

SOCIAL HOST LIABILITY REVISITED

WHAT IS NO LONGER SOCIABLE OR PERMISSIBLE

In the dog days of summer 2000, the legislature passed and the Governor signed a small but potent piece of legislation. House bill- number 4506 is prosaically entitled: An Act relative to the sale or delivery of alcoholic beverages or alcohol to a person under 21 years of age.” It provides for criminal penalties when a homeowner, a social host, knowingly or intentionally supplies, gives, provides or allows a person under 21 years old to possess alcoholic beverages on property owned or controlled by him. The likely target scenario is a private party at a home, an apartment or a condominium at which alcohol is available and where adults and minors are present. The statute also provides criminal penalties for the direct and indirect sale, delivery, service, or furnishing of alcoholic beverages by an adult to a person under 21 years old at a commercial establishment. In this instance, the likely scenario is a commercial bar, restaurant, or club in which an adult bartender or customer obtains or furnishes a drink to a minor.

It is a good law. It will save lives. Its text is one page. Its ramifications speak volumes:

Whoever makes a sale or delivery of any alcoholic beverage or alcohol to any person under 21 years of age, either for his own use or for the use of his parent or any other person, or whoever, being a patron of an establishment licensed under section 12 or 15, delivers or procures to be delivered in any public room or area of such establishment if licensed under section 12, 15, 19B or 19C or 19D or in any area of such establishment if licensed under said section 15, 19B, 19C or 19D any such beverages or alcohol to or for use by a person who he knows or has reason to believe is under 21 years of age or whoever procures any such beverage or alcohol for a person 21 years of age in any establishment licensed under section 12 or procures any such beverage or alcohol for a person under 21 years of age who is not his child, ward or spouse in any establishment licensed under said section 15, 19B, 19C or 19D or whoever furnishes any such beverage or alcohol for a person under 21 years of age shall be punished by a fine of not more than \$2,000 or by imprisonment for not more than one year or both. For the purpose of this section the word “furnish” shall have the following meaning:- to knowingly

or intentionally supply, give, or provide to or allow a person under 21 years of age except for the children and grandchildren of the person being charged to possess alcoholic beverages on premises or property owned or controlled by the person charged.”

In the past, it was civilly unlawful to serve or furnish alcohol to a minor in a commercial establishment when its employees knew or should have known that an adult intermediary was purchasing an alcoholic drink for a minor. (see *Tobin v. Norwood Country Club*, 422 Mass. 126 (1996) If that same act had taken place at a private residence there was nothing in civil or criminal law to prevent it.

In the recent past, the illegal consumption or possession of alcohol by a minor at a private residence was not a violation of either criminal or civil law-for either the minor or the adult social host. The only exception was if a social host directly placed an alcoholic beverage into the hands of a minor or adult who was visibly intoxicated. As a result, private residences became a haven for illegal drinking on the part of minors and adults. This law partially closes that legal loop-whole.

Now, it is a misdemeanor (a fine not more than \$2000 or imprisonment for not more than 1 year) for a social host to permit a minor to possess alcoholic beverages on his/her property. A social host is a person who owns or controls property at which alcoholic beverages are being served or are available. The legislation provides the practical backbone and rationale for social hosts to prevent their children, and the children of their friends and neighbors from possessing or drinking alcoholic beverages at their social gatherings. It will encourage cooperation among neighbors and parents to prevent their children’s illegal possession or consumption of alcohol at one another’s homes.

The at-home consumption of alcohol by minors is an old problem. It has become egregious in recent years as families have two parents working or, a single parent working fulltime. There are typically two situations where problems occur. In the first, a social host permits minors to possess or drink alcoholic beverages at a social gathering held at her home during, for example, a graduation party. Adults and minors attend the party. Alcoholic beverages are provided to the guests by the social host. In the second instance, a homeowner does not actually give permission or furnish alcoholic beverages to the minors. The minors bring the alcoholic beverages to the home or social gathering to be consumed there by them. Under the new law, a social host may be criminally liable merely for “allowing” the minor to possess alcohol in her home. Ironically, under Massachusetts law as

it now stands, a social host may be criminally liable in this situation, but not civilly liable, since she did not directly serve an intoxicated minor. It is unclear, at the moment, how far the courts will extend the reach of the statute.

This legislation was passed, in part, to answer the following question: how does society protect its children from the known ravages of intoxication? The illegal consumption of alcohol by minors causes harm to themselves and to those with whom they come in contact when they are intoxicated. We know children are particularly susceptible because of their age, inexperience, and lack of judgment.

The new law is certain to generate controversy. Some parents believe it is safer for their teenage children and their friends to drink at home. If the minors have a “few” beers under parental supervision at least the children are protected. The parents know where their children are and feel reassured they that will not drink and drive. It is the judgment of these parents that such a scenario is preferable to having their children illegally obtaining alcohol somewhere else and running the risk of driving while under the influence of alcohol.

Other parents are outraged at such behavior. For them there is still the danger that many of these teenagers will drive while intoxicated to and from this “safe” party. They also see it as undermining their parental authority and at odds with their strongly held beliefs concerning their children’s physical and emotional wellbeing.

Police, on the other hand, will applaud the law. As a result of the carnage on the highways, many police departments in the Commonwealth have adopted a “zero tolerance” policy concerning the consumption of alcohol by minors. The police have strictly enforced the laws against drunk driving and drinking by minors in parks and other places of public accommodation. In the past, the reaction of parents has been mixed. Some are very supportive. They encourage the police. These parents see the problem as a public health issue that affects their children’s lives, and the lives of everyone in the community.

Other parents have been more ambivalent towards the police’s “zero tolerance” policy. In some respects, these parents see alcohol as a safe drug. It is not heroine or cocaine. It does not bring to mind crack houses, emaciated addicts or hypodermic needles. They view alcohol consumption by teenagers as a right of passage. Many parents would not even list alcohol as the legally regulated drug that it is. This ambivalence is at the heart of the matter when parents instruct their children about the use and abuse of alcohol.

In addition, some parents see “zero tolerance” enforcement as unnecessary. They believe that a more “cooperative” spirit should exist in which their children are not arrested but merely held by the police without being “booked” until such time as their parents can come and get them. Some parents have even become hostile to the whole notion of police enforcement. They argue that any criminal offense will have severe repercussions concerning their children’s ability to get into a good college.

Will the law stop underage drinking? It is unlikely. Minors are presently receiving too many mixed messages about alcohol consumption. At best, parents seem to be saying, do as I say not as I do. At worst, parents are tacitly condoning their children’s drinking as long as it does not become a behavioral issue at home. Unfortunately, Americans have a deep cultural bias toward using alcohol as a lubricant for social interaction. It is advertised as a means by which adults can unwind from the pressures of daily living. In that sense, adults are modeling to their children their own learned behavior about alcohol consumption. If children examined these parental assumptions too closely it would make their parents extremely uncomfortable.

This social ambivalence toward alcohol is reflected in the laws of the Commonwealth. The legal term for a homeowner’s civil liability concerning the alcohol consumption on his premises is called “social host” liability. The Supreme Judicial Court has stated that a homeowner can be held liable only when he directly serves an intoxicated guest an alcoholic beverage at a time when the host observes the guest to be visibly intoxicated. The mere consumption of alcohol at a private residence by an intoxicated guest will not make the host liable for any alcohol related injuries to the guest; nor will it make the homeowner liable to anyone the guest may injure as a result of the guest’s intoxication. This social host “immunity” for the most part has been applicable whether the guest was an adult or a minor. This is one reason why graduation parties have become such a problem for local police departments. The private home had, in an odd and unintended way, become a safe haven for illegal drinking by minors. Sometimes there was adult complicity or tacit acceptance of the consumption of alcohol by minors. At other times, hosts turned a “blind eye” to the minors’ activity. The behavior was tolerated for a variety of reasons. Sometimes it was socially too awkward to address the problem; sometimes the hosts could not control the behavior of the minors in attendance. At other times, the homeowners were unwilling to risk a public confrontation with friends and family. These parties frequently had “open” or self-service bars in which it was easy for teenagers, as well as adults, to obtain and consume a variety of alcoholic beverages.

This apparent license to countenance activity in the home that is not lawful in public accommodations has been reaffirmed in recent months. In June, the Supreme Judicial Court decided in the case of *Luoni v. Berube*, 431 Mass. 729 (2000) that social hosts were not liable to a guest who was injured at a Fourth of July party by fireworks brought to the party. The fireworks were set-off by other unidentified guests without the hosts' permission. The court held:

The defendants did not furnish the fireworks or give permission for the display on their property. Their status as social hosts carried with it neither the means, nor the legal obligation, to supervise or prevent the discharge of the fireworks by others. See *Ulwick v. DeChristopher* 411 Mass., 401,406 (1991). Were the rule otherwise, injuries to guests at parties would lead to considerable litigation, with plaintiffs claiming that social hosts should have supervised guests who misused alcohol, not furnished by the hosts, set off fireworks, not provided by the hosts, played dangerous games, engaged in horseplay around swimming pools, and so forth." *Id.* at 734.

With the advent of this criminal statute it is now a misdemeanor for adults to permit minors to consume alcohol at home. There now will be serious consequences if the homeowner does nothing. He can be fined, and go to jail. He may also face substantial civil damages for which he may not be insured. These not insignificant consequences will make homeowners more likely to monitor alcohol consumption at their parties. They will also make it more likely that social hosts will say something to friends, neighbors and relatives when alcohol is used by minors, or abused by adults. In a sense, the statute will provide "social cover" for homeowners. In order to protect themselves from criminal liability they will have to protect their guests.

Due to the new law, there are a myriad of issues the courts and the insurance industry will need to address in the coming months. What is the effect of this criminal statute on the civil liability of homeowners? Will the SJC expand its interpretation of social host liability in light of this criminal statute? Since a violation of a criminal statute is some evidence of negligence in the courts of the Commonwealth can civil litigants bring successful lawsuits against social hosts without waiting for a decision from the SJC? Can plaintiffs in a civil suit state a claim upon which relief can be granted sufficient to resist a motion to dismiss or a motion for summary judgment? Will the current homeowner's liability insurance policies provide coverage if there is civil liability? Absent specific terms of exclusion relating

to the consumption of alcohol in a homeowner's insurance policy isn't there already insurance coverage for any judgment against the homeowner? If a homeowner's insurance policy contains language that excludes coverage for any "injury caused by a violation of a penal law or ordinance committed by or with the knowledge or consent of any insured" does the violation of this criminal statute preclude coverage? Does it make any difference that the statute is used to prove only some evidence of negligence on the part of the homeowner as opposed to negligence per se?

In the collegiate rich environment of metropolitan Boston, the consequences of this legislation are also likely to ripple throughout the academic community. There has always been a problem on college campuses with underage drinking. This problem has been compounded because of the age differential of college students during the course of their academic careers. Freshmen typically enter college when they are 18 years old. During the course of their sophomore and junior years they are likely to be 19 and 20 years old respectively. It is only when students become seniors that they reach the legal drinking age of 21 years old. Sometimes they turn 21 only at the end of their senior year.

Of course, the fact that under-age students consume alcohol on and off campus is not new to parents, educators or students. In light of this legislation, the consequences will be new, and perhaps unanticipated. Imagine a college senior, a member of the football team, who is attending school on an athletic scholarship. He takes his freshman girlfriend to a neighborhood bar. The senior who is 21 years old walks to the bar and buys two glasses of beer. He brings them back to his table in the crowded bar and gives one of the beers to his date. The senior has just committed a misdemeanor for which he can be fined and imprisoned. If he is found guilty he could lose his eligibility to play football, be suspended from college, lose his scholarship, go to jail or all of the above. If the bartender served the same two students at the bar and did not ask for an ID to check their ages he also committed a misdemeanor. As a result he could lose his job and the bar could have its license suspended or revoked. If the two students continued to drink at the bar and became intoxicated, the consequences for the bartender and for the owner of the bar could be substantial. They could include both criminal penalties and civil damages if the students injure themselves or others due to their intoxication. Adding insult to injury, since the bar's employees violated a penal statute by serving the underage freshmen the insurance company for the bar may deny coverage under its policy of insurance due to the violation of a penal statute.

If one moves the locus to an on-campus bar, a fraternity party, a college dorm or an off-campus apartment the opportunities for the statute to be violated by students are obvious and almost endless. Parents would be surprised to receive a telephone call from a police station informing them that their son was being charged with a crime. They would be further shocked to learn that they needed to get their son a criminal attorney to represent him at a District Court bench trial for a violation of a misdemeanor that could send him to jail.

The criminal responsibility of a university may also become more acute since the mere possession of alcohol by a minor on property owned or controlled by the one charged is a violation of the statute. Suppose the state police received a credible tip that there is a university reception at which minors are seen “in possession” of alcoholic beverages. Could the faculty advisors at the reception, the Dean of Students or the University Trustees be charged with a violation of the statute? After all, the law holds responsible those who “control” the property. What happens if the students’ intoxication causes injury to innocent third parties? Can the violation of the penal statute be introduced in the civil proceedings against the university as some evidence of its negligence in “furnishing” alcohol to a minor?

The courts are likely to provide guidance to these questions in the coming years. At present, one thing is clear. The Massachusetts legislature has taken a forceful step against adults who are responsible for furnishing alcohol to minors.

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