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Tort Law - Common Law Negligence - Liability of Commercial Vendor of Alcohol - Duty Derived from Criminal Statute

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TORT LAW—COMMON LAW NEGLIGENCE—LIABILITY OF COMMERCIAL VENDOR OF ALCOHOL—DUTY DERIVED FROM CRIMINAL STATUTE—The Pennsylvania Supreme Court has held that as a matter of common law a commercial licensee of alcoholic beverages can be held liable for third party injuries which are proximately caused by the sale of alcohol to a minor.

Matthews v. Konieczny, Pa. , 527 A.2d 508 (1987).¹

On December 8, 1979, Matthew Capriotti entered J-B Beverage Distributors, Inc. and purchased a case of beer.² After purchasing the beer, Capriotti returned to his car where he and James J. Matthews then drove to the home of John Konieczny.³ After picking Konieczny up, the three youths proceeded to drive around in the car while drinking the beer which had been purchased at the distributorship.⁴ At some point, Konieczny began driving the car,⁵ and shortly thereafter, he lost control of the car and struck a tree.⁶ As a result of the accident James J. Matthews was fatally injured.⁷

The administrators of Matthews' estate filed suit in the Court of Common Pleas of Delaware County, Pennsylvania.⁸ Separate claims were filed against Konieczny, J-B Beverage Distributors, Inc., and Paul and Gloria Berkowitz.⁹ The claim against Konieczny was based

1. This is a consolidation of two cases.

2. *Matthews v. Konieczny*, Pa. , 527 A.2d 508, 510 (1987). At the time of the purchase, Capriotti was seventeen years old. He was never asked for verification of his age and he was not visibly intoxicated when the purchase was made. *Id.*

3. *Id.* Matthews and Konieczny were also minors who had contributed money towards the purchase of the beer. However, neither one had ever entered the distributorship and neither had ever been seen by the owners or employees of the distributorship. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.* Paul and Gloria Berkowitz were the owners and employees of the J-B Beverage Distributors, Inc. and were named as individual defendants in this action. *Id.*

upon his alleged negligence in failing to properly operate the car.¹⁰ The claim against J-B Beverage Distributors, Inc. and the Berkowitzes was based upon their alleged negligence in selling alcohol to a minor and failing to determine the age of a purchaser of beer.¹¹ Konieczny filed cross-claims against J-B Beverage Distributors, Inc. and the Berkowitzes, who subsequently filed motions for summary judgment.¹² The trial court granted the motions and the superior court affirmed this decision on appeal.¹³

The second case involved Freil's Beverages, Inc., a distributorship which sold a case of beer to nineteen year old William McGee.¹⁴ Two six packs of the beer purchased from Freil's were consumed by Richard Bradshaw, who was subsequently involved in an automobile accident which injured Christina Mancuso.¹⁵ Actions were instituted against Bradshaw, Freil's Beverages, Inc., and the owners of the automobile driven by Bradshaw.¹⁶ The trial court granted a motion for summary judgement in favor of Freil's Beverages, Inc. and the superior court affirmed.¹⁷

10. *Id.*

11. *Id.* As part of this claim, it was alleged that J-B Beverage Distributors, Inc. and the Berkowitzes had violated § 4-493 of the Pennsylvania Liquor Code. That section states in pertinent part:

It shall be unlawful - . . . (1) for any licensee or the board, or any employee, servant or agent of such licensee or of the board, . . . to sell, furnish or give any liquor or malt or brewed beverages, or to permit any liquor or malt or brewed beverages to be sold . . . to any minor. . . .

47 PA. STAT. ANN. § 4-493 (Purdons 1969). *Id.*

12. *Matthews*, 527 A.2d at 510.

13. *Matthews v. Konieczny*, 338 Pa. Super. 504, 488 A.2d 5 (1985). In upholding the trial court's decision, the superior court relied upon the wording of § 4-497 of the Pennsylvania Liquor Code. That section states in pertinent part:

No licensee shall be liable to third persons on account of damages inflicted upon them off of the licensed premises by customers of the licensee unless the customer who inflicts the damages was sold, furnished or given liquor or malt or brewed beverages by the said licensee or his agent, servant or employee when the said customer was visibly intoxicated.

47 PA. STAT. ANN. § 4-497 (Purdons 1969).

The superior court reasoned that "the statute only speaks of customers who were sold alcoholic beverages and who were visibly intoxicated To find otherwise would disregard the clear intent of the statute." *Matthews*, 338 Pa. Super. at 507, 488 A.2d at 7.

14. *Mancuso v. Bradshaw*, Pa. , 527 A.2d 508, 510 (1987).

15. *Id.*

16. *Id.* The action against Freil's Beverages, Inc. was based upon its alleged negligence in serving alcohol to a minor and failing to determine the age of a purchaser of beer. *Id.*

17. *Mancuso v. Bradshaw*, 338 Pa. Super. 328, 487 A.2d 990 (1985). The

On appeal to the Pennsylvania Supreme Court, the decisions of the superior court were reversed.¹⁸ In confronting the threshold issue with which the court was faced,¹⁹ Justice McDermott, writing for the majority, relied heavily upon the court's decision in *Congini v. Portersville Valve Company*.²⁰ Justice McDermott rejected the licensee's arguments²¹ attempting to distinguish *Congini* and stated that they were not compelling because they ignored the underlying rationale of that decision.²² The majority then concluded that the standard of negligence *per se* adopted in *Congini* should be equally applicable to a licensee who serves alcoholic beverages to a minor.²³ The court reasoned that holding otherwise would impose a lower standard of care upon those who sell alcoholic beverages than that imposed upon the public at large.²⁴

After concluding that commercial licensees are negligent *per se* when serving alcoholic beverages to minors, the court held that licensees may not claim statutory immunity under section 4-497 of

superior court held that "without a showing that the purchaser was visibly intoxicated at the time of the sale, no liability can be attributed to the licensee." *Id.* In distinguishing *Congini v. Portersville Valve Co.*, 504 Pa. 157, 470 A.2d 515 (1983), the superior court acknowledged that the *Congini* decision was indicative of the direction of the law. The superior court distinguished that decision, however, by stating that "*Congini* dealt with a social host to whom § 4-497 would be utterly inapplicable. The instant case involves a licensee to whom we have held that § 4-497 does apply." 338 Pa. Super. at 332, 487 A.2d at 993.

18. *Matthews*, Pa. , 527 A.2d 508 (1987).

19. *Id.* The court stated that "the threshold issue in these cases is whether a commercial licensee of alcoholic beverages can be held liable for damages caused by the service of alcohol to a minor." 527 A.2d at 511.

20. 504 Pa. 157, 470 A.2d 515 (1983). In *Congini*, the court held that a social host who serves alcohol to a minor to the point of intoxication can be held liable for injuries proximately resulting from the minor's intoxication. *Id.* at 163, 470 A.2d at 518. The *Congini* court adopted a standard of negligence *per se* with respect to social hosts who serve alcoholic beverages to a minor.

21. *Matthews*, 527 A.2d at 511. The licensee made two arguments seeking to distinguish *Congini*. First, it was asserted that *Congini* involved a social host as opposed to a licensee. Secondly, it was argued that the injured parties in the present case were not the persons to whom the alcohol had been served. In *Congini*, the injured party was served the alcoholic beverages by the social host. *Id.*

22. *Id.* As part of the underlying rationale for its decision in *Congini*, the Pennsylvania Supreme Court stated that liability should be imposed upon those who serve alcoholic beverages to a minor "to protect both minors and the public at large from the perceived deleterious effects of serving alcohol to persons under twenty-one years of age." *Congini*, 504 Pa. at 163, 470 A.2d at 518.

23. *Matthews*, 527 A.2d at 511.

24. *Id.*

the Pennsylvania Liquor Code²⁵ when their "customer" is a minor.²⁶ The court rejected the argument that licensees should be immune from third party suits where the person served was not visibly intoxicated²⁷ and reasoned that if immunity were granted to a licensee who operates his business in violation of the Pennsylvania Crimes Code,²⁸ such a decision would be irrational and contrary to public policy.²⁹ The majority acknowledged the fact, however, that a commercial licensee may shield himself from potential liability by complying with the requirements of section 4-495 (e) of the Pennsylvania Liquor Code.³⁰

In a concurring opinion, Justice Hutchinson contended that licensee liability should be imposed based upon the policy expressed in Article IV of the Pennsylvania Liquor Code.³¹ Continuing, Justice Hutchinson asserted that the penalties and sanctions of the Pennsylvania Liquor Code itself provide a better basis for imposing liability than reference to sanctions within the Pennsylvania Crimes Code do.³² He stated that a *Congini* form of analysis is not necessary when the Liquor Code provides an adequate basis for imposing licensee liability.³³

25. *Id.* 527 A.2d at 514. See *supra* note 13 for the text of § 4-497.

26. *Id.* The court concluded that the term "customer" as used in § 4-497 of the Pennsylvania Liquor Code was not intended to apply to minors. "[U]nless one accepts the rather absurd idea that the General Assembly intended to include within a statutory immunity those without capacity to legally engage in the described transactions, one must accept the conclusion that the immunity was intended only for service to legally competent customers." 527 A.2d at 513.

27. *Id.* at 512.

28. Act of December 6, 1972, P.L. 1482, No. 334, § 1. 18 PA. CONS. STAT. ANN. § 6308 (Purdons 1983), as amended by Act of April 28, 1978, P.L. 202, No. 53, § 7 (8), states: "A person commits a summary offense if he, being less than 21 years of age, attempts to purchase, purchases, consumes, possesses or transports any alcohol, liquor or malt or brewed beverages." *Id.* See also 18 PA. CONS. STAT. ANN. § 306 (Purdons 1983) which states: "(a) General rule - A person is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is legally accountable, or both." *Id.*

29. *Matthews*, 527 A.2d at 514.

30. *Id.* at 511. See 47 PA. CONS. STAT. ANN. § 4-495 (e) wherein it is stated: "The signed statement in the possession of a licensee . . . may be offered as a defense in all civil or criminal prosecutions for serving a minor, and no liability shall be imposed if the Liquor Control Board or the courts are satisfied that the licensee . . . acted in good faith." *Id.*

31. *Matthews*, 527 A.2d at 514.

32. *Id.*

33. *Id.* Justice Hutchinson expressed his belief that the Pennsylvania Liquor Code was enacted with a deep concern for:

the protection of minors both from their own follies and those of their

A dissenting opinion was filed by Chief Justice Nix. In his dissent, the Chief Justice was critical of the majority's use of the *Congini* decision as a basis for reaching their decision.³⁴ Additionally, Chief Justice Nix contended that the Pennsylvania Liquor Code itself prevented the court from reaching such a result.³⁵ The Chief Justice concluded that the majority had overstepped its bounds by intruding into a realm reserved exclusively for the legislature.³⁶

Justice Zappala also filed a dissenting opinion in which he criticized the majority's decision as going beyond social policy and intruding upon legislatively created liability.³⁷ In addition, Justice Zappala argued that licensee liability need not be commensurate with social host liability because the latter is a judicially created liability where the former is mandated by legislative enactment.³⁸ As such, he rejected the majority's reasoning that failing to impose liability on licensees would hold them to a lower standard of care than that imposed upon the general public.³⁹

At common law,⁴⁰ there was no cause of action for injuries sustained as a result of the sale or furnishing of alcoholic beverages to a strong and able-bodied man.⁴¹ The theory behind this rule was

contemporaries. It is readily foreseeable that the unlawful sale of beer to a single minor carries with it substantial risk that the beer will reach and affect others in the same age group and these concerns were addressed by the drafters of the Liquor Code.

Id. at 517. Like the majority, Justice Hutchinson was also constrained to believe that the statutory immunity provision of the Liquor Code is inapplicable when the licensee serves intoxicating beverages to a minor. In his opinion, an interpretation of the term "customer", as used in the immunity provision, which would include sales to minors, would render the provisions of § 4-495(e) meaningless. *Id.*

34. *Id.* at 518.

35. *Id.*

36. *Id.* Chief Justice Nix argued that the majority ignored a clear legislative direction when they used *Congini* as a basis for their decision. In so arguing, Chief Justice Nix stated: "The legislature has expressly preempted the regulation of a liquor licensee under the Liquor Code At this late date I believe it inappropriate for the judicial branch to intrude into an area where the legislature has attempted to regulate all aspects of that industry." *Id.* at 520.

37. *Id.*

38. *Id.*

39. *Id.*

40. See *Bishop v. United States*, 334 F. Supp. 415 (S.D. Tex. 1971), *rev'd on other grounds*, 476 F.2d 977 (5th cir.), *cert. denied*, 414 U.S. 911 (1973). The "common law" refers to "Those principles, usages and rules of action applicable to the government and security of persons and property which do not rest upon any express or positive declaration of the will of the legislature." 334 F. Supp. at 416.

41. See, e.g., *Cruse v. Aden*, 127 Ill. 231, 20 N.E. 73 (1889); *Klein v.*

that the consumption of alcohol, rather than the sale or furnishing of it, was the proximate cause of any injuries sustained as a result of intoxication.⁴² Furthermore, injuries resulting from the furnishing of alcoholic beverages were not a foreseeable consequence of the sale and were viewed as being too remote to impose liability upon the seller.⁴³ Consequently, an intoxicated person was responsible for his own tortious conduct resulting in injuries to himself or third persons,⁴⁴ and recovery was often denied on grounds of contributory negligence.⁴⁵

It is clear that the common law courts were reluctant to impose liability on a liquor vendor for injuries sustained by his patrons.⁴⁶ Not surprisingly, there was an even greater reluctance to impose liability for injuries sustained by innocent third parties.⁴⁷ In fact, it

Raysinger, 504 Pa. 141, 470 A.2d 507 (1983); *see generally* 45 Am. Jur. 2d *Intoxicating Liquors* §§ 553-554 (1969) and 48A C.J.S. *Intoxicating Liquor* § 428 (1981) and cases cited therein.

42. *See, e.g.*, Nolan v. Morelli, 154 Conn. 432, 226 A.2d 383 (1967); *State ex rel. Joyce v. Hatfield*, 197 Md. 249, 78 A.2d 754 (1951); *see generally* 45 Am. Jur. 2d *Intoxicating Liquors* § 553 (1969) and cases cited therein.

43. *See supra* notes 41-42 and accompanying text.

44. *See, e.g.*, *State ex rel. Joyce v. Hatfield*, 197 Md. 249, 78 A.2d 754 (1951), where the Maryland Supreme Court noted: "Human beings, drunk or sober, are responsible for their own torts. The law [apart from statute] recognizes no relation of proximate cause between a sale of liquor and a tort committed by a buyer who has drunk the liquor." *Id.* at 254, 78 A.2d at 756.

45. *See King v. Henkie*, 80 Ala. 505 (1876).

46. The common law rule of non-liability was qualified under special circumstances where a drunkard needed protection from his own follies. *See McCue v. Klein*, 60 Tex. 168 (1883); *Bissell v. Starzinger*, 112 Iowa 266, 83 N.W. 1065 (1900); *Ibach v. Jackson*, 148 Or. 92, 35 P.2d 672 (1934). *See also* 30 Am. Jur. *Intoxicating Liquors* § 520 (1958) wherein it is stated:

However, the common-law rule is generally qualified to the extent of giving a right of action against one furnishing liquor in favor of those injured by the intoxication of the person so furnished, where the liquor was given or sold to a person who was in such a condition as to be deprived of his will power or responsibility for his behavior, or to a habitual drunkard, or in violation of a prohibitory statute. Moreover, liability is sometimes imposed upon proprietors of liquor establishments for failure to exercise reasonable care to protect patrons from injury at the hands of intoxicated fellow patrons.

Id.

47. There were a few exceptions to this rule, but they were usually limited to the drunkard's immediate family. *See, e.g.*, *Skinner v. Hughes*, 13 Mo. 440 (1850) (permitting a slave owner to recover against an innkeeper for the death of his slave); *Riden v. Grim Bros.*, 97 Tenn. 220, 36 S.W. 1097 (1896) (permitting wife a cause of action against an innkeeper for his repeated sales of liquor to her husband in violation of state statute); *Pratt v. Daly*, 55 Ariz. 535, 104 P.2d 147 (1940) (permitting wife to sue for loss of consortium). *See also* Comment, *Common Law Liability of the Liquor Vendor*, 18 W. RES. L. REV. 251 (1966).

was not until the late 1950's that the common law began to recognize a cause of action for third persons injured by an intoxicated person.⁴⁸

Although the common law rule was one of non-liability, there was legislative liability in the form of "dram shop" or "civil liability" acts which could be enforced in the courts.⁴⁹ Dram shop acts imposed civil liability by creating a statutory cause of action which was generally enforceable by anyone injured by an intoxicated person's actions.⁵⁰ These acts were generally aimed at liquor licensees⁵¹, and judicial construction of these acts often resulted in evaluating the licensee's conduct according to a standard of strict liability.⁵²

A significant judicial attack upon the common law rule of non-liability began to emerge in the late 1950's. Beginning with *Waynick v. Chicago's Last Dep't. Store*,⁵³ several jurisdictions began to impose common law liability on commercial licensees for injuries sustained by third persons as a result of an intoxicated patron's actions.⁵⁴ In

48. See *infra* notes 53-57 and accompanying text.

49. Dram shop acts were created as early as 1853. See *Strubble v. Nodwift*, 11 Ind. 64 (1858). Today, there are twenty-one states which still have dram shop acts. See Comment, *supra* note 47, at 252 for a listing of these states.

Some states which previously had dram shop acts have repealed them. Included in these states are: Pennsylvania, see *Schelin v. Goldberg*, 188 Pa. Super. 341, 146 A.2d 648 (1958); New Jersey, see *Rappaport v. Nichols*, 31 N.J. 188, 156 A.2d 1 (1959). See also Comment, *Dram Shop Liability - A Judicial Response*, 57 CALIF. L. REV. 995 (1969), for a discussion of the development of dram shop liability.

50. See, e.g., Pennsylvania Civil Damage Act, Laws of Pa. 1854, No. 648 § 3, repealed, 47 PA. CONS. STAT. ANN. § 9-901 (Purdons 1969).

51. See *Edgar v. Kajet*, 84 Misc. 2d 100, 375 N.Y.S. 2d 548 (N.Y. Sup. Ct. 1975), *aff'd mem.*, 55 A.D. 2d 597, 389 N.Y.S.2d 631 (N.Y. App. Div. 1976) (New York Dram Act applies only to commercial licensees).

52. See Prosser and Keeton on the Law of Torts § 81 (Keeton 5th ed. 1984). According to Prosser, dram shop acts are designed to "impose strict liability, without negligence, upon the seller of intoxicating liquor, when the sale results in harm to the interests of a third person because of the intoxication of the buyer." *Id.* at 581.

53. 269 F.2d 322 (7th Cir. 1959), *cert. denied*, 362 U.S. 903 (1960). In *Waynick*, the plaintiff was injured by an intoxicated motorist. Although there was a civil dram shop act which was found to be inapplicable, the court nevertheless concluded that because there had been a violation of a state criminal statute prohibiting the sale of alcohol to an intoxicated person, there had been a breach of duty giving rise to liability. The court premised this duty on the broad public policy against serving alcohol to intoxicated persons. *Id.* at 326.

54. Many of these jurisdictions predicated liability upon the violation of state prohibitory statutes, which were interpreted by the courts as imposing a duty upon the licensee. See, e.g., *Rappaport v. Nichols*, 31 N.J. 188, 156 A.2d 1 (1959) (violation of statute prohibiting sales of alcohol to minors gives rise to duty on behalf of commercial licensee); *Davis v. Shiappacosse*, 155 So.2d 365 (Fla. 1963) (violation of statutory prohibition of sales of alcohol to minor gives rise to duty);

the landmark case of *Rappaport v. Nichols*,⁵⁵ the New Jersey Supreme Court held that a commercial licensee who serves intoxicating beverages to a minor in violation of a state prohibitory statute is liable to third persons injured as a result of the minor's intoxication.⁵⁶ The court reasoned that these prohibitory statutes were intended to protect the general public, as well as minors and intoxicated persons.⁵⁷

The judicial erosion of the common law rule was recognized in Pennsylvania beginning with *Manning v. Yokas*.⁵⁸ In *Manning*, the plaintiff brought an action under the Pennsylvania Civil Damage Act⁵⁹ for injuries sustained as a result of a collision with an intoxicated minor. In holding the commercial licensee liable for the plaintiff's injuries, the Pennsylvania Supreme Court stated that the old common law rule of non-liability was no longer applicable because the term "any one aggrieved" as used in the Pennsylvania Civil Damage Act encompassed third persons injured as a result of an intoxicated person's actions.⁶⁰ In *McKinney v. Foster*,⁶¹ decided one

Hutchens v. Hankins, 303 S.E.2d 584 (N.C. Ct. App.), *review denied*, 309 N.C. 191, 305 S.E. 2d 734 (1983) (duty upon commercial licensee derived from criminal statute). See also Prosser, *supra* note 52, § 36 at 220, wherein it is stated: "The courts are seeking, by something in the nature of judicial legislation, to further the ultimate policy for the protection of individuals which they find underlying the statute, and which they believe the legislature must have had in mind." *Id.*

55. 31 N.J. 188, 156 A.2d 1 (1959).

56. *Id.* The New Jersey Supreme Court noted that "Where a tavern keeper sells alcoholic beverages to a person who is visibly intoxicated or to a person he knows or should know from the circumstances to be a minor, he ought to recognize and foresee the unreasonable risk of harm to others." *Id.* at 201, 156 A.2d at 8. Therefore, the court noted, "Service to [a minor or intoxicated person] may also constitute common law negligence." *Id.* at 202, 156 A.2d at 8.

57. *Id.* The court viewed the licensee's violation of the statute as a breach of duty owed to the general public. As such, the court stated: "It seems clear to us that these broadly expressed restrictions were not narrowly intended to benefit minors and intoxicated persons alone but were wisely intended for the protection of members of the general public as well." *Id.*

58. 389 Pa. 136, 132 A.2d 198 (1957).

59. Laws of Pa. 1854, No. 648 § 3 at 644. The act provided in pertinent part:

"That any person furnishing intoxicating drinks to any other person in violation of any existing law, or the provisions of this act, shall be held civilly responsible for any injury to person or property in consequence of such furnishing, and anyone aggrieved may recover full damages against such person so furnishing by action on the case."

Id.

60. In reaching this decision, the court stated that an innkeeper is "as much responsible for the accident as if he had stripped the gears of the car or had damaged the steering wheel, which defects in the operation of the car were directly responsible for the uncontrollability which caused the collision." *Manning*, 389 Pa. at 140, 132 A.2d at 200.

61. 391 Pa. 221, 137 A.2d 502 (1958).

year later, the Pennsylvania Supreme Court held that third party injuries are a foreseeable consequence of serving intoxicating beverages to a minor, and a commercial licensee may be held liable for injuries proximately caused by the minor's intoxication.⁶²

With the rulings in *Manning* and *McKinney*, the Pennsylvania courts had effectively undermined the common law rule of non-liability.⁶³ However, after the repeal of the Pennsylvania Civil Damage Act,⁶⁴ it remained for the Pennsylvania courts to create a basis of third party recovery grounded in the common law. That decision came in *Jardine v. Upper Darby Lodge No. 1973, Inc.*,⁶⁵ where recovery against a tavern was permitted by a pedestrian injured by one of the tavern's intoxicated patrons. The Pennsylvania Supreme Court held that when intoxication is the proximate cause of injuries sustained by a third party, recovery against a commercial licensee who furnishes the alcohol is permissible.⁶⁶

62. *Id.* With respect to the element of foreseeability, the court made the following observation:

"It is common knowledge that great numbers of persons, minors as well as adults, drive automobiles (too many of them, unfortunately, while intoxicated), and it was well within the realm of foreseeability that one illegally served with intoxicants might negligently drive an automobile and cause injury to persons or property."

Id. at 224, 137 A.2d at 504.

63. *See supra* notes 58-62 and accompanying text. In *Manning*, the common law rule was diminished when the Pennsylvania Supreme Court rejected the notion that the consumption of alcohol, rather than the sale or furnishing of it, is the proximate cause of resultant injuries. In *McKinney*, the Pennsylvania Supreme Court then rejected the notion that injuries resulting from intoxication are not a foreseeable consequence of the furnishing of alcoholic beverages.

64. The Pennsylvania Civil Damage Act was repealed by 47 PA. CONS. STAT. ANN. § 9-901 (Purdon 1969).

65. 413 Pa. 626, 198 A.2d 550 (1964).

66. *Id.* By the time *Jardine* was decided, the Pennsylvania Liquor Code had been enacted. Therefore, the court concluded that violation of § 4-493 prohibiting the sale of alcohol to minors and visibly intoxicated persons was negligence *per se*. *Id.* at 631-32, 198 A.2d at 553. The court then went on to note the following: "The first prime requisite to deintoxicate one who has, because of alcohol, lost control over his reflexes, judgment, and sense of responsibility to others is to stop pouring alcohol into him. *This is a duty which everyone owes to society and to law entirely apart from statute.*" *Id.* at 631, 198 A.2d at 553 (emphasis added). The licensee in *Jardine* had argued that the repeal of the Pennsylvania Civil Damage Act precluded any recovery by a third party. The court rejected this argument, however, and noted that "The repeal of the Dramshop Act did not wipe out the remedy which that Act afforded victims of intoxicated persons." *Id.* at 631, 198 A.2d at 553. The court continued by stating that: "When an act embodying in expressed terms a principle of law is repealed by the legislature, then the principle as it existed at common law is still in force." *Id.* (quoting from *Schelin v. Goldberg*, 188 Pa. Super. 341, 146 A.2d 648 (1958)).

*Matthews v. Konieczny*⁶⁷ was decided on common law principles of negligence. When considering the ramifications of this decision, it is important to remember that this case was dealing with a prohibition on the sale of alcohol to minors. Minors, as opposed to adults, are not considered strong and able-bodied men in the eyes of the law,⁶⁸ and a legislative judgment has been made that minors are legally incompetent to handle the effects of alcohol.⁶⁹ Furthermore, there is a strong public policy behind the prohibition on the sale of alcohol to minors.⁷⁰

The Pennsylvania Supreme Court in *Matthews* relied substantially on its decision in *Congini v. Portersville Valve Co.*⁷¹ In *Congini*, the Pennsylvania Supreme Court held that a social host who serves intoxicating beverages to a minor to the point of intoxication is negligent *per se* and is liable for any injuries proximately caused as a result of the intoxication.⁷² The *Congini* court derived the social

67. See *supra* note 2.

68. See *Congini v. Portersville Valve Co.*, 504 Pa. 157, 160, 470 A.2d 515, 517 (1983). See also *Orner v. Mallick*, Pa. , 527 A.2d 521, 523 (1987).

69. *Id.* See also Pennsylvania Crimes Code, 18 PA. CONS. STAT. ANN. § 6308 (Purdons 1983).

70. This public policy is expressed in 18 PA. CONS. STAT. ANN. § 6308 (Purdons 1983) as well as 47 PA. CONS. STAT. ANN. § 4-493 (Purdons 1969).

71. 504 Pa. 157, 470 A.2d 515 (1983). *Congini* involved a social host who had served intoxicating beverages to a minor at a party. The minor was allegedly served to the point of intoxication, and was subsequently involved in an automobile accident where he sustained personal injuries. It is readily noticeable, therefore, that the *Congini* decision is distinguishable from *Matthews* in two important respects. First, *Congini* involved a social host as opposed to a liquor licensee. And second, the plaintiff in *Congini* was the intoxicated minor, whereas the plaintiff in *Matthews* was a third party. While these distinctions are notable, the *Matthews* court found them unpersuasive. The court disposed of the first distinction by finding that social hosts and commercial licensees both owe a duty to the minor and public at large not to serve intoxicating beverages to a minor in violation of the Pennsylvania Crimes Code. The second distinction was not dispositive because, as the *Matthews* court correctly pointed out, dicta in the *Congini* opinion did not limit liability to injuries sustained by the minor.

72. *Id.* at 160, 470 A.2d at 518. See also *Orner v. Mallick*, Pa. , 527 A.2d 521 (1987), reaffirming the holding in *Congini*. The *Orner* court, however, went one step further and held that the service of any amount of alcohol to a minor is a breach of statutory duty, and an adult need not serve a minor to the point of intoxication in order to be held liable for damages proximately caused by the minor's intoxication. *Id.* at 524. For discussions on social host liability, See Note, 23 DUQ. L. REV. 1307 (1985) and Comment, *Denial of Social Host Liability for Furnishing Alcohol to a Visibly Intoxicated Guest in Klein v. Raysinger: A Failure in Judicial Reasoning*, 23 DUQ. L. REV. 1121 (1985).

host's duty from the Pennsylvania Crimes Code⁷³ when it held that violation of this statute constitutes negligence *per se*.⁷⁴

The decision in *Congini* was based upon considerations of social policy and the legislative judgement that minors are legally incompetent to handle the effects of alcohol.⁷⁵ The Pennsylvania Supreme Court noted that the prohibition against serving alcohol to minors was an "obvious legislative decision to protect both minors and the public at large from the perceived deleterious effects of serving alcohol to persons under twenty-one years of age."⁷⁶ Therefore, the court concluded, the basis of a cause of action against an adult is the service of alcohol to the minor and not whether a particular plaintiff is entitled to recover damages.⁷⁷

The issue in *Matthews* - whether a commercial licensee of alcoholic beverages can be held liable for third party injuries resulting from the sale of alcohol to minors - had previously been decided in *Simon v. Shirley*.⁷⁸ In *Simon*, a minor had been served intoxicating beverages at a bar and was subsequently involved in a fatal head-on collision with a third party.⁷⁹ In denying recovery to the third party's estate, the Pennsylvania Superior Court held that a liquor licensee cannot be held civilly liable for injuries sustained by a third party unless his customer is visibly intoxicated at the time of the sale.⁸⁰

Like every other state, Pennsylvania has enacted a prohibitory statute which forbids the sale of alcohol to minors.⁸¹ There has been

73. Laws of Pa. 1972, P.L. 1482, No. 334 § 1. For an explanation of the use of criminal statutes to impose civil liability, see Prosser, *supra* note 52, at 222.

74. *Congini*, 504 Pa. at 160, 470 A. 2d at 518. See also RESTATEMENT (SECOND) OF TORTS § 286 (1965).

75. *Id.* at 161, 470 A. 2d at 517.

76. *Id.* at 162-63, 470 A.2d at 518.

77. *Id.* The court pointed out that a finding of negligence *per se* does not automatically entitle a plaintiff to recover damages. The finding merely satisfies the plaintiff's burden of showing that the defendant's conduct was negligent; the plaintiff must still establish proximate causation. *Id.* See also RESTATEMENT (SECOND) OF TORTS § 288B (1965) and Prosser, *supra* note 52, at 230.

78. 269 Pa. Super. 362, 409 A.2d 1365 (1979). *Simon* was the first Pennsylvania decision to deal with this precise issue subsequent to the enactment of the statutory immunity provision of the Pennsylvania Liquor Code. *Id.* See 47 PA. CONS. STAT. ANN. § 4-497 (Purdons 1969).

79. *Simon*, 269 Pa. Super. at 364, 409 A.2d at 1366.

80. *Id.* at 367, 409 A.2d at 1366. In reaching this conclusion, the superior court interpreted the statutory immunity provision of the Pennsylvania Liquor Code as being applicable to both minors and adults. The holding in *Matthews* overrules this interpretation. See *Matthews*, 527 A.2d at 514 n. 12.

81. See *supra* note 11. See also Comment, *supra* note 47, at 262 for a listing of each state's prohibitory statute.

a trend in recent years for courts in several jurisdictions to construe these prohibitory statutes as creating a statutory duty on the part of adults not to serve intoxicating beverages to a minor.⁸² Furthermore, violation of these state prohibitory statutes is considered either negligence *per se*⁸³ or evidence of negligence of the offender.⁸⁴

A review of Pennsylvania case law reveals that there is a duty owed to both minors and the public at large not to serve intoxicating beverages to a minor.⁸⁵ This duty may be gleaned from either the Pennsylvania Liquor Code⁸⁶ or the Pennsylvania Crimes Code.⁸⁷ However, it is clear that the Pennsylvania courts have repeatedly held that violation of these state prohibitory statutes is negligence *per se* which gives rise to potential liability.⁸⁸

The Pennsylvania Liquor Code imposes liability upon a commercial licensee who serves intoxicating beverages to a minor.⁸⁹ At the same time, a licensee is granted statutory immunity from liability for third party injuries unless his customer was visibly intoxicated at the time the alcohol was furnished.⁹⁰ It is therefore a matter of statutory

82. See *infra* notes 83 and 84. See also Prosser, *supra* note 52, at 220 wherein it is stated:

"The standard of conduct required of a reasonable person may be prescribed by legislative enactment. When a state statute provides that under certain circumstances particular acts shall or shall not be done, it may be interpreted as fixing a standard for all members of the community, from which it is negligence to deviate." (citations omitted.)

Id. See generally Morris, *The Relation of Criminal Statutes in Tort Liability*, 46 HARV. L. REV. 453 (1933); Morris, *The Role of Criminal Statutes in Negligence Actions*, 49 COL. L. REV. 21 (1949); Williams, *The Effect of Penal Legislation in the Law of Torts*, 23 MOD. L. REV. 232 (1960).

83. See, e.g., *Congini v. Portersville Valve Co.*, 504 Pa. 157, 470 A.2d 515 (1983); *Brattain v. Herron*, 159 Ind. App. 663, 309 N.E.2d 150 (1974).

84. See, e.g., *Rappaport v. Nichols*, 31 N.J. 188, 156 A.2d 1 (1959); *Coulter v. Superior Court*, 21 Cal.3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978); *Sorenen v. Olde Milford Inn Inc.*, 46 N.J. 582, 218 A.2d 630 (1966).

85. See *infra* note 88.

86. See 47 PA. CONS. STAT. ANN. § 4-493(1) (Purdons 1969).

87. See 18 PA. CONS. STAT. §§ 306 and 6308 (Purdons 1983).

88. See, e.g., *Majors v. Brodhead Hotel Inc.*, 416 Pa. 235, 205 A.2d 873 (1965) (violation of statute making it unlawful to sell liquor to a minor or visibly intoxicated person is negligence *per se*); *Smith v. Clark*, 411 Pa. 142, 190 A.2d 441 (1963) (serving intoxicants to a minor or visibly intoxicated persons in violation of statute prohibiting such a sale constitutes negligence); *Jardine v. Upper Darby Lodge No. 1973, Inc.*, 413 Pa. 626, 198 A.2d 550 (1964) (serving intoxicants to a minor in violation of state prohibitory statute constitutes negligence); *Congini v. Portersville Valve Co.*, 504 Pa. 157, 470 A.2d 515 (1983) (service of alcohol to minor in violation of Pennsylvania Crimes Code is negligence *per se*).

89. See *supra* notes 11 and 88.

90. See *supra* note 13.

interpretation as to whether the statutory immunity provision of the Pennsylvania Liquor Code is applicable when a licensee furnishes alcoholic beverages to a minor.

Legislative enactments in Pennsylvania are to be construed, if possible, so as to give effect to all of the statutes provisions.⁹¹ Furthermore, it is presumed that the legislature does not intend an absurd or unreasonable result by the enactment of a statute.⁹² Applying these basic canons of construction to the Pennsylvania Liquor Code, it would be inconsistent in several respects for a licensee to be granted statutory immunity after serving alcoholic beverages to a minor.

To begin with, a minor by law is incapable of purchasing alcoholic beverages.⁹³ This legislative judgment leads to the conclusion that a minor could not be a legal "customer" of a liquor licensee.⁹⁴ Secondly, the Pennsylvania Liquor Code provides a separate, absolute immunity provision against civil and criminal liability for a licensee who makes a good faith effort to verify the age of those to whom he serves intoxicating beverages.⁹⁵ It would have been inconsistent for the legislature to have included minors within the statutory immunity provision embodied in section 4-497 while at the same time providing immunity from liability for sales to minors under section 4-495(e).⁹⁶ Finally, it would have been irrational and unreasonable for the legislature to have intended to provide immunity for a licensee

91. 1 PA. CONS. STAT. § 1921 (Purdons 1969).

92. 1 PA. CONS. STAT. § 1922 (Purdons 1969).

93. Pennsylvania law requires that a person be 21 years of age before he can legally purchase alcoholic beverages. See 18 PA. CONS. STAT. § 6308 (Purdons 1983).

94. See *Matthews*, 527 A.2d at 513.

95. See 47 PA. CONS. STAT. ANN. § 4-495(e) (Purdons Supp. 1987). See *supra* note 30 for the text of this section.

There are numerous cases which have held that this provision is the only available defense to a licensee who serves a minor in violation of the Pennsylvania Liquor Code. See, e.g., *Commonwealth ex rel. Pennsylvania Liquor Control Board v. Demangone*, 212 Pa. Super. 308, 243 A.2d 187 (1968); *Appeal of Charsuner Bar Corporation* 68 Pa. C. 382, 449 A.2d 106 (1982).

96. See *Matthews*, 527 A.2d at 517, where the Pennsylvania Supreme Court stated:

[A] broad definition of the term "customer" which would include minors in the immunity section, renders meaningless the provisions of section 495, 47 P.S. § 4-495(e), providing a licensee who inadvertently serves the minor with a defense to any civil or criminal action if he obtains a certification in the prescribed form by the minor that he is in fact of an age which permits the serving of alcoholic beverages.

Id. (Hutchinson, J., concurring).

when that same legislature has made a determination that minors are legally incompetent to handle the effects of alcohol.⁹⁷

By concluding that the statutory immunity provision of the Pennsylvania Liquor Code is not applicable to a commercial licensee who sells alcoholic beverages to a minor, it is clear that the *Matthews* court was correct in its holding.⁹⁸ However, the court should not have constrained itself to deriving the licensee's duty from the Pennsylvania Crimes Code. There was adequate common law precedent which the court failed to even consider in reaching its decision. In particular, *Manning v. Yokas*⁹⁹ and *McKinney v. Foster*¹⁰⁰ provide adequate grounds for the imposition of potential liability on a commercial licensee.¹⁰¹

The holding in *Matthews*, which imposes a standard of negligence *per se* on commercial licensees who serve intoxicating beverages to a minor,¹⁰² does not impose automatic or absolute liability.¹⁰³ The element of proximate cause is still an integral part of the plaintiff's burden of proof.¹⁰⁴ Furthermore, a licensee is permitted to establish the contributory negligence of a minor whom he serves.¹⁰⁵

97. See *supra* note 93.

98. The court held that as a matter of common law a commercial licensee can be held liable for injuries sustained by third persons which are proximately caused by the minor's intoxication. *Matthews*, 527 A.2d at 512.

99. See *supra* note 58.

100. See *supra* note 61.

101. See *supra* notes 58-63 and accompanying text. Although *Manning* and *McKinney* were decided when the Pennsylvania civil damage act was in effect, the principles set forth in these cases are now part of the common law of Pennsylvania. See *supra* note 66.

102. *Matthews*, 527 A.2d at 512. The courts holding is consistent with the national trend in cases such as this. See *Rappaport v. Nichols*, 31 N.J. 188, 156 A.2d 1 (1959); See also *Matthews*, 527 A.2d at 512 n.12 for a listing of other jurisdictions reaching the same conclusion.

103. See *Matthews*, 527 A.2d at 511-512. Under this standard, it is the service of alcohol to the minor which provides the basis for a finding of negligence. The court noted that a finding of negligence *per se* merely satisfies the plaintiff's burden of establishing the defendant's negligence. Causation must still be established by the plaintiff in order for liability to be imposed. *Id.* n.4. See also *Congini*, 504 Pa. at 163 n.4, 470 A.2d at 518 n.4.

104. *Id.* In order to establish proximate cause in Pennsylvania, the defendant's negligence must be a "substantial factor" in the resultant injury. See *Majors v. Brodhead Hotel, Inc.*, 416 Pa. 265, 205 A.2d 873 (1965).

105. *Matthews*, 527 A.2d at 512. Pennsylvania has enacted a comparative negligence statute. See 42 PA. CONS. STAT. § 7102 (Purdons 1987). See also *Congini v. Portersville Valve Co.*, 504 Pa. 157, 470 A.2d 515 (1983) (discussing the possibilities of establishing comparative negligence).

This aspect of the court's conclusion is difficult to reconcile with the substantial

There seems to be little doubt that the decision in *Matthews* will meet with opposition. It has already been contended by the dissenters in *Matthews* that the decision is a judicial intrusion into the legislative decision to regulate the liability of licensees.¹⁰⁶ Furthermore, it is contended that the liability of commercial licensees is a matter of legislative discretion¹⁰⁷ and that the social policies for imposing liability on licensees should not be carried over onto the mandate of the Pennsylvania Liquor Code.¹⁰⁸ These arguments are unpersuasive, however, because they overlook the long-standing and presently existing public policy of prohibiting minors from consuming alcoholic beverages.

In light of the precedent which preceded the decision in *Matthews*, it can safely be said that the decision is a consistent development in the common law of Pennsylvania.¹⁰⁹ The Pennsylvania courts have long adhered to the principle that the common law should grow and adapt to the changing needs of society¹¹⁰ and the outcome in *Matthews* follows in this tradition.¹¹¹ Furthermore, a decision such as *Matthews* properly allocates the costs and risks which the consumption of alcohol by minors inevitably creates for both the minor and the public at large.¹¹²

precedent which has recognized that the minor's contributory negligence may not be established. See *Major v. Brodhead Hotel, Inc.*, 416 Pa. 265, 205 A.2d 873 (1965), citing § 483 of the RESTATEMENT (SECOND) OF TORTS. "If the defendant's negligence consists in violation of a statute enacted to protect a class of persons from their inability to exercise self-protective care, a member of such a class is not barred by his contributory negligence from recovery for bodily harm caused by violation of the statute." *Id.* at 876.

106. *Matthews*, 527 A.2d at 518. In his dissent, Chief Justice Nix stated that: "The legislature has expressly preempted regulation of a liquor licensee under the Liquor Code." *Id.*

107. *Id.*

108. *Id.* Justice Zappalla stated in his dissent that:

"The majority improperly overlays the social policy arguments which prevailed in [*Congini*] onto the Liquor Code's specific limitation of civil liability of licensees. Although the legislature may not have kept pace with the judiciary's view of public policy, as the majority clearly wishes, it is not the court's prerogative to compel compliance with its view."

Id. at 520.

109. See *supra* notes 58-63 and accompanying text.

110. See Comment, *supra* note 72, at 1124.

111. It is well-known that drunk driving has become a major concern in society today. Alcohol is responsible for at least 50 percent of all highway deaths which occur. See The Presidential Commission on Drunk Driving, Final Report 1. For a discussion of liability to third persons injured by drunk drivers, See Comment, *Third Party Liability for Drunk Driving: When "One for the Road" Becomes One for the Courts*, 29 VILL. L. REV. 1119 (1983-84).

112. For a discussion on the particulars of this point, see Note, 22 DUQ. L. REV. 1105 (1984).

It remains to be seen what reaction the Pennsylvania General Assembly will have, if any, to the decision reached in *Matthews*.¹¹³ The most prudent course of action which the legislature could pursue would be to leave the common law unchanged in this area, or codify the holding reached in *Matthews*. Of course, the legislature could expressly overrule the *Matthews* holding or limit its applicability to particular situations. In light of the strong social policies which exist in this area, however, it would seem safe to assume that the legislature will not, and should not, abrogate the potential liability which a commercial licensee faces when he serves intoxicating beverages to a minor.

Bryan D. Kocher

113. At the present time, the Pennsylvania legislature has taken no action to abrogate the holding in *Matthews*.