SASKATCHEWAN
LAW REVIEW

Social Host Liability: A Logical Extension of Commercial Host Liability?

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This article explores whether social host liability should be recognized in Canada. There appears to be some reluctance to acknowledge social host liability. Although this may be a reflection of collective welfarism, it is inconsistent with negligence law generally and also a disincentive for accident prevention. There is no reason for social hosts to enjoy immunity from liability where they have failed to do what a reasonable person ought to have done in similar circumstances to prevent a foreseeable risk of injury. Profitability, which has traditionally been used to justify the imposition of liability on commercial hosts and not social hosts, is best considered in determining the appropriate standard of care and not the existence of a duty of care. The author examines decisions on social host liability, arguing that liability has not been imposed, not because it would be inconsistent with Canadian law, but because of failure to establish some essential requirements for negligence liability in the circumstances. Social host liability is a logical extension of commercial host liability, brings the law in line with negligence law generally, and encourages socially responsible behaviour on the part of social hosts.

I. INTRODUCTION

The British Columbia Supreme Court decision in *Prevost (Committee of)* v. *Vetter*[1] made headlines because it was the first to impose liability on parents for a teen guest's drunk driving on the basis of social hosts in Canada. In *Prevost*, two teenage sons of the defendants Greg and Shari Vetter hosted an impromptu backyard party at their home where teenage guests consumed their own alcohol. The defendant Desiree Vetter was one of the guests at the party. She allegedly drove from the party while intoxicated, with a number of passengers in her car, including the plaintiff. Soon after they had left the Vetter residence, Desiree's car was involved in a single vehicle accident in which the plaintiff sustained serious injuries. The plaintiff sued a

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1 *Prevost (Committee of)* v. *Vetter* (2001), 197 D.L.R. (4th) 292, 5 C.C.L.T. (3d) 266 (B.C.S.C.).

number of defendants including the parents of the teenage hosts for failing to take reasonable steps to prevent the defendant Desiree from becoming intoxicated or driving while under the influence of alcohol. Both sides agreed that the defendants did not serve alcoholic beverages to the guests. In fact, the consumption of alcohol at the defendants' residence was in violation of a house rule that prohibited minors from consuming alcohol at their home. The summary trial judge found that by permitting the use of their property for teenage parties where alcohol was consumed, the defendants were under a legal duty to ensure that guests did not endanger themselves or others from drunk driving. Failure to take reasonable steps to either prevent Desiree from becoming intoxicated or stop her from driving while intoxicated was found to be a breach of the defendants' duty of care to the plaintiff. Liability was imposed on the parents on the assumption that the alleged breach caused or contributed to the accident. By implication, social hosts can be liable in negligence for injury to their guests or others caused by inebriated guests, whether they provide alcoholic drinks or not, in so far as there was a reasonably foreseeable risk of injury and the host fails to prevent it from materializing.[2] The British Columbia Court of Appeal has ordered a new trial. In setting aside the summary trial decision, Smith J.A. speaking for the British Columbia Court of Appeal, held that an existence of a duty of care and the breach of that duty could not be established in the absence of evidence of causation, which remained unresolved.[3] It appears that the defendants' appeal was successful because it was inappropriate for the summary trial judge to have made a finding of liability in the face of inconclusive evidence of facts (case was not suited for summary trial) and not because social host liability is inconceivable. If the parents were found liable in the new trial, the decision would seem to blur the distinction between commercial and social host liability in Canada.

This article examines the jurisprudential basis for social host liability. Generally, the common law distinguishes between misfeasance (dangerous conduct) and nonfeasance (failure to act to the benefit of another) and imposes liability only for the former. As part of the plaintiff-favourable development of the common law, courts are increasingly recognizing an affirmative duty of care in a number of nonfeasance-like situations, based on a "special relationship" between the parties.[4] Courts have recognized a special relationship

2 The author is of the opinion that no distinction should be made between adult and underage guests who become intoxicated, as is the case in most U.S. states. See Part VII below.

3 *Prevost* v. *Vetter*, [2002] B.C.J. No. 602 (C.A.), online: QL (BCJ).

4 P. Osborne, *The Law of Torts* (Toronto: Irwin Law, 2000) at 67.

between alcohol-serving establishments and their patrons and third parties who could reasonably be imperilled by an intoxicated patron. Factors that influence a finding of a special relationship include commercial benefits to the defendant arising from the relationship with the plaintiff or a third party. Courts often emphasize the economic nature of the defendant's activity as the basis of commercial host liability. The rationale is that since commercial establishments obtain economic benefits from their relationship with their patrons, it is logical to impose a duty of care on them to take affirmative steps to protect their patrons from danger to themselves and others. I argue that the emphasis on profitability, which has served as the main distinction between commercial host and social host liability is misplaced. Although courts often recognize the existence of special relationships where there is a contractual or quasi-contractual relationship between the parties, duties of affirmative action have also been imposed even when there is no economic benefit to the defendant. Even in the context of commercial relationships, the linchpin of affirmative duty is not the economic benefit that inures to the establishment, but the reasonable foreseeability of injury. In my opinion, the economic factor is best considered in the context of the standard of care, that is, what is required of commercial hosts to discharge the duty imposed on them, which might be different from what is required of a particular social host.

Social host liability is consistent with legal precedent and negligence principles generally. Excluding social host liability based on policy considerations is a function of the two-stage test in *Anns* v. *Merton London Borough Council*[5] for determining whether a duty of care should exist in a particular situation. According to the *Anns* test, a *prima facie* duty of care arises where parties are in a proximate relationship and injury to the plaintiff is reasonably foreseeable. The presumptive duty can be limited or negated on the basis of policy considerations. Reluctance to recognize social host liability stems from alleged social and economic implications of such liability for social hosts and how such a finding might detrimentally affect social relations and compensation of accident victims. This article argues that legal principles and broad policy issues must be kept distinct from social and economic considerations that seem to make it difficult for courts to recognize social host liability as a logical extension of commercial host liability in appropriate cases. This is precisely what Lord Wilberforce's dictum in *Anns* was intended to do.

The article begins with a brief discussion of the basis for recognizing a duty of care in negligence law, followed by a review of Canadian case law on commercial and social host liability. I then explore why

5 [1978] A.C. 728 (H.L.).

courts are reluctant to recognize social host liability. Next, I undertake a brief discussion of the purposes of tort law to help understand the judicial reluctance to impose social host liability. This is followed by a discussion of Canadian case law on social host liability with the aim of challenging the perception that social host liability is not recognized in Canada. Finally, the article looks at U.S. jurisprudence on social host liability and concludes that it may be appropriate to hold social hosts liable for injuries to or caused by their intoxicated guests, but the threshold for liability should be higher than what may be applicable to commercial hosts.

II. ESTABLISHING DUTY OF CARE IN NEGLIGENCE LAW

In *Anns*, the House of Lords established a two-step test for ascertaining whether a duty of care exists in a particular case. The Supreme Court of Canada adopted the *Anns* two-stage test in *Kamloops (City of)* v. *Nielsen*,[6] where Wilson J. said that in order to determine whether a tort law duty of care exists,

> two questions must be asked: (1) is there a sufficiently close relationship between the parties...so that, in the reasonable contemplation of the [defendant], carelessness on its part might cause damage to the person? If so, (2) are there any considerations which ought to negative or limit (a) the scope of the duty and (b) the class of persons to whom it is owed or (c) the damages to which a breach of it may give rise?[7]

The first branch of the test emphasizes the role of proximity or closeness that must exist between the defendant's conduct and the plaintiff's injury to justify fixing the defendant with liability. In commenting on the notion of proximity in *Norsk*,[8] McLachlin J. (as she then was) for the majority noted, "Proximity may consist of various forms of closeness—physical, circumstantial, causal or assumed...Viewed thus, the concept of proximity may be seen as an umbrella, covering a number of disparate circumstances in which the relationship between the parties is so close that it is just and reasonable to permit recovery in tort."[9]

Adoption of the two-step approach for the determination of tort duty has enabled Canadian courts to openly consider policy issues that might limit or exclude the presumptive duty of care in particular

6 [1984] 2 S.C.R. 2, 10 D.L.R. (4th) 641 [hereinafter cited to S.C.R.].
7 *Ibid.* at 10-11.
8 *C.N.R.* v. *Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021, 91 D.L.R. (4th) 289 [hereinafter cited to S.C.R.]
9 *Ibid.* at 1152.

situations. Canadian courts have been unequivocal about the role of policy considerations in the imposition of tort liability. In particular, courts consider the purpose to be served by imposing a duty on one person to avoid injury to another person's interests and the societal benefits of the imposition of duty. Thus, under the second branch of the *Anns/Kamloops* test a *prima facie* duty of care can be negated because it would result in undesirable social and economic consequences from a public policy perspective. Although the *Anns* test has been rejected in England, the Supreme Court of Canada has consistently reaffirmed its support for the two-step approach for deciding when a duty of care should be imposed.[10]

A presumptive duty of care to plaintiffs is easily established in most cases. Since the adoption of the two-stage test, Canadian courts have had no difficulty in regarding injured plaintiffs as foreseeable. However, courts do not find the existence of a duty of care in all cases. Ultimately, decisions regarding the imposition of a duty of care are determined by policy considerations of the perceived or real ramifications of a duty or no duty. In the context of social host liability, courts have often maintained that an imposition of a legal duty would result in unacceptable economic and social consequences. This had led one author to conclude that policy considerations trump legal principles in determining the existence of a duty in negligence actions.[11] This article explores how policy considerations have spurred judicial recognition of commercial host liability on the one hand and discouraged social host liability on the other. Emphasis on policy considerations in favour of commercial host liability has diverted attention from the real basis of liability in such cases, which is reasonable foreseeability of injury and the defendant's failure to take reasonable measures to avoid injury to the plaintiff. As will be argued later in this article, economic benefit to commercial establishments and their ability to spread losses *per se* cannot support a finding of liability in the absence of reasonable foreseeability of injury to the plaintiff. There is no reason to exclude liability when a social host has failed to prevent an obvious risk of injury to the plaintiff.

III. CANADIAN CASE LAW ON COMMERICAL AND SOCIAL HOST LIABILITY

In the landmark decision in *Jordan House Ltd.* v. *Menow*[12] the Supreme Court of Canada recognized that alcohol-serving establishments owe a duty of care to intoxicated patrons not to expose them to reasonably foreseeable risks of injury. In *Jordan House*, the plaintiff, a frequent

10 See *Ryan* v. *Victoria (City)*, [1999] 1 S.C.R. 201, 168 D.L.R. (4th) 513; *Norsk*, *supra* note 8 at 1152.
11 See generally L.N. Klar, "Judicial Activism in Private Law" (2001) 80 Can. Bar Rev. 215.
12 [1974] S.C.R. 239, 38 D.L.R. (3d) 105 [hereinafter cited to S.C.R.].

patron of the defendant, was served past his visible point of intoxication and subsequently ejected from the defendant's establishment. The defendant's employees knew that in order to get home, the plaintiff would have to walk along a busy highway in an intoxicated condition. On his way home, a negligent driver struck the plaintiff on the highway. The Court held the operator partly liable for the plaintiff's injury. Laskin J. noted that this was an invitor-invitee relationship from which the defendant derived an economic benefit. Not only did the defendant's employees serve the patron alcohol beyond the point of intoxication in violation of a provincial statute and the defendant's own internal rules, but they also failed to recognize the clearly foreseeable risk of personal injury to the patron when he was ejected from the hotel. The defendant's personal knowledge of the plaintiff and the peculiar risk that he faced upon being shown the exit made it reasonable to impose a duty of care on the hotel not to expose him to foreseeable risk of injury. The hotel breached the duty owed to the plaintiff when it ejected him from the bar.

In *Stewart* v. *Pettie*,[13] the Supreme Court of Canada extended the duty of care owed by commercial alcohol providers to their intoxicated patrons to include third parties who might reasonably come into contact with the patron and to whom they pose some risk. Major J. said extending the duty of care recognized in *Jordan House* to third parties was a logical step because the source of risk to both categories of persons is the same.[14]

Generally, Canadian courts have resisted the imposition of social host liability for injuries suffered or caused by intoxicated guests. *Baumeister (Guardian ad litem of)* v. *Drake*[15] is often cited as authority that Canadian law does not recognize social host liability for the consequences of the drunk driving of their guests. In *Baumeister*, the plaintiff was one of a large number of uninvited guests who crashed a high school graduation party, which was hosted by the defendants Mr. and Mrs. Carefoot for their son, and consumed their own alcohol. The plaintiff left the party intoxicated and as a passenger of one of the uninvited guests. The driver was impaired and ignored the host's advice not to drive. The plaintiff sustained severe injuries in an accident due to the driver's negligence and sought to hold the hosts partly liable for his injuries. The British Columbia Supreme Court dismissed the action against the hosts because they did nothing to permit, induce, encourage or enable the drunken driver to become impaired.[16]

13 [1995] 1 S.C.R. 131, 121 D.L.R. (4th) 222 [hereinafter cited to S.C.R.].

14 *Ibid.* at 143.

15 (1986), 5 B.C.L.R. (2d) 382, 38 C.C.L.T. 1 (S.C.).

16 The *Baumeister* Court found that the driver was impaired prior to arriving at the hosts' residence and subsequently aggravated his impairment by consuming his own alcohol or that of other guests.

Despite the view that *Baumeister* establishes that social host liability is not part of Canadian law, I wish to show in Part VI that the decision does not support that conclusion.

IV. JUDICIAL RELUCTANCE TO RECOGNIZE SOCIAL HOST LIABILITY

Reasonable foreseeability of injury can be obvious in both commercial and social host situations in so far as the guest exhibits visible signs of intoxication and the host knows or ought reasonably to have known that the guest's insobriety poses a risk of harm to him- or herself and others. Similarly, reasonable foreseeability of injury can arise where guests, to the host's knowledge, consume large amounts of alcohol, regardless of the source. This should suffice for the relationship of proximity anticipated by Lord Atkin's dictum in *Donoghue* v. *Stevenson*[17] and the first branch of the *Anns/Kamloops* test. Thus, a *prima facie* duty of care should be recognized where it clearly ought to be in the reasonable contemplation of a host that failure to take preventative steps might cause injury to their guest or others. Social host liability has often been excluded on the basis of the potential social and economic consequences of a finding of liability. This has partly been achieved by emphasizing the difference between commercial and social hosts and why liability should be imposed on the former as a matter of legal principle.

A common theme that runs through commercial host liability cases is the economic nature of the establishments' activities—since operators receive pecuniary benefits from their relationship with intoxicated patrons, it behoves them to take affirmative steps to protect patrons and others from foreseeable risk of harm. The profit factor is often cited as the basis for distinguishing commercial hosts from social hosts. Unlike commercial hosts, social hosts have no such pecuniary interests in their guests' alcohol consumption.[18] As well, commercial hosts insure against risk of loss as a cost of doing business.

17 [1932] A.C. 562 (H.L.).

18 See for example *Crocker* v. *Sundance Northwest Resorts Ltd.*, [1988] 1 S.C.R. 1186, 51 D.L.R. (4th) 321 at 329, 334, where Wilson J. emphasized that the imposition of liability on the defendant was warranted by the fact that the race was run for profit. In *Hague* v. *Billings* (1989), 48 C.C.L.T. 192, 68 O.R. (2d) 321 at 337 (H.C.), Granger J. noted, "If tavern owners are allowed to sell intoxicating beverages, they must accept as a price of doing business, a duty to attempt to keep the highways free of drunk drivers. The duty to take affirmative action is for the protection of the general public...the public has a right to assume that a person or corporation making a profit from the sale of intoxicants will acknowledge and carry out this duty." In *Lum (Guardian ad litem of)* v. *McLintock* (1997), 45 B.C.L.R. (3d) 303 at 310 (S.C.), the Court echoed similar sentiments in finding a commercial host partly liable for injuries caused by an intoxicated patron. Mackenzie J. said the second defendant "is part of a commercial enterprise that profits from the sale of alcoholic beverages with a clear responsibility not to exploit profit potential at a

Emphasis on profit is not a satisfactory justification for the imposition of a duty of care on commercial hosts and not social hosts.[19] As Klar points out, there should be "nothing inherently special about profiting from an activity".[20] Klar notes that in the context of driving, commercial and gratuitous drivers equally owe a duty of care to their passengers.[21] As well, the duty of care owed by an owner-operator of a vessel to take reasonable care for the safety of their guest passengers is not determined by any economic benefit to the host.[22] Similarly, no distinction is made between commercial car dealers and individuals who gratuitously lend their cars to persons they know to be intoxicated or are not qualified to drive. Both categories of persons owe a duty of care to the driver and the public based on reasonable foreseeability of injury, although what is required to discharge that duty might be different.[23]

There is no justification for making profitability the distinguishing factor between commercial and social host liability. Liability in both cases should be based on general negligence analysis. The risk of harm is the same whether the host is a commercial vendor or a social host. Ultimately, a duty of care arises from provision of alcohol or more broadly the opportunity to consume alcohol, intoxication, and the foreseeability of risk of injury from the guest's intoxicated condition, such as knowledge (or likelihood) that the guest will soon drive.[24] In such circumstances, a host has created or contributed to a foreseeable risk of injury and is obligated to take preventative steps to avoid

cost of setting impaired motorists loose on the roads". See also L.N. Klar, "Recent Developments in Canadian Law: Tort Law" (1991) 23 Ottawa L. Rev. 177 at 209-10; *Harriman* v. *Smith*, 697 S.W.2d 219 at 221 (Mo. Ct. App. 1985).

19 See *Kelly* v. *Gwinnell*, 96 N.J. 538, 476 A.2d 1219 at 1224 (N.J.S.C. 1984), where Wilentz C.J. rejected the profit justification for distinguishing commercial hosts from social hosts.

20 L.N. Klar, "The Role of Fault and Policy in Negligence Law" (1996) 35 Alta. L. Rev. 24 at 36.

21 *Ibid.*

22 See *Horsley (Next friend of)* v. *McLaren* (1971), [1972] S.C.R. 441 at 461, 22 D.L.R. (3d) 545, where the Supreme Court of Canada recognized that the defendant, owner-operator of a pleasure boat, owed a duty of affirmative action to take reasonable steps to rescue a passenger who fell overboard through no fault of the owner-operator. Laskin J. (as he then was) noted that this duty "did not depend on the existence of a contract of carriage, nor on whether [the host] was a common carrier or a private carrier of passengers. Having brought his guests into a relationship with him as passengers on his boat, albeit as social or gratuitous passengers, he was obliged to exercise reasonable care for their safety."

23 See *Hempler* v. *Todd* (1970), 14 D.L.R. (3d) 637, 74 W.W.R. 758 (Man. Q.B.); *Ontario Hospital Services Commission* v. *Borsoski* (1973), 54 D.L.R. (3d) 339, 7 O.R. (2d) 83 (H.C.); *Hall* v. *Hebert*, [1993] 2 S.C.R. 159, 101 D.L.R. (4th) 129.

24 *Callion Estate (Public Trustee of)* v. *Callion Estate*, [2002] A.J. No. 74 at paras. 39-47 (Q.B.), online: QL (AJ).

the risk materializing.[25] In *Stewart*, the Supreme Court of Canada emphasized that recognition of a duty of care in commercial host cases is not because of the economic nature of the relationship but the probable risk of injury to the patron or others in the particular circumstances. Thus, a duty of affirmative action arises only where the risk of injury to the intoxicated patron and others was foreseeable and the host failed to take the steps necessary to avert the risk of harm. Major J. said,

> There is little difficulty with the proposition...that a general duty of care exists between [alcohol-serving] establishments...and persons using the highways. I do, however, have difficulty accepting the proposition that the mere existence of this "special relationship", without more, permits the imposition of a positive obligation to act.... The existence of this "special relationship" will frequently warrant the imposition of a positive obligation to act, but the *sine qua non* of tortious liability remains the foreseeability of the risk. Where no risk is foreseeable as a result of the circumstances, no action will be required, despite the existence of a special relationship.[26]

This is consistent with the Court's earlier decision in *Jordan House* where Laskin J. said his decision should not be construed as imposing a duty of care on alcohol vendors to guarantee the safety of every patron who becomes intoxicated at their establishment. Liability in negligence depends on reasonable foreseeability of injury to the plaintiff. He said, "A great deal turns on the knowledge of the operator (or his employees) of the patron and his condition."[27] Similarly, in *Skinner* v. *Baker Estate*,[28] Dunnet J. held that a commercial alcohol

25 See *Kelly*, *supra* note 19 at 1224.

26 *Stewart*, *supra* note 13 at 149-50. In this case, the Court found that there was no reasonable foreseeability of injury to the plaintiff because the defendant, Pettie, was in the company of his wife and sister who did not consume any alcohol. It was reasonable for the establishment to assume that one of the sober persons would drive or that they would make safe transportation arrangements. See also *Plett* v. *Blackrabbit* (2001), 292 A.R. 173 at 176 (Q.B.).

27 *Jordan House*, *supra* note 12 at 250. In *Hague*, *supra* note 18, the Court found a commercial host partly liable for injuries caused by an intoxicated patron. The Court found that the establishment was located on a major highway in a small town. The staff knew or ought to have known that most of their guests were not residents of the town and were likely to drive on the highway. This, combined with the serious injuries that can be inflicted by an automobile driven by an impaired person, imposed a heavy duty of care on the hotel and its staff not to serve such guests excessive alcohol, as that would make them a danger to others.

28 (1991), 34 M.V.R. (2d) 157, 8 C.C.L.I. (2d) 154 (Ont. Gen. Div.).

provider's duty of care to intoxicated patrons must be predicated upon the former's awareness, either actual or constructive, of the latter's inebriated condition and the resulting danger that they pose to themselves and others.[29]

Focus on failure to act in the face of foreseeable risk of harm ensures that the basis of a duty remains the host's knowledge (both actual and constructive) of the patron's inebriated state and the risk of harm to him- or herself and others arising therefrom.[30] It also supports a finding of liability even in the absence of economic benefit to the defendant in so far as she or he may be guilty of failure to take preventative measures to avoid a foreseeable risk of harm.[31] Maintaining a distinction between commercial and social hosts and holding the former liable for injury to or caused by their intoxicated patrons is an attempt to situate negligence liability within a contractual framework, though not strictly based on privity of contract. Although there is no requirement that the patron who consumed the alcohol should have been a contracting party, liability appears to be confined to situations where the host derived economic benefit from the service of alcohol.

Profitability should inform the standard of care expected in a particular case and not the existence of a duty. As Klar notes, "In determining the standard of care required, factors such as profit, the special skills of the defendant, and statutory responsibilities which govern the activity, could lead to a higher standard of conduct required from the commercial host."[32] In determining whether a duty of care has been breached, it is standard analysis to consider the probability and gravity of injury and the cost of avoiding the injury

29 In *Skinner*, there was no evidence of how much alcohol the deceased defendant had consumed prior to going to the Legion Hall, he did not exhibit signs of impairment upon arrival, and the Legion employee did not serve him alcohol past the visible point of intoxication. Dunnet J. concluded that there was no evidence of visible impairment that the employee saw or ought to have observed: *ibid.*

30 See *Linn*, *supra* note 18. In this case, the defendant drank to excess in a commercial establishment. The server knew the defendant was intoxicated and would be driving. In fact, the server walked the defendant to his vehicle and saw him drive away. The defendant's vehicle struck and injured the plaintiff. The Court held that the bar breached its duty to the patron and held the establishment partly liable for the plaintiff's injuries.

31 In *Linn* v. *Rand*, 356 A.2d 15 at 18 (N.J. Sup. Ct. App. Div. 1976), the Court noted that a duty of care should be imposed on both commercial and social hosts if they fail to prevent a reasonably foreseeable risk of harm. The Court said, "It makes little sense to say that the licensee...is under a duty to exercise care, but give immunity to a social host who may be guilty of the same wrongful conduct merely because he is unlicensed".

32 Klar, "Role of Fault", *supra* note 20 at 37.

in determining the reasonableness of the defendant's conduct.[33] Commercial hosts would normally be expected to assume a higher burden in taking steps to prevent injury to their patrons and others, the rationale being that not only was injury reasonably foreseeable, but also, since they derive an economic benefit from the serving of alcohol, there could be an implied legal duty to ensure the safety of their patrons and others. As well, commercial hosts are more likely to have the expertise required to determine when a patron has drunk in excess and to recognize subtle signs of impairment. Indeed, commercial hosts would be expected to go to greater lengths to discharge this obligation, such as arranging rides or providing accommodation to intoxicated patrons and also having a system of ensuring that intoxicated patrons avail themselves of those services. On the other hand, a social host might not be expected to have an equally elaborate system that provides such safety mechanisms and ensures that guests actually use those services. Thus, although both commercial and social hosts could owe a duty of care to their intoxicated guests and others who may reasonably come into contact with them, the standard of care required would depend on the nature of their relationship.[34] This would be in recognition of the fact that the commercial host may have been motivated by profit in over-serving a particular patron. It also encourages socially responsible behaviour on the part of alcohol-serving establishments not to put profit ahead of safety and if they choose the former, to take positive steps to prevent reasonably foreseeable injury to patrons and others.

In sum, although courts tend to emphasize the economic benefit to defendants in commercial host liability cases, the ultimate determinant of liability remains the foreseeability of harm to patrons and others. Economic benefit to the host gives rise to a "special relationship" but this does not necessarily lead to the imposition of a duty. Actual or constructive knowledge of the patron's intoxicated condition coupled with the reasonable foreseeability of risk of injury to the patron or others is the *sine qua non* for imposing a duty of care in particular cases. This is consistent with other areas of tort law where a duty to take affirmative steps may arise even in the absence of a commercial relationship. The economic nature of the relationship

33 See *The Wagon Mound (No. 2)*, [1967] 1 A.C. 617 (P.C.); *Botting* v. *British Columbia* (1996), 33 C.C.L.T. (2d) 294, 24 M.V.R. (3d) 117 (B.C.S.C.).

34 In *Haggarty* v. *Desmarais*, [2000] B.C.J. No. 186 (S.C.), online: QL (BCJ), the plaintiff, an intoxicated guest, ignored the host's efforts to prevent her from driving. Not only did she insist on her ability to drive safely, but she also refused the host's offer of accommodation or calling a cab. The action against the hosts for the plaintiff's subsequent injuries was dismissed because no duty of care arose in the circumstances. The Court further noted that even if a duty existed, the defendants' efforts to prevent her from driving satisfactorily discharged any duty they must have owed in the circumstances.

should determine the nature and not the existence of a duty of care. Imposition of a duty on social hosts in appropriate cases should be a logical extension of commercial host liability. Profitability *per se* is not a good reason to distinguish the commercial host from the social host. Consistent with the general negligence analysis, social host liability should be recognized when the risk of harm is reasonably foreseeable. Therefore, there is no substantive justification for excluding social host liability. In line with the *Anns/Kamloops* test, it will be shown later in this article that prevailing policy considerations against drunk driving also support social host liability. The next section examines a possible theoretical rationale for excluding social host liability. The discussion is situated in the theoretical basis of tort law generally.

V. THEORETICAL UNDERPINNINGS OF TORT LAW

The objective of this section is to explore a possible theoretical rationale for courts' reluctance to recognize social host liability. The desire to compensate accident victims appears to be an important objective of tort law. The conceptual vehicle that has been employed to achieve this objective, at least in the context of social hosts, though laudable, does nothing to encourage socially responsible behaviour by way of accident prevention or even personal accountability for one's acts and omissions. The system is reactive in that it tries to compensate accident victims after the fact without exacting some measure of responsibility from hosts who may have been able to prevent the accident in the first place. This article takes the position that the laudable goals of compensation and loss distribution should be pursued in a way that encourages socially responsible behaviour from everyone, including social hosts, without unduly stifling social relations.

Judicial response to claims by accident victims is influenced by the courts' perception of the purpose(s) of tort law. There are two main approaches to understanding the purpose of tort law—the moralist and functionalist arguments. Both moralists and functionalists agree that negligence law is fault-based: that is, wrongdoing on the part of the defendant remains the basis of tort liability. However, moralists view tort law as primarily a system of corrective justice, while functionalists perceive tort law as a means to achieving socially desirable goals.

The moralist view suggests that tort law is primarily an ethical system aimed at equality between individuals by correcting individual injustices that arise between them as a result of the wrongful conduct of one person.[35] In this sense, tort law's main purpose is to restore

35 See generally E.J. Weinrib, *The Idea of Private Law* (Cambridge, Mass.: Harvard University Press, 1995); L.N. Klar, *Tort Law*, 2d ed. (Toronto: Carswell, 1996) at 12-14.

the equilibrium between the parties that has been disturbed by the defendant's wrongdoing. The focus is on the defendant's conduct and getting him or her to take personal responsibility for correcting the imbalance caused by his or her wrongdoing. Within this framework, tort law's value is intrinsic and therefore to be valued as an end in itself. The existence of tort law requires no justification beyond the purpose of corrective justice. All other goals, such as entitlement to compensation that follows a finding of wrongdoing, are incidental. Thus, tort law need not be justified based on the extent to which it achieves these other goals. The moralist view would support social host liability in so far as the plaintiff's injury is the foreseeable consequence of the host's act or omission. Social hosts are expected to take personal responsibility for their conduct and remedy the resulting wrong to the injured party, which is partly or wholly due to the host's breach of duty. Consistent with the moralist view of tort law, imposition of liability in this context would be solely based on the host's wrongdoing and the need to restore the equilibrium between the parties that has been disturbed by the defendant's conduct. All other considerations are extrinsic to the imposition of liability. The defendant's wrongful conduct justifies shifting the plaintiff's losses from the accident to the defendant's shoulders.

The moralist view of tort law is premised on a false sense of equality among individuals. Advocates of this view do not recognize the inequality in society and the fact that sometimes we need to look beyond the immediate litigants to include broader economic, social, and political factors in determining what equality in a particular context ought to be and, more precisely, how losses ought to be apportioned in the interest of fairness. At best, the moralist view of tort law achieves formal equality by seemingly returning the parties to the *status quo ante*. This view of tort law seems to be premised on fixed notions of tortious conduct that could have no bearing on prevailing social, economic and political conditions. The responsibility for tortious conduct and the resulting entitlement to damages takes place in the abstract without any reference to the actual conditions of the parties and how the decision could alter their lives for the worse.

In practice, tort liability tends to be contextual. Not all interests deserve or receive the same degree of protection, if at all, by tort law.[36] As well, the nature of the defendant's conduct plays a significant role in the imposition of liability.[37] Deliberate interference with other

36 For example, see Fleming who notes, "A duty not to expose others to unreasonable risks is most generally recognized with reference to physical harm to persons or tangible things. More reservations have been evident in regard to purely financial loss and to non-external injury like mental distress." J.G. Fleming, *The Law of Torts*, 9th ed. (North Ryde, N.S.W.: LBC Information Services, 1998) at 7.

37 See F.A. Trindade & P. Cane, *The Law of Torts in Australia*, 2d ed. (Melbourne: Oxford University Press, 1993) at 2-3.

peoples' interests usually serves no social purpose and courts are less charitable to intentional wrongdoers than unintentional conduct that results in injury to others. The social utility of a defendant's conduct may be a factor to be considered in imposing liability. Similarly, the likelihood of risk, the severity of harm and the cost of averting the same, are all considered in negligence cases. Clearly, the analysis extends beyond the fault of the defendant to include broader social policy considerations.

The moralists' focus on corrective justice as the primary function of tort law generally presupposes that public policy considerations have no place in the assessment of liability. A survey of negligence law jurisprudence shows the opposite. Wright observed that the essential purpose of tort law is to determine which of the many claims for losses are worthy of compensation and to what extent the law will limit freedom of action either by compelling persons to refrain from conduct that may cause harm to others or by making them compensate those who suffer losses due to their conduct. Where courts draw the line between compensable and non-compensable losses is influenced, *inter alia*, by policies that reflect prevailing social, moral and economic conditions.[38] Since the adoption of the two-part *Anns/Kamloops* test for establishing the existence of a legal duty, Canadian courts have been unequivocal about the role of policy considerations in the imposition of tort liability, in particular, whether one person has a duty to avoid injury to another person's interests.[39]

As well, the moralist view of tort law with its emphasis on personal accountability for the consequences of one's wrongful conduct is individualistic and inconsistent with current notions of social welfare and collectivism. It focuses on the culpability of the defendant and loss shifting without considering the social utility of the defendant's conduct or the relative positions of the litigants. Also, the moralist view is essentialist because it portrays fault as the ultimate determinant of tort liability. In the context of negligence law, this would, for example, render the remoteness factor irrelevant in addition to policy considerations noted in the preceding paragraph. A plaintiff would only have to establish fault and causation to be entitled to compensation for their losses. In practice, the establishment of fault, though important for tort liability, does not necessarily entitle an injured party to compensation. Much of it depends on other factors such as

38 C.A. Wright, "The Province and Function of the Law of Torts" in A.M. Linden, ed., *Studies in Canadian Tort Law* (Toronto: Butterworths, 1968) 1 at 5.

39 See generally Klar, "Judicial Activism", *supra* note 11, who argues that policy considerations seem to trump judicial policy in the determination of whether a duty exists in negligence actions in Canada.

the changing social and economic conditions in which the parties must operate, including the availability of liability insurance and the needs of the community in general.[40] Rather than shifting losses from the plaintiff to the defendant, oftentimes tort law is used, whether directly or indirectly, to spread losses throughout the community or to consumers of particular goods and services.[41] Although McLachlin J. (as she then was) rejected open considerations of the economic factor in determining liability in *Norsk*, it appears that courts are sometimes influenced by economic considerations in making decisions about the imposition of liability in appropriate cases, albeit indirectly. This is similar to the court's refusal to openly recognize the role of policy considerations in determining duty of care prior to the *Anns* decision. I find La Forest's position about the role of economic theory in the assessment of liability more forthright,[42] although I would not go as far as him to make the ability to spread loss an essential element in determining where to fix liability. La Forest maintains that the ability to spread losses should be one of the policy considerations in determining liability in cases that demand pragmatic solutions.[43]

The predominant view is that tort law is functional: it is intended to achieve a number of objectives for the aggregate welfare of society. The existence of tort law is justified based on the extent to which it achieves these goals. Although there is no agreement on the catalogue of objectives of tort law, there seems to be general agreement that the most important objective of tort law is to provide compensation to accident victims. Other goals of tort law include accident prevention through deterrence and education.[44] The degrees to which these

40 See Wright, *supra* note 38 at 5, 8. Despite the traditional view expressed by Simmonds V.-C., in *Lister* v. *Romford Ice and Cold Storage*, [1957] A.C. 555 at 576-77, that tort liability should not be predicated on the fact of insurance, there is no doubt that courts have shown a great deal more ease in making damages awards since the advent of liability insurance. Presumably this is because individual defendants rarely have to shoulder all the financial consequences of a judgment single-handedly. See also J. Stapleton, "Tort, Insurance and Ideology" (1995) 58 Mod. L. Rev. 820.

41 See Fleming, *supra* note 36 at 12-13; Osborne, *supra* note 4 at 14; Stapleton, *supra* note 40 at 825; A.M. Linden, *Canadian Tort Law*, 7th ed. (Toronto: Butterworths, 1997) at 4-5; *Norsk*, *supra* note 8 at 1120, La Forest J. (dissenting).

42 See generally La Forest's dissenting judgments in *Norsk*, *ibid.* at 1116-23, and *London Drugs* v. *Kuehne & Nagel*, [1992] 3 S.C.R. 299, 97 D.L.R. (4th) 261 [hereinafter cited to S.C.R.].

43 See also *Lamb* v. *Camden London Borough Council*, [1981] 1 Q.B. 625 at 637-38 (C.A.), Lord Denning M.R.

44 For a general discussion of the aims of tort law, see Linden, *Canadian Tort Law*, *supra* note 41, c. 1; Osborne, *supra* note 4 at 13-18; G. Williams & B.A. Hepple, *Foundations of the Law of Tort*, 2d ed. (Toronto: Butterworths, 1984) at 27-30. See also *Kendall* v. *Fontaine*, [1995] B.C.J. No. 1636 at para. 28 (S.C.), online: QL (BCJ).

goals are achieved remain questionable, hence the focus tends to be on adjusting or spreading losses after the accident has occurred and damage has been sustained.[45] Entitlement to compensation remains a matter of social policy and is intended to further the good of society as a whole. Hence, not all losses are compensable. Additionally, the extent of compensation is determined by factors such as remoteness and the plaintiff's own conduct.

Oftentimes, social host liability arises in the context of automobile accidents causing injury to guests and others. Hosts may not carry liability insurance to cover such losses. Meanwhile the financial consequences of being found liable can be devastating. Although social host liability can be covered by personal liability insurance under homeowner's and tenant's policies, it is an unreliable source of compensation.[46] Since personal liability insurance is not compulsory, there is no guarantee that a particular social host has such coverage. Even when the host has liability insurance, compensation levels may vary depending on the coverage, thereby not constituting a reliable means for compensating accident victims. Further, coverage is often limited to legal liability arising from an insured's personal actions. Social host liability may arise from omissions on the part of the host rather than from positive actions. It is therefore conceivable that even when a social host carries personal liability insurance, such claims could be excluded from compensation under the host's insurance policy. Therefore, personal liability insurance is not a reliable avenue for securing adequate compensation for accident victims.

Similarly, reliance cannot be placed on private sector first party insurance. Although an increasing number of Canadians have first party insurance coverage for personal disability, such policies are not universal.[47] Compulsory automobile insurance easily fills the lacuna in this area of the law. Compulsory automobile insurance ensures that there would often be some, even if limited, compensation for an injured party. In this way, losses of accident victims can easily be distributed among the motoring public. In contrast, commercial establishments are expected to carry liability insurance to cover such losses as a condition of doing business. This makes commercial hosts attractive defendants without having to worry about the loss-spreading function of tort law. Unlike most social hosts, commercial hosts are able to absorb and spread the cost of accidents to their customers either through higher prices or liability insurance. Hence, commercial hosts are perceived to be suitable channels for loss spreading whereas

45 See Wright, *supra* note 38; Fleming, *supra* note 36 at 5; Williams & Hepple, *supra* note 44 at 3.

46 See G.G. Hilliker, *Liability Insurance Law in Canada*, 3d ed. (Toronto: Butterworths, 2001) at 243-45.

47 See Osborne, *supra* note 4 at 21-22.

social hosts are not. Most social host liability cases arise in relation to automobile accidents. However, social hosts are not perceived as reliable channels for loss spreading. Thus, no social purpose would be served by holding them liable for a plaintiff's injuries. Further, social host liability is perceived to portend a chilling effect on social relations and is therefore to be avoided. A combination of these factors partly account for the reluctance to recognize social host liability.

Policy considerations about the potential devastating economic and social consequences of social host liability and the unlikelihood of the opportunity to spread losses have operated to exclude a finding of a duty of care in most cases. For the most part, these concerns remain the subtext of judicial decisions not to impose a duty of care on social hosts.[48] Some United States courts have unequivocally asserted that the possibility of insurance coverage is a valid consideration in imposing social host liability.[49] It is questionable whether these policy considerations should continue to exclude the finding of a duty of care, especially when current public policy and opinion seem to favour zero-tolerance for drunk driving. This would support the imposition of a duty of care on social hosts who could reasonably have prevented injury to persons and property arising from drunk driving. In *Kelly*, Wilentz C.J. noted that in view of the harm caused by drunken drivers, the growing intolerance for such losses and the recognition of commercial host liability, the imposition of a duty of care in this context is consistent with and supportive of the social goal of ridding the roads of intoxicated drivers and is supported by society.[50]

48 Similar policy concerns underlie the principle of *respondeat superior* or vicarious liability. See *London Drugs*, *supra* note 42 at 338-39, where La Forest J. (dissenting) noted that vicarious liability, among others, allows a plaintiff to receive compensation from a person with deep pockets, who is also in a better position to spread tort losses by passing them on through liability insurance or higher prices.

49 For example, see *Kelly*, *supra* note 19, where both Wilentz C.J. for the majority and Garibaldi J., dissenting, were in agreement that the possibility of hosts having insurance coverage for such losses is a factor to be considered in imposing liability. Wilentz C.J. imposed liability on the hosts, among other things, because he was convinced their homeowner's insurance policy would cover such liability: at 1225. In failing to impose liability, Garibaldi J. doubted whether social host liability is covered under the homeowner's insurance policy. More generally, he doubted the propriety of compensating injured victims through a homeowner's insurance policy, among other things, when a reliable remedy exists under compulsory automobile insurance schemes: at 1225, 1227, 1232-33, 1234-35. See also *Andres v. Alpha Kappa Lambda Fraternity*, 730 S.W.2d 547 (Mo. Sup. Ct. 1987) where the Court argued against social host liability, partly because social hosts could not insure against such liability.

50 *Supra* note 19 at 1224. Wilentz C.J. recognized that the possibility of social host liability could affect the mood at social gatherings and thereby diminish the enjoyment and relaxation typical of such gatherings. However, given concerns about the consequences of drunk driving, any change in social behaviour resulting from social host liability will be worth it.

Although the moralist view of tort law, for the most part, appears more academic than practical, it provides a limited conceptual vehicle for arguing in favour of social host liability. Given the focus on fault and corrective justice, moralists would be willing to recognize social host liability where the host's conduct causes or contributes to the plaintiff's injury without having to worry about the perceived difficulties that such a decision might have for the host and society in general. The moralist view is not helpful beyond this point because it does not allow the active involvement of tort law in pursuing substantive equality by looking beyond *prima facie* duty of care and whether the host's breach of that duty caused or contributed to the plaintiff's loss. As La Forest pointed out in *Norsk*, in appropriate cases the situations of both plaintiff and defendant need to be examined in imposing liability.[51]

Emphasis on the loss-spreading function of tort law appears to promote a sense of collective welfare, moral responsibility, and may account for the judicial reluctance to recognize social host liability.[52] Despite the moral and social justification for maintaining the *status quo*, failure to impose liability is a disincentive for accident prevention. It weakens tort law's objectives of deterrence and education and creates a moral hazard. As well, it diminishes the concept of personal fault, which constitutes the basis of Canadian tort law. Given the human and economic costs of accidents, this is not a socially responsible position because it compromises public safety and individual responsibility. As I have argued throughout this article, this is a misplaced focus that does nothing to promote the well-being of individuals. It is better to recognize that social host liability may arise in appropriate cases. Concerns about the consequences of drunk driving and collective security, support the elimination of the artificial distinction between commercial and social hosts and demand socially responsible behaviour on the part of all hosts. Preferably, the nature of the relationship between the host and guest should determine the appropriate standard of care and not the existence of a legal duty. Similarly, loss-spreading and absorption capabilities may be appropriately considered in the apportionment of liability as a court sees fit in particular cases.

Even if the imposition of a duty of care on social hosts is simply a reflection of symbolic personal responsibility and therefore is not a good conduit for loss distribution, it could at least achieve the goals of accident prevention and indicate society's disapproval of social hosts' failure to take preventative measures in the face of reasonably

51 *Norsk*, *supra* note 8 at 1116.

52 There is a perception that social host liability is inconsistent with collectivism because it could impose huge financial burdens arising from social relations on the shoulders of individuals with the likelihood of catastrophic financial consequences for social hosts.

foreseeable risks of injury. More importantly, social host liability is consistent with the fault-based framework of Canadian tort law. Reluctance to impose liability on social hosts also stems from the potential consequences of such findings, which are considered under the policy branch of the *Ann/Kamloops* test. In my opinion, these are narrow policy considerations that should not prevent the extension of legal principles in this area of the law. As well, societal concerns about the effects of drunk driving should trump potential consequences of a finding of liability against social hosts. Recognizing that a duty of care could be imposed on social hosts will enable Canadian courts and academics to openly develop jurisprudence for determining when it might be appropriate to impose tort liability on social hosts. The next section examines some Canadian cases on social host liability. I argue that social host liability is consistent with general negligence law.

VI. SOCIAL HOST LIABILITY IN CANADA

The objective of this section and throughout this article is to challenge the view that social host liability is not recognized in Canada. In fact, the few cases on social host liability appear to support the imposition of liability where requisite elements can be established. Oftentimes, claims for liability fail because no duty of care arose in the circumstances or that there was no breach of duty or both. These findings are matters of fact, are case-specific, and do not negate the possibility of a duty of care in appropriate cases. It will be argued later in this section that even the recent British Columbia Court of Appeal decision in *Prevost* would appear to support social host liability. Despite the Court's ambivalence about whether social host liability is recognized in Canada, it ordered a new trial to determine whether the parents could be liable in the circumstances. The British Columbia Court of Appeal did not see fit to grant the parents' motion to dismiss the action against them, even though it was argued that social host liability is not recognized in Canada.

Contrary to popular perception, the *Baumeister* decision is not against social host liability. Rather, the decision should be limited to the facts of that case. No duty of care could realistically have arisen in the circumstances. The negligent driver was one of over two hundred guests who crashed the defendant's party already intoxicated and consumed their own alcohol at the party. The hosts were exonerated because they did not supply alcohol.[53] Even if we assume that by not turning the uninvited guests away, the hosts impliedly assumed

53 This is evidenced, *inter alia*, by the Court's reference to U.S. decisions, which emphasized the serving of alcohol as the basis of liability, with approval. See *Kelly*, *supra* note 19; *Walker* v. *Kennedy*, 338 N.W.2d 254 (Minn. Sup. Ct. 1983). See Part VII below regarding U.S. cases on social liability for a discussion of these cases.

responsibility for the safety of guests and the public from impaired driving, thereby giving rise to a duty of care, they may have successfully discharged the burden imposed on them in the circumstances.[54]

Canadian courts have begun to evince a willingness to impose liability on social hosts for injuries to or caused by their intoxicated guests. In *Stevenson* v. *Clearview Riverside Resort*,[55] Wilson J. noted that social host liability has developed as an extension of commercial host liability. Courts rely on the existence of a special relationship between the host and the injured party, evidence of impairment when guests leave the social event, and the reasonable foreseeability that they pose a threat to themselves and others. These factors distinguish the social host from all others and justify imposition of a duty in appropriate cases. Although some courts have suggested that the provision of alcohol is the basis of the special relationship giving rise to a duty of care,[56] a duty may equally arise where hosts merely provide the opportunity for guests to consume their own alcohol such as B.Y.O.B. (bring your own bottle) parties. Reasonable foreseeability of injury should be the ultimate determinant whether a duty of care should be imposed or not. In *Wince (Guardian ad Litem of)* v. *Ball*,[57] where guests consumed their own alcohol, Bielby J. noted that the supply of alcohol is not necessary to determine social host liability.[58]

Like commercial host liability, a duty of care does not arise simply because a social host has offered alcohol or created the opportunity for guests to consume alcohol. A duty of care exists only where there is foreseeable risk of injury, for example, where the host serves or permits an obviously inebriated guest to consume alcohol knowing that she or he would be driving soon or permits a visibly intoxicated guest to drive away or be in a dangerous situation without making reasonable efforts to prevent him or her from doing so. In *Alchimowicz*,[59] the plaintiff attended a party where he consumed alcohol. He later went to a park with some friends where he sustained serious injury after diving from a dock in an intoxicated state. The claim against the social host was dismissed because there was no

54 The host's advice to Drake not to drive suggests that he was concerned about his ability to drive safely. Given that Mr. Carefoot did not know exactly how much Drake had consumed and the large number of guests, it was impossible to monitor guests' consumption patterns. The defendant's efforts to dissuade Drake from driving could have been reasonable to discharge the burden imposed on the host in those circumstances.

55 [2000] O.J. No. 4863 (Sup. Ct. Jus.), online: QL (OJ).

56 See *Baumeister*, *supra* note 15; *Stevenson*, *supra* note 55; *Alchimowicz* v. *Schram*, [1997] O.J. No. 135 (Gen. Div.), aff'd [1999] O.J. No. 115 (C.A.), leave to appeal dismissed December 16, 1999, [1999] S.C.C.A. No. 127, online: QL (OJ).

57 (1996), 136 D.L.R. (4th) 104, 8 W.W.R. 28 (Alta. Q.B.).

58 This point is discussed in detail in the context of U.S. case law, Part VII below.

59 *Alchimowicz*, *supra* note 56.

foreseeable risk of injury to warrant imposition of a duty in the circumstances. Although the host served the plaintiff some alcohol, it was not excessive and the latter did not exhibit any observable signs of gross intoxication at any time while he was at the defendant's party.[60] Similar sentiments have been echoed in cases such as *Haggarty* v. *Desmarais*,[61] and *Broadfoot* v. *Ontario (Minister of Transportation and Communication)*,[62] where courts have consistently failed to impose a duty on hosts in the absence of foreseeable risk of injury to guests and others. Even when a host supplies alcohol, a duty of care does not necessarily arise from the quantity of alcohol consumed. Rather, it is the degree of impairment that guests exhibit and the likelihood of harm to guests and others that constitute the basis of a legal duty on the defendant. Thus, reasonable foreseeability of injury cannot be established solely based on a guest's blood alcohol level at the time of the accident. As Quinn J. pointed out in *Broadfoot*, social hosts do not have the benefit of a guest's blood alcohol reading. This is consistent with the fact that people have varying degrees of tolerance to alcohol consumption. Therefore, the basis of a duty should remain observable signs of impairment and failure to avoid a foreseeable risk of injury.

Emphasis on evidence of impairment ensures that social host liability arises only when the guest appears intoxicated, regardless of how much alcohol the guest consumes either prior to or while at the host's social event.[63] Additionally, it allays some of the concerns

60 As it turned out, the plaintiff consumed substantial amounts of alcohol prior to arriving at the defendant's party and for the most part, drank his own alcohol while at the party. As an experienced drinker, the plaintiff was good at concealing his impairment from alcohol. See also *Stevenson*, *supra* note 55 at para. 33, where third parties purchased alcohol for the plaintiff who had previously consumed substantial amounts of alcohol but did not exhibit any sign of impairment and subsequently sustained serious injuries. In dismissing the claim against the third parties, the Court held that they were not social hosts *per se* and therefore owed no duty of care to the plaintiff. Further, the Court noted that even if the relationship was one potentially giving rise to a duty, no duty will arise in the absence of obvious impairment at the time alcohol was supplied.

61 *Haggarty*, *supra* note 34. The Court refused to impose a duty of care on the social host in this case because they did not offer the plaintiff drinks and therefore did not know how much she had consumed. More importantly, there was no foreseeable risk of injury to justify imposition of duty in the circumstances because she did not appear intoxicated when she left the party.

62 (1997) 32 O.R. (3d) 361, 25 M.V.R. (3d) 224 (Gen. Div.). In this case, although the host served the deceased a considerable amount of alcohol, an action against the host was dismissed because the deceased driver did not exhibit signs of impairment while at the host's house.

63 In *Fitkin (Litigation Administrator of)* v. *Latimer* (1997), 35 O.R. (3d) 464 (C.A.), the plaintiff, after consuming alcohol at the defendants' residence, sustained serious injury when he attempted to dive into a backyard pool. The action against the host was dismissed because unknown to the defendants, the plaintiff had consumed a substantial amount of alcohol prior to arriving at their house but did not appear

about the chilling effects on social relations by reaffirming that the mere consumption of alcohol at a social gathering is not sufficient to impose liability. This is a principled position since social hosts might not be able to monitor the consumption patterns of their guests. Even when hosts exercise a high degree of control over guests' alcohol consumption, it might not be feasible for a host to monitor each guest's alcohol consumption, for example, where there is a large number of guests. More importantly, given that a duty of care may arise even when guests consume their own alcohol, it is reasonable that the law imposes a duty of care on hosts only when guests appear intoxicated. Since most social hosts are not in the business of selling alcohol, the criteria for imposing a duty of care should remain objective. A duty should arise in the face of observable signs of intoxication coupled with the likelihood that the guest would pose a danger to her- or himself or others. A duty of care might also arise where a guest, to the host's knowledge, consumes a significant amount of alcohol and a reasonable person might have reason to suspect that he or she might be intoxicated, even in the absence of signs of insobriety.[64] Furthermore, a duty of care will arise where the host has personal knowledge of the drinking habits of the guest and knows that the latter is intoxicated and will drive.[65]

Even when a duty is recognized, social host liability must ultimately be predicated on the existence of a reasonable foreseeability of injury from the consumption of alcohol, the defendant's failure to prevent the risk of injury from materializing, and evidence that the host's negligence caused or contributed to the injury in question. Thus, a social host will be liable only when it was reasonably foreseeable that intoxicated guests posed a risk to themselves or others. For the most part, the risk in question relates to injuries from drunk driving. Therefore, there can be no liability when it was not foreseeable that the guest would drive. In *Wince*,[66] the Court dismissed a claim against the defendant father who permitted a teenage party in his home where alcohol was consumed on the ground that the father could not

intoxicated. The defendants had no way of knowing the plaintiff's condition and the mere consumption of alcohol at their premises did not impose a duty of care on the defendants for the plaintiff's benefit.

64 This is consistent with *Stewart*, where the Supreme Court of Canada held that a duty of care might arise based on the amount of alcohol consumed to the knowledge of the host even if the guest did not exhibit signs of intoxication: *supra* note 13 at 132-33.

65 See *Dryden (Litigation Guardian of)* v. *Campbell Estate* (2001), 11 M.V.R. (4th) 247, O.J. No. 829 (Gen. Div.), online: QL (OJ). In this case, a duty of care was imposed on the co-defendant for purchasing and consuming alcohol with the defendant, who was known to have a drinking problem and a propensity for impaired driving.

66 *Supra* note 57.

have foreseen that the intoxicated guest would be driving.[67] The *Wince* decision is consistent with commercial host liability cases where courts impose liability only in circumstances where the risk of injury is reasonably foreseeable.[68] Courts have reached similar conclusions in non-driving settings. In *Fitkin*,[69] which involved a swimming pool injury, the Court held that the host was not liable for the respondent's injuries because those injuries were not a foreseeable outcome of the respondent's activity on the host's premises. The Court pointed out that no one had ever climbed the railings surrounding the pool and there was no reason to foresee that the plaintiff would climb them on that fateful day.[70]

The preceding discussion shows that social host liability is unlikely to have the negative effects on social relations as is commonly perceived. Courts are likely to require a high threshold for establishing evidence of impairment in social host cases. Given that most veteran drinkers appear to remain in control when intoxicated and hosts are not expected to be human breathalyser machines, the evidence of impairment requirement will be difficult to establish in most cases. Also, given that hosts might not always be in a position to monitor alcohol consumption, the quantity of alcohol test will also be difficult to establish. Even when the person is obviously impaired, no duty may arise in the absence of foreseeability of injury to guests or others. For the most part, no duty can arise in relation to guests not driving. Once the risk of harm is foreseeable, a duty of care should not be limited to hosts who provided intoxicants or somehow controlled guests' alcohol consumption. In *Haggarty*, the Court did not rule out the possibility of a duty of care even though the defendants did not give the plaintiff any alcohol or assist her to obtain her own.

Where a duty of care is recognized, then the adequacy of the host's precautions to avoid the risk of injury, if any, comes under

67 The teenage guest was intoxicated at the party but had no car on site. He left the party as a passenger of a sober friend who dropped him at another location where the teenage guest had parked his car. The teenage guest later struck a pedestrian. The Court concluded that the defendant father could not have foreseen the accident in these circumstances.

68 See *Stewart*, *supra* note 13, where the Supreme Court of Canada concluded that given that the defendant was in the company of sober adults who knew how much alcohol he had consumed, it was not reasonably foreseeable that the intoxicated guest would drive. The commercial host was not obliged to prevent the patron from driving. Thus, failure to inquire whether the defendant was going to drive or to take steps to prevent him from driving did not cause the plaintiff's injury. See also *Alchimowicz*, *supra* note 56.

69 *Supra* note 63.

70 See also *Stevenson*, *supra* note 55 at paras. 38-39, where the Court concluded that the plaintiff's decision to dive into the river was sudden and unexpected and could not be a reasonably foreseeable consequence of the provision of alcohol.

judicial scrutiny. As in all negligence cases, liability will be imposed only where the host breached the duty of care imposed on him or her in the circumstances. In *Chretien* v. *Jensen*,[71] the British Columbia Court of Appeal affirmed the trial decision holding the defendant occupiers liable for failing to take reasonable steps to protect the plaintiff from a reasonable risk of harm although they did not provide the alcohol that the plaintiff consumed. The defendants obtained the permission of the provincial government to build, maintain and repair a bridge that provided access to an island where they live. The bridge was constructed primarily for vehicular traffic and had no handrails. The bridge, to the defendants' knowledge, had become a hang-out for their children and their friends in the evenings where alcohol was routinely consumed. The defendants did not generally attend the parties or provide alcohol. The plaintiff, who became intoxicated at one such gathering, was severely injured when he fell off the bridge. In holding the defendants partly liable for the plaintiff's injuries, the Court noted that the accident was within the foreseeable risk of injury and the defendants were negligent in not taking reasonable steps to prevent it. Absence of handrails made the bridge unsafe for social gatherings where alcohol was likely to be consumed. The defendants' failure to install handrails or prohibit the use of the bridge for parties in such circumstances was negligent on their part.

Liability in *Chretien* was based on general negligence principles by which a reasonable person is expected not to create a reasonably foreseeable risk of harm or take reasonable steps to avoid the risk of injury. Although the defendants had no actual knowledge of who attended social gatherings on the bridge at particular times, they were aware of the use of the bridge for such purposes and the inherent risk of harm to guests. Given the condition of the bridge, and the times and nature of the social gatherings, permission for the use of the bridge in this manner gave rise to a foreseeable risk of injury to warrant imposition of a duty of care. Failure to prohibit the use of the bridge for social gatherings or render it safe for such purposes constituted a breach of the duty imposed on the defendants. The defendants in this case can be likened to hosts who permit alcohol to be consumed at their social gatherings. It is not unreasonable to expect hosts to ensure, within reasonable limits, that their intoxicated guests do not pose a danger to themselves or the public. Hosts should make reasonable efforts to stop guests who they know would be driving from drinking past the point of visible intoxication or prevent them from driving while intoxicated.

In *Prevost* the British Columbia Supreme Court imposed liability on the parents of teenage hosts for injuries to the plaintiff that were

71 (1998), 58 B.C.L.R. (3d) 186, [1999] 6 W.W.R. 648 (C.A.).

allegedly caused by the drunk driving of a guest who had consumed alcohol at their home. Liability was based on an alleged foreseeability of risk to teenage guests and others from drunk driving and the defendant's failure to prevent the risk of injury from materializing.[72] In setting aside the summary trial decision, the British Columbia Court of Appeal did not indicate that a duty of care could not be imposed on the parents in these circumstances. Rather, the Court of Appeal held that there was insufficient evidence before the summary trial judge to conclusively determine whether such a duty in fact arose in the circumstances, what the appropriate standard of care was and, assuming that a duty existed and the parents were in breach of that duty, whether that breach caused the plaintiff's injuries. Even if the defendants had established a "paternalistic relationship" with the minor guests as suggested by the summary trial decision, that in and of itself was insufficient to give rise to a duty of care. As Major J. stated in *Stewart*, the special relationship may exist in respect of all guests, but preventative steps need to be taken only when there is a foreseeable risk of harm.[73] Indeed, the trial judge in *Prevost* was careful to limit liability even in the context of the so-called paternalistic relationships to situations where the host knew or ought to have known that the guest was impaired either based on the consumption of alcohol or physical symptoms of intoxication.[74]

It follows that liability should not be imposed on the defendants in *Prevost* unless the plaintiff is able to show that, aside from permitting teenagers to hold parties at their house, the defendants did or omitted to do something that a reasonable person would have done in the

72 The summary trial judge found that by allowing teenagers to hang out and consume alcohol at their home, the defendants created a dangerous situation because of the possibility of intoxicated teenagers driving. As well, the parents established a paternalistic relationship with the minor guests and were therefore obligated to take reasonable steps to prevent the risk of injury. In fact, the defendants had taken steps to prevent intoxicated teenagers from driving in the past. The defendant Shari Vetter routinely offered accommodation to intoxicated guests, asked them to surrender their keys and sometimes offered to drive them home, all in an effort to prevent the foreseeable risk of harm to guests and others from drunk driving.

73 See also *John* v. *Flynn* (2001), 201 D.L.R. (4th) 500, O.J. No. 2578 (C.A.), online: QL (OJ), where the plaintiff was injured as a result of the drunk driving of the defendant's employee. The Ontario Court of Appeal found that notwithstanding an alleged paternalistic relationship between the defendant and its employees (employer had undertaken to help employees with alcohol abuse problems to quit drinking but agreement was rarely enforced), the employer was not liable for the plaintiff's injuries because there was no foreseeable risk of injury on the night in question necessitating the employer to take preventative steps to avoid injury to the employee or others from drunk driving. The employer was unaware that Flynn was intoxicated on the night in question, did not provide alcohol, and did not condone his driving while intoxicated.

74 *Prevost*, *supra* note 1 at 315.

circumstances. However, it could be argued that Shari's knowledge of the police visit, the likelihood that some teenage guests might be drunk and the possibility of drunk driving (provided Desiree exhibited signs of intoxication when she left the party and that this would have been noticed by a reasonable person in the mother's circumstances), gave rise to a duty of care to prevent a reasonably foreseeable risk of injury to guests and others from drunk driving.[75] Given the defendant's knowledge of the possibility of drunk driving and the consequences of the same, her failure to personally control the guests when she became aware of the party might have been negligent. This may be analogous to the failure of the defendants to install handrails or prohibit the use of the bridge for social gatherings involving the consumption alcohol in *Chretien*.

Assuming that duty and breach may be established in *Prevost*, liability can be imposed only if the defendant's negligence caused or contributed to the plaintiff's injury. The issue of causation is yet to be resolved in this case. There is a suggestion in paragraph 22 of the British Columbia Supreme Court decision that the accident occurred when the driver focused her attention on changing the song on the CD player and negotiating a curve at the same time, which may be tricky even when a person is perfectly sober. The police may have hastily concluded that the accident was the result of drunk driving because the driver failed the roadside breathalyser test. In *Wince* v. *Ball*, the Court agreed that the defendant's failure to supervise the party might have been negligent but that did not cause the accident because there was nothing that he could have done differently than what in fact happened.

The preceding discussion shows that in spite of the low rate of success in social host liability cases and even judicial ambivalence, it is inappropriate to conclude that social host liability is not recognized in Canada. Social host liability appears to be a logical extension of commercial host liability and negligence principles generally. Claims against social hosts have been unsuccessful either because a duty of care could not be imposed in the circumstances or because the duty was not breached or both. These cases could have been unsuccessful even if the claims had been against commercial hosts because of the absence of essential element(s) for a successful negligence claim. The high threshold for establishing social host liability ensures that liability will arise only in limited cases, allaying concerns about possible floodgates and the chilling effects on social relations arising from the imposition of liability. Like all other negligence claims, social host

75 The only basis of liability in a case like *Prevost*, where the host did not provide alcohol or see the guest consume alcohol, should be obvious signs of impairment at the time the guests leave the social gathering.

liability cases are fact driven. Liability will be imposed only where a host failed to take preventative steps in the face of a reasonably foreseeable risk of injury, their breach of duty caused or contributed to the plaintiff's injury, and the injury is not too remote.

VII. UNITED STATES CASE LAW ON SOCIAL LIABILITY

United States courts have not hesitated to impose liability on social hosts for the negligence of intoxicated guests who are minors. Generally, a social host who serves alcoholic beverages to a visibly intoxicated minor, knowing the minor will thereafter drive, may be held liable for the consequences of the drunken driving of the minor. Liability of social hosts for the negligence of drunken minor guests have been recognized both at common law[76] and under statutes.[77]

American courts remain divided on social host liability of intoxicated adult guests.[78] Those which recognize social host liability do so on the basis of the existence of a duty of care determined by reasonable foreseeability of injury to guests and others arising from the host's conduct. Other jurisdictions maintain that there is no reason to change the common law position that makes the consumption and not the provision of alcohol the proximate cause of negligent conduct.[79] States that have declined to impose liability have not disputed the reasonable foreseeability of the risk of harm in these situations. Rather, they have relied on a host of policy considerations such as lack of profit for the provision of alcohol, difficulties in monitoring guests' consumption patterns and the

76 See *Linn*, *supra* note 31; *Sutter* v. *Hutchings*, 327 S.E.2d 716 (Ga. Sup. Ct. 1985), where the host was found liable at common law for serving alcohol to a visibly intoxicated seventeen-year old.

77 See *Brattain* v. *Herron*, 309 N.E.2d 150 (Ind. Ct. App. 1974); *Longstreth* v. *Gensel*, 377 N.W.2d 804 (Mich. Sup. Ct. 1985); *Koback* v. *Crook*, 366 N.W.2d 857 (Wis. Sup. Ct. 1985).

78 Arizona, District of Columbia, Alabama, California, Connecticut, Illinois, Michigan, Mississippi, New York, Ohio, Pennsylvania, South Carolina, Tennessee and Texas do not recognize liability. Dobbs observes that generally, social host liability remains unpopular with many courts: D.B. Dobbs, *The Law of Torts* (St. Paul, Minn.:West Group, 2000) at 902-903. Others have taken a restrictive approach to social host liability. For instance, in New Jersey, a social host is not liable to an adult drinker for his or her own injuries resulting from his or her intoxication: N.J. Stat. Ann. § 2A:15-5.7 (1987). Other states limit liability to situations where a social host serves alcohol to a visibly intoxicated adult, Ga. Code Ann. § 51-1-40 (1988).

79 See *McGuiggan* v. *New England Telephone and Telegraph Co.*, 496 N.E.2d 141 at 145 (Mass. Sup. Ct. 1986). In this case, the Court doubted the soundness of the "proximate cause" argument in excluding social host liability. The Court noted, "The risk created by serving liquor to an intoxicated person who is about to operate a motor vehicle is far too apparent to permit the conclusion that the social host's act could not have been the 'proximate' cause of a third person's injury."

chilling effects on social relations that could result from social host liability as the rationale for excluding liability. Furthermore, some courts, while recognizing that the principles of negligence law could be extended to impose liability on social hosts, have nevertheless found it inappropriate to do so out of deference to the legislature. It has been argued that given the gravity of social host liability, the legislature is best suited to regulate the conduct of social hosts and determine the scope of the duty of care.[80] States like Texas have considered extending liability to social hosts but have not enacted statutes to that effect. Some courts have cited this as an indication of and support for their refusal to impose liability on social hosts.[81] In *Kelly*, Wilentz C.J. for the majority countered this argument by noting that courts have decided many important issues without any prior legislative study.[82] This is true of commercial host liability in Canada.[83] Although it appears that commercial host liability in most States stems from "Dram Shop" legislation that imposes civil liability for a commercial host's negligence in serving alcoholic beverages to a visibly intoxicated patron,[84] liability has also been recognized in States where no such legislation exists based on an extension of common law negligence principles.[85]

For the most part, courts that refuse to impose social host liability tend to confuse the existence of a duty of care with the standard of care. For instance in *Harriman*,[86] the hosts allowed alcohol to be

80 In *Kelly*, *supra* note 19 at 1230-32, Garibaldi J. (dissenting) noted that social host liability is a radical departure from existing principles of law with extraordinary effects on the average citizen. Thus, a thorough analysis of the implication of social host liability should be undertaken by the legislature before any imposition of duty. See also *Harriman*, *supra* note 18; *Graff* v. *Beard*, 858 S.W.2d 918 (Tex. Sup. Ct. 1993); *Bankston* v. *Brennan*, 507 So. 2d 1385 (Fla. Sup. Ct. 1987).

81 See *Graff*, *supra* note 80.

82 *Kelly*, *supra* note 19 at 1227.

83 See *Jordan House*, *supra* note 12. Although the defendant's conduct was in violation of the Ontario *Liquor Control Act*, R.S.O. 1990, c. L.18, the decision has been applied in all Canadian jurisdictions whether they have such statutes or not. Commercial host liability for negligence is now part of the common law in Canada.

84 See *Texas Alcoholic Beverage Code* § 2.03 (West Supp. 1993). The statute is the exclusive basis for civil liability of commercial hosts in Texas. See also *California Civil Code*, Part 3 §1714 (West 1993); *Iowa Code* §123.49 (West 1992).

85 Dobbs, *supra* note 78 at 899-900. See *El Chico Corp.* v. *Poole*, 732 S.W.2d. 306 (Tex. Sup. Ct. 1987); *Carver* v. *Schafer*, 647 S.W.2d 570 (Mo. Ct. App. 1983) mentions other states that have recognized common law negligence actions under similar circumstances. The decision in *Carver* was subsequently abrogated by statute, but the right to sue commercial hosts convicted or who have received a suspended sentence for injury arising from their negligence in serving a minor or a visibly intoxicated person has been preserved: see *Sampson* v. *W.F. Enterprises, Inc.*, 611 S.W.2d 333 (Mo. Ct. App. 1980).

86 *Harriman*, *supra* note 18.

served to an intoxicated guest who also happened to be a minor. The guest was subsequently involved in an automobile accident that claimed the life of the plaintiff's son. The Court recognized that the facts of the case would support the imposition of a common law duty of care but declined to recognize such a duty for social hosts because of the difficulties in determining the content of that duty and the appropriate standard of care.

Similarly, in *Graff* v. *Beard*,[87] the Texas Court of Appeal, in a ground-breaking decision, held that social hosts may be liable to third parties for the acts of their intoxicated adult guests if the host knows they will be driving. The Texas Supreme Court reversed the decision, among other things, because of the complexities of determining the liability of social hosts. For example, the Court noted that it is unclear how much control a host has to exercise over alcohol supply to engender liability. Moreover, it might be difficult for a social host to monitor alcohol consumption of their guest and know when a guest has reached the point of intoxication. Furthermore, the Court noted that it is not clear precisely what affirmative acts would be required to discharge this duty. In addition, the Court wondered to what extent a host must go to prevent an intoxicated guest from driving: would a simple request suffice or is the host required to physically restrain an intoxicated guest or compel them to stay on their premises until they are sober or arrange a ride for them? The Court also noted that it might be very difficult for a host to stop a guest from becoming intoxicated and driving. The Court concluded that given these difficulties, it is unfair to shift legal responsibility from the guest to the host who only provides alcohol at social gatherings.

Presumably, none of the reasons cited for not imposing social host liability affects the likelihood of injury to guests and others when an intoxicated guest drives away in her or his car. There is no justification for shielding the host from liability if he or she has in any way contributed to the guest's intoxication or was aware or ought to have been aware of the dangers of the intoxicated guest driving. As in the case of commercial host liability, responsibility for the negligence of an intoxicated guest will not arise merely from the provision of alcohol. To be liable, the circumstances must have been such that the host was or ought to have been aware of the guest's intoxicated condition and the risk she or he poses to him- or herself or others. Reluctance to recognize social host liability is a disincentive for hosts to prevent reasonably foreseeable risk of injury with relatively little effort on their part. The host might have provided alcohol or the opportunity for the guest to be intoxicated with knowledge of the guest's vulnerability regarding alcohol consumption and the fact that

87 801 S.W.2d 158 (Tex. Ct. App. 1990).

he or she will be driving and still escape liability. That was precisely what happened in *Homan* v. *George*,[88] where the defendants over-served alcohol to a known alcoholic and also thwarted efforts to arrange a safe ride for the plaintiff by denying that she was at their residence. The plaintiff was subsequently involved in a motor vehicle accident in which she sustained serious personal injury and incurred liability for property damage. The plaintiff's action against the hosts was dismissed because there is no common law social host liability in the state of Ohio. Strausbaugh J. noted that in Ohio, it is the consumption and not the provision of alcohol that is considered the proximate cause of injury in such circumstances. There was no legal duty on the defendants to act for the plaintiff's benefit. This position disregards the fact that nonfeasance is sustainable only where the person has not caused the dangerous situation in question. As the dissent points out, this is not like coming across an intoxicated 'stranger' and watching her place herself in danger. Here the defendants contributed to the plaintiff's intoxication, failed to reasonably prevent the risk of injury to the plaintiff and others, and should have borne some responsibility for their role in the unfortunate outcome.

Implicit in many courts' reluctance to recognize social host liability is an assumption that hosts would be responsible for the entire loss and guests will not be held responsible for their behaviour. For the most part, liability would be apportioned according to the fault of each party under apportionment legislation. Making guests bear the entire responsibility for the consequences of their drinking sends a wrong message to hosts who may have contributed to their intoxication or could have prevented the foreseeable risk of injury from materializing. It may also defy common sense to suggest that intoxicated guests are better placed to anticipate the risk of injury arising from their intoxication. Intoxicated guests might be unable to foresee the risk of harm precisely because of their insobriety.

Some American states perceive social host liability as a logical extension of the common law of negligence. *Kelly* v. *Gwinnell*[89] is one such case. In this case, the New Jersey Supreme Court held that a social host who knowingly serves liquor to an intoxicated guest and knows that the guest would thereafter drive is liable for injuries to third parties caused by the negligent driving of the intoxicated guest. Emphasis appears to be on the provision of alcohol and the knowledge that the guest might pose a danger to others and presumably themselves. Thus in *Walker* v. *Kennedy*,[90] the Minnesota Supreme Court declined to impose liability on social hosts for injuries caused

88 713 N.E.2d 432 (Ohio Ct. App. 1998).
89 *Supra* note 19.
90 *Supra* note 53.

by an intoxicated guest because they only provided the facilities for a party but did not supply alcohol. Amdahl C.J., speaking for the Court noted, "An essential element for social host liability is that the guest is 'given or furnished' alcoholic beverages by the person from whom recovery is sought....Since it is undisputed that [the guest] was not 'given or furnished' liquor by any member of the Kennedy family, social host liability is inappropriate in the present case."[91]

As was argued in the previous section, provision of alcohol need not be the only basis of a duty of care. In *McGuiggan* the Court emphasized that a social host who knowingly serves or permits guests to consume alcohol past the point of intoxication and was aware that they would be driving would be liable for injuries caused by the guests' negligent operation of a motor vehicle. No liability will be imposed on the social host where it was not reasonable for him or her to have been aware of the guests' intoxicated condition or that they might be driving.[92] Reasonable foreseeability of injury could be actual or constructive. In *Huston* v. *Konieczny*,[93] the absentee parents of teenage hosts were held liable for injuries resulting from the negligence of a drunk driver who had obtained and consumed alcohol at an unsupervised teenage party. The Court opined that it was reasonably foreseeable that teenage guests would consume alcohol, become intoxicated and drive while intoxicated in the absence of an adult supervisor. Thus, the parents, by permitting their children to host the party, knew or should have known that their conduct was likely to expose others to risks of harm and should have taken preventative measures to avoid this outcome.

Emphasis on reasonable foreseeability of injury as the basis of a duty blurs the distinction between social and commercial hosts. The focus is rightly on conduct of hosts that poses a risk to their guests and others and not on the nature of their relationship. Just as with any dangerous situation one creates or contributes to, hosts have a

91 *Ibid.* at 255.
92 *Supra* note 79. The defendants hosted a graduation party for their son. There were about thirty guests. Several people acted as bartenders and guests also helped themselves to alcoholic beverages provided by the defendants. The hosts offered Magee one drink upon arrival but did not know how much more he drank. Magee appeared sober when he left the hosts' residence. The hosts had no reason to believe he was impaired and therefore incapable of driving safely. The deceased, the hosts' son and a passenger in Magee's car, was killed as a result of Magee's negligent driving while intoxicated. The deceased's estate sued the parents as social hosts of the intoxicated driver. The Court held that the facts did not support liability against the hosts because there was no foreseeable risk of injury in the circumstances.
93 556 N.E.2d 505 (Ohio Sup. Ct. 1990).

duty to prevent reasonably foreseeable consequences of their conduct. As Richardson J. pointed out in *Coulter* v. *Superior Court*,[94]

> it is small comfort to the [victim of]...an accident involving an intoxicated driver to learn that the driver received his drinks from a hospitable social host rather than by purchase at a bar. The danger of ultimate harm is as equally foreseeable to the reasonably perceptive host as to the bartender. The danger and risk to the potential victim on the highway is equally as great, regardless of the source of the liquor.[95]

As argued in the previous section, the nature of the relationship should inform the appropriate standard of care in particular cases. This is a principled approach from the plaintiffs' perspective and is consistent with negligence law generally.

VIII. CONCLUSION

Social host liability is a logical extension of commercial host liability and negligence law generally. A duty of care arises where the risk of injury to guests or others is reasonably foreseeable and the *prima facie* duty is not negated by policy considerations. Factors that have traditionally supported exclusion of social host liability, such as the provision of alcohol, the economic benefit inuring to the host and the ability to absorb and spread risks, are best considered in other parts of the negligence analysis, such as the appropriate standard of care and apportionment of liability. These policy considerations should not affect the existence of a duty of care where a host has failed to exercise reasonable care in the face of a foreseeable risk of injury that has in fact materialized. This approach reconciles the two competing theoretical underpinnings of tort law by maintaining the fault-basis of Canadian tort law and also incorporating social justice goals in the determination of liability. Recognition that social host liability can arise in appropriate cases is likely to encourage socially responsible behaviour on the part of hosts and thereby contribute to accident prevention. Concerns about drunk driving as a major factor in serious and fatal injuries involving automobiles also support social host liability in appropriate cases.

Contrary to popular perception, social host liability is unlikely to have a chilling effect on social relations. The threshold for liability is high. For example, no liability arises in the absence of a duty of care

94 *Coulter v. Superior Court of San Mateo County*, 577 P.2d 669 (Cal. Sup. Ct. 1978). The Court's decision to recognize social host liability was subsequently abrogated by statute.

95 *Ibid.* at 674.

where the host has no reasonable grounds to believe that guests pose a danger to themselves or others and where the duty is successfully discharged. Finally, social host liability cases, like all other negligence cases, are subject to the other control devices of negligence law, namely causation, remoteness and defences. These are sufficient safeguards to protect the interests of hosts, guests, victims and society in general.