CARDOZO

Benjamin N. Cardozo School of Law • Yeshiva University

Foundations of Legal Analysis and the Judicial Process
Dean and Professor Melanie Leslie
Fall 2025

Introduction

This Orientation program in the legal system and case reading and analysis helps students understand the methods and best practices for learning the law in preparation for the first year of law school. Students are introduced to the central work of law students and lawyers: (i) understanding the structure and context of the legal system; (ii) reading and understanding judicial opinions; (iii) learning how to brief cases to prepare for law school classes, and iii) learning how to make a legal argument. We will introduce students to methods of learning the law including the skills of questioning, argument, application of legal sources to hypothetical scenarios, case briefing, taking class notes, and making connections between cases. This course provides a foundation for the first year of law school and beyond, exposing students to the concepts and tools that will be developed and honed through doctrinal courses, the Lawyering and Legal Writing course, and other forms of legal study throughout law school.

Learning Objectives:

In Foundations of Legal analysis and the Judicial Process, students will develop:

1. A basic understanding of the structure of the U.S. legal system
2. An understanding of the difference between common law and statutory law
3. An understanding of how a case develops from inception to trial to appeal
4. Case reading and analysis skills
5. An understanding of how to analyze, argue, and apply law and facts (including the use of precedent)
6. Effective and efficient approaches to law school learning, including notetaking and case briefing

Program Material

Class readings are posted on the Canvas page for this class. Carefully read, and take notes on, the material provided before our first meeting. Additional materials may be added during and after Orientation.

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Assignments and Reading

Session Date & Time		**Assignments to Complete BEFORE session**
Session 1 (90 mins) 8/18/25 10AM-11:45AM (with 15 min break)	**Readings** 1) How a Dispute Becomes a Case 2) Oren Kerr, How to Read a Legal Opinion 3) Guidelines for Case Briefing 4) *McCray v. Lockheed Martin Corp.* (edited) **Topics Covered:** **1)** Review of the U.S. government structure and Overview of the court system **2)** Federal v. state court jurisdiction **3)** Introduction to the common law **4)** Lifecycle of a case **5)** *McCray v. Lockheed Martin*	1) Read (several times) and take notes on the assigned reading
Session 2 (60 mins) 8/18/25 1PM-2PM	**Readings:** • *Kelly v. Gwinnell* (edited) **Topics Covered:** • Briefing a case (*Kelly v. Gwinnell,* as edited) • The role of precedent in judicial reasoning • Binding and persuasive sources of law • Review of the Trial Process • The Appellate Process	Take a stab at creating a case brief of *Kelly v. Gwinnell*
Session 3 (90 mins) 8/19/25 10:00 AM-11:30AM	**Topics Covered:** • Continuation of last class • Introduction to the Socratic Method – simulation using *Kelly v. Gwinnell* • "Thinking like a lawyer": learning to make a legal argument	Review class notes from Monday's classes

Session 4 – Simulated Class (60 mins) 8/19/25 12:30PM-1:30PM	• Continuation of "thinking like a lawyer" exercises • Best practices for law school learning	

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How to Read a Legal Opinion

A Guide for New Law Students

Orin S. Kerr

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How to Read a Legal Opinion

A Guide for New Law Students

Orin S. Kerr

This essay is designed to help new law students prepare for the first few weeks of class. It explains what judicial opinions are, how they are structured, and what law students should look for when reading them.

I. What's in a Legal Opinion?

When two people disagree and that disagreement leads to a lawsuit, the lawsuit will sometimes end with a ruling by a judge in favor of one side. The judge will explain the ruling in a written document referred to as an "opinion." The opinion explains what the case is about, discusses the relevant legal principles, and then applies the law to the facts to reach a ruling in favor of one side and against the other.

Modern judicial opinions reflect hundreds of years of history and practice. They usually follow a simple and predictable formula. This

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Orin Kerr is a professor of law at the George Washington University Law School.

section takes you through the basic formula. It starts with the introductory materials at the top of an opinion and then moves on to the body of the opinion.

The Caption

The first part of the case is the title of the case, known as the "caption." Examples include *Brown v. Board of Education* and *Miranda v. Arizona*. The caption usually tells you the last names of the person who brought the lawsuit and the person who is being sued. These two sides are often referred to as the "parties" or as the "litigants" in the case. For example, if Ms. Smith sues Mr. Jones, the case caption may be *Smith v. Jones* (or, depending on the court, *Jones v. Smith*).

In criminal law, cases are brought by government prosecutors on behalf of the government itself. This means that the government is the named party. For example, if the federal government charges John Doe with a crime, the case caption will be *United States v. Doe*. If a state brings the charges instead, the caption will be *State v. Doe*, *People v. Doe*, or *Commonwealth v. Doe*, depending on the practices of that state.[1]

The Case Citation

Below the case name you will find some letters and numbers. These letters and numbers are the legal citation for the case. A citation tells you the name of the court that decided the case, the law book in which the opinion was published, and the year in which the court decided the case. For example, "U.S. Supreme Court, 485 U.S. 759 (1988)" refers to a U.S. Supreme Court case decided in 1988 that appears in Volume 485 of the *United States Reports* starting at page 759.

The Author of the Opinion

The next information is the name of the judge who wrote the opinion. Most opinions assigned in law school were issued by courts

[1] English criminal cases normally will be *Rex v. Doe* or *Regina v. Doe*. Rex and Regina aren't the victims: the words are Latin for "King" and "Queen." During the reign of a King, English courts use "Rex"; during the reign of a Queen, they switch to "Regina."

with multiple judges. The name tells you which judge wrote that particular opinion. In older cases, the opinion often simply states a last name followed by the initial "J." No, judges don't all have the first initial "J." The letter stands for "Judge" or "Justice," depending on the court. On occasion, the opinion will use the Latin phrase "per curiam" instead of a judge's name. Per curiam means "by the court." It signals that the opinion reflects a common view among all the judges rather than the writings of a specific judge.

The Facts of the Case

Now let's move on to the opinion itself. The first part of the body of the opinion presents the facts of the case. In other words, what happened? The facts might be that Andy pulled out a gun and shot Bob. Or maybe Fred agreed to give Sally $100 and then changed his mind. Surprisingly, there are no particular rules for what facts a judge must include in the fact section of an opinion. Sometimes the fact sections are long, and sometimes they are short. Sometimes they are clear and accurate, and other times they are vague or incomplete.

Most discussions of the facts also cover the "procedural history" of the case. The procedural history explains how the legal dispute worked its way through the legal system to the court that is issuing the opinion. It will include various motions, hearings, and trials that occurred after the case was initially filed. Your civil procedure class is all about that kind of stuff; you should pay very close attention to the procedural history of cases when you read assignments for your civil procedure class. The procedural history of cases usually will be less important when you read a case for your other classes.

The Law of the Case

After the opinion presents the facts, it will then discuss the law. Many opinions present the law in two stages. The first stage discusses the general principles of law that are relevant to cases such as the one the court is deciding. This section might explore the history of a particular field of law or may include a discussion of past cases (known as "precedents") that are related to the case the court is de-

ciding. This part of the opinion gives the reader background to help understand the context and significance of the court's decision. The second stage of the legal section applies the general legal principles to the particular facts of the dispute. As you might guess, this part is in many ways the heart of the opinion: It gets to the bottom line of why the court is ruling for one side and against the other.

Concurring and/or Dissenting Opinions

Most of the opinions you read as a law student are "majority" opinions. When a group of judges get together to decide a case, they vote on which side should win and also try to agree on a legal rationale to explain why that side has won. A majority opinion is an opinion joined by the majority of judges on that court. Although most decisions are unanimous, some cases are not. Some judges may disagree and will write a separate opinion offering a different approach. Those opinions are called "concurring opinions" or "dissenting opinions," and they appear after the majority opinion. A "concurring opinion" (sometimes just called a "concurrence") explains a vote in favor of the winning side but based on a different legal rationale. A "dissenting opinion" (sometimes just called a "dissent") explains a vote in favor of the losing side.

II. Common Legal Terms Found in Opinions

Now that you know what's in a legal opinion, it's time to learn some of the common words you'll find inside them. But first a history lesson, for reasons that should be clear in a minute.

In 1066, William the Conqueror came across the English Channel from what is now France and conquered the land that is today called England. The conquering Normans spoke French and the defeated Saxons spoke Old English. The Normans took over the court system, and their language became the language of the law. For several centuries after the French-speaking Normans took over England, lawyers and judges in English courts spoke in French. When English courts eventually returned to using English, they continued to use many French words.

Why should you care about this ancient history? The American colonists considered themselves Englishmen, so they used the English legal system and adopted its language. This means that American legal opinions today are littered with weird French terms. Examples include plaintiff, defendant, tort, contract, crime, judge, attorney, counsel, court, verdict, party, appeal, evidence, and jury. These words are the everyday language of the American legal system. And they're all from the French, brought to you by William the Conqueror in 1066.

This means that when you read a legal opinion, you'll come across a lot of foreign-sounding words to describe the court system. You need to learn all of these words eventually; you should read cases with a legal dictionary nearby and should look up every word you don't know. But this section will give you a head start by introducing you to some of the most common words, many of which (but not all) are French in origin.

Types of Disputes and the Names of Participants

There are two basic kinds of legal disputes: civil and criminal. In a civil case, one person files a lawsuit against another asking the court to order the other side to pay him money or to do or stop doing something. An award of money is called "damages" and an order to do something or to refrain from doing something is called an "injunction." The person bringing the lawsuit is known as the "plaintiff" and the person sued is called the "defendant."

In criminal cases, there is no plaintiff and no lawsuit. The role of a plaintiff is occupied by a government prosecutor. Instead of filing a lawsuit (or equivalently, "suing" someone), the prosecutor files criminal "charges." Instead of asking for damages or an injunction, the prosecutor asks the court to punish the individual through either jail time or a fine. The government prosecutor is often referred to as "the state," "the prosecution," or simply "the government." The person charged is called the defendant, just like the person sued in a civil case.

In legal disputes, each party ordinarily is represented by a lawyer. Legal opinions use several different words for lawyers, includ-

ing "attorney" and "counsel." There are some historical differences among these terms, but for the last century or so they have all meant the same thing. When a lawyer addresses a judge in court, she will always address the judge as "your honor," just like lawyers do in the movies. In legal opinions, however, judges will usually refer to themselves as "the Court."

Terms in Appellate Litigation

Most opinions that you read in law school are appellate opinions, which means that they decide the outcome of appeals. An "appeal" is a legal proceeding that considers whether another court's legal decision was right or wrong. After a court has ruled for one side, the losing side may seek review of that decision by filing an appeal before a higher court. The original court is usually known as the trial court, because that's where the trial occurs if there is one. The higher court is known as the appellate or appeals court, as it is the court that hears the appeal.

A single judge presides over trial court proceedings, but appellate cases are decided by panels of several judges. For example, in the federal court system, run by the United States government, a single trial judge known as a District Court judge oversees the trial stage. Cases can be appealed to the next higher court, the Court of Appeals, where cases are decided by panels of three judges known as Circuit Court judges. A side that loses before the Circuit Court can seek review of that decision at the United States Supreme Court. Supreme Court cases are decided by all nine judges. Supreme Court judges are called Justices instead of judges; there is one "Chief Justice" and the other eight are just plain "Justices" (technically they are "Associate Justices," but everyone just calls them "Justices").

During the proceedings before the higher court, the party that lost at the original court and is therefore filing the appeal is usually known as the "appellant." The party that won in the lower court and must defend the lower court's decision is known as the "appellee" (accent on the last syllable). Some older opinions may refer to the appellant as the "plaintiff in error" and the appellee as the "defendant

in error." Finally, some courts label an appeal as a "petition," and require the losing party to petition the higher court for relief. In these cases, the party that lost before the lower court and is filing the petition for review is called the "petitioner." The party that won before the lower court and is responding to the petition in the higher court is called the "respondent."

Confused yet? You probably are, but don't worry. You'll read so many cases in the next few weeks that you'll get used to all of this very soon.

III. What You Need to Learn from Reading a Case

Okay, so you've just read a case for class. You think you understand it, but you're not sure if you learned what your professor wanted you to learn. Here is what professors want students to know after reading a case assigned for class:

Know the Facts

Law professors love the facts. When they call on students in class, they typically begin by asking students to state the facts of a particular case. Facts are important because law is often highly fact-sensitive, which is a fancy way of saying that the proper legal outcome depends on the exact details of what happened. If you don't know the facts, you can't really understand the case and can't understand the law.

Most law students don't appreciate the importance of the facts when they read a case. Students think, "I'm in law school, not fact school; I want to know what the law is, not just what happened in this one case." But trust me: the facts are really important.[2]

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[2] If you don't believe me, you should take a look at a few law school exams. It turns out that the most common form of law school exam question presents a long description of a very particular set of facts. It then asks the student to "spot" and analyze the legal issues presented by those facts. These exam questions are known as "issue-spotters," as they test the student's ability to understand the facts and spot the legal issues they raise. As you might imagine, doing well on an issue-

Know the Specific Legal Arguments Made by the Parties

Lawsuits are disputes, and judges only issue opinions when two parties to a dispute disagree on a particular legal question. This means that legal opinions focus on resolving the parties' very specific disagreement. The lawyers, not the judges, take the lead role in framing the issues raised by a case.

In an appeal, for example, the lawyer for the appellant will articulate specific ways in which the lower court was wrong. The appellate court will then look at those arguments and either agree or disagree. (Now you can understand why people pay big bucks for top lawyers; the best lawyers are highly skilled at identifying and articulating their arguments to the court.) Because the lawyers take the lead role in framing the issues, you need to understand exactly what arguments the two sides were making.

Know the Disposition

The "disposition" of a case is the action the court took. It is often announced at the very end of the opinion. For example, an appeals court might "affirm" a lower court decision, upholding it, or it might "reverse" the decision, ruling for the other side. Alternatively, an appeals court might "vacate" the lower court decision, wiping the lower-court decision off the books, and then "remand" the case, sending it back to the lower court for further proceedings. For now, you should keep in mind that when a higher court "affirms" it means that the lower court had it right (in result, if not in reasoning). Words like "reverse," "remand," and "vacate" means that the higher court though the lower court had it wrong.

Understand the Reasoning of the Majority Opinion

To understand the reasoning of an opinion, you should first identify the source of the law the judge applied. Some opinions interpret the Constitution, the founding charter of the government. Other cases

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spotter requires developing a careful and nuanced understanding of the importance of the facts. The best way to prepare for that is to read the fact sections of your cases very carefully.

interpret "statutes," which is a fancy name for written laws passed by legislative bodies such as Congress. Still other cases interpret "the common law," which is a term that usually refers to the body of prior case decisions that derive ultimately from pre-1776 English law that the Colonists brought over from England.[3]

In your first year, the opinions that you read in your Torts, Contracts, and Property classes will mostly interpret the common law. Opinions in Criminal Law mostly interpret either the common law or statutes. Finally, opinions in your Civil Procedure casebook will mostly interpret statutory law or the Constitution. The source of law is very important because American law follows a clear hierarchy. Constitutional rules trump statutory (statute-based) rules, and statutory rules trump common law rules.

After you have identified the source of law, you should next identify the method of reasoning that the court used to justify its decision. When a case is governed by a statute, for example, the court usually will simply follow what the statute says. The court's role is narrow in such settings because the legislature has settled the law. Similarly, when past courts have already answered similar questions before, a court may conclude that it is required to reach a particular result because it is bound by the past precedents. This is an application of the judicial practice of "stare decisis," an abbreviation of a Latin phrase meaning "That which has been already decided should remain settled."

In other settings, courts may justify their decisions on public policy grounds. That is, they may pick the rule that they think is the best rule, and they may explain in the opinion why they think that rule is best. This is particularly likely in common law cases where judges are not bound by a statute or constitutional rule. Other courts will rely on morality, fairness, or notions of justice to justify

[3] The phrase "common law" started being used about a thousand years ago to refer to laws that were common to all English citizens. Thus, the word "common" in the phrase "common law" means common in the sense of "shared by all," not common in the sense of "not very special." The "common law" was announced in judicial opinions. As a result, you will sometimes hear the phrase "common law" used to refer to areas of judge-made law as opposed to legislatively-made law.

their decisions. Many courts will mix and match, relying on several or even all of these justifications.

Understand the Significance of the Majority Opinion

Some opinions resolve the parties' legal dispute by announcing and applying a clear rule of law that is new to that particular case. That rule is known as the "holding" of the case. Holdings are often contrasted with "dicta" found in an opinion. Dicta refers to legal statements in the opinion not needed to resolve the dispute of the parties; the word is a pluralized abbreviation of the Latin phrase "obiter dictum," which means "a remark by the way."

When a court announces a clear holding, you should take a minute to think about how the court's rule would apply in other situations. During class, professors like to pose "hypotheticals," new sets of facts that are different from those found in the cases you have read. They do this for two reasons. First, it's hard to understand the significance of a legal rule unless you think about how it might apply to lots of different situations. A rule might look good in one setting, but another set of facts might reveal a major problem or ambiguity. Second, judges often reason by "analogy," which means a new case may be governed by an older case when the facts of the new case are similar to those of the older one. This raises the question, which are the legally relevant facts for this particular rule? The best way to evaluate this is to consider new sets of facts. You'll spend a lot of time doing this in class, and you can get a head start on your class discussions by asking the hypotheticals on your own before class begins.

Finally, you should accept that some opinions are vague. Sometimes a court won't explain its reasoning very well, and that forces us to try to figure out what the opinion means. You'll look for the holding of the case but become frustrated because you can't find one. It's not your fault; some opinions are written in a narrow way so that there is no clear holding, and others are just poorly reasoned or written. Rather than trying to fill in the ambiguity with false certainty, try embracing the ambiguity instead. One of the skills of top-flight lawyers is that they know what they don't know: they know

when the law is unclear. Indeed, this skill of identifying when a problem is easy and when it is hard (in the sense of being unsettled or unresolved by the courts) is one of the keys to doing very well in law school. The best law students are the ones who recognize and identify these unsettled issues without pretending that they are easy.

Understand Any Concurring and/or Dissenting Opinions

You probably won't believe me at first, but concurrences and dissents are very important. You need to read them carefully. To understand why, you need to appreciate that law is man-made, and Anglo-American law has often been judge-made. Learning to "think like a lawyer" often means learning to think like a judge, which means learning how to evaluate which rules and explanations are strong and which are weak. Courts occasionally say things that are silly, wrongheaded, or confused, and you need to think independently about what judges say.

Concurring and dissenting opinions often do this work for you. Casebook authors edit out any unimportant concurrences and dissents to keep the opinions short. When concurrences and dissents appear in a casebook, it signals that they offer some valuable insights and raise important arguments. Disagreement between the majority opinion and concurring or dissenting opinions often frames the key issue raised by the case; to understand the case, you need to understand the arguments offered in concurring and dissenting opinions.

IV. Why Do Law Professors Use the Case Method?

I'll conclude by stepping back and explaining why law professors bother with the case method. Every law student quickly realizes that law school classes are very different from college classes. Your college professors probably stood at the podium and droned on while you sat back in your chair, safe in your cocoon. You're now starting law school, and it's very different. You're reading about actual cases, real-life disputes, and you're trying to learn about the law by picking up bits and pieces of it from what the opinions tell

you. Even weirder, your professors are asking you questions about those opinions, getting everyone to join in a discussion about them. Why the difference?, you may be wondering. Why do law schools use the case method at all?

I think there are two major reasons, one historical and the other practical.

The Historical Reason

The legal system that we have inherited from England is largely judge-focused. The judges have made the law what it is through their written opinions. To understand that law, we need to study the actual decisions that the judges have written. Further, we need to learn to look at law the way that judges look at law. In our system of government, judges can only announce the law when deciding real disputes: they can't just have a press conference and announce a set of legal rules. (This is sometimes referred to as the "case or controversy" requirement; a court has no power to decide an issue unless it is presented by an actual case or controversy before the court.) To look at the law the way that judges do, we need to study actual cases and controversies, just like the judges. In short, we study real cases and disputes because real cases and disputes historically have been the primary source of law.

The Practical Reason

A second reason professors use the case method is that it teaches an essential skill for practicing lawyers. Lawyers represent clients, and clients will want to know how laws apply to them. To advise a client, a lawyer needs to understand exactly how an abstract rule of law will apply to the very specific situations a client might encounter. This is more difficult than you might think, in part because a legal rule that sounds definite and clear in the abstract may prove murky in application. (For example, imagine you go to a public park and see a sign that says "No vehicles in the park." That plainly forbids an automobile, but what about bicycles, wheelchairs, toy automobiles? What about airplanes? Ambulances? Are these "vehicles" for the purpose of the rule or not?) As a result, good lawyers

need a vivid imagination; they need to imagine how rules might apply, where they might be unclear, and where they might lead to unexpected outcomes. The case method and the frequent use of hypotheticals will help train your brain to think this way. Learning the law in light of concrete situations will help you deal with particular facts you'll encounter as a practicing lawyer.

Good luck!

E. LITIGATION: HOW A DISPUTE BECOMES A "CASE"[34]

As said earlier, the cases you will read in law school (and as a practicing lawyer) are, for the most part, appellate decisions. That is, the case has been brought to trial, a verdict rendered by the factfinder (either a judge or jury), one party (or both) has appealed the decision to the next higher court in that jurisdiction. What question is before the court on appeal? Who has brought the appeal, and what happened in the court below? The answer to these questions will tell you the *procedural posture* of the case you are reading and, ultimately, shed light on exactly what issue(s) the case does — *and does not* — address.[35]

Your ability to read and understand a case thoroughly will depend in no small measure on your understanding of how cases are brought, tried, and appealed — in short, Civil Procedure. The following discussion is provided to assist you in your general understanding of how a lawsuit is brought in court.[36] We will trace the steps involved in bringing a civil action in the context of a simple hypothetical.[37]

Victim v. Driver

You are a lawyer in the State of Euphoria. Victim comes to you with a problem. She was getting onto her motorcycle in front of the local DVD store, having just rented an instructional DVD on tree house renovation, when Driver rounded the corner in his '57 Edsel, lost control of the wheel, and slammed into Victim and her bike. Victim lists for you all of the troubles she has suffered as a result of the accident: her back and neck were sprained, her motorcycle was totaled, she missed three weeks of work as an aerobics instructor, and she never got to see the DVD she had rented. You take notes during the interview and tell Victim you will get back to her. Now, alone in your office, what do you do?

Is there a cause of action?

Your first job as a lawyer is to determine if Victim has a legally cognizable claim, or *cause of action* — that is, has she suffered something at the hands of Driver for which the courts will grant her relief? As a practical matter, you must also assess her chances of winning even if her claim is legally sufficient. Remember, in our system of justice, a plaintiff must prove that the defendant has done what is

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[34] (c) 1992 Victoria A. Kummer. Ms. Kummer was a student in our Legal Process Workshop. She undertook the task of preparing the following pages. Her goal was to render a complex process understandable to raw novices without distorting it. We obviously believe that she succeeded splendidly. We would only add this caveat: the goal here is to give you a "palm-of-the-hand" view of matters procedural. Inescapably, some finer points and distinctions have been ignored. You will learn about all of them in due course in Civil Procedure.

[35] Remember, a court can only make a binding ruling on a question that is squarely before it. Musings by a court on an issue outside the specific question it faces are called *dicta* and, while persuasive, do not carry the authority of an actual holding.

[36] As you undoubtedly know by now, Civil Procedure is a fascinating and complex area of study to which law schools typically devote an entire semester, or even a year. This rudimentary outline is merely an introduction to the basic concepts of Civil Procedure.

[37] Our concern at this juncture is only civil cases. The somewhat different procedures of a criminal action, in which the State brings a case against a defendant for criminal wrongdoing, will not be treated here.

claimed, while the defendant is not required to prove anything. Before Victim can recover a judgment against Driver, for example, she must prove her case against him by a "preponderance" of the evidence — the factfinder (either judge or jury) must find it "more likely than not" that Driver "caused" Victim's injuries and did so in a manner giving rise to legal liability.

You have looked through the law books and your old Torts class notes, and you have finally determined that Victim's injuries may be redressed — that is, the law does provide relief for the injuries Victim claims to have suffered at Driver's hands. You have also learned that a nearby motorcycle gang saw the whole thing, so you have a flock of witnesses to help you prove your case. You describe your ordinary fee scale to Victim, who says it sounds reasonable. In your infinite wisdom, you take Victim's case.

What forum?

Now that you have a case to bring, the next logical question is, *where* do you bring it? The court you choose is called the *forum*, and there are many different *fora* from which to choose — municipal, county, district, federal, etc. Where do you go? A court can only hear a case if it is empowered to do so — i.e., if it has "jurisdiction" over the subject matter of the case and over the parties involved. When we say "jurisdiction," we are really talking about two distinct kinds of power: *subject matter jurisdiction* and *personal jurisdiction*. Whether or not a court is empowered to hear a case — whether it has "jurisdiction" — turns on issues such as the nature of the claim, how much money is at stake, where the claim arose, and the state citizenship of the parties.

The competence of a court to hear certain kinds of cases depending on the nature of the claims asserted and the amount in controversy is called the *subject matter jurisdiction* of a court. *Common law* claims are almost always based on *state* common law (federal common law exists, but it is quite rare), and therefore come within the subject matter jurisdiction of the state court. The typical Tort or Contract lawsuit will usually be a *state* claim, arising under state law, and is properly brought in a state court of general jurisdiction.[38]

The subject matter jurisdiction of federal courts is generally limited to cases that arise under federal law. For example, if Victim were claiming that Driver was involved in monopolistic trade practices, then *Victim v. Driver* would be a case arising under federal law (the Sherman Antitrust Act), and would properly belong in federal court. There is one major exception to this limitation of federal jurisdiction: federal courts also have subject matter jurisdiction in cases involving state law claims if the parties are from different states, or if one of the parties is from a foreign country, *and* the amount in dispute exceeds $75,000. In such "diversity cases" (i.e. cases involving parties of "diverse" citizenship), which account for roughly a quarter of the federal docket, the court will apply the law of the state in which it sits.

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[38] "General jurisdiction" as opposed to "limited jurisdiction." "Courts of limited jurisdiction" — Surrogate's Court, Family Court, Criminal Court, etc. — are usually courts which are empowered to hear only certain kinds of claims such as administration of estates, child custody, and murder, to name a few.

In our case, suppose Victim and Driver are from different states. We know that Victim is a citizen of the State of Euphoria. If Driver was a citizen of the State of Grace, and Victim's claim was for $1,000,000, Victim would have her choice of fora: she may bring suit against Driver in either state or federal court. Choosing the forum for your client's case is a strategic decision which you will make based on a variety of factors, such as which forum's procedural rules could be best used to your client's benefit,[39] which forum can get Victim a trial most quickly, or which forum would provide Victim with the most generous jury. Whichever forum Victim chooses, Driver may be entitled to contest Victim's choice and may try to move the case to the other forum.

Still supposing that Victim and Driver are from different states, what happens if you decide that it is best for Victim to sue in state court? Would it do Victim any good to simply go into the Euphoria state court and bring a claim against Driver? The historical answer would have been no. Since Driver is not from the State of Euphoria, the State of Euphoria may not subject Driver to its judicial process — it lacks *personal jurisdiction* over Driver. Driver may only be hauled into court in his own state, the State of Grace. For this reason, Victim must go to the State of Grace, and sue in Grace's state court if Victim wants to bring her case against Driver in state court. However, at present state statutes almost always provide for jurisdiction over out-of-state drivers who have accidents within the state. Under "long arm statutes," this has been expanded to include all tortious conduct within the state. The out of state driver statutes rely on a concept of "implied consent" that makes all drivers subject to personal jurisdiction.[40]

Bringing the Suit

As it turns out, both Victim and Driver live in Euphoria, so your options for a forum are limited to the Euphoria state court. How do you commence the suit? There are formal procedures, the details of which will vary from state to state, but which will in most respects follow one of two general patterns.

In many jurisdictions (including the federal trial courts), the lawsuit is commenced by *filing a complaint* with the court. If Euphoria were such a "file and serve" state, you would commence your case by first filing the complaint with the Euphoria state court. Afterwards, you would *serve* upon Driver a *summons* which directs Driver to come to court to defend himself. Included with the summons would be a copy of the complaint.

If, on the other hand, Euphoria were a "serve and file" state, you would commence your case by first serving Driver (by mail or by a professional process-server) with the summons and a copy of the complaint. You would not file copies with the court until later, at such time as either you or Driver needed a judge

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[39] The body of substantive law that applies to any given case is not necessarily the law of the forum. Determining which jurisdiction's substantive law will apply is the subject of a fascinating course entitled Conflict of Laws. However, a case in a particular forum will be subject to the *procedural* law of that forum regardless of what substantive law applies.

[40] You will learn about other exceptions to the "rule" regarding personal jurisdiction in Civil Procedure.

to take action of some kind (for example, to decide something or to order the other party to do something).

The Complaint

The complaint informs the court and Driver of Victim's claims — e.g., "Driver negligently failed to keep control of his automobile and drove it into me, causing the following injuries." The complaint will also outline the relief Victim is seeking from Driver — in this case, an amount of money. If Driver ignores the summons and complaint, the court will render a *default judgment* against him, and the case is over — Victim wins.

The Answer

If Driver is wise, he will avoid a default by responding to the complaint with an *answer*. The answer is a formal document responding to, and often denying outright, each of the specific allegations made in the complaint. It may include one or more *affirmative defenses*, stating in essence "yes, but" (that is, the events occurred as Victim says, but other facts negate Driver's liability), or it may even raise a *counterclaim*, seeking to impose a liability on Victim.

Before or after answering, Driver could also move to dismiss *for failure to state a claim upon which relief can be granted* (also called a *demurrer*, stating in essence "so what?" — even if the events occurred exactly as Victim says, the actions by Driver or injuries to Victim are not anything for which the law grants relief) or *for lack of jurisdiction* (stating in essence, "you can't touch me" or "you can't hear this kind of case").

In general, if the facts are undisputed, and the case hinges solely on a question of law, the judge can decide the case alone and prior to trial on a *motion to dismiss*, or on a *motion for summary judgment*. These pre-trial motions, as well as the *motion for judgment as a matter of law* (formerly called a directed verdict motion) *during* the trial, and the *renewal of motion for judgment after trial* (formerly called a judgment notwithstanding the verdict or a J.N.O.V.[41]) share the same basic argument: they ask the court to enter judgment for the moving party *as a matter of law* — because the facts alleged by plaintiff do not amount to a cognizable claim, or because the law does not recognize the defense advanced by the defendant, or because no facts are in dispute and the judge can determine the winner as a matter of law.

Where a question of fact exists, however, the parties must be given the opportunity to prove the facts they have asserted in their complaint and answer. The proving ground is, of course, the trial itself, and the outcome of the case is placed in the hands of the factfinder — either the judge sitting as a trier of fact (the parties having waived their rights to a jury trial) or the jury.

In our case, Driver raises several defenses in his answer. He claims that Victim was wrong in her recital of the facts, asserting that he was driving carefully at the

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[41] J.N.O.V. stands for "judgment *non obstante veredicto*." The Federal Rules of Civil Procedure were amended in 1991 to eliminate some of the more archaic terminology found within our federal system. Some state courts still use these older terms, however, and you will still find them mentioned in the cases pre-dating the 1991 amendment.

time of the accident, and denying all fault. In addition, he alleges that Victim herself caused the accident by slamming into Driver's Edsel, and that Driver is therefore not liable for Victim's injuries.[42] Driver also moves to dismiss Victim's claim for injuries stemming from the fact that she never got to view her instructional DVD, arguing that "deprivation of DVD watching" is not a legal claim recognized by the State of Euphoria.

The judge agrees with Driver and dismisses ("throws out" is how laypersons and newspaper reporters tend to put it) Victim's "deprivation of DVD watching" claim. The other claims, however, are legally cognizable and involve disputed facts, thus requiring a trial before a factfinder.

Discovery

Despite what you may think as a result of seeing the "surprise witness" or the metaphorical "smoking gun" evidence on television, the opposing sides in a lawsuit not only share information with each other, they are actually under an obligation to do so. The pre-trial exchange of information is called *discovery*, and in both the federal and state courts a significant portion of the procedural rules is devoted to governing this process. The rules provide a variety of methods to assist the lawyers in their search. *Interrogatories* are written questions served on the opposing party, to which a written response is required to be produced by the party with the aid of her lawyer. *Depositions* are oral examinations of witnesses and parties conducted by the opposing party before a court reporter — a stenographer who (for a fee) produces a transcript of the deposition for each side. Parties may also request the *production of documents* relating to the opposing party, witnesses, the event itself, insurance coverage, and related information.

In this case, you call in Driver for an oral deposition, in which he again insists on his version of the story. You request the production of documents from his car mechanic relating to the service history of the Edsel as well as a copy of Driver's insurance policy.[43] Driver, for his part, deposes Victim as well as every member of the motorcycle gang that will be testifying on her behalf. He also requests the production of documents from her employer (the aerobics fitness center), relating to her health evaluations and her job performance. You refuse this request as totally irrelevant to the dispute, and Driver files a motion asking the court to compel you to comply with the request for document production. The judge agrees with you that Victim's job performance history is irrelevant to the proceedings and denies that portion of the motion, but orders you to comply with the request for documents relating to her health evaluation, since Victim has put her health "in issue" by claiming personal injury and damages from loss of work.

Summary Judgment

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[42] Driver's claim that Victim is responsible could form the basis for a *counterclaim* by Driver against Victim — a new lawsuit, tried at the same time, in which Driver is the plaintiff suing Victim for damage to his Edsel and any personal injuries he sustained. Let's keep things simple, however, and assume that Driver suffered no personal or property injury in the accident, and therefore has no interest in counterclaiming against Victim.

[43] Why do you think these documents would be helpful to your case?

All during Discovery, at any point until the trial starts, either party may move for *summary judgment*. The question before the court on summary judgment is: for each and every claim in the complaint, is there any genuine issue of material fact for which a trial is required and, if not, is the moving party entitled to judgment as a matter of law? Each claim resolution of which turns on a disputed material fact must be resolved by a factfinder after a trial. In essence then, the question raised by a motion for summary judgment is whether there is anything for a jury (or a judge as fact-finder) to do.

The Jury

Your case against Driver is going to be tried before a jury of six people.[44] When Discovery is completed and the parties are ready for trial, the court will empanel a jury. Many lawyers insist that they have won (or lost) certain cases at this stage of the proceedings. Choosing a jury provides you as the lawyer with strategic opportunities to begin trying your case. You are presented with the opportunity to hear the potential jurors answer questions addressed to them by the judge or by the lawyers. This allows you, first, to select only those jurors who you are confident will see the evidence in the light most favorable to Victim. Second, it allows you, in a setting somewhat less formal than the trial, to begin subtly to lay out your vision of the case for them. The question and answer session between the judge, attorneys, and potential jurors is known as *voir dire*.[45]

The Trial

Your jury is empanelled, and you are ready for trial. You make your opening statement, and Driver's attorney makes his. As the attorney for the plaintiff, you present your case first. You call your first witness, Victim, and ask her questions on *direct examination*. The attorney for Driver questions Victim on *cross examination*. When Driver's attorney asks a question or introduces evidence in a manner which you believe violates the rules of evidence, you *object* in very specific terms so that the record reflects your objection and the reasons for it. In this way, you have ensured that the trial record preserves your objection so that, if necessary, you may raise this point on appeal.

After you have presented all of your witnesses, and Driver's attorney has cross examined each of your witnesses, plaintiff will *rest*. This marks the close of the plaintiff's case. Driver may now move for a *judgment as a matter of law* (formerly: move for a directed verdict), arguing essentially the same thing that he argued at the (pre-trial) summary judgment stage of the proceedings: that, even if the court accepts all of the evidence which the Plaintiff has just presented, the court must still direct a verdict for the defendant Driver as a matter of law because, in light of the proof presented up to this point, no reasonable jury could render a verdict for the plaintiff Victim. If you have not presented any evidence which tends to prove the

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[44] The size of a civil jury will vary from jurisdiction to jurisdiction.

[45] "Voir dire" translates literally, from modern French, as "to see speak," which is indeed what happens during voir dire. That is not actually what it means, however. The "voir" is a corruption of "vrai," which means "true." So what is really happening in voir dire, at least from an etymological perspective, is not that the lawyers are seeing prospective jurors speak, but rather that the prospective jurors are speaking the truth — or so it is hoped.

facts as alleged in Victim's complaint, then you have not established a *prima facie* case — a case which, on the face of it, is legally sufficient to form the basis of Driver's liability. If you have not "made out" your prima facie case, Driver may very well win his motion, and the case will be over before Driver even presents his defense. The case is "taken away from the jury," a permissible outcome because the jury could only have either (a) reached the same outcome or (b) acted unreasonably.

In this case, the court finds that you have made out your prima facie case on the claim regarding Victim's totaled motorcycle, but the court is not certain you have made out your case regarding the personal injury suffered by Victim. Driver's motion for judgment as a matter of law is therefore denied as to the motorcycle claim, but the court *reserves* judgment regarding the personal injury claim. This claim will still go to the jury along with the rest of the case at the close of Driver's case, but by "reserving" judgment, the court has essentially reserved the right to change its mind after the jury deliberates.

After the plaintiff rests, it is Driver's turn to present his case. He calls and examines his witnesses who are in turn subjected to your searing cross examination. At the close of Driver's case, *both* parties are permitted to move for a directed verdict. Driver renews his motion for directed verdict, arguing that on the proof presented no reasonable trier of fact could find for the Victim. You argue simply that even if the court were to accept Driver's version of the facts as true, that is no defense so Victim must win. Let's assume the judge denies the motions (except for the claim on which the court previously reserved judgment, which is really just a conditional denial), and both sides present their closing arguments to the jury.

Your final opportunity to influence the jury takes place in the form of the judge's instructions, or "charge" to the jury. The jury's determination is limited to questions of fact. The judge's charge states the law, which the jury will apply in reaching its ultimate conclusion as to liability. Before your closing arguments, both you and Driver's attorney will have submitted to the court proposed jury instructions which present the law in a manner most favorable to your respective clients and which, you hope, the judge will adopt in charging the jury. After the jury is charged, they deliberate, and you bite your nails.

The jury comes back, and they have found in favor of Victim on all of her claims — including the claim for personal injury. Driver, however, is permitted to renew his motion for judgment after trial. He does so, and the court grants the motion. Therefore, even though the jury found in favor of Victim on her claim for personal injury, the judge "takes the claim away from the jury" and directs the entry of judgment for Driver on that claim, concluding that Driver is not legally liable for Victim's sprained back and neck.

Appeal

You are not satisfied with the outcome of this case, because you believe that the claim for personal injury and the claim for loss of "DVD watching" should have been left for the jury to decide. You and Victim therefore decide to file an *appeal*. Driver is happy with the dismissal of those two claims, and does not believe that he will get anywhere if he tries to appeal the other claims (on which he lost), so Driver does not file a cross-appeal. He merely "responds" to the appeal as the *Appellee*, or

Respondent, while Victim is in the position of the *Appellant*, or *Petitioner*.

The appeal is a direct attack on the final judgment of the trial court. You claim that the trial court committed an error of law in the proceedings below. For our appeal, you file your papers with the Euphoria Supreme Court arguing that the trial court's dismissal of the "DVD watching" claim, and the grant of Driver's renewed motion for judgment after trial on Victim's personal injury claim, constituted "reversible error,"[46] and therefore the jury's original verdict on the personal injury claim should be reinstated and the plaintiff should be granted a new trial on the "DVD watching" claim.[47]

In Euphoria, there are three levels of courts, as is standard. Thus, appeals go initially to the "intermediate" appellate court; after a decision is rendered there the parties may seek review by the state's highest court (or "court of last resort"). In general, the loser on appeal does not have a right to this further appeal; the highest court chooses which cases to hear (it has a "discretionary docket") and will agree to hear only those of sufficient importance to merit its attention. Similarly, in the federal system, for example, the losing party in the District (trial) Court can appeal as of right to the Court of Appeals, or Circuit Courts. If the losing party wishes to pursue its claims further, in almost all cases it must petition the U.S. Supreme Court for a *writ of certiorari*, the mechanism by which the Court brings the case to it from a lower court. Issuing the writ is completely discretionary, and the Court grants only a tiny portion of "cert" petitions.

You now write a *brief* for the appellate court, a long document (despite its name) outlining the errors of the court below. Driver's attorney files a brief arguing that the court made no errors or that any it made did not affect the outcome. You both submit your briefs, and on the day for oral argument you come to court, stand before the panel of judges (appellate courts typically consist of a panel of three judges), and argue your position.

In this case, you argue that a claim based on "deprivation of DVD watching" is or should be a cognizable claim in the State of Euphoria, and you detail for the court your reasons, pointing to cases that allow such a claim or analogous claims and to policy reasons why doing so would be a good idea. Relying on the trial record, you also argue that Victim's claim for personal injury to her neck and back was fully substantiated by the evidence at trial so that the jury verdict in that claim should not have been set aside by the trial court. Driver's attorney then argues the opposing side, pointing out all of the reasons that "deprivation of DVD watching" should not be considered a legally compensable injury in this state and all the reasons that your evidence in the personal injury claim was legally insufficient.

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[46] Error that is merely "harmless" is insufficient to cause the appellate court to reverse a lower court's ruling. The moving party must have suffered some *prejudice* as a result of the error for the court to impose a remedy so drastic as reversal.

[47] Courts are always interested in time-saving measures. The appeal of a *judgment after trial* presents a wonderful opportunity to appeal a judgment without asking the appellate court to order a time-consuming new trial. If a judgment after trial is reversed, the original jury verdict can simply be reinstated. On the other hand, the DVD-watching claim has never been litigated, so there is no *judgment* to reinstate if Victim wins her appeal on that claim. If Victim wants to collect on this issue, she must go to trial and win again.

The disposition in an appeal is delivered in the form of a written opinion — the very appellate opinions to which most of your law school reading will be devoted. The court will explain its decision to affirm or reverse, often placing its decision in the context of a wealth of common law authority for its conclusion.

Assume that in the case of *Victim v. Driver*, the court finds that the trial court committed errors of law in setting aside the jury's verdict on the personal injury claim. It will then *reverse* the lower court's ruling. It will not itself enter a new judgment. Instead, it will "remand" the case to the trial court, with instructions to enter judgment for the plaintiff. On the other hand, assume also that the appellate court agrees with the trial court with regard to the "DVD watching" claim, concluding that under Euphoria state law "deprivation of DVD watching" does not present the kind of loss that is legally redressable. Accordingly, it will *affirm* the lower court in this respect, and there the matter ends (unless, of course, Victim seeks review by the state supreme court).

Res Judicata

The case of *Victim v. Driver* is complete, and the judgments are final. Victim's claims against Driver arising out of this accident have been exhausted by this lawsuit, and Victim is *barred* from bringing a new lawsuit in the future based on any claim (either a new one, or one of the claims on which she previously sued) arising from the same accident. We say that the decision of the court in *Victim v. Driver* has "*res judicata*" effect, meaning that the judgment is final and cannot be challenged in a later proceeding. Victim cannot later sue Driver, and Driver cannot later sue Victim, on any *claim or defense* that was raised in this case. The parties are also barred from later raising claims or defenses that were not raised here but could have been. We say that such claims and defenses are *merged* in the judgment. Nor may the parties relitigate any issue in any later disputes between them, if that issue was actually litigated, and was essential to the judgment, in *Victim v. Driver*.

F. JUDGMENTS AND THEIR EFFECTS — HEREIN OF RES JUDICATA, AND SOME OTHER IMPORTANT WORDS[48]

We need to talk about four words, or rather about two sets of two words each, about which we must be clear. They are:

reversing and overruling

res judicata and stare decisis

1. *Reversing and Overruling*

Let us follow the fate of a *single* lawsuit between plaintiff X and defendant Y. As we saw in *Victim v. Driver*, it will begin in a "lower court," typically a trial court of the appropriate jurisdiction. If one or the other or both of the parties are

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[48] We are indebted to Jones, Kernochan, and Murphy's *Legal Method* for the thought of attempting to clear up this particular bit of endemic beginning law student confusion. *See* HARRY W. JONES ET AL., LEGAL METHOD 7–8 (1980).

dissatisfied with the decision of the lower court, they will take their dispute to a "higher court"; that is, they will appeal, claiming that the lower court was wrong on certain matters, it "erred." Often, the "higher court" is not the highest court of the jurisdiction, in which case the plaintiff or the defendant, or both, if they are still not satisfied after the ruling of the intermediate court, may seek to have the highest court in the jurisdiction — e.g., the "Supreme Court of California," "The New York Court of Appeals" (do you know what it is called in your state?) — hear the case.[49]

The language alone — higher, lower — tells you that the structure is hierarchical. The highest court issues orders to the "lower court" (e.g., hold a new trial, enter judgment for the plaintiff, conduct further proceedings consistent with this opinion, etc.) and the lower court must obey. If the higher court concludes that the lower court reached the correct result, it will *affirm*. On the other hand, we use the magic word "reverse" (as in "We hereby reverse" or "Judgment reversed") when a higher court decides that the court one step below on the hierarchical ladder in the suit between X and Y erred in a non-harmless way.

What, then, is "overruling"?

Suppose that the controversy between our friends X and Y takes place in the State of New Jersey, and that the New Jersey Supreme Court has agreed to review the case, one or both of the parties being unhappy with the decision below. Suppose further that at a time past the New Jersey Supreme Court heard a different case, a dispute between A and B, and "ruled" in favor of B. If the X-Y dispute is factually similar to the A-B dispute, then the decision in the case of *A v. B* is a "precedent" for the case of *X v. Y*. Under the doctrine of stare decisis, the Supreme Court of New Jersey "is bound" to follow the rule of *A v. B* and it must render judgment for defendant Y — *unless*. Unless, that is, it decides to "overrule" *its own prior* decision, in the case of *A v. B*. Should it not overrule, we say it "followed," "stood by," or "adhered to" *A v. B*. Note that the lower court in *X v. Y* was also "bound" by the case of *A v. B*; indeed, more meaningfully than was the state Supreme Court. Because *A v. B* was decided by a higher court, overruling was simply not an option for the lower court.[50]

To put it as succinctly as possible: a court *reverses* the decision of a (lower) court *in the same controversy*; it *overrules* itself, that is, it disavows in a *later, different* case, what *it itself* had ruled in a *prior, different, but factually similar case.*

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[49] The United States Supreme Court building contains a rather primitive gymnasium, including a basketball court. The gym is on the building's top floor, and is accordingly often referred to as "the highest court in the land."

[50] Or so "the law." But note:

> Some time ago, a handful of judges on the local superior court bench began deciding summary judgment motions without according the parties the benefit of oral argument. * * * In *Mediterranean Construction Co. v. State Farm Fire & Casualty Co.*, this court took a long, hard look at the language of Code of Civil Procedure section 437c, and came to the inescapable conclusion that, as now drafted, it requires oral argument on summary judgment motions * * *.
>
> We thought — incorrectly, as it turned out — that the trial courts would simply follow our opinion even if they disagreed with it. Stare decisis and all that stuff. But sometimes it seems as though we have to remind the lower court there is a judicial pecking order.

Gwartz v. Superior Court, 71 Cal. App.4th 480, 83 Cal Rptr.2d 865 (1999) (Sills, J.).

The case of *X v. Y*, we said, takes place in New Jersey. Suppose *A v. B* was a New York decision and it was the New York Court of Appeals that gave judgment for B. Must New Jersey now, in *X v. Y*, follow New York? The answer is *no* — stare decisis has territorial limitations. The New York Court of Appeals can only *bind* itself and New York's lower courts. It cannot *bind* the New Jersey Supreme Court or any other tribunal in any other state. Decisions of courts in other jurisdictions are considered "persuasive authority," but *not* binding precedent.

2. Res Judicata *and* Stare Decisis

Let us assume that our hypothetical dispute resulted in a final judgment in the New Jersey Supreme Court for defendant Y. The case is now "res judicata." What that means is that X may not ever again sue Y *over this particular dispute*. This is true even if the rule which is the reason for the outcome of the *X v. Y* dispute is later abandoned; indeed, it is true even if *X v. Y* is itself overruled.

Suppose X is a tenant and Y his landlord. X is suing Y to recover for personal injuries suffered when an intruder entered the apartment building where X lives and injured X in the hallway of the building in the course of a robbery. The Supreme Court of New Jersey ultimately decides in the case that landlords owe no duty to protect tenants against the criminal actions of third parties. Therefore, judgment is for defendant Y.

Some time after the *X v. Y* litigation has concluded, X is again injured in the same apartment building, perhaps even by the same robber. X again sues Landlord Y. The lower courts rule in favor of the landlord — stare decisis requires that they follow "the law," the rule laid down by the Supreme Court of New Jersey in *X v. Y I*. Plaintiff X again asks the New Jersey Supreme Court to review the case. (Why would the plaintiff persist? For that matter, what made him bring the suit in the first place?) The Supreme Court agrees to hear it: it believes its decision in *X v. Y I* may have been wrong and intends to use *X v. Y II* to re-examine the problem. As we have seen, the principle of stare decisis is not absolute with regard to the Court's own prior decisions. Indeed, in this case it declares that landlords *do* have a duty to protect tenants against criminal intruders.

May X now, on the basis of *X v. Y II*, sue Y again to recover for the *first* assault? The answer is a categorical no. Why? *Res judicata*. Think about it. To permit X to sue again after the law has changed would mean that no lawsuit is *ever* truly over. The law is constantly changing, constantly favoring one point of view and then another. It would be manifestly unfair to the litigants on *either* side of a lawsuit to keep them in suspense, forever anticipating the next change in the law which would permit an old adversary to crop up and reinstate a lawsuit that everyone thought had been put to rest.

In sum, in *X v. Y II* the Court *reverses* the lower courts' decisions and *overrules* its own decision in *X v. Y I*. It can do so because *stare decisis* is not absolute; but X cannot sue again to recover for the first assault, notwithstanding the change in the law, because that claim is *res judicata*.

Guidelines for Case Briefing

A case brief is not a formal legal document. However, as a law student, "briefing" the cases you are reading for your courses will be very helpful to you both in class and later when you are outlining the course material and studying for your examinations. The best way to master case reading and analysis is to prepare case briefs of the cases you read and to take systematic and thorough notes of the discussions of the cases in class. The form of the case brief helps you organize case related information and refer to it easily.

There is not one way to brief a case. Many forms may be used with success. Your Elements textbook suggests one approach. The most important learning and study aid you should be working on in the early days of law school is developing the briefing form that works best for you. It must allow you to distill the important elements of each case quickly and accurately and it must provide you with sufficient information to make it useful in understanding the case, in following the discussion of the case in class, in answering questions about the case if called upon in class, in preparing an outline of the course, and in studying for the course's examination.

The basic outline of the briefs you prepare for the beginning Legal Writing classes is as follows:

1. **Case Heading**. Write out the full and proper citation of the case. The correct citation identifies the case and specifies where it may be found should you want to look up and read a more complete version of the case than is typically provided in your casebook, and it tells you important information about the decision, including the court that decided the case and when it was decided.

2. **Parties**. Identify and provide a very brief description of who sued whom. Who was the plaintiff, defendant, appellant, appellee?

3. **Procedural History and Outcome**. Most decisions you will read are from appellate courts. Include in the procedural history of a statement of how the case arrived at the appellate court whose opinion is now being read and analyzed. Include who won in the lower court, who is appealing and the outcome in this appeal.

4. **Facts**. Include only those facts or parts of the story or dispute of the case that are most important to the opinion you are briefing, the facts most likely to be important in using this case to predict the outcome of a similar controversy.

5. **Issue(s)**. The issue is a comprehensive articulation of the legal question or questions actually before the court presented in the context of the facts of the case. The issue should combine the legal question with tome significant facts. When the court answers the question posed, in most instances it has decided the case. The party appealing may be complaining about an error of law that was made by the lower court. Yet, unless that is the primary issue

in the case, focus on the substantive legal question raised in the case, not the procedural issue or sub-issue.

6. **Holding**. The holding is the court's legal answer to the question posed in the issue but often is broader than the context from which the question arose. The holding is not the outcome on appeal. The outcome is who won and who lost. The holding is the court's resolution of the issue presented in broader terms than presented in the issue and the application of the rule of law that compelled the result, the decision, in this case. The holding answers the question posed by the issue with more than a simple "yes" or "no." The holding and rule may be the same or very close in some cases. Generally, the rule is the broader legal principle that supports and is derived from the holding. The language of the holding may be framed in the language of the court, although you should be able to state it in your own words as well. Note that particular language of the court does not become the holding simply because the judge might call it that.

7. **Reasoning**. The reasoning is the basis on which the court justifies and explains its decision. It may contain doctrine (the basis in law for the decision), and policy (other factors that may account for the decision).

8. **Notes, Dissents**. This section may be helpful in further explaining additional aspects of the case or in raising questions you want to remember.

437 F.Supp.3d 907
United States District Court, D. Colorado.

Becky MCCRAY, Plaintiff,
v.
LOCKHEED MARTIN CORPORATION, Defendant.

Case No. 1:19-cv-03298-DDD-NRN
|
Signed January 30, 2020

ORDER DENYING MOTION TO REMAND AND GRANTING MOTION TO DISMISS

Daniel D. Domenico, United States District Judge

Plaintiff Becky McCray was an employee of Defendant Lockheed Martin Corporation. Attending a party on Lockheed's campus, she and a senior manager consumed alcohol, and the two rode off on the manager's motorcycle. While still on Lockheed's campus, the manager crashed the motorcycle. He died, and Ms. McCray sustained injuries. She now sues Lockheed, alleging state-law theories of tort liability all premised on the presence of alcohol at the party. Lockheed removed the case, invoking diversity jurisdiction. Before the Court are two motions: Ms. McCray's motion to remand (Doc. 19), which is **DENIED**; and Lockheed's motion to dismiss (Doc. 14), which is **GRANTED**.

PROCEDURAL HISTORY AND MOTION TO REMAND

[ed note: Ms. McCray filed this suit in the Colorado District Court for Denver County against Lockheed, Lockheed removed the action to federal court on diversity jurisdiction grounds, and Ms. McCray filed a motion to remand, in which she argues that Lockheed has shown neither complete diversity nor that the amount in controversy exceeds $75,000].

"A corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business." 28 U.S.C. § 1332(c)(1). A corporation's "principal place of business, for diversity jurisdiction purposes, is its nerve center." *Hertz Corp. v. Friend*, 559 U.S. 77, 130 S.Ct. 1181, 175 L.Ed.2d 1029 (2010). As Ms. McCray points out, the "burden of establishing subject matter jurisdiction is on the party asserting jurisdiction," *Montoya v. Chao*, 296 F.3d 952, 955 (10th Cir. 2002) (citing *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994)), and when "challenged on allegations of jurisdictional facts, the parties must support their allegations by competent proof." *Hertz Corp.*, 559 U.S. at 96–97, 130 S.Ct. 1181.

Ms. McCray is a citizen of Florida. Initially, she argued that Lockheed's "bare assertions," contained within its notice of removal, do not establish that it is not also a citizen of Florida. (Doc. 19, at 5–6.)[1] Lockheed responded by supplying an affidavit and a document from the Colorado secretary of state showing that (1) it is incorporated in Maryland, and (2) the operations of all four of its main business segments—including those of Lockheed Martin Space, which operates on the campus at issue here—are subject to the approval, oversight, and authority of its corporate headquarters in Maryland. (*See* Docs. 26-1, 26-2.) In her reply, Ms. McCray concedes that "Lockheed's main incorporation is in Maryland, and it has provided sufficient evidence

that its 'nerve center' appears to be in Maryland," but she maintains that "it nonetheless is also at home in Florida." [because it was incorporated in Florida in the past].

* * *

Ms. McCray is wrong. Even were a corporation capable of having multiple states of incorporation, Ms. McCray has not controverted Lockheed's evidence that it is incorporated in Maryland only. . . . [I]t is immaterial that Lockheed, on its own or through other entities, does certain business in Florida. A "corporation's 'nerve center,' usually its main headquarters, is a single place." *Hertz Corp.*, 559 U.S. at 93, 130 S.Ct. 1181. This is where "officers direct, control, and coordinate the corporation's activities." *Id.* at 78, 130 S.Ct. 1181. As Lockheed has demonstrated, and Ms. McCray concedes, the relevant nerve center is Maryland because that is the location from whence its operations are directed.

Ms. McCray also initially argued that Lockheed failed to show that the amount in controversy exceeds $75,000. This disingenuous position ignores her own representations made to the Colorado court stating that she sought a monetary judgment over $100,000 (Doc. 1-2, at 3), and to this Court certifying "economic damages in the amount of $1,169,437.44." . . . The Court is satisfied the amount in controversy meets the jurisdictional requirements.

For these reasons, the Court finds it has subject matter jurisdiction over this case. Ms. McCray's motion to remand is denied, and the Court turns to the merits of the motion to dismiss.

ALLEGATIONS IN THE COMPLAINT

The following allegations are taken from Ms. McCray's Complaint (Doc. 6) and are treated as true for purposes of assessing the motion to dismiss. *See Wilson v. Montano*, 715 F.3d 847, 850 n.1 (10th Cir. 2013).

On May 13, 2017, Lockheed's employees, including Ms. McCray, participated in an "Employee Engagement Team" party, organized by the company, at the baseball fields and pavilions at Lockheed's campus in Jefferson County, Colorado. Lockheed has policies that prohibit alcoholic beverages on company property and at company-sponsored events. Despite those policies, there was an "unwritten rule" that Lockheed would not enforce the alcoholic beverage prohibition for parties like the one at issue here and would even "encourag[e] [its] workforce to get drunk at" them.

Lockheed did not serve alcohol at the party, but Lockheed's employees, supervisors, and managers provided it themselves, and many were drinking. While there, Ms. McCray interacted with a senior manager, Christopher Weigand, and the two of them consumed numerous alcoholic beverages. Mr. Weigand then invited Ms. McCray to ride with him on his motorcycle, and she accepted. With Mr. Weigand driving, the two sped away from the party down Cemetery Road, a private street on Lockheed's property. Mr. Weigand lost control, the motorcycle crashed into a ditch, and both passengers were ejected. Mr. Weigand died at the scene. Ms. McCray suffered serious injuries but survived.

Ms. McCray now brings claims against Lockheed for premises liability, negligence, and negligent supervision—all based on Lockheed's alleged unreasonable failure "to protect against the dangerous conditions" created by permitting alcohol at the party and failure "to enforce the no alcohol policy[ ] by encouraging [its] workforce to get drunk at the [p]arty."

MOTION TO DISMISS

Lockheed moves to dismiss on a single ground: According to Lockheed, Ms. McCray's causes of action . . . are barred by the protections of Colorado's Dram Shop Act. In relevant part, that Act reads:

> (1) The general assembly hereby finds, determines, and declares that this section shall be interpreted so that any common law cause of action against a vendor of alcohol beverages is abolished and that in certain cases the consumption of alcohol beverages rather than the sale, service, or provision thereof is the proximate cause of injuries or damages inflicted upon another by an intoxicated person, except as otherwise provided in this section....
>
> (4)(a) No social host who furnishes any alcohol beverage is civilly liable to any injured individual or his or her estate for any injury to the individual or damage to any property suffered, including any action for wrongful death, because of the intoxication of any person due to the consumption of such alcohol beverages, except when:
>
> (I) It is proven that the social host knowingly served any alcohol beverage to the person who was under the age of twenty-one years or knowingly provided the person under the age of twenty-one a place to consume an alcoholic beverage; and
>
> (II) The civil action is commenced within one year after the service.

Colo. Rev. Stat. § 44-3-801.[3] In diversity cases, federal courts apply state law and must defer to the decisions of the controlling state's highest court. *Kokins v. Teleflex, Inc.*, 621 F.3d 1290, 1295 (10th Cir. 2010). . . .

Lockheed argues, under the circumstances alleged here, that it is a "social host" within the meaning of the Act and so is protected from liability for injuries caused by its guest, Mr. Weigand. Ms. McCray responds that Lockheed is not a protected social host because the company did not furnish alcohol to anyone at the party.

As a matter of first principles, Ms. McCray has a point. The operative text in the Act does indeed suggest that it only protects a "social host who furnishes any alcohol beverage." And the allegations here do not say that Lockheed purchased, served, or otherwise directly "furnished" alcohol at the party. Lockheed, though, argues that failing to treat it as a social host under the Act would lead to the bizarre result that it (and other party hosts) *would not* be liable if they had actively supplied alcohol to someone who gets intoxicated and causes injury, but *would* be liable if someone else brought the alcohol.

Though the Act itself does not define either "social host" or "furnish," the Court is convinced that Colorado's courts would agree with Lockheed that the Act applies here.

* * *

[Ed note: Court analyzes prior cases to interpret the statue as protecting Lockheed].

The limited circumstances outlined in the Act provide "the only basis for a claim of negligently selling, serving, or providing alcohol beverages, because in all other cases it is the consumption of alcohol beverages that is the proximate cause of the injury caused by the intoxicated person." *Rojas*, 68 P.3d at 592–93. Colorado's courts have interpreted the Act to generally prevent plaintiffs from suing the host of a party "for injury to a third person because of the intoxication of a guest." *Forrest*, 833 P.2d at 874. Since that is what the Complaint here seeks to do, it must be dismissed.

CONCLUSION

Ms. McCray's motion to remand (Doc. 19) is **DENIED**. Lockheed's motion to dismiss (Doc. 14) is **GRANTED**. The Complaint (Doc. 6) is **DISMISSED WITH PREJUDICE**. This case shall be closed.

KeyCite Yellow Flag
Superseded by Statute as Stated in Kubert v. Best, N.J.Super.A.D., August 27, 2013

96 N.J. 538
Supreme Court of New Jersey.

Marie E. KELLY, Plaintiff-Appellant,
v.
Donald C. GWINNELL and Paragon Corp., Defendants-Appellants,
and
Joseph J. Zak and Catherine Zak, Defendants-Respondents.

Argued Feb. 21, 1984.
|
Decided June 27, 1984.

Opinion
The opinion of the Court was delivered by

WILENTZ, C.J.

This case raises the issue of whether a social host who enables an adult guest at his home to become drunk is liable to the victim of an automobile accident caused by the drunken driving of the guest. Here the host served liquor to the guest beyond the point at which the guest was visibly intoxicated. We hold the host may be liable under the circumstances of this case.

At the trial level, the case was disposed of, insofar as the issue before us is concerned, by summary judgment in favor of the social host. The record on which the summary judgment was based (pleadings, depositions, and certifications) discloses that defendant Donald Gwinnell, after driving defendant Joseph Zak home, spent an hour or two at Zak's home before leaving to return to his own home. During that time, according to Gwinnell, Zak, and Zak's wife, Gwinnell consumed two or three drinks of scotch on the rocks. Zak accompanied Gwinnell outside to his car, chatted with him, and watched as Gwinnell then drove off to go home. About twenty-five minutes later Zak telephoned Gwinnell's home to make sure Gwinnell had arrived there safely. The phone was answered by Mrs. Gwinnell, who advised Zak that Gwinnell had been involved in a head-on collision. The collision was with an automobile operated by plaintiff, Marie Kelly, who was seriously injured as a result.

After the accident Gwinnell was subjected to a blood test, which indicated a blood alcohol concentration of 0.286 percent.[1] Kelly's expert concluded from that reading that Gwinnell had consumed not two or three scotches but the equivalent of thirteen drinks; that while at Zak's home Gwinnell must have been showing unmistakable signs of intoxication; and that in fact he was severely intoxicated while at Zak's residence and at the time of the accident.

Kelly sued Gwinnell … and thereafter plaintiff amended her complaint to include Mr. and Mrs. Zak as direct defendants. The Zaks moved for summary judgment, contending that as a matter of law a host is not liable for the negligence of an adult social guest who has become intoxicated while at the host's home. The trial court granted the motion on that basis [and] … entered final judgment in favor of Zak pursuant to Rule 4:42–2. … The Appellate Division affirmed, *Kelly v. Gwinnell,* 190 *N.J.Super.* 320, 463 *A.*2d 387 (1983). It noted, correctly, that New Jersey has no Dram Shop Act imposing liability on the provider of alcoholic beverages, and that while our decisional law had imposed such liability on licensees, common-law liability had been

extended to a social host only where the guest was a minor. *Id.* at 322–23, 463 *A.*2d 387. It explicitly declined to expand that liability where, as here, the social guest was an adult. *Id.* at 325–26, 463 *A.*2d 387.

The Appellate Division's determination was based on the apparent absence of decisions in this country imposing such liability (except for those that were promptly overruled by the Legislature).[2] *Id.* at 324–25, 463 *A.*2d 367. The absence of such determinations is said to reflect a broad consensus that the imposition of liability arising from these social relations is unwise. Certainly this immunization of hosts is not the inevitable result of the law of negligence, for conventional negligence analysis points strongly in exactly the opposite direction. "Negligence is tested by whether the reasonably prudent person at the time and place should recognize and foresee an unreasonable risk or likelihood of harm or danger to others." *Rappaport v. Nichols,* 31 *N.J.* 188, 201, 156 *A.*2d 1 (1959); *see also Butler v. Acme Mkts., Inc.,* 89 *N.J.* 270, 445 *A.*2d 1141 (1982) (supermarket operator liable for failure to provide shoppers with parking lot security). When negligent conduct creates such a risk, setting off foreseeable consequences that lead to plaintiff's injury, the conduct is deemed the proximate cause of the injury. "[A] tortfeasor is generally held answerable for the injuries which result in the ordinary course of events from his negligence and it is generally sufficient if his negligent conduct was a substantial factor in bringing about the injuries." *Rappaport, supra,* 31 *N.J.* at 203, 156 *A.*2d 1; *see Ettin v. Ava Truck Leasing Inc.,* 53 *N.J.* 463, 483, 251 *A.*2d 278 (1969) (parking tractor-trailer across street is substantial factor in cause of accident when truck with failed brakes collides into trailer).

Under the facts here defendant provided his guest with liquor, knowing that thereafter the guest would have to drive in order to get home. Viewing the facts most favorably to plaintiff (as we must, since the complaint was dismissed on a motion for summary judgment), one could reasonably conclude that the Zaks must have known that their provision of liquor was causing Gwinnell to become drunk, yet they continued to serve him even after he was visibly intoxicated. By the time he left, Gwinnell was in fact severely intoxicated. A reasonable person in Zak's position could foresee quite clearly that this continued provision of alcohol to Gwinnell was making it more and more likely that Gwinnell would not be able to operate his car carefully. Zak could foresee that unless he stopped providing drinks to Gwinnell, Gwinnell was likely to injure someone as a result of the negligent operation of his car. The usual elements of a cause of action for negligence are clearly present: an action by defendant creating an unreasonable risk of harm to plaintiff, a risk that was clearly foreseeable, and a risk that resulted in an injury equally foreseeable. Under those circumstances the only question remaining is whether a duty exists to prevent such risk or, realistically, whether this Court should impose such a duty.

In most cases the justice of imposing such a duty is so clear that the cause of action in negligence is assumed to exist simply on the basis of the actor's creation of an unreasonable risk of foreseeable harm resulting in injury. In fact, however, more is needed, "more" being the value judgment, based on an analysis of public policy, that the actor owed the injured party a duty of reasonable care. *Palsgraf v. Long Island R.R. Co.,* 248 *N.Y.* 339, 162 *N.E.* 99 (1928). In *Goldberg v. Housing Auth. of Newark,* 38 *N.J.* 578, 583, 186 *A.*2d 291 (1962), this Court explained that "whether a *duty* exists is ultimately a question of fairness. The inquiry involves a weighing of the relationship of the parties, the nature of the risk, and the public interest in the proposed solution." *See also Portee v. Jaffee,* 84 *N.J.* 88, 101, 417 *A.*2d 521 (1980) (whether liability for negligently inflicted emotional harm should be expanded depends "ultimately" on balancing of conflicting interests involved).

When the court determines that a duty exists and liability will be extended, it draws judicial lines based on fairness and policy. In a society where thousands of deaths are caused each year by drunken drivers,[3] where the damage caused by such deaths is regarded increasingly as intolerable, where liquor licensees are prohibited from serving intoxicated adults, and where long-standing criminal sanctions against drunken driving have recently been significantly strengthened to the point where the Governor notes that they are regarded as the toughest in the nation, see Governor's Annual Message to the N.J. State Legislature, Jan. 10, 1984, the imposition of such a duty by the judiciary seems both fair and fully in accord with the State's policy. Unlike those cases in which the definition of desirable policy is the subject of intense controversy, here the imposition of a duty is both

consistent with and supportive of a social goal—the reduction of drunken driving—that is practically unanimously accepted by society.

While the imposition of a duty here would go beyond our prior decisions, those decisions not only point clearly in that direction but do so despite the presence of social considerations similar to those involved in this case—considerations that are claimed to invest the host with immunity. In our first case on the subject, *Rappaport, supra,* 31 *N.J.* 188, 156 *A.*2d 1, we held a licensee liable for the consequences of a customer's negligent operation of his automobile. The customer was a minor who had become intoxicated as a result of the consumption of liquor at various premises including the licensee's. While observing that a standard of conduct was contained in the statute prohibiting licensees from serving liquor to minors and in the regulation further prohibiting service to any person actually or apparently intoxicated, our decision that the licensee owed a duty to members of the general public was based on principles of common-law negligence.[4]

We later made it clear that the licensee's duty is owed to the customer as well, by holding in *Soronen v. Olde Milford Inn, Inc.,* 46 *N.J.* 582, 218 *A.*2d 630 (1966), that the licensee who served liquor to an intoxicated customer was liable to that customer for the death that resulted when the customer fell in the licensed premises while leaving the bar. While the situation of a licensee differs in some respects from that of a social host, some of the same underlying considerations relied on here in disputing liability are present in both: the notion that the real fault is that of the drunk, not the licensee, especially where the drinker is an adult (as he was in *Soronen*); and the belief—not as strong when applied to licensed premises as when applied to one's home—that when people get together for a friendly drink or more, the social relationships should not be intruded upon by possibilities of litigation.

The Appellate Division moved our decisional law one step further, a significant step, when it ruled in *Linn v. Rand,* 140 *N.J.Super.* 212, 356 *A.*2d 15 (1976), that a social host who serves liquor to a visibly intoxicated minor, knowing the minor will thereafter drive, may be held liable for the injuries inflicted on a third party as a result of the subsequent drunken driving of the minor. There, practically all of the considerations urged here against liability were present: it was a social setting at someone's home, not at a tavern; the one who provided the liquor to the intoxicated minor was a host, not a licensee; and all of the notions of fault and causation pinning sole responsibility on the drinker were present. The only difference was that the guest was a minor—but whether obviously so or whether known to the host is not disclosed in the opinion.[5]

In *Rappaport,* we explicitly noted that the matter did not involve any claim against "persons not engaged in the liquor business." 31 *N.J.* at 205, 156 *A.*2d 1. We now approve *Linn* with its extension of this liability to social hosts. In expanding liability, *Linn* followed the rationale of *Rappaport* that the duty involved is a common law duty, not one arising from the statute and regulation prohibiting sales of liquor to a minor, neither of which applies to a social host.[6] *Cf. Congini v. Portersville Valve Co., ——Pa. ——, ——, 470 A.*2d 515, 517–18 (1983) (in which the Pennsylvania Supreme Court relied exclusively on statutes criminalizing the provision of alcohol to minors as the basis for extending liability to a social host). The fair implication of *Rappaport* and *Soronen,* that the duty exists independent of the statutory prohibition, was thus made explicit in *Linn.* As the court there noted: "It makes little sense to say that the licensee in *Rappaport* 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." 140 *N.J.Super.* at 217, 356 *A.*2d 15.[7]

The argument is made that the rule imposing liability on licensees is justified because licensees, unlike social hosts, derive a profit from serving liquor. We reject this analysis of the liability's foundation and emphasize that the liability proceeds from the duty of care that accompanies control of the liquor supply. Whatever the motive behind making alcohol available to those who will subsequently drive, the provider has a duty to the public not to create foreseeable, unreasonable risks by this activity.

We therefore hold that a host who serves liquor to an adult social guest, knowing both that the guest is intoxicated and will thereafter be operating a motor vehicle, is liable for injuries inflicted on a third party as a result of the negligent operation of a

motor vehicle by the adult guest when such negligence is caused by the intoxication. We impose this duty on the host to the third party because we believe that the policy considerations served by its imposition far outweigh those asserted in opposition. While we recognize the concern that our ruling will interfere with accepted standards of social behavior; will intrude on and somewhat diminish the enjoyment, relaxation, and camaraderie that accompany social gatherings at which alcohol is served; and that such gatherings and social relationships are not simply tangential benefits of a civilized society but are regarded by many as important, we believe that the added assurance of just compensation to the victims of drunken driving as well as the added deterrent effect of the rule on such driving outweigh the importance of those other values. Indeed, we believe that given society's extreme concern about drunken driving, any change in social behavior resulting from the rule will be regarded ultimately as neutral at the very least, and not as a change for the worse; but that in any event if there be a loss, it is well worth the gain.[8]

The liability we impose here is analogous to that traditionally imposed on owners of vehicles who lend their cars to persons they know to be intoxicated. *Knight v. Gosselin,* 124 *Cal.App.* 290, 12 *P.*2d 454 (Dist.Ct.App.1932); *Harris v. Smith,* 119 *Ga.App.* 306, 167 *S.E.*2d 198 (Ct.App.1969); *Pennington v. Davis-Child Motor Co.,* 143 *Kan.* 753, 57 *P.*2d 428 (1936); *Deck v. Sherlock,* 162 *Neb.* 86, 75 *N.W.*2d 99 (1956); *Mitchell v. Churches,* 119 *Wash.* 547, 206 *P.* 6 (1922). If, by lending a car to a drunk, a host becomes liable to third parties injured by the drunken driver's negligence, the same liability should extend to a host who furnishes liquor to a visibly drunken guest who he knows will thereafter drive away.

Some fear has been expressed that the extent of the potential liability may be disproportionate to the fault of the host. A social judgment is therein implied to the effect that society does not regard as particularly serious the host's actions in causing his guests to become drunk, even though he knows they will thereafter be driving their cars. We seriously question that value judgment; indeed, we do not believe that the liability is disproportionate when the host's actions, so relatively easily corrected, may result in serious injury or death. The other aspect of this argument is that the host's insurance protection will be insufficient. While acknowledging that homeowners' insurance will cover such liability,[9] this argument notes the risk that both the host and spouse will be jointly liable. The point made is not that the level of insurance will be lower in relation to the injuries than in the case of other torts, but rather that the joint liability of the spouses may result in the loss of their home and other property to the extent that the policy limits are inadequate.[10] If only one spouse were liable, then even though the policy limits did not cover the liability, the couple need not lose their home because the creditor might not reach the interest of the spouse who was not liable. *Newman v. Chase,* 70 *N.J.* 254, 266, 359 *A.*2d 474 (1976); *King v. Greene,* 30 *N.J.* 395, 153 *A.*2d 49 (1959); *ESB, Inc. v. Fisher,* 185 *N.J.Super.* 373, 448 *A.*2d 1030 (Ch.Div.1982). We observe, however, that it is common for both spouses to be liable in automobile accident cases. It may be that some special form of insurance could be designed to protect the spouses' equity in their homes in cases such as this one. In any event, it is not clear that the loss of a home by spouses who, by definition, have negligently caused the injury, is disproportionate to the loss of life of one who is totally innocent of any wrongdoing.

Given the lack of precedent anywhere else in the country, however, we believe it would be unfair to impose this liability retroactively. *Merenoff v. Merenoff,* 76 *N.J.* 535, 388 *A.*2d 951 (1978); *Darrow v. Hanover Twp.,* 58 *N.J.* 410, 278 *A.*2d 200 (1971); *Willis v. Department of Conservation & Economic Dev.,* 55 *N.J.* 534, 264 *A.*2d 34 (1970). Homeowners who are social hosts may desire to increase their policy limits; apartment dwellers may want to obtain liability insurance of this kind where perhaps they now have none. The imposition of retroactive liability could be considered unexpected and its imposition unfair. We therefore have determined that the liability imposed by this case on social hosts shall be prospective, applicable only to events that occur after the date of this decision. We will, however, apply the doctrine to the parties before us on the usual theory that to do otherwise would not only deprive the plaintiff of any benefit resulting from her own efforts but would also make it less likely that, in the future, individuals will be willing to claim rights, not yet established, that they believe are just.

The goal we seek to achieve here is the fair compensation of victims who are injured as a result of drunken driving. The imposition of the duty certainly will make such fair compensation more likely. While the rule in this case will tend also to deter

drunken driving, there is no assurance that it will have any significant effect. The lack of such assurance has not prevented us in the past from imposing liability on licensees. Indeed, it has been only recently that the sanction of the *criminal* law was credited with having some significant impact on drunken driving.[11] We need not, however, condition the imposition of a duty on scientific proof that it will result in the behavior that is one of its goals. No one has suggested that the common-law duty to drive carefully should be abolished because it has apparently not diminished the mayhem that occurs regularly on our highways. We believe the rule will make it more likely that hosts will take greater care in serving alcoholic beverages at social gatherings so as to avoid not only the moral responsibility but the economic liability that would occur if the guest were to injure someone as a result of his drunken driving.

We do not agree that the issue addressed in this case is appropriate only for legislative resolution. Determinations of the scope of duty in negligence cases has traditionally been a function of the judiciary. The history of the cases cited above evidences a continuing judicial involvement in these matters. Without the benefit of any Dram Shop Act imposing liability on licensees, legislation that is quite common in other states, this Court determined that such liability nevertheless existed.[12] We did so in 1959 and have continued to expand that concept since then. We know of no legislative activity during that entire period from 1959 to date suggesting that our involvement in these matters was deemed inappropriate; even after the judiciary expanded this liability to include social hosts in its decision in *Linn,* there was no adverse reaction on the part of the Legislature. In fact, the Legislature's passage of S. 1054, imposing criminal liability on anyone who purposely or knowingly serves alcoholic beverages to underage persons, indicates that body's approval of the position taken eight years earlier in *Linn.* The subject matter is not abstruse, and it can safely be assumed that the Legislature is in fact aware of our decisions in this area. Absent such adverse reaction, we assume that our decisions are found to be consonant with the strong legislative policy against drunken driving.

* * *

This Court has decided many significant issues without any prior legislative study. In any event, if the Legislature differs with us on issues of this kind, it has a clear remedy. [citations omitted]. . .

We are satisfied that our decision today is well within the competence of the judiciary. Defining the scope of tort liability has traditionally been accepted as the responsibility of the courts. Indeed, given the courts' prior involvement in these matters, our decision today is hardly the radical change implied by the dissent but, while significant, is rather a fairly predictable expansion of liability in this area.[14]

* * *

If we but step back and observe ourselves objectively, we will see a phenomenon not of merriment but of cruelty, causing misery to innocent people, tolerated for years despite our knowledge that without fail, out of our extraordinarily high number of deaths caused by automobiles, nearly half have regularly been attributable to drunken driving. *See supra,* at 1222 n. 3. Should we be so concerned about disturbing the customs of those who knowingly supply that which causes the offense, so worried about their costs, so worried about their inconvenience, as if they were the victims rather than the cause of the carnage? And while the dissent is certainly correct that we could learn more through an investigation, to characterize our knowledge as “scant” or insufficient is to ignore what is obvious, and that is that drunken drivers are causing substantial personal and financial destruction in this state and that a goodly number of them have been drinking in homes as well as taverns. Does a court really need to know more? Is our rule vulnerable because we do not know—nor will the Legislature—how much injury will be avoided or how many lives saved by this rule? Or because we do not know how many times the victim will require compensation from the host in order to be made whole?

This Court senses that there may be a substantial change occurring in social attitudes and customs concerning drinking, whether at home or in taverns. We believe that this change may be taking place right now in New Jersey and perhaps elsewhere. It is the upheaval of prior norms by a society that has finally recognized that it must change its habits and do whatever is required, whether it means but a small change or a significant one, in order to stop the senseless loss inflicted by drunken drivers. We did not cause that movement, but we believe this decision is in step with it.

* * *

We therefore reverse the judgment in favor of the defendants Zak and remand the case to the Law Division for proceedings consistent with this opinion.

GARIBALDI, J., dissenting.

Today, this Court holds that a social host who knowingly enables an adult guest to become intoxicated knowing that the guest will operate a motor vehicle is liable for damages to a third party caused by the intoxicated guest. The imposition of this liability on a social host places upon every citizen of New Jersey who pours a drink for a friend a heavy burden to monitor and regulate guests. It subjects the host to substantial potential financial liability that may be far beyond the host's resources.

My position as a strong advocate of legal measures to combat drunk driving is established. *See In re Kallen,* 92 *N.J.* 14, 455 *A.*2d 460 (1983). The majority need not parade the horrors that have been caused by drunk drivers to convince me that there is always room for stricter measures against intoxicated drivers. I too am concerned for the injured victim of a drunken driver. However, the almost limitless implications of the majority's decision lead me to conclude that the Legislature is better equipped to effectuate the goals of reducing injuries from drunken driving and protecting the interests of the injured party, without placing such a grave burden on the average citizen of this state.

I

Prior to today's decision, this Court had imposed liability only on those providers of alcoholic beverages who were licensed by the State. *See Rappaport v. Nichols,* 31 *N.J.* 188, 156 *A.*2d 201 (1959). The Appellate Division also had expanded the liability to a social host who served liquor to a minor. *Linn v. Rand,* 140 *N.J.Super.* 212, 356 *A.*2d 15 (App.Div.1976).[1] Although both of these cases were based on common-law negligence, the courts deemed the regulations restricting the service of alcohol to minors significant enough evidence of legislative policy to impart knowledge of foreseeable risk on the provider of the alcohol and to fashion a civil remedy for negligently creating that risk.

Many other states have considered the problem before us today but no judicial decision establishing a cause of action against a social host for serving liquor to an adult social guest is currently in force. Any prior judicial attempts to establish such a cause of action have been abrogated or restricted by subsequent legislative action. *See, e.g., Cal.Civ.Code* § 1714 (as amended Stats.1978, ch. 929, § 2, p. 2904); *Or.Rev.Stat.* § 30.955 (1979).

* * *

II

My reluctance to join the majority is not based on any exaggerated notion of judicial deference to the Legislature. Rather, it is based on my belief that before this Court plunges into this broad area of liability and imposes high duties of care on social hosts, it should carefully consider the ramifications of its actions. The Court acts today with seemingly scant knowledge and little care for the possible negative consequences of its decision.

The magnitude of the problem with which we are dealing is entirely unknown. As the Illinois Appellate Court noted in *Miller v. Moran, supra,* 96 *Ill.App.*3d at 600, 421 *N.E.*2d at 1049, the injured party normally has a remedy against the direct perpetrator of the injury, the intoxicated driver. The majority's portrayal of the specter of many innocent victims with no chance of recovery against drunk drivers is specious.

* * *

A significant difference between an average citizen and a commercial licensee is the average citizen's lack of knowledge and expertise in determining levels and degrees of intoxication. Licensed commercial providers, unlike the average citizen, deal with the alcohol-consuming public every day. This experience gives them some expertise with respect to intoxication that social hosts lack. A social host will find it more difficult to determine levels and degrees of intoxication.

The majority holds that a host will be liable only if he serves alcohol to a guest knowing both that the guest is intoxicated and that the guest will drive. *Ante* at 1224. Although this standard calls for a subjective determination of the extent of the host's knowledge, a close reading of the opinion makes clear that the majority actually is relying on objective evidence. The majority takes the results of Gwinnell's blood alcohol concentration test and concludes from that test that "the Zaks must have known that their provision of liquor was causing Gwinnell to become drunk * * *." *Ante* at 1221.

Whether a guest is or is not intoxicated is not a simple issue. Alcohol affects everyone differently. "[T]he precise effects of a particular concentration of alcohol in the blood varies from person to person depending upon a host of other factors. See generally Perr, 'Blood Alcohol Levels and "Diminished Capacity",' 3 (No. 4) J. Legal Med. 28–30 (April 1975)." *State v. Stasio,* 78 *N.J.* 467, 478 n. 5, 396 *A.*2d 1129 (1979). One individual can consume many drinks without exhibiting any signs of intoxication. Alcohol also takes some time to get into the bloodstream and show its outward effects. Experts estimate that it takes alcohol twenty to thirty minutes to reach its highest level in the bloodstream. See *American Medical Association, Alcohol and the Impaired Driver* (1968). Thus, a blood alcohol concentration test demonstrating an elevated blood alcohol level after an accident may not mean that the subject was obviously intoxicated when he left the party some time earlier. "Moreover, a state of obvious intoxication is a condition that is very susceptible to after the fact interpretations, *i.e.,* objectivereview of a subjective decision. These factors combine to make the determination that an individual is obviously intoxicated not so obvious after all." Comment, "Social Host Liability for Furnishing Alcohol: A Legal Hangover?" 1978 *Pac.L.J.* 95, 103. Accordingly, to impose on average citizens a duty to comprehend a person's level of intoxication and the effect another drink would ultimately have on such person is to place a very heavy burden on them.

The nature of home entertaining compounds the social host's difficulty in determining whether a guest is obviously intoxicated before serving the next drink. In a commercial establishment, there is greater control over the liquor; a bartender or waitress must serve the patron a drink. Not so in a home when entertaining a guest. At a social gathering, for example, guests frequently serve themselves or guests may serve other guests. Normally, the host is so busy entertaining he does not have time to analyze the state of intoxication of the guests. Without constant face-to-face contact it is difficult for a social host to avoid serving alcohol to a person on the brink of intoxication. Furthermore, the commercial bartender usually does not drink on the job. The social host often drinks with the guest, as the Zaks did here. The more the host drinks, the less able he will be to determine when a guest is intoxicated. It would be anomalous to create a rule of liability that social hosts can deliberately avoid by becoming drunk themselves.

* * *

The majority suggests that my fears about imposition of liability on social hosts who are not in a position to monitor the alcohol consumption of their guests are "purely hypothetical" in that the present case involves a host and guest in a one-to-one situation. It is unrealistic to assume that the standards set down by the Court today will not be applied to hosts in other social situations. Today's holding leaves the door open for all of the speculative and subjective impositions of liability that I fear.

* * *

Further, it is not clear from the Court's opinion to what lengths a social host must go to avoid liability. Is the host obligated to use physical force to restrain an intoxicated guest from drinking and then from driving? Or is the host limited to delay and subterfuge tactics short of physical force? What is the result when the host tries to restrain the guest but fails? Is the host still liable? The majority opinion is silent on the extent to which we must police our guests.

III

The most significant difference between a social host and a commercial licensee, however, is the social host's inability to spread the cost of liability. The commercial establishment spreads the cost of insurance against liability among its customers. The social host must bear the entire cost alone. While the majority briefly discusses this issue, noting that it may result in a catastrophic loss of a home to a husband and wife, it apparently does not consider this much of a problem to the average New Jersey citizen. It assumes that such liability is now covered or will be covered under the homeowner's insurance policy.

The majority cites no authority for its belief that actions against social hosts will be covered under homeowner's insurance. This new cause of action will be common and may result in large awards to third parties. Even if it is assumed that homeowner's insurance will cover this cause of action, it is unrealistic to believe that insurance companies will not raise their premiums in response to it.

Furthermore, many homeowners and apartment renters may not even have homeowner's insurance and probably cannot afford it. Other homeowners may not have sufficient insurance to cover the limitless liability that the Court seeks to impose. These people may lose everything they own if they are found liable as negligent social hosts under the Court's scheme. The individual economic cost to every New Jersey citizen should be weighed before today's result is reached.

* * *

IV

In conclusion, in trivializing these objections as "cocktail party customs", *ante* at 1230 and "inconvenience", *ante* at 1227, the majority misses the point. I believe that an in-depth review of this problem by the Legislature will result in a solution that will further the goals of reducing injuries related to drunk driving and adequately compensating the injured party, while imposing a more limited liability on the social host. Imaginative legislative drafting could include: funding a remedy for the injured party

by contributions from the parties most responsible for the harm caused, the intoxicated motorists; making the social host secondarily liable by requiring a judgment against the drunken driver as a prerequisite to suit against the host; limiting the amount that could be recovered from a social host; and requiring a finding of wanton and reckless conduct before holding the social host liable.

I do not propose to fashion a legislative solution. That is for the Legislature. I merely wish to point out that the Legislature has a variety of alternatives to this Court's imposition of unlimited liability on every New Jersey adult. Perhaps, after investigating all the options, the Legislature will determine that the most effective course is to impose the same civil liability on social hosts that the majority has imposed today. I would have no qualms about that legislative decision so long as it was reached after a thorough investigation of its impact on average citizens of New Jersey.

For reversal and remandment —Chief Justice WILENTZ, and Justices CLIFFORD, SCHREIBER, HANDLER, POLLOCK and O'HERN—6.

Opposed —Justice GARIBALDI—1.

All Citations

96 N.J. 538, 476 A.2d 1219

Footnotes

1 Under present law, a person who drives with a blood alcohol concentration of 0.10 percent or more violates *N.J.S.A.* 39:4–50 as amended by *L.* 1983, *c.* 129, the statute concerning driving while under the influence of intoxicating liquor.

2 The Appellate Division noted that several state court decisions imposing liability against social hosts under circumstances similar to those in this case were abrogated by later legislative action. We note that legislation enacted in Oregon did not abrogate the state court's holding in *Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity,* 258 *Or.* 632, 485 *P.*2d 18 (1971). The court found that a host directly serving liquor to a guest has a duty to refuse to serve the guest when it would be unreasonable under the circumstances to permit the guest to drink. Eight years later the legislature enacted *Or.Rev.Stat.* § 30.955, limiting a cause of action against a private host for damages incurred or caused by an intoxicated social guest to when the host "has served or provided alcoholic beverages to a social guest when such guest was visibly intoxicated." The legislature did not, therefore, preclude liability of private hosts under a negligence theory but instead decided that the social guest must be visibly intoxicated before the host will be held accountable for injuries caused by the guest's intoxicated conduct.
Nevertheless, we acknowledge that many jurisdictions have declined to extend liability to social hosts in circumstances similar to those present in this case. See, *e.g., Klein v. Raysinger,* —— *Pa.* ——, 470 *A.*2d 507, 510 (1983), and collected cases cited therein.

3 From 1978 to 1982 there were 5,755 highway fatalities in New Jersey. Alcohol was involved in 2,746 or 47.5% of these deaths. Of the 629,118 automobile accident injuries for the same period, 131,160, or 20.5% were alcohol related. The societal cost for New Jersey alcohol-related highway deaths for this period has been estimated as $1,149,516,000.00, based on statistics and documents obtained from the New Jersey Division of Motor Vehicles. The total societal cost figure for all alcohol-related accidents in New Jersey in 1981 alone, including deaths, personal injuries and property

damage was $1,594,497,898.00. *New Jersey Division of Motor Vehicles, Safety, Service, Integrity, A Report on the Accomplishments of the New Jersey Division of Motor Vehicles* 45 (April 1, 1982 through March 31, 1983). These New Jersey statistics are consistent with nationwide figures. *Presidential Commission on Drunk Driving, Final Report* 1 (1983).

4 We noted that the statutory and regulatory violations could properly be considered by a jury as evidence of the licensee's negligence. *Rappaport,* 31 *N.J.* at 202–03, 156 *A.*2d 1.

5 The case was decided on a motion for summary judgment. The court noted that the record did not indicate the minor's age. The opinion does not rely at all on the host's ability easily to determine the fact that the guest was a minor, a factor relied on to some extent in the arguments seeking to distinguish the present case from *Linn.*

6 We note that the Senate and Assembly have recently passed a bill that, if signed into law, would make it a disorderly persons offense knowingly to offer or serve an alcoholic beverage to a person under the legal drinking age. Senate Bill No. S. 1054.

7 While *Linn* 's statement of the legal rule does not explicitly go beyond the situation in which the social guest was a minor (140 *N.J.Super.* at 217, 219, 220, 356 *A.*2d 15), its reasoning would apply equally to an adult guest.

8 We note that our holding and the reasoning on which it is based may be regarded as inconsistent with *Anslinger v. Martinsville, Inn, Inc.,* 121 *N.J.Super.* 525, 298 *A.*2d 84 (App.Div.1972), certif. den., 62 *N.J.* 334, 301 *A.*2d 449 (1973). There, the court refused to impose liability on business associates for the injuries a drunken guest suffered after leaving their social affair. The guest died when the car he was driving rammed into a truck on a highway. That court also ruled that decedent's drunkenness constituted contributory negligence, available to the business (or social) host as a defense (as distinguished from its unavailability where defendant is a licensee; *see Soronen, supra,* 46 *N.J.* 582, 218 *A.*2d 630). We express no opinion on that question, which is not before us since Gwinnell's only claim against Zak is for contribution or indemnification and not for personal injuries. While, as noted *infra* at 1230, Zak and Gwinnell may be liable as joint tortfeasors as to Kelly, any right of contribution or indemnification between the two will have to be determined by the trial court on remand. That determination presumably will require consideration of the effect, if any, of *Soronen, Anslinger,* and the Comparative Negligence Act, *N.J.S.A.* 2A:15–5.1–5.3 (which was not in effect at the time of those decisions).
The *Anslinger* court also discussed, in dictum, the policy against imposing liability on hosts in social or quasi-business settings. Today, the facts of the case before us persuade us that policy considerations warrant imposing such a duty on a social host. We note also the case of *Figuly v. Knoll,* 185 *N.J.Super.* 477, 449 *A.*2d 564 (Law.Div.1982), which, on facts substantially similar to those before us, held the social host liable.

9 The dissent challenges our assumption that present homeowners' policies cover the liability imposed by this decision. At oral argument, counsel for both sides indicated that they believe typical homeowners' policies would cover such liability. Even if that is so, however, says the dissent, the homeowner/social host is unable “to spread the cost of liability.” *Post* at 1242. The contrast is then made with the commercial licensee who “spreads the cost of insurance against liability among its or her customers.” *Id.* But the critical issue here is not whether the homeowner can pass the cost on or must bear it himself, but whether tort law should be used to spread the risk over a large segment of society through the device of insurance rather than imposing the entire risk on the innocent victim of drunken driving. Obviously there will be some additional insurance premium at some point that homeowners and renters will have to bear. Their inability to pass that cost on to others, however, is no more persuasive than that same argument would be as to the “average citizen's” automobile liability insurance or, for that matter, for homeowners' insurance as it now exists.

[10] We need not, and do not, reach the question of which spouse is liable, or whether both are liable, and under what circumstances.

[11] Within the last year those laws have been strengthened and officials have stepped up enforcement efforts. Since 1980, the number of drunk driving arrests in New Jersey has increased by approximately 40%. The number of drunk driving deaths has decreased in this State from a high of 376 deaths in 1981 to a reported preliminary total of 270 deaths in 1983. Since the State minimum drinking age was returned to 21 years in 1983, the number of fatal accidents involving people under the age of 21 has dropped significantly. In 1982, drunken drivers between the ages of 18 and 20 were responsible for 67 highway fatalities. Preliminary figures for 1983 show that this age group was responsible for 38 drunk driving deaths that year. There has been a corresponding drop in the number of injuries sustained in accidents involving drunk drivers. *New Jersey Division of Motor Vehicles, Safety, Service, Integrity, A Report on the Accomplishments of the New Jersey Division of Motor Vehicles, supra,* at 44. Law enforcement officials believe that the decrease in accidents and injuries is attributable to the recent changes in these laws. See Comments of Attorney General, *quoted in* "Highway Carnage," *Herald News,* Mar. 13, 1984, p. A–10; Comments of Director, Division of Motor Vehicles, *quoted in* "Teen Road Carnage Drops Sharply in First Year of Higher Drinking Age," *The Star-Ledger,* Mar. 8, 1984, p. 1.

[12] Justice Jacobs adverted to this fact in his opinion in *Soronen, supra:* "Many states have dram shop acts in which the legislature has specifically fixed the scope and extent of the tavern keeper's civil responsibility for injuries which result from his service of alcoholic beverages to an intoxicated person. We have no such act and must therefore deal with the common law principles of negligence and proximate causation." 46 *N.J.* at 592, 218 *A.*2d 630.

[13] The dissent's reference to Oregon statutes as abrogating or restricting a prior judicial determination in favor of the cause of action, *post* at 1231 is incorrect. The Oregon statute accepted the judicial determination similar to that made in this case; its effect, as noted *supra* at 1221 n. 2, was only to prevent further expansions of liability beyond that allowed by this Court today.

[14] In view of the arguments set forth, the dissent's approval of the decision in *Linn* is difficult to understand. *Post* at 1230. The difference between that case and the instant case is simply one of degree. There a social host was held liable for the consequences of drunken driving by a minor who had been served by the host in a social setting. The legislative indicator of liability was not significantly stronger (in *Linn* a statutory and regulatory prohibition was involved, applicable, however, only to licensees; here only a regulatory prohibition); in both cases social habits may be affected, substantial economic consequences may result, and in both the court acts without the advantage of a legislative inquiry. The dissent's notion that *Linn* can be distinguished because "minors occupy a special place in our society and traditionally have been protected by state regulation from the consequences of their own immaturity" fails to acknowledge that the thrust of the case was to provide compensation for an innocent victim of a drunken driver where the driver happened to be a minor and not even a party to the action. The entire rationale of the opinion is that there is no sound reason to impose liability on a licensee and not on a social host. There is not a word nor the slightest implication in the opinion suggesting that the underlying purpose of the decision was to protect minors.

[1] If this case involved service of alcohol by a social host to a minor guest, I would vote with the majority in approving *Linn v. Rand, supra,* 140 *N.J.Super.* 212, 356 *A.*2d 15, to the extent it has been interpreted as applying only to social hosts who serve liquor to minors. The distinction I draw is based on the clearly and frequently expressed legislative policy that minors should not drink alcoholic beverages, *see, e.g., N.J.S.A.* 33:1–77, and on the fact that minors occupy a special place in our society and traditionally have been protected by state regulation from the consequences of their own immaturity. Although the majority sees no basis for this distinction, I am not alone in making it. *Compare Klein v. Raysinger, ——Pa. ——,* 470 *A.*2d 507 (1983) (in which the Supreme Court of Pennsylvania refused to extend liability to a social host who serves an adult guest) *with Congini v. Porterville Valve Co., —— Pa. ——,* 470 *A.*2d 515 (1983)

(decided on the same day as *Klein* by the same court but extending liability to a social host who served liquor to a minor guest); *see also* Senate Bill S–1054 (recently passed by the Senate and Assembly imposing criminal liability on social hosts who serve liquor to minors but not mentioning hosts who serve liquor to adults).

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