. Total Petroleum, Inc., 847
F. Supp. 747, 749 (D. Minn. 1994); Donaldson v. Young Women's Christian Ass'n,
539 N.W.2d 789, 792 (Minn. 1995); Harper v. Herman, 499 N.W.2d 472, 474
(Minn. 1993); Erickson v. Curtis Inv. Co., 447 N.W.2d 165, 168 (Minn. 1989); An-
ders v. Trester, 562 N.W.2d 45, 47 (Minn. Ct. App. 1997); Errico v. Southland
(Minn. Jan. 27, 1994); Spitzak v. Hylands, Ltd., 500 N.W.2d 154, 156 (Minn. Ct.
App. 1993), \textit{rev. denied}, No. C3-92-2217 (Minn. July 15, 1993). Because the exis-
tence of a legal duty is the threshold issue in all negligence cases, the issue is fre-
quently litigated in negligence lawsuits. Parties have argued about the existence of
a duty in numerous situations. \textit{See generally} Sulik, 847 F. Supp. at 749 (arguing
whether a merchant has a duty to protect its customers); Donaldson, 539 N.W.2d at
792 (arguing whether person in custody of another has a duty to protect); Harper,
499 N.W.2d at 474 (arguing whether a social host has a duty to protect his guest);
Erickson, 447 N.W.2d at 168 (arguing whether a parking ramp owner has a duty to
protect patrons); Anders, 562 N.W.2d at 47 (arguing whether merchant has a duty
to protect customers); Errico, 509 N.W.2d at 587 (arguing whether a merchant has
a duty to protect customers); Spitzak, 500 N.W.2d at 156 (arguing whether land-
lord had duty to protect a tenant).}
whether or not a duty is owed and to whom that duty is owed.\textsuperscript{25}

There are numerous situations where a defendant simply owes no duty to anyone, unless the defendant has assumed a duty to act or stands in some special relationship to the plaintiff.\textsuperscript{26} This is known as the nonaction or "nonfeasance" rule.\textsuperscript{27}

The duty question is especially difficult when analyzing whether a duty is owed to a third person. Various fact situations can create a duty to protect when (1) the defendant innocently creates the risk or harm,\textsuperscript{28} (2) the defendant's relationship to the plaintiff creates a duty,\textsuperscript{29} (3) the defendant's affirmative action creates a duty,\textsuperscript{30} (4) the defendant's undertaking creates a duty,\textsuperscript{31} and (5) the defendant's undertaking creates a duty to third persons.\textsuperscript{32}

In many cases, the defendant himself does not cause the harm to the plaintiff.\textsuperscript{33} Rather, the defendant fails to protect the plaintiff from the risk of some other harm.\textsuperscript{34} The duty to protect question is, "could [the defendant] have prevented the injury by a warning or by exercising the control he had over the attacker...?\textsuperscript{35} Usually, the question is not whether the defendant should rescue the plaintiff already in danger, but whether defendant should exercise

\textsuperscript{25} Keeton \textit{et al.}, \textit{supra} note 12, § 53, at 356. Keeton defines the duty question as dealing with "the problem of the relation between individuals which imposes upon one a legal obligation for the benefit of another...." \textit{Id.} Keeton concludes, "in other words, 'duty' is a question of whether the defendant is under any obligation for the benefit of a particular plaintiff." \textit{Id. See also supra} note 24.


\textsuperscript{27} \textit{Id.} § 315, at 855.

\textsuperscript{28} \textit{Id.} § 316, at 856. When a defendant either knows or should know that he has caused physical harm to the plaintiff, the defendant has a duty to avoid further harm even if the harm was caused without fault. \textit{Id.}

\textsuperscript{29} \textit{Id.} § 317, at 857. Sometimes the defendant's relationship with the plaintiff creates a duty. \textit{Id.} These relationships are characterized as "special," and include, (1) the carrier/passenger relationship, (2) the innkeeper/guest relationship, (3) the landowner/invitee relationship, (4) the custodian/ward relationship, and (5) the employer/employee relationship. \textit{Id.}

\textsuperscript{30} \textit{Id.} § 318, at 859. When a defendant affirmatively acts to help a person, he must act with reasonable care. \textit{Id.}

\textsuperscript{31} \textit{Id.} § 319, at 860. "The general rule that undertakings can create a duty of care is often expressed by saying one who voluntarily assumes a duty must then perform that duty with reasonable care." \textit{Id. See also Restatement (Second) of Torts} § 323 (1965).

\textsuperscript{32} \textit{Id.} § 321, at 869-70. In certain situations, the defendant's undertaking with respect to one person may impose on him a duty of care for another person. \textit{Id.} at 871.

\textsuperscript{33} \textit{Id.} § 322, at 874.

\textsuperscript{34} \textit{Id.}

\textsuperscript{35} \textit{Id.}
care to prevent the harm to the plaintiff in the first place.\footnote{6} All state jurisdictions have various rules regarding when a person has a duty to protect another by preventing some recognized harm.\footnote{37} Despite the technical differences among the rules, the pre-

\footnote{6}{Id.}

\footnote{37}{Moye v. A.G. Gaston Motels, Inc., 499 So. 2d 1368, 1370 (Ala. 1986) (stating that under Alabama law, a person has no duty to protect another from the criminal acts of third parties absent a special relationship); Parish v. Truman, 603 P.2d 120, 122 (Ariz. Ct. App. 1979) (holding that under Arizona law, the duty to protect arises when a special relationship exists between the parties); First Commercial Trust Co. v. Lorcin Eng’g, Inc., 900 S.W.2d 202, 204 (Ark. 1995) (holding that under Arkansas law, the duty to protect arises when a special relationship exists between the parties); Davidson v. City of Westminster, 649 P.2d 894, 897 (Cal. 1982) (holding that under California law, the duty to protect arises when a special relationship exists between the parties); Perreira v. State, 768 P.2d 1198, 1208 (Colo. 1989) (holding that under Colorado law, the duty to protect arises if a special relationship exists between the parties); Todd M. v. Richard L., 696 A.2d 1063, 1072 (Conn. Super. Ct. 1995) (holding that under Connecticut law, the duty to protect arises when a special relationship exists between the parties); Parrotino v. City of Jacksonville, 612 So. 2d 586, 589 (Fla. Dist. Ct. App. 1992) (holding that under Florida law, the duty to protect arises if a special relationship exists between the parties); Associated Health Sys. v. Jones, 366 S.E.2d 147, 151 (Ga. Ct. App. 1988) (holding that under Georgia law, the duty to protect arises if a special relationship exists between the parties); Doe v. Grosvenor Props. Ltd., 829 P.2d 512, 515-16 (Haw. 1992) (adopting the RESTATEMENT (SECOND) OF TORTS § 315 as the basis for Hawaii’s duty to protect); Sterling v. Bloom, 723 P.2d 755, 769 (Idaho 1986) (holding that under Idaho law, the duty to protect arises if a special relationship exists between the parties); Osborne v. Stages Music Hall, Inc., 726 N.E.2d 728, 732 (Ill. App. Ct. 2000) (holding that under Illinois law, the duty to protect arises when a special relationship exists between the parties); Gunter v. Village Pub, 606 N.E.2d 1310, 1312 (Ind. Ct. App. 1993) (holding that under Indiana law, the duty to protect arises when: (1) the party to be charged has knowledge of the circumstance or situation surrounding the relationship or (2) if the party to be charged gratuitously or voluntarily assumes a duty); Mastbergen v. City of Sheldon, 515 N.W.2d 3, 4 (Iowa 1994) (holding that under Iowa law, the duty to protect arises when a special relationship exists between the parties); C.J.W. v. State, 853 P.2d 4, 9 (Kan. 1993) (adopting the RESTATEMENT (SECOND) OF TORTS §§ 315-20 as the basis for the imposition of a duty to protect); Grimes v. Hettinger, 566 S.W.2d 769, 775 (Ky. Ct. App. 1978) (holding that under Kentucky law, the duty to protect arises if a special relationship exists between the parties); Mixon v. Davis, 732 So. 2d 628, 631 (La. Ct. App. 1999) (holding that under Louisiana law, the duty to protect arises when a special relationship exists between the parties); Bryan R. v. Watchtower Bible and Tract Soc’y of N.Y., Inc., 738 A.2d 839, 845 (Me. 1999) (holding that under Maine law, the duty to protect arises if a special relationship exists between the parties); Scott v. Watson, 359 A.2d 548, 552 (Md. 1976) (holding that under Maryland law, the duty to protect arises if a special relationship exists between the parties); Lyon v. Morphew, 678 N.E.2d 1306, 1309 (Mass. 1997) (holding that under Massachusetts law, the duty to protect arises if a special relationship exists between the parties); Williams v. Cunningham Drug Stores, Inc., 418 N.W.2d 381, 383 (Mich. 1988) (holding that under Michigan law, the duty to protect arises when a special relationship exists between the parties); Claybon v.
Midwest Petroleum Co., 819 S.W.2d 742, 744 (Mo. Ct. App. 1991) (holding that under Missouri law, there is a duty to protect when: (1) a special relationship exists or (2) when special facts and circumstances exist); Krieg v. Massey, 781 P.2d 277, 279 (Mont. 1989) (holding that under Montana law, the duty to protect arises if a special relationship of control exists between the parties); Hamilton v. City of Omaha, 498 N.W.2d 555, 560 (Neb. 1993) (adopting the RESTATEMENT (SECOND) OF TORTS § 315 as the basis for the Nebraska rule which states that the duty to protect arises when (1) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct or (2) a special relation exists between the actor and the other which gives to the other a right to protection); Scialabba v. Brandise Constr. Co., 921 P.2d 928, 930 (Nev. 1996) (holding that under Nevada law, the duty to protect exists if the relationship between the parties has an element of control); Marquay v. Eno, 662 A.2d 272, 278 (N.H. 1995) (holding that under New Hampshire law, the duty to protect may arise when a special relationship exists between the parties); Atamian v. Supermarkets Gen. Corp., 369 A.2d 38, 41 (N.J. Super. Ct. Law Div. 1976) (holding that under New Jersey law, a duty to protect may arise in certain situations if a special relationship exists or special circumstances exist); Rummel v. Edgemont Realty Partners, Ltd., 859 P.2d 491, 494 (N.M. Ct. App. 1993) (holding that under New Mexico law, the duty to protect arises when a special relationship exists between the parties); Fay v. Assignment Am., 666 N.Y.S.2d 304, 306 (N.Y. App. Div. 1997) (holding that under New York law, the duty to protect arises when a special relationship exists between the parties); Hite v. Brown, 654 N.E.2d 452, 456 (Ohio Ct. App. 1995) (holding that under Ohio law, the duty to protect arises when a special relationship exists between the parties); Wofford v. E. State Hosp., 795 P.2d 516, 519 (Okla. 1990) (holding that under Oklahoma law, the duty to protect depends on the relationship of the parties and the risk involved); Keeland v. Yamhill County, 545 P.2d 137, 139-40 (Or. Ct. App. 1976) (adopting the RESTATEMENT (SECOND) OF TORTS § 320 as Oregon's basis for the imposition of a duty to protect); Zanine v. Gallagher, 497 A.2d 1332, 1334 (Pa. Super. Ct. 1985) (holding that under Pennsylvania law, the duty to protect exists when there is a special relationship or when the risk is foreseeable); Erickson v. Lavielle, 368 N.W.2d 624, 627 (S.D. 1985) (adopting the RESTATEMENT (SECOND) OF TORTS § 314A as South Dakota's basis for the imposition of a duty to protect); Lloyd v. S.S. Kresge Co., 270 N.W.2d 423, 426 (Wis. Ct. App. 1978) (holding that under Wisconsin law, the duty to protect arises when a special relationship exists between the parties). Some states, however, do not necessarily recognize a duty to protect a third person. Kanayurak v. N. Slope Borough, 677 P.2d 893, 899 n.11 (Alaska 1984) (holding that under Alaska law, "special relationship" is just another way of saying the amount of care required is proportional to the risk or responsibility involved); Castellani v. Del. State Police, 751 A.2d 934, 938 (Del. Su-
vailing general rule is that a duty to protect another person is owed when a special relationship exists between the parties and the risk of harm is foreseeable.38

C. Minnesota History

Minnesota lagged behind the English law in recognizing the concept of a duty. However, in 1907, the Minnesota Supreme Court was faced for the first time with the question of whether or not a defendant has a duty to act affirmatively for the benefit of another person.

1. Recognizing A Duty—Depue v. Flateau

Minnesota first recognized the existence of a duty to protect another from a recognized harm in Depue v. Flateau.39 The Depue court, in straying from the former no duty rule40 stated:

per. Ct. 1999) (holding that under Delaware law, the scope of duty depends on the nature of the relationship between the parties). North Carolina and South Carolina case law regarding the duty to protect primarily focuses on the public duty doctrine. E.g., Hedrick v. Rains, 466 S.E.2d 281, 284 (N.C. Ct. App. 1996) (holding that under the public duty doctrine a duty is owed to the general public, not specific individuals); Wells v. City of Lynchburg, 501 S.E.2d 746, 751-52 (S.C. Ct. App. 1998) (holding a duty is owed to the general public, not to individuals). In addition, an extensive search of Mississippi, North Dakota, Rhode Island, Utah, Virginia, and Wyoming case law did not provide an answer whether those states recognized a duty to protect.

38. Supra note 37.

39. 100 Minn. 299, 111 N.W. 1 (1907). In Depue, plaintiff was a cattle salesman and called upon defendants at their home to inspect some cattle. Id. at 1-2. Plaintiff was unable to inspect the cattle because it was too dark and cold. Id. Plaintiff then asked defendants if he could spend the night and inspect the cattle the next morning. Id. Defendants refused, but invited plaintiff to stay for dinner. Id. After dinner, plaintiff became violently ill and fainted. Id. at 1-2. Nonetheless, defendants put plaintiff in his cutter and started his team of horses on the way home. Id. at 2. During the trip, plaintiff fainted again, fell off his cutter, and nearly froze to death. Id. Plaintiff eventually sued defendants, alleging they had a duty to protect him. Id. The Depue court basically adopted the duty formula from an early English case, Heaven v. Pender. Id. at 2. See also Heaven v. Pender, 11 Q.B.D. 503, 508 (1883).

40. Depue, 100 Minn. at 302-303, 111 N.W. at 2 (citing Union Pac. Ry. Co. v. Cappier, 72 Pac. 281 (Kan. 1903)). Those duties where the court dictated merely by good morals or by humane considerations are not within the domain of the law. Feelings of kindness and sympathy may move the Good Samaritan to minister to the sick and wounded at the roadside, but the law imposes no such obligation; and suffering humanity has no legal complaint against those who pass by on the other side. Id. The Depue court simply stated that the Cappier rule had no application.
Whenever a person is placed in such a position with regard to another that it is obvious that, if he does not use due care in his own conduct, he will cause injury to that person, the duty at once arises to exercise care commensurate with the situation in which he thus finds himself, and with which he is confronted, to avoid such danger; and a negligent failure to perform the duty renders him liable for the consequences of his neglect.

Thus, Minnesota imposed, for the first time, a common-law duty to protect on people who know or should know the needs of a person in their control. Stated simply, the Depue court imposed a duty to protect on defendants who either know or should know that the plaintiff may be injured by nonaction.

2. "No Duty" Cases And The Special Relationship Rule

Aside from the Depue rule, Minnesota generally follows the nonfeasance rule. In Delgado v. Lohmar, the Minnesota Supreme Court imposed a duty to act affirmatively for the benefit of another per-
Court stated that generally, a person has no duty to act for the protection of another person.\textsuperscript{46} However, the nonfeasance rule stated in \textit{Delgado} is not absolute.

Minnesota imposes a legal duty to protect another person when (1) the parties stand in some special relationship to one another and (2) the risk of injury involved is foreseeable.\textsuperscript{47} In addition, not only must the plaintiff have a special relationship with the defendant and the risk must be foreseeable, but the plaintiff must also have a reasonable expectation of protection.\textsuperscript{48}

In order for a special relationship to exist, the defendant must be in a position to protect against, and must be expected to protect against, the threatened harm.\textsuperscript{49} In bits and pieces Minnesota has recognized special relationships, and the corresponding legal duty to protect, in a limited number of situations. They include: (1) common carriers/passengers,\textsuperscript{50} (2) innkeepers/guests,\textsuperscript{51} (3) posses-
sors of land/persons permissively on the land; (4) hospital/patient; (5) landlord/tenant; (6) parking ramp owner/customer; and (7) custodial relationships. Generally these "special relationships" include a financial benefit for the defendant upon whom the duty to protect is imposed.

3. Social Host Duty To Protect Cases—Gilbertson v. Leininger And Harper v. Herman

The existence of an affirmative duty to protect has been contested numerous times in Minnesota courts. In Gilbertson v. Leininger, the plaintiff attempted to convince the court to extend the duty to protect to a social host. However, in 1993, the Minnesota Supreme Court ruled on the social host duty to protect issue Harper

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52. Leaon v. Wash. County, 397 N.W.2d 867, 873 (Minn. 1986); RESTATEMENT (SECOND) OF TORTS § 318 (1965).
53. N.W. Hosp. of Minneapolis, 236 Minn. 384, 387, 53 N.W.2d 17, 19 (Minn. 1952); Roettger v. United Hosp. of St. Paul, 380 N.W.2d 856, 859-60 (Minn. Ct. App. 1986).
55. Erickson, 447 N.W.2d at 169-70.
57. Harper v. Herman, 499 N.W.2d 472, 474 n. 2 (quoting W. PAGE KEETON ET. AL., PROSSER AND KEETON ON TORTS, § 56 at 374 (5th ed. 1984)). Keeton says:

In addition such [special] relations have often involved some existing or potential economic advantage to the defendant. Fairness in such cases thus may require the defendant to use his power to help the plaintiff, based upon the plaintiff's expectation of protection, which itself may be based upon the defendant's expectation of financial gain.

Id.

58. Negligence cases alleging a duty to protect are frequently litigated because so few special relationships are recognized in Minnesota. See generally Sulik v. Total Petroleum, Inc., 847 F. Supp. 747, 749 (D. Minn. 1994) (arguing about whether merchant has a duty to protect customers); Gilbertson v. Leininger, 599 N.W.2d 127, 130-31 (Minn. 1999) (arguing about whether social host has a duty to protect a guest); Donaldson v. Young Women's Christian Ass'n, 539 N.W.2d 789, 792 (Minn. 1995) (arguing about whether women's home had a duty to protect a non-custodial guest); Harper, 499 N.W.2d at 474 (arguing about whether social host had a duty to protect a guest); Erickson, 447 N.W.2d at 168 (arguing about whether parking ramp owner had a duty to protect patrons); Errico v. Southland Corp., 509 N.W.2d 585, 587 (Minn. Ct. App. 1993) rev. denied, No. C3-93-980 (Minn. Jan. 27, 1994) (arguing about whether merchant had a duty to protect customers).

59. Gilbertson, 599 N.W.2d at 130. Plaintiff brought suit claiming defendants had a duty to protect her because, as social hosts, they had custody of her under circumstances in which she could not protect herself. Id. at 131.
In the Harper case, the Minnesota Supreme Court stated that a social host owner of a boat had no duty to protect his guest. Thus, prior to Gilbertson, Minnesota courts have already refused to impose a blanket duty to protect on social hosts.

III. The Gilbertson Decision

A. The Facts

Susan Gilbertson was a guest at the home of Richard Leininger and Jacqueline Hess for a Thanksgiving holiday celebration. During the course of the evening, Gilbertson drank one bottle of wine and one beer. After the party, Gilbertson decided to spend the night at Leininger’s house. During the night, Gilbertson left the living room couch and slept in Leininger’s son’s bedroom. When

60. Harper, 499 N.W.2d at 472. In Harper, plaintiff was a guest on defendant’s boat. Id. at 473. Defendant was an experienced boat owner and considered himself to be in charge of the boat’s occupants, while plaintiff had some experience in swimming generally, but had no formal training with regard to diving. Id. Defendant docked the boat near an island. Id. The bottom of the lake was not visible from the boat. Id. at 473-74. Plaintiff, without warning, dove off the side of the boat into approximately two to three feet of water. Id. at 474. Plaintiff struck the bottom of the lake with his head, severed his spinal cord, and as a result, was rendered a C6 quadriplegic. Id. Plaintiff brought suit, alleging that defendant had a duty to protect him by warning him of the shallowness of the water. Id. The trial court granted defendant’s summary judgment motion, holding that the law imposes no such duty. Id. The court of appeals reversed, holding that defendant voluntarily assumed a duty to protect plaintiff by allowing him on the boat. Id. The Minnesota Supreme Court reversed the court of appeals, holding that Minnesota law does not impose on social hosts a duty to protect guests. Id. at 475.

61. Harper, 499 N.W.2d at 475. The Harper court held that Minnesota law does not impose on social hosts a duty to protect guests. Id. The court was mainly concerned with the lack of a recognized special relationship between the parties. Id. at 474. Specifically, the court focused on the custodial nature of the relationship between Herman and Harper. Id. The court stated that a special relationship could exist between Harper and Herman only if “Herman had custody of Harper under circumstances in which Harper was deprived of normal opportunities to protect himself.” Id. The court concluded that the evidence did not establish that Harper was particularly vulnerable or that he could not protect himself or that Herman had considerable power over Harper. Id. The absence of these elements precluded the imposition of a duty to protect. Id.

62. Gilbertson, 599 N.W.2d at 128. Defendants Richard Leininger and Jacqueline Hess worked with Plaintiff Gilbertson at Mystic Lake Casino as blackjack dealers. Id.

63. The celebration party was actually held after Thanksgiving, on November 26, 1995. Id.

64. Id. at 129.

65. Id.

66. Hess provided Gilbertson with a pillow and blanket and told her that she
Gilbertson awoke at 9:00 a.m. the next morning, Leininger and Hess noticed dried blood under her nose and informed her of the same.\textsuperscript{67} Gilbertson touched the dried blood and returned upstairs.\textsuperscript{68} Leininger and Hess then left Gilbertson alone in the house for the morning.\textsuperscript{69}

Leininger and Hess found Gilbertson sleeping upon their return.\textsuperscript{70} Around 3:00 p.m., Gilbertson returned downstairs and Leininger and Hess noticed that she had not yet cleaned up.\textsuperscript{71} At this point, Leininger and Hess wondered whether something might be wrong.\textsuperscript{72} At 4:30 p.m., Hess called a nurse help line for advice as well as her friend, Christine Tollefson.\textsuperscript{73} Tollefson instructed Hess to call 911, which Hess did immediately.\textsuperscript{74}

When the paramedics arrived, they believed Gilbertson was intoxicated, but still transported her to the hospital.\textsuperscript{75} At the hospital, the doctor noticed a large bruise on the back of Gilbertson's head and ordered a CT scan.\textsuperscript{76} The CT scan revealed an acute subdural
hematoma and a skull fracture. Following treatment for her injuries, Gilbertson filed a negligence suit against Leininger and Hess. The trial court found Leininger and Hess negligent and the court of appeals affirmed.

B. The Court's Analysis

The Minnesota Supreme Court reversed the trial court and court of appeals. The Supreme Court held that Minnesota does not recognize social hosts’ duty to protect their guests. The court's decision was based on the fact that a social host/guest relationship was not a recognized “special relationship.”

Specifically, the court found that Leininger and Hess did not have custody and control of Gilbertson while she was a guest in the house. Furthermore, the court found that Leininger and Hess were in no position to protect against, and were not expected to protect against, Gilbertson’s injuries.

77. Id. Gilbertson required an operation to remove the hematoma and reduce the swelling in her brain. Id. Even though Gilbertson apparently made a very good recovery, she continues to suffer residual damage from the injury. Id.

78. Id. Gilbertson alleged that Leininger and Hess should have known earlier in the day that she was seriously hurt and their delay in seeking medical treatment increased the severity of her head injury. Id.

79. The trial court also denied defendants’ motions for judgment notwithstanding the verdict and motion for a new trial. Id.

80. The court of appeals found there was sufficient evidence for the jury to impose a legal duty on Leininger and Hess. Id. The court of appeals held that the jury could have reasonably concluded that Gilbertson’s increasing confusion throughout the course of the day, as well as her inability to care for herself, could support the conclusion that defendants’ delay in seeking medical attention was the proximate cause of Gilbertson’s injury. Gilbertson v. Leininger, 1998 WL 764081 at * 1 (Minn. Ct. App. 1998), rev’d 599 N.W.2d 127 (Minn. 1999). Thus, because the jury could have reasonably found that defendants’ action or inaction was the proximate cause of plaintiff’s injuries, the court of appeals could not reverse the trial court’s verdict. Id.

81. Gilbertson, 599 N.W.2d at 132.

82. Id.

83. Id. at 131.

84. Id. The court stated that Leininger and Hess did not have physical custody and control of Gilbertson. Id. Rather, she was merely a dinner guest who happened to spend the night at their home. Id. The court commented that in order to have custody and control over plaintiff, defendant must have “considerable power over [plaintiff’s] welfare.” Id. (citing Harper v. Herman, 499 N.W.2d 472, 475 (Minn. 1993)).

85. Id. at 131-32. The court decided that Leininger and Hess were not in a position to protect against Gilbertson’s injury because they had no medical experience or training, particularly in recognizing and treating a subdural hematoma. Id. at 131. Furthermore, the court commented that Gilbertson could not
IV. ANALYSIS

A. Gilbertson Is A Correct Interpretation Of Minnesota Law

The Gilbertson holding is a correct interpretation of existing Minnesota law. Under current law, in order to impose a duty to protect, the parties must stand in some special relationship and the risk of harm must be foreseeable.

1. Special Relationship

Minnesota recognizes only certain relationships as "special" and the Minnesota Supreme Court previously decided that social hosts have no duty to protect guests. Thus, the plaintiff in Gilbertson tried to persuade the court that her relationship with defendants was somehow "special." The plaintiff alleged that her relationship with defendants was custodial in nature while she was a guest in their home. This was the only possible relationship applicable under the facts of the case.

The plaintiff alleged she was under the custody of defendants to the extent that she was deprived of the normal opportunities of have had any reasonable expectation that Leininger and Hess protect her from injuring herself. Id. at 132. The court stated that because a social host/guest relationship was not "special" and Leininger and Hess did not have custody or control of Gilbertson, no duty to protect existed. Id.

86. Existing Minnesota law states that a duty to protect arises if: (1) a special relationship exists and (2) the risk of harm is foreseeable. E.g., Erickson v. Curtis Inv. Co., 447 N.W.2d 165, 168-69 (Minn. 1989); Delgado v. Lohmar, 289 N.W.2d 479, 483-84 (Minn. 1979). Since the social host/guest relationship is not "special," no duty to protect exists. Harper v. Herman, 499 N.W.2d 472, 474-75 (Minn. 1993) (stating that social host owner of boat had no duty to protect his guest on the boat from possible injury).

87. Erickson, 447 N.W.2d at 168-69.

88. Common carriers/passengers; innkeepers/guests; possessors of land/persons allowed on the land; hospital/patient; landlord/tenant; parking ramp owner/customer; and custodial relationships. Donaldson v. Young Women's Christian Ass'n, 539 N.W.2d 789, 792 (Minn. 1995); Harper, 499 N.W.2d at 474; Erickson, 447 N.W.2d at 168; RESTATEMENT (SECOND) OF TORTS § 314A (1965).

89. Harper, 499 N.W.2d at 475.

90. If plaintiff's relationship with defendants was not one of the seven recognized special relationships, then her negligence claim would fail because defendants had no duty to protect her. Erickson, 447 N.W.2d at 168-69 (Minn. 1989); Lundgren v. Fultz, 354 N.W.2d 25, 27 (Minn. 1984); Errico v. Southland Corp., 509 N.W.2d 585, 587 (Minn. Ct. App. 1993) rev. denied, No. C3-93-980 (Minn. Jan. 27, 1994).

91. Gilbertson, 599 N.W.2d at 131. Incidentally, this is the exact same claim that plaintiff in Harper made. Harper, 499 N.W.2d at 474. The Minnesota Supreme Court rejected plaintiff's claim in that case. Id. at 475.
self-protection. The Supreme Court correctly recognized that plaintiff had not entrust her safety to defendants, defendants had not accepted any entrustment, and plaintiff was not under the physical custody or control of defendants. The absence of these elements defeated plaintiff's claim that her relationship with the defendants was custodial. Therefore, plaintiff's relationship with defendants was not "special."

2. Foreseeability Of Risk Involved

One element untouched by the court was the foreseeability of the risk involved. Even if the court ruled that the defendants' relationship with the plaintiff was "special," the foreseeability of the particular risk involved—suffering a skull fracture and subdural hematoma from a fall after a night of drinking—seems too remote to impose a duty.

The possibility that a guest may suffer a subdural hematoma and skull fracture is too remote to be construed as foreseeable.

92. Gilbertson, 599 N.W.2d at 131. See also RESTATEMENT (SECOND) OF TORTS § 314A (1965).
93. Appellant's Br. at 9, Gilbertson (No. C9-98-646) (arguing that "the custody exception does not apply to...mere physical presence in a place owned by another person").
94. Gilbertson, 599 N.W.2d at 131. In order for any special relationship to exist, plaintiff must entrust her safety to defendant and defendant must accept that entrustment. Sulik v. Total Petroleum, Inc., 847 F. Supp. 747, 750 (D. Minn. 1994) (citing Erickson, 447 N.W.2d at 169). Perhaps the best indicator that plaintiff was not under defendants' control, such that she was deprived of the opportunity to protect herself, was the fact that defendants had no authority to send her to the hospital when the paramedics arrived. Appellant's Br. at 10, Gilbertson (No. C9-98-646). Instead, the paramedics used an "emergency hold for transport" to take control of plaintiff and get her to the hospital. Id. See also Gilbertson, 599 N.W.2d at 130.
95. Gilbertson, 599 N.W.2d at 131-32.
96. Id. at 127-32. According to existing law, in order for a duty to protect to be imposed, a special relationship must exist between the parties and the risk involved must be foreseeable. Erickson, 447 N.W.2d at 168-69.
97. See generally Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 100-101 (1928). The Palsgraf decision stated that not only must the plaintiff to whom a duty is owed be foreseeable, but the risk involved to that particular plaintiff must also be foreseeable. Id. In other words, it must be foreseeable that the particular plaintiff may be injured and the risk involved was the foreseeable cause of the injury in question. Id.
98. The risk of harm must be one that a person could reasonably anticipate. Austin v. Metro. Life Ins. Co., 277 Minn. 214, 217, 152 N.W.2d 136, 138 (Minn.

http://open.mitchellhamline.edu/wmlr/vol27/iss2/38
The same can be safely said for any medical emergency occurring in the host's home unless the host has some specific knowledge of a guest's medical condition.\textsuperscript{99}

This is even more true in a situation where the host is unaware that the guest has been injured, such as was the case in \textit{Gilbertson}.\textsuperscript{100} In this case, the defendants did not know that the plaintiff had injured herself.\textsuperscript{101} The plaintiff apparently struck her head at some point during the night, although it is not clear when or where the injury occurred. Given the fact that defendants were not doctors or nurses or medical personnel and that they had no experience or training in recognizing or treating subdural hematomas or skull fractures, the injury was unforeseeable and the defendants cannot be expected to protect against it.\textsuperscript{102} Thus, in \textit{Gilbertson}, even if the court held social hosts have a duty to protect their guests, Leininger and Hess should not be liable because the risk of suffering a subdural hematoma and skull fracture is unforeseeable.

**B. Public Policy Supports Not Imposing A Duty To Protect On Social Hosts**

1. **Unforeseeable Medical Emergencies**

In addition to conforming to existing case law, the \textit{Gilbertson} decision is also supported by strong public policy considerations. If a duty to protect is imposed on social hosts, they may be discouraged from inviting people into their homes for fear of possible litigation, should a medical or some other emergency arise.\textsuperscript{103} Specifically regarding medical emergencies, the law must not force social hosts to inquire about a guest's medical condition, medications, and unusual behavior each time they come into the home.\textsuperscript{104} Additionally, there are guests who have unknown medical needs and

\textsuperscript{99} A host would be unable to reasonably anticipate any kind of medical emergency unless the guest's medical history is known. \textit{See generally Austin, 277 Minn. at 217, 152 N.W.2d at 138. Only when a guest's medical history is known would the host even have an opportunity to anticipate and protect against a specific risk of harm. Id.}

\textsuperscript{100} \textit{Gilbertson}, 599 N.W.2d at 131-32 (stating that defendants were not in a position to protect against an "unknown" injury).

\textsuperscript{101} \textit{Id. See also Appellant's Br. at 11, Gilbertson (No. C9-98-646).}

\textsuperscript{102} \textit{Gilbertson}, 599 N.W.2d at 131.

\textsuperscript{103} Appellant's Br. at 16, \textit{Gilbertson} (No. C9-98-646).

\textsuperscript{104} \textit{Id.}
therefore an emergency can be just as unexpected for the guest as for the social host.\textsuperscript{105} Therefore, if the medical emergency is unforeseeable for the guest, the guest cannot realistically expect the host to protect the guest from that emergency.\textsuperscript{106}

Furthermore, medical emergencies generally are unforeseeable,\textsuperscript{107} and it would therefore be impossible for a host—particularly a host with no experience or training in dealing with medical emergencies—to protect a guest from those emergencies. This is especially true when a medical emergency can have the same signs and symptoms as something as common as intoxication.\textsuperscript{108} When a medical emergency has the same symptoms as intoxication, it is impossible for a host to foresee any particular risk of injury and a duty to protect cannot be imposed.\textsuperscript{109} In a situation where the symptoms of the injury appear to be something as common as intoxication, hosts will almost inevitably dismiss the thought of any medical emergency and instead attribute any strange behavior to the suspected intoxication.\textsuperscript{110}

Additionally, the mere possibility that some sort of medical emergency may occur in a host’s home—rather than in the guest’s home, a restaurant, or anywhere else—cannot and must not make the host’s relationship with guests “special” for the purpose of imposing a duty to protect.\textsuperscript{111}

\section*{2. Absence Of Financial Benefit In The Social Host/Guest Relationship}

Also, the recognition of a special relationship and the corresponding imposition of a duty to protect often involves financial factors.\textsuperscript{112} Typically, special relationships involve some existing or

\footnotesize{\textsuperscript{105} Id.\textsuperscript{106} The Gilbertson court adhered to this argument. \textit{Gilbertson}, 599 N.W.2d at 132. The court stated that plaintiff could not reasonably expect defendants to protect her against a skull fracture and subdural hematoma. \textit{Id.}\textsuperscript{107} The basic definition of “emergency” includes an element of unforeseeability. \textit{BOUVIER’S LAW DICTIONARY}, 1008 (3d Rev. 1984). Bouvier’s Law Dictionary states that an emergency is “an unforeseen occurrence or condition.” \textit{Id.}\textsuperscript{108} \textit{Gilbertson}, 599 N.W.2d at 130-31.\textsuperscript{109} Because one of the two elements—foreseeability of the risk involved—is not fulfilled, a duty to protect cannot be imposed. Erickson v. Curtis Inv. Co., 447 N.W.2d 165, 168-69 (Minn. 1989).\textsuperscript{110} This is a safe argument because even trained medical professionals sometimes have difficulty distinguishing a medical emergency from intoxication, as was the case in \textit{Gilbertson}. \textit{Gilbertson}, 599 N.W.2d at 131.\textsuperscript{111} Appellant’s Br. at 16, \textit{Gilbertson} (No. C9-98-646).\textsuperscript{112} See discussion supra Part II.C.
potential financial advantage to the defendant. This logically should alert the defendant to the possibility that the plaintiff may expect some sort of protection because of the value of the financial benefit he or she is conferring upon defendant.

The financial benefit factor was analyzed by the Minnesota Supreme Court in Harper when the court declined to impose on a social host a duty to protect his guest. Therefore, because in most situations a social host does not benefit financially from having the guest in his home, there should be no special relationship between the parties and a duty to protect should not be imposed on the social host.

3. Instead Of Creating A New Duty, Minnesota Should Rely On Existing Law To Protect Guests

Finally, instead of imposing a blanket duty to protect on social hosts, Minnesota courts should rely on existing Minnesota law to protect guests. Then, a flood of new litigation will not appear on court dockets because the law is settled in that area and is less conducive to litigation.

As a property owner, the social host already has a duty to maintain a safe premises. The occupant of premises is bound to exercise reasonable care to keep them in a safe condition for those who come upon them by express or implied invitation. Such duty of reasonable care includes the duty of making the premises safe as to dangerous conditions or activities on the premises of which the occupant knows or should know.

Therefore, under the "safe premises" rule, a social host would

113. KEETON ET AL., supra note 12, § 56, at 374.
114. Id. (stating that fairness should indicate to defendant that plaintiff may expect some protection based on the financial benefit conferred on defendant by plaintiff).
115. Harper v. Herman, 499 N.W.2d 472, 474 n.2 (Minn. 1993). The Harper court ultimately concluded that defendant had not deprived plaintiff of the normal opportunities of self-protection. Id. at 474. Presumably, the court considered that defendant obtained no financial benefit from plaintiff by allowing him on his boat. Id. (stating that there was no evidence that defendant was benefiting financially from letting plaintiff on his boat). Thus, it would not have been fair to subject defendant to a staggering amount of financial liability if there was no financial benefit for him to derive from allowing plaintiff on his boat. Id.
have a duty to make sure that his home did not have any dangerous conditions or activities on it that could potentially harm guests. Thus, a host would have some duty to act affirmatively for a guest, but only with respect to the condition of the premises. However, the duty to maintain a safe premises would not extend to observing and diagnosing unforeseeable medical emergencies that could occur in the home.

By relying on the above-established rule, Minnesota can avoid the imposition of a blanket duty to protect, just as the Harper court did, on social hosts, and the already-crowded court dockets will be spared additional litigation.

C. If A Future Social Host Duty Is Appropriate, It Must Be Strictly Based On Existing Minnesota Law

In her brief, plaintiff in Gilbertson maintains that, pursuant to the Depue holding, a social host duty to protect must be imposed. However, as defendants aptly point out and the court recognized, the Depue holding is inapplicable to the facts of the case. First, since the defendant in Depue did not actually know of or appreciate the plaintiff’s condition, no duty could be imposed. Secondly, the Depue holding relied on the distinction between invitees and licensees, a distinction that has been abolished in Minnesota. Finally, the Depue holding has been rejected by recent decisions as

119. Erickson, 432 N.W.2d at 201; Zuercher, 66 N.W.2d at 896.
120. Erickson, 432 N.W.2d at 201; Zuercher, 66 N.W.2d at 896.
121. Supra note 107 and accompanying text; See also Appellant's Br. at 16, Gilbertson (No. C9-98-646) (stating that the occurrence of a medical emergency in a host’s home does not create a special relationship or justify the imposition of a duty).
123. Appellant's Br. at 7, Gilbertson (No. C9-98-646).
125. Gilbertson, 599 N.W.2d at 132 n.2 (stating that “Depue is not dispositive”).
127. Id. at 13-14.
128. Id. at 14. See also Peterson v. Balach, 199 N.W.2d 639, 647 (Minn. 1972) (abolishing the distinctions in the status of land entrants when examining the duty a landowner owes).
129. These recent decisions emphatically state that in the absence of a special relationship, no duty to protect exists. Donaldson v. Young Women's Christian Ass'n, 599 N.W.2d 789, 792 (Minn. 1995). The fact that an actor realizes or should realize that he must take action to protect another does not of itself impose upon
suffering from overbreadth.\textsuperscript{130}

Thus, even though \textit{Depue} is still good law, it is inapplicable to the specific facts of the \textit{Gilbertson} case.\textsuperscript{131} However, if in the future, Minnesota courts find it necessary to impose a duty to protect on social hosts, that duty must be based on a strict reading of \textit{Depue} and existing Minnesota law.

The \textit{Depue} holding states that a person has an affirmative duty to act on behalf of another if it is obvious that the other person will be in danger if no action is taken.\textsuperscript{132} The operative word in the rule is "obvious." That is, the host must know of or appreciate the guest's condition before a duty to act is imposed.

It must be obvious to the host or a reasonable person in the host's position that the guest is in need of protection based on the problem or the guest's condition.\textsuperscript{133} Otherwise, the burden placed on the social host is far too great.\textsuperscript{134} Furthermore, if the risk is not obvious, it becomes increasingly unforeseeable and if the risk is unforeseeable, then no duty to protect exists.\textsuperscript{135}

Not only must the risk be obvious, but the risk must also be something that the social host is in a position to protect against and is expected to protect against.\textsuperscript{136} As stated earlier, medical emergencies cannot fall within this category because they are unexpected and unforeseeable.\textsuperscript{137} A guest simply cannot expect that a social host, without medical training or knowledge, will be able to protect against unforeseeable medical emergencies.\textsuperscript{138} To force som
cial hosts to protect against unexpected and unforeseeable medical emergencies is to foist far too great a responsibility on them. The imposition of such a duty is contrary to existing law and public policy.\(^{139}\)

V. CONCLUSION

The *Gilbertson* decision is a correct interpretation of Minnesota law as the social host/guest relationship is not recognized as a "special relationship" and the risk of a medical emergency occurring in the host's home is generally unforeseeable. Social hosts must not be saddled with a blanket duty to protect their guests. A duty to protect against sudden, unforeseen medical emergencies that occur in a host's home cannot be imposed because it is contrary to existing law and public policy. Furthermore, the risk of a possible medical emergency is unexpected and unforeseeable.

If such a duty proves to be necessary in the future, Minnesota courts must keep in mind the basic premise of a duty to protect. The risk to be protected against must not only be obvious and foreseeable, but it also must be something that the host is in a position to protect against and something that the host should be expected to protect against. A medical emergency, such as the one in the *Gilbertson* case, presumably would be covered under such a duty to protect.

\(^{139}\) See discussion *supra* Parts IV.A, IV.B.