

PUBLIC HEARING

before

ASSEMBLY LAW, PUBLIC SAFETY AND DEFENSE COMMITTEE

on

ASSEMBLY BILL 43

(Exempts social hosts from civil liability for injuries caused by  
adult consumers of alcoholic beverages served by them)

and

ASSEMBLY BILL 347

(Limits the amount of liability damages  
for sellers of alcoholic beverages)

Held:  
April 4, 1985  
Room 346  
State House Annex  
Trenton, New Jersey

**MEMBERS OF COMMITTEE PRESENT:**

Assemblyman Joseph L. Bocchini, Jr., Chairman  
Assemblyman Nicholas J. LaRocca, Vice Chairman  
Assemblyman Frank M. Pelly  
Assemblyman Robert J. Martin  
Assemblyman William P. Schuber

**ALSO PRESENT:**

Aggie Szilagyi  
Office of Legislative Services  
Aide, Assembly Law, Public  
Safety and Defense Committee

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# ASSEMBLY, No. 43

## STATE OF NEW JERSEY

PRE-FILED FOR INTRODUCTION IN THE 1984 SESSION

By Assemblymen HOLLENBECK and SCHWARTZ

AN ACT concerning the service of alcoholic beverages and supplementing Title 33 of the Revised Statutes.

1 BE IT ENACTED *by the Senate and General Assembly of the State*  
2 *of New Jersey:*

1 1. No person, other than a person licensed according to the pro-  
2 visions of Title 33 of the Revised Statutes to sell alcoholic bever-  
3 ages, who furnishes any alcoholic beverage to a person at or over  
4 the age at which a person is authorized to purchase and consume  
5 alcoholic beverages shall be civilly liable to any person or the estate  
6 of any person for personal injuries or property damage inflicted as  
7 a result of intoxication by the consumer of the alcoholic beverages.

1 2. This act shall take effect immediately.

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### STATEMENT

The purpose of this bill is to exempt social hosts from civil liability for injuries caused by adult consumers of alcoholic beverages served by them.

This bill, if enacted, would distinguish between the responsibilities of an alcoholic beverage licensee and those of a social host. According to the New Jersey Administrative Code 13:2-23.1, which carries the full force of law, the holder of a liquor license shall not serve a person who is actually or apparently intoxicated. The courts have held that a licensee may be civilly liable for injuries caused by an intoxicated person whom he has served. Licensees hold their alcoholic beverages licenses not as a right but as a privilege. Their strict obligation not to serve intoxicated persons

stems from the responsibility to the public assumed when they take on such a license.

But to hold a social host liable for the actions of a drunken guest denies that the adult consumer of alcoholic beverages is primarily responsible for his actions. This bill is not intended to encourage hosts to serve liquor to intoxicated guests or allow intoxicated guests to drive. Rather, it is the purpose of this bill to recognize that an adult who becomes intoxicated is more responsible for his condition than the host who serves him at a party.

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AN ACT CONCERNING THE SERVICE OF ALCOHOLIC BEVERAGES AND PUNISHING FOR THE SERVICE OF ALCOHOLIC BEVERAGES TO A PERSON WHO IS UNDER THE INFLUENCE OF SUCH BEVERAGES.

SECTION 1. The purpose of this bill is to extend the liability of a social host to a person who serves alcoholic beverages to a person who is under the influence of such beverages.

SECTION 2. A person who serves alcoholic beverages to a person who is under the influence of such beverages shall be liable for the damages resulting from the consumption of the alcoholic beverages by the person who is under the influence of such beverages.

SECTION 3. This act shall take effect immediately.

SECTION 4. The purpose of this bill is to extend the liability of a social host to a person who serves alcoholic beverages to a person who is under the influence of such beverages.

SECTION 5. A person who serves alcoholic beverages to a person who is under the influence of such beverages shall be liable for the damages resulting from the consumption of the alcoholic beverages by the person who is under the influence of such beverages.

SECTION 6. This act shall take effect immediately.

ASSEMBLY, No. 347

STATE OF NEW JERSEY

PRE-FILED FOR INTRODUCTION IN THE 1984 SESSION

By Assemblyman RILEY

AN ACT concerning civil actions against persons who sell or furnish alcoholic beverages, amending N. J. S. 2A:14-1 and N. J. S. 2A:31-5 and supplementing Title 2A of the New Jersey Statutes.

1 BE IT ENACTED *by the Senate and General Assembly of the State*  
2 *of New Jersey:*

1 1. (New section) The Legislature finds and declares that:

2 a. As a direct consequence of the judicial imposition of civil  
3 liability upon persons who sell or furnish alcoholic beverages in a  
4 negligent manner, a person faces great difficulty in obtaining  
5 insurance against the imposition of civil liability for negligently  
6 selling or furnishing alcoholic beverages;

7 b. Where insurance coverage is available, exorbitant increases  
8 in its costs have occurred and many persons who sell or furnish  
9 alcoholic beverages do not, therefore, obtain this coverage;

10 c. This lack of insurance adversely affects those persons and  
11 potential claimants;

12 d. In order to make it economically feasible for insurance  
13 companies to provide coverage, the incidence of liability should be  
14 more predictable; and

15 e. To encourage the development of risk reduction techniques,  
16 the limits of the civil liability of those persons must be defined in  
17 the law.

1 2. N. J. S. 2A:14-1 is amended to read as follows:

2 2A:14-1. Every action at law for trespass to real property, for  
3 any tortious injury to real or personal property, for taking, detain-  
4 ing, or converting personal property, for replevin of goods or

**EXPLANATION**—Matter enclosed in bold-faced brackets [thus] in the above bill  
is not enacted and is intended to be omitted in the law.

Matter printed in italics *thus* is new matter.

5 chattels, for any tortious injury to the rights of another not stated  
6 in [sections] *N. J. S. 2A:14-2* and *N. J. S. 2A:14-3* [of this Title],  
7 or for recovery upon a contractual claim or liability, express or  
8 implied, not under seal, or upon an account other than one which  
9 concerns the trade or merchandise between merchant and merchant,  
10 their factors, agents and servants, shall be commenced within six  
11 years next after the cause of any such action shall have accrued.

12 This section shall not apply to any action for breach of any  
13 contract for sale governed by [section] *N. J. S. 12A:2-725* [of the  
14 New Jersey Statutes] or to any action for tortious injury to real or  
15 personal property governed by section 3 of P. L. . . . ., c. . . .  
16 (*C. . . . .*) (now pending before the Legislature as Assembly  
17 Bill No. 347 of 1984).

1 3. (New section) A civil action which alleges tortious injury to  
2 real or personal property caused by a defendant who sold or  
3 furnished alcoholic beverages in a negligent manner shall be com-  
4 menced within two years after the cause of action accrued.

1 4. *N. J. S. 2A:31-5* is amended to read as follows:

2 2A:31-5. [In] *Except as otherwise provided in section 5 of*  
3 *P. L. . . . ., c. . . . (C. . . . .) (now pending before the*  
4 *Legislature as Assembly Bill No. 347 of 1984), in every action*  
5 *brought under the provisions of this chapter the jury may give*  
6 *such damages as they shall deem fair and just with reference to*  
7 *the pecuniary injuries resulting from such death, together with*  
8 *the hospital, medical and funeral expenses incurred for the de-*  
9 *ceased, to the persons entitled to any intestate personal property*  
10 *of the decedent.*

1 5. (New section) Damages assessed against a defendant for  
2 negligently selling or furnishing alcoholic beverages are limited to  
3 the following amounts:

- 4 a. \$75,000.00 per person for death or personal injury;
- 5 b. \$150,000.00 for all deaths or personal injuries, regardless of
- 6 the number of persons; and
- 7 c. \$10,000.00 for injury to real or personal property.

1 6. This act shall take effect immediately.

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STATEMENT

The purpose of this bill is to limit the amount of damages which may be assessed against a person for negligently selling or furnishing alcoholic beverages. The maximum amount recoverable for personal injury or death is \$75,000.00 per person to a total of \$150,000.00 for all deaths or personal injuries regardless of the

number of persons. The maximum amount recoverable for property damage is \$10,000.00.

The bill also establishes a statute of limitations of two years on civil actions for tortious injury to real or personal property in civil actions alleging the negligent sale or furnishing of alcoholic beverages. The existing statute of limitations on civil actions for tortious injury to real or personal property is six years.

number of years. The maximum number of years for property

damage is \$100,000.

The bill also contains a title of "Limitation of Liability on

Real Estate for Tortious Injury to Real Property" in civil

actions against the negligent sale or transfer of interests

in real estate. The existing statute of limitations on civil actions for

injury to real or personal property is six years.

ASSEMBLYMAN JOSEPH L. BOCCHINI, JR. (Chairman): First of all, on behalf of the Assembly Law, Public Safety and Defense Committee, I would like to thank everyone who has taken the time to come here this afternoon. If I may, on behalf of the Committee, I will start with an opening statement I have prepared.

Ladies and gentlemen, the purpose of this hearing is to elicit information and evaluate the public's concern about the liability of social hosts and alcoholic beverage licensees for any injury or damage to a third party caused by an intoxicated person who had been served by the host or licensee.

Increasingly over the last few years, liquor liability and the availability of insurance as protection against such liability have become a serious concern for the alcoholic beverage industry. While alcoholic beverage sales by retail licensees have been reported to be down approximately 30%, or more, the premiums for liability insurance have risen, in some cases, by 300% or even 500%. The number of insurance companies writing such insurance has dwindled from a few to one, or none.

I have been informed that as of this week there are no insurance companies in this State providing liability insurance to licensees. However, I believe Hazel will correct me with some recent information she has received within the last few days. Recent articles show that lawsuits filed against bar owners have risen dramatically in the last five years; yet, no insurance at reasonable rates is available. The economic stability of the alcoholic beverage industry in this State is in jeopardy. The Committee wants to know what is going on out there. How many lawsuits are being filed? What are the amounts of any judgments or settlements? Why is insurance not being written?

The Committee seeks all information you have available and suggestions for action. Along with our discussions, we will consider Assembly Bill 347 sponsored by Assemblyman Riley. Now, I want to emphasize to anyone who is here today with relation to any particular piece of legislation, we will not be voting to release any particular piece of legislation; however, in the context of this hearing it may

very well be discussed. Mr. Riley's bill limits the amount of damages which may be assessed against a person for negligently selling or providing alcoholic beverages.

A discussion of liquor liability necessarily entails a discussion of the recent New Jersey Supreme Court decision of Kelly versus Gwinnell, which imposed liability against a social host under certain circumstances. It is my opinion, and I believe that of many of us who are involved in the legal profession, that social host liability is nothing more than an extension of the current liquor liability that has been imposed on tavern owners and restaurateurs here in New Jersey. Consequently, although the Committee could spend the entire afternoon discussing the liability of licensees, the discussions would be incomplete without the consideration of the related issue of social host liability. General issues within the topic of liquor liability affect both social hosts and licensees. The Court in the Kelly decision stated: "Given the facts before us, we decide only that where the social host directly serves the guest and continues to do so, even after the guest is visibly intoxicated, knowing that the guest will soon be driving home, the social host may be liable for the consequences of the resulting drunken driving." They go on to say: "We are not faced with a party where many guests congregate, nor with guests serving each other, nor with a host busily occupied with other responsibilities, and therefore, unable to attend to the matter of serving liquor, nor with a drunken host." They emphasize: "We will face those situations when and if they come before us." I emphasize that because I believe to a certain extent -- and I don't want to put too much of my own feeling into this -- that there has been a reaction by many people as to what this case is saying. The case, as I have read it, is a very narrowly construed decision.

This Committee is now responding to widespread public opinion that the Supreme Court decision may have gone too far. We are responding to the Court's own statement in the Kelly decision, which stated: "If the Legislature differs with us on issues of this kind, it has a clear remedy." That's obvious; our remedy is to do something about it legislatively. The dissent in the Kelly case made a

persuasive argument when it noted that the issue is best left to a legislative determination. The dissent advocated imaginative legislative drafting on the issue of social host liability. However, they didn't go quite far enough to decide to draft any to give us as an idea.

This public hearing is a fact-finding and educational session for this Committee, which has been called to act upon a host liability bill, A-43, sponsored by Assemblyman Hollenbeck. We may, in all probability, be called upon in the future to act upon other bills or recommendations for bills developed after an in-depth study of the issue. By reviewing and analyzing possible legislative action, we seek to strike a just and fair balance between imposing responsibilities on those who drink to excess, on those who serve alcohol to their friends, or on those who sell it to their customers. This Committee wants to become fully educated on the facts and issues of liquor liability so that intelligent, thoughtful, and precise legislative action, in whatever form necessary, may be taken.

I must emphasize something else at this juncture. This hearing, or any legislation that arises out of this hearing, or other hearings, or hearings that may be held as a result of the Social Host Liability Commission, which was put in place under legislation sponsored by Senate President Orechio— None of these hearings are intended, nor will they, nor is it my feeling that they should, in any way, manner, shape, or form, impact to the detriment of the existing alcoholic beverage consumption driving laws we have, better known as the DWI laws, or the drunk driving laws. We are not on an expedition to try to soften them. I think this State has come to be looked upon as a State that has very good drunk driving laws. There has been an impact as far as the public is concerned in their performance behind the wheels of cars as a result of this. But at the same time, in fairness to those people who run businesses in this State and who are getting their brains beat in, if you listen to them the way I have in going to certain meetings with tavern owners, as far as the availability of insurance for them is concerned, the premiums they are paying, and the cost to them -- something doesn't make sense.

Hopefully, through the Department of Insurance and through the ABC, in conjunction with tavern owners and restaurateurs, with the help of MADD and other concerned people, we will be able to establish something in this State which will keep people who are in business, in business.

With that, I would like to acknowledge the other members of my Committee. To my left is Assemblyman Martin; to his left is Assemblyman Schuber. To my right, at the far end, is Assemblyman Pelly. The Vice Chairman of the Committee, Assemblyman LaRocca, is on his way from Hudson County and should be here shortly.

Before we proceed with our first witness, are there any comments from any members of the Committee?

ASSEMBLYMAN SCHUBER: If I may, Mr. Chairman, I would first like to congratulate you for calling this Committee hearing with regard to this very, very important issue. I think there is certainly nothing more on the minds of our constituents at the present time than the present state of the drunk driving legislation in this State and the obvious extension of some of that policy through the Kelly versus Gwinnell case. I think it is clear to us as legislators that it is the public policy of this State, and rightfully so, that we have a strong set of laws to crack down on an individual, or individuals, who would drink and drive at the same time. The statistics with regard to the results of the people who do that are obvious to all and have been well-reported in the press.

Therefore, this is basically the public policy of this Legislature and past Legislatures, and of the Executive, and now it has been adopted, or extended, by the Court. The case of Kelly versus Gwinnell, however, raises some interesting points. It takes the very basic public policy of this State to crack down on the drinking driver and expands it beyond what had been before just a prohibition with regard to the serving of minors in the home, which I think was a good decision in the Linn case, and expands that now to social interaction between adults in the home. The question before us now is whether we, as a Legislature, are going to permit the extension of this policy to that extent.

We, in the Legislature, obviously have three things we can do with regard to this as a result of these hearings: We can accept the policy as outlined in the case of Kelly versus Gwinell; we can take no action whatsoever as a result of that; or, we can adopt a statute that adopts it. We can limit it to some extent or we can adopt legislation that would do away with the decision itself.

As for myself, there is no question; I certainly agree with the public policy this State has announced with regard to the treatment of the drinking driver. But, I think there are some practical questions raised by the case of Kelly. Number one, there is the practical question of whether this has gone too far, to the extent of trying to regulate the interaction of adults on a social level. The majority of the Supreme Court indicates they do not believe that to be a problem. Justice Garibaldi indicates that she thinks it is, and I have certain questions with regard to that. There is the very practical issue of whether, in fact, insurance coverage can be brought about as a result of this, or whether existing insurance is adequate to cover this great -- I think -- expansion of the liability of the individual in his own home. I think that is a very valid question. Justice Garibaldi recognizes it and I think it is a question we must devote some time to.

There is the whole question of whether there is equal responsibility on the part of a host of a party, as opposed to the individuals who go there, and the practical problems that result from having something going on in your own home. These are all questions, Mr. Chairman, that I know we are going to address here. I think that our point of emphasis should be along the question of if, in fact, we believe we should extend this policy, whether there should be some limitations on it as far as the amount of liability, and what should the standard be for the individual. I think we should make a clear distinction between an adult and a minor. Personally, I have no intention of accepting any legislation that will do away with the principles of the case of Linn versus Rand, which dealt with an individual serving a minor in the home. We have made the serving of minors a criminal offense in this State, and I don't think we can take

upon ourselves, at this point, any legislation that would warrant the watering down of that. When we deal with the interaction of adults, that is a whole different ball game. I look forward to the testimony that may be elicited here today because I certainly have many questions as a result of the Kelly case.

Again, I thank you for providing an opportunity to present all of the witnesses who are here today. I look forward to an extremely interesting hearing with regard to an issue of utmost importance in the State.

ASSEMBLYMAN BOCCHINI: Thank you, Pat. Bob, is there anything you would like to add?

ASSEMBLYMAN MARTIN: I think you and Pat have basically raised my concerns, and I have a lot of concerns. I just agree with the minority opinion in the Kelly case. I do believe that this is something that should be handled by the Legislature, as opposed to the courts. I would like to see our Committee eventually take some action. Thank you.

ASSEMBLYMAN BOCCHINI: Assemblyman Pelly?

ASSEMBLYMAN PELLY: No, thank you.

ASSEMBLYMAN BOCCHINI: We have 17 or 18— I have two lists, and if you take both of them we have better than 30 people who want to testify today, although some of them may be duplicates. As you speak, if you are speaking on the social host or the alcoholic beverage licensee liability, please address both of those issues at that time.

I know we have the new Commissioner of Insurance with us. (Commissioner not in the room) We will go on to someone else; Hazel is out in the hall speaking to someone. We have Assemblyman Riley's aide, Shawn Sheekey, with us. Assemblyman Riley is the sponsor of Assembly Bill 347. Shawn, if you're ready, we will take Assemblyman Riley's statement at this time. We have a copy of the entire statement, so if you want to condense it, you may certainly do so.

SHAWN SHEEKEY: Okay, I'll do that. Pardon me if I speak quickly at times. I realize we are under a time constraint.

First of all, thank you for establishing this public hearing. I would like to read this statement on behalf of Assemblyman Riley:

"Dear Chairman Bocchini and members of the Committee: I am sorry that a previous commitment makes it impossible for me to attend your public hearing. However, I would ask that you not take my absence as meaning that I am not concerned. Quite frankly, I believe that the enactment of Assembly Bill 347, at least in some version, may be tantamount to the salvation of an industry which is in very serious trouble.

"As all of us are aware, the actions taken by us, the legislators of New Jersey, together with the Governor, during the previous five years, have produced the desired effect, that being a reduction in drunk driving. However, an unfortunate side effect of the latest trend of the law has been a 35% reduction in the tavern business.

"Compounding the problem inherent in this huge loss of revenue, would be the fact that the tavern owners and liquor store owners are now confronting huge increases for dram shop or liquor law liability coverage. Normally, if you have a situation where the demand and exposure decrease, we would all expect the coverage for same to decrease. However, the reverse has been the effect in this unique area of insurance coverage.

"Additionally, one of the larger writers in this surplus lines field, Occidental Fire and Casualty Company, has now advised their policyholders that they will no longer be writing liquor law liability coverage. Needless to say, when you have a reduced number of companies writing a certain coverage, you have a reduced supply, which would inherently increase the costs even more.

"In addition to my aide, Shawn Sheekey, I believe there will be many other people testifying in favor of this drastically needed legislation. I believe that the stories may vary, although the bottom line will be the same, that being that we must do something before we put these hard-working people totally out of business.

"Concerning the legislation itself, I would be amenable to changes being made with the draft of Assembly Bill 347. Specifically, I believe that the coverage area in Section 5 should be increased to \$100,000 per person and \$300,000 per incident. I would also suggest that this coverage become compulsory as a criteria for holding a liquor license.

"These are not exclusive. I have spoken to Commissioner Gluck, and we are willing to do whatever is necessary to help the people of this industry. I would be more than willing to listen to any suggested amendments to this legislation.

"The two changes I have previously suggested would result in protection to the patrons and to those whom we seek to protect from allegedly intoxicated persons. It would also protect the licensees from exposure to bankruptcy every time a dram shop case is filed, and finally, I believe, as someone who is heavily involved in the insurance industry, that this would encourage many companies to offer liquor liability coverage. If this presumption becomes valid, we would have a situation whereby the supply would increase, and therefore, the price would decrease. In this regard, having spoken to several surplus lines persons regarding this, I received the distinct impression that this would be the result of the enactment of such legislation.

"Again, I am sorry that I could not attend the public hearing. I would ask that you seriously consider this bill and the effects of same, in order that we may give some aid and assistance to this beleaguered industry. Sincerely, Assemblyman Dennis L. Riley."

I would like to say that I am here to listen and to consider any recommendations.

ASSEMBLYMAN BOCCHINI: Before I call our next witness, who will be the Commissioner of Insurance, if I might I would like to read into the record a letter I received dated April 3, under the signature of Attorney General Irwin I. Kimmelman. It was addressed to me on behalf of the Committee:

"Dear Assemblyman Bocchini: I am in receipt of your invitation to testify before the Assembly Law and Public Safety Committee on April 4 on the subject of host liability.

"Although I wholeheartedly support your aim of soliciting testimony in order to establish the basis for clear legislative policy on this important issue, host liability is a civil matter outside the realm of my authority.

"As Attorney General, I have no official policy statement on the issue and, of course, my personal viewpoint is not germane at this time. As a matter of social policy, the issue of host liability is more appropriately addressed by the Legislature. For this reason, I will not be attending your Committee meeting.

"I thank you for your invitation, and wish to restate my endorsement of the efforts of your Committee to tackle the difficult social issue. Thank you." It is signed by the Attorney General.

In addition, Director Vassallo from the ABC will be here, if he hasn't already arrived. Bob Pinard is here presently.

Before I call Hazel, I would like to point something out just as food for thought. Some of you may recall the Rutgers University Eagleton Poll that I believe was released on September 1, 1984. One of the statements made to the 804 people who were questioned between July 30 and August 6 was: There is widespread disagreement with a decision handed down by the New Jersey Supreme Court holding that under certain conditions persons serving alcoholic beverages in their own homes may be liable for damages caused by drunk drivers. In the results, it was interesting to note that the report stated that while bars were not covered under that ruling -- although they, in effect, are under several other court rulings -- far more disagreed with this ruling than supported it by a 69% to 26% margin. The remainder had no opinion. The director of the poll commented: "Opposition to the decision seems to be based on a general belief that people should answer for their own actions. They do not want to regulate their guests or be legally responsible for them," which is enunciated under a statutory law, I believe, in California. They are probably some of the areas we will be getting into.

At this time, it is my pleasure to introduce as our next witness, for her first appearance, as I understand it, at a public hearing as the new Commissioner of Insurance, Hazel Gluck. I'm sure,

Hazel, if your tenure as the Insurance Commissioner is as good as that of the Lottery Director, it will be an excellent one.

**COMMISSIONER HAZEL FRANK GLUCK:** I hope you're right. Assemblymen and ladies and gentlemen: First, let me say that I am delighted, Mr. Chairman, that you called this session because, obviously, it got everyone into one room to discuss the problem, which I don't think anyone has been able to accomplish so far.

Secondly, let me introduce Joe Kenney. Joe Kenney is an Assistant Commissioner with the Department of Insurance who has, as they say in the industry, a long tale, backward and forward. He is well-versed in some of the issues that you probably have questions on today, why insurance companies are not writing, etc. I thought it would be appropriate to bring Joe so he could answer any of your questions that I might not yet have the expertise to do.

Thank you for inviting me to speak today. As you noted, this is my first formal testimony at a public hearing since becoming Commissioner. I am glad to have the opportunity to be able to address this kind of an important topic, one which should be a focus for anyone who serves alcohol to persons who will drive on our roads and highways.

As you know, at issue is the scope of the liability of social hosts, tavern owners, and other alcoholic beverage licensees for damages to a third party caused by an intoxicated driver who had been served by that host or tavern owner. Recent court decisions, particularly the New Jersey Supreme Court's decision last year in Kelly versus Gwinnell, would allow the victim injured in a subsequent car crash to sue the host who had directly served the intoxicated driver. Earlier court decisions would similarly permit an injured victim to sue a tavern owner who directly served such a driver.

Obviously, it is important that this Committee study the effect of these rulings on the availability and affordability of insurance coverage for both the host and the tavern owner. I am here to address those questions which this Committee raised in its letter to me. I will discuss the availability issue first.

With regard to a social host, not only is liquor liability coverage available, but this coverage is already provided in a typical

homeowner's or renter's policy. Because such policies do not specifically exclude host liquor liability, the insured host can expect that his insurer will provide coverage up to the limits provided in his policy.

The plight of tavern owners, on the other hand, is just the opposite. Tavern owners have a difficult time finding an insurance company to insure them for this potential liability. Companies dislike recent court decisions which obviously have not favored tavern owners, but instead have followed the State's strong policy against drunk drivers. Companies are running scared, ever frightened of a potential increase in lawsuits and settlement claims. They are, therefore, reluctant to insure for this type of coverage. It is not true, however, that only one company in the State will write this coverage. Currently, two surplus lines companies and two admitted companies write this line of coverage, but it cannot be denied that they are very selective in the business that they will insure.

Let me deviate for a moment here. Today, as a matter of fact before I came over here -- and Assistant Commissioner Kenney has been working on this now for the past couple of weeks -- the Allied Fidelity Insurance Company of Indianapolis was granted a Certificate of Authority to write liquor law liability in the State of New Jersey. At least it will ease the market to a certain degree. Occidental Fire and Casualty Company of North Carolina, which is one of the principal writers of liquor law liability, had announced its intention of dropping coverage. The Bond of Insurance has arranged for an orderly withdrawal from the market. Occidental will continue to renew existing policies until April 15, rather than abruptly discontinuing all coverage. The Department also has under review an application by another company based in New Jersey for authority to write liquor law liability coverage. So, things have changed even within the last couple of days in this very volatile atmosphere we're in.

This selectivity operates to severely restrict the availability of this coverage to tavern owners, and the Department of Insurance views this as a problem. You ask, "What are the possible solutions?" Well, four options immediately come to mind, all of which

require legislative action to implement: (1) the establishment of a self-insurance pool; (2) the establishment of an assigned risk pool similar to the JUA or FAIR Plan for this class of risk; (3) the establishment of a reasonable cap on a tavern owner's liability; and (4), the placement of the liability on the drinker, with limited liability on the tavern owners or social hosts.

The first two options are unworkable, in our opinion, because, quite frankly, the Department is without sufficient resources to monitor another self-insurance pool or assigned risk plan at this time. The latter two options, both of which would place a cap on a licensee's liability, seemed the most appropriate solutions we had before us as of a couple of days ago. A cap is necessary because insurance companies cannot be induced to write this coverage unless they have some idea of their potential liability. Yet, merely establishing a cap on a tavern owner's liability does not address the problem created for those seriously injured victims who would be denied full recovery for their injuries due to the imposition of a cap. That is why the bill introduced by Assemblyman Riley -- A-347 -- is a step in the right direction, but we do not think it goes far enough.

Assemblyman Riley's bill would limit the maximum costs recoverable for personal injury or death to \$75,000 per person, and to a total of \$150,000 for all deaths or injuries regardless of the number of persons involved in the accident. We are in agreement with his concept of a cap, but we feel that the amounts are too low. We recommend that a single total limit of \$500,000, indexed to inflation, is a more appropriate limitation on liability.

To address the concern created by catastrophic injuries, we suggest that there should be a catastrophic assessment in the rate, charged either to all those buying liability policies or to those solely purchasing liquor law liability. This assessment could be used to fund claims in excess of the cap that was established. Although the Department does not have the resources to administer this assessment fund, it could possibly be administered by the Unsatisfied Claim and Judgment Fund. The Unsatisfied Claim and Judgment Fund currently handles medical expense claims under the Personal Injury Protection

coverage which exceed the \$75,000 liability cap for each company. This Fund also receives its money through an assessment process. It would be up to the Legislature to determine whether the catastrophic assessment involved with the liquor law liability should be borne by the policyholder, if the company is assessed, or by the tavern owners.

In any event, the most important point to be made is that a cap should be established so that tavern owners will have this much needed coverage available to them.

My concern with A-43, sponsored by Assemblyman Hollenbeck, is that it provides no cap to facilitate the availability of coverage to tavern owners. It would permit the scope of liability of tavern owners to remain status quo, thereby failing to address the availability of this insurance. Assemblyman Hollenbeck's bill would also overrule the recent Supreme Court decision in Kelly versus Gwinell, with the result that social hosts would not be liable for the action of drunken guests. I will make no comment on this issue, as I have made it a general rule to avoid commenting on a Supreme Court decision. Just as the Supreme Court didn't seek out my opinion on this issue prior to ruling, I am sure you do not need my input to legislate as you see fit.

Now that you recognize, and have recognized, that liquor liability coverage is now available to social hosts, is not so available to tavern owners, and that a solution has been suggested for this, we can move on to the issue of affordability.

Although the companies allege that homeowners' rates will surely rise once those claims and lawsuits start rolling in, the truth of the matter is that we don't know, and cannot accurately predict, whether the rates will rise. It is too soon after last year's Supreme Court decision to determine whether the number or amounts of claims will rise due to the Court's unexpected broadening of coverage. In the future, the Department will order appropriate statistics on this so that this information will be available. To date, insurance companies have not changed their homeowners' or renters' policies nor raised their rates in response to the Court's decision on social host liability. Therefore, any discussion of mandatory coverages for social hosts is premature until we know the real extent of potential claims -- not just predictions.

We cannot really comment on the affordability of this coverage for tavern owners. Liquor law liability of tavern owners is not regulated by the Department because it is commercial insurance. With the enactment of the Commercial Deregulation Act in November, 1982, companies do not file rates, rules, or forms for this coverage, nor are they required to file any statistics for this particular coverage. Therefore, we have no information as to how much the insurance premiums of tavern owners have increased over the last three years. Information relating to this problem is not readily available, but we are ordering companies to compile this information in the future.

Unfortunately, as you can see, we cannot provide much input on the issue of affordability of coverage for social hosts or tavern owners because either it is too soon to have any available data as far as social hosts are concerned, or no data to date has been compiled as far as tavern owners are concerned. We hope to be able to provide you with better information in the future.

Lastly, I would like to take a minute to discuss a remaining question you posed. You asked whether personal catastrophe insurance covers claims against drunken guests. There are two types of personal catastrophe policies: personal umbrella policies and personal excess policies. A personal excess policy would cover all losses exceeding the normal homeowner's policy limit up to the limit contained in the excess policy. For the excess coverage to apply, therefore, the underlying homeowner's policy limit first must be exhausted. It should be noted, however, that any coverage excluded under the homeowner's policy is also excluded under the excess policy. But, this is not currently a problem because social host liability is now included, at this point, under a homeowner's policy. What the future--

ASSEMBLYMAN BOCCHINI: (interrupting) Excuse me. Would you please repeat that?

COMMISSIONER GLUCK: Okay. I know this is-- Right now, liability for social hosts is covered under the homeowner's policy. Okay? If in the future it were not under the homeowner's policy, it also would not be covered under the excess liability policy because it

would be removed from both. Right now the problem doesn't exist, but I guess what I'm saying is that there is a potential for a problem if, in fact, experience shows, going down the road, that there have been cases, settlements, etc. So, there isn't a problem now, but there could be a potential problem down the road.

The second type of personal catastrophe policy -- the personal umbrella policy -- provides coverage for situations excluded under the underlying homeowner's policy. Therefore, the typical personal catastrophe policyholder can anticipate coverage of the social host liability.

I have attempted to provide you with responses to the questions posed and with other information to aid you in your consideration of a reasonable solution to the liability problems of social hosts and tavern owners. I hope you have found this information insightful, or at least somewhat useful. I am personally willing to discuss it with you at any time. I, or my staff, will always be available to you.

Let me just say that there may be other solutions you may want to consider. Other states have done different things; for instance, in the State of California it is a misdemeanor -- you know, it's simply a misdemeanor -- if you serve a drink to someone and he goes out and has an accident. The State of Wisconsin has not strayed from the theory that it is the consumption rather than the sale that is the proximate cause of intoxication. The Wisconsin Supreme Court indicated that to assign blame to the one who served the alcohol rather than the one who voluntarily consumed the alcohol was carrying the chain link too far. So, in Wisconsin you have one side of the coin, and in California you have the other side of the coin. It varies from state to state as to what their Supreme Courts have said and as to the kinds of laws they have enacted.

ASSEMBLYMAN BOCCHINI: Is there anything else, Hazel?

COMMISSIONER GLUCK: No. We are available for--

ASSEMBLYMAN BOCCHINI: (interrupting) If I may, not being as familiar with insurance terminology as you and Joe are, and maybe some of the members of my Committee, I need a little clarification as to-- When you refer to surplus lines, what does that mean?

COMMISSIONER GLUCK: Yes. Joe?

**JOSEPH B. KENNEY:** That is an unauthorized insurer. There are certain risks which are either difficult or impossible to place in the admitted market. Some companies can be brought in to furnish this coverage on what we call the Commissioner's unauthorized insurers' list. Technically, they do not have facilities within the State. They are brought in by a New Jersey property and casualty broker. They do not come in on their own; they are brought in by a broker.

The statistical information -- financial information -- is reviewed and approved, and this determines whether or not they comply with the surplus lines statutes. But, it is an unauthorized insurer. For the purposes of this discussion, it is also very possible for the difficult-to-place risk, and that is usually on the Commissioner's list of difficult-to-place risks. With that kind of a risk, an insured, such as a tavern owner, could go directly to a surplus lines company.

ASSEMBLYMAN BOCCHINI: Is that list readily available to restaurateurs, tavern owners -- licensees?

MR. KENNEY: Yes, it is published annually.

ASSEMBLYMAN BOCCHINI: If you take the surplus lines suppliers, or insurers, if my understanding is correct, that is all we have writing in New Jersey right now. Is that correct?

COMMISSIONER GLUCK: Well, until today that might have been correct.

MR. KENNEY: Until today, Assemblyman, you had one company which--

ASSEMBLYMAN BOCCHINI: (interrupting) Was that Occidental?

MR. KENNEY: Yes, Occidental was writing. You had one unauthorized insurer which was writing, but very selectively. You have another unauthorized insurer writing very selectively. Now, there are still some admitted companies writing very selectively. I have been on the horn the last couple of weeks with some who are writing a piece here and a piece there, and they will continue to do so, but they will not open up the floodgates to write this kind of business.

ASSEMBLYMAN BOCCHINI: Keeping in mind the surplus lines market, do you think-- This is sort of a pointed question. I don't

really intend it to be that way, but do you think that is a fair situation? I mean, can you recommend or establish— I don't expect an answer today necessarily. If it happens to pop out, that's great, but I understand that with some of these questions you might have to take time to reflect upon them. Hopefully, the thought process will be a rewarding one for all of us who are concerned. But, keeping that in mind, do you think you can find a way to recommend that the State establish a system whereby we can open it up or require it to be mandatory for people to write?

MR. KENNEY: If you see fit to come up with legislation -- whatever way you can do it -- to sort of balance what the companies perceive to be an unbalanced situation with regard to court decisions-- That is a real fear. Their policies have been written not to reflect certain coverage situations; that is another fear. I think what we are trying to do is get enough insurers in here to take some of the pressure off and write. We should do that within the next couple of weeks. I think some companies will then take another look at it, but I don't think they are going to turn all the way around completely. It is going to be there until -- according to the companies -- there is some kind of capping, some kind of restriction on a person's right to sue, which is a problem in itself.

I don't think leaving the situation where it is, without any legislative amendment at all to cure the situation, is going to result in a clear availability problem and a clear affordability problem. That is what we have to tackle next.

ASSEMBLYMAN BUCCHINI: Okay. Hazel, you mentioned something and, Joe, you also mentioned something which I think I have a problem with to the extent that-- I understand that you don't want to necessarily intrude, per se, into the legislative process. But, quite candidly, I am of the opinion that you have become a very integral part of this legislative process. I, as one legislator, will certainly look to your input as this thing unfolds and goes beyond the embryonic stage we are in today. I don't think the Legislature in and of itself is necessarily so collectively wise that it is going to put together a piece of legislation without your help on this.

COMMISSIONER GLUCK: No, I didn't mean to imply that. I appreciate what you have said, Mr. Chairman, but I guess what I'm saying is that we can't give you any data now which is, you know-- What our function should be at this point is to give you data vis-a-vis social hosts.

ASSEMBLYMAN BOCCHINI: Correct.

COMMISSIONER GLUCK: There isn't that much experience.

ASSEMBLYMAN BOCCHINI: I understand.

COMMISSIONER GLUCK: It hasn't changed, but you might say, "Well, based on the experience of the rest of the liability insurance lines that are being written, we anticipate it will and, therefore, we want to do this before it happens."

ASSEMBLYMAN BOCCHINI: When this was deregulated in 1982-- That would have been Governor Kean who signed that into law in 1982, correct?

COMMISSIONER GLUCK: Yes.

ASSEMBLYMAN BOCCHINI: The deregulation did not necessarily mean that the Department of Insurance, through their other statutory availabilities, could not -- and you were not the Commissioner then -- have tracked or required reporting by the companies. Is that correct?

COMMISSIONER GLUCK: That is my understanding, but it was not done.

MR. KENNEY: It was not done.

ASSEMBLYMAN BOCCHINI: Was there a tracking or a reporting, to your knowledge, prior to 1982?

COMMISSIONER GLUCK: Before the act, there probably was.

MR. KENNEY: The enactment of the Commercial Deregulated Rate Act was possibly the result of inaction by the Department, which did everything on a manual basis. Filings had to be done manually, which took a ton of time. The industry became upset by that, and there was bad name-calling back and forth. It was my understanding that the insurance industry lobbied for -- I don't know if I should use that word or not -- or pushed for this kind of legislation.

ASSEMBLYMAN BOCCHINI: For the deregulation?

MR. KENNEY: For the deregulation, yes, which takes it out of prior approval.

ASSEMBLYMAN BOCCHINI: Right, which then made it, if I may just project a thought that comes to me— Once that went through, it made it easier for the Department of Insurance to say, "We no longer have to track this at the same time."

COMMISSIONER GLUCK: I guess so, but the idea was, it was supposed to— As I understand it, it was supposed to be a competitive market, and therefore because it was a competitive market, it didn't need to be regulated. I submit to you that a lot of that competitive market, as I see it today, doesn't exist.

Now, I also understand that the Commissioner has the authority to be able to pull certain of these lines out -- for lack of a more erudite terminology -- and look at them. I have to tell you -- and I'm not here to tell you what our problems are in the Department -- that our physical space is such that if I went out tomorrow to get 10 people, I couldn't fit them in the building. So, we really do have a problem in doing that. I'm sure it can be resolved going down the road, but that's been one of the problems we have to address, vis-a-vis our own Department of Insurance, which we are taking a really hard look at right now.

MR. KENNEY: Excuse me, sir.

ASSEMBLYMAN BOCCHINI: Yes.

MR. KENNEY: To add to that, one quick statement. The law says that the Commissioner may require a company's underwriting guidelines. I think people look at the "may require," and it doesn't seem that severe. We are taking steps to change that. Where the company's underwriting guidelines will be gathered, we will come with a regulation stipulating, "These are what you must abide by," rather than reviewing each company's underwriting guidelines, which takes a bundle of people. I think in that way we will be able to clean up this act to a certain degree -- not totally, but we won't make the same mistakes as we did before.

ASSEMBLYMAN BOCCHINI: In relation to the legislation which caused the deregulation, I request that you look into the possibility of taking the tavern owners' insurance, or the liquor liability type of insurance-- I would appreciate an opinion on whether or not we should

consider removing that, amending the legislation, which would take that particular business, remove it from the deregulated process, and put it back into a regulated process.

COMMISSIONER GLUCK: I think -- and we will certainly get back to you on this -- the Commissioner has the ability to do that.

ASSEMBLYMAN BOCCHINI: I mean, if you can do it through regulation, fine.

COMMISSIONER GLUCK: We will double check it. However, I have to tell you that it is not only this liability, but it's pollution liability, and it's condominium liability. This is one part or one piece of this overall problem, as I see it, regarding liability.

ASSEMBLYMAN BOCCHINI: As far as the liquor liability insurers are concerned, they are very limited, and they "spot write." As I understand it, there are some who will not write down in the shore area. Maybe I can understand that from a few years back; I don't know. There are others who are writing, but, you know, other than the two additional you are dealing with, Hazel, is there anything on the horizon for us to look forward to?

COMMISSIONER GLUCK: Other than the one who came on board today and the one we hope will come on board within the next two weeks, not that I know of.

MR. KENNEY: I have a three o'clock meeting with one in my office. (laughter)

COMMISSIONER GLUCK: He's the best thing for the State.

ASSEMBLYMAN BOCCHINI: Are they both surplus lines--

MR. KENNEY: (interrupting) Admitted.

COMMISSIONER GLUCK: They are admitted. These are admitted carriers. What Joe is doing--

ASSEMBLYMAN BOCCHINI: (interrupting) Will that cause a difference in the rates, one being admitted as opposed to one being an unauthorized writer?

MR. KENNEY: Well, really, they can charge anything they want, even if they are admitted in this line. It is a special risk. It is on the affordable list, until we remove it. Right now, liquor law liability is-- They can charge anything they want for it.

ASSEMBLYMAN BOCCHINI: Assemblymen, do you have any questions?

ASSEMBLYMAN SCHUBER: I appreciate Hazel coming here today and giving us information with regard to some of the insurance questions we had. I think what she said was very informative, especially for many of us who do not deal in the insurance field.

There is one comment I would make, however. Let me just switch over to the social host for a second. After this case came out, I pulled out my own policy. The fact of the matter is, it would appear that this type of liability is covered by most homeowners' policies. My concern, however, is-- I seem to remember either Justice Garibaldi reading, or rendering, or one of the comments on that, a dissent-- There is no question in my mind -- even though this case is relatively young, and probably the amount of claims on it is unknown at this time -- that as a result of it, the insurance carriers are going to have to come and partition for rate increases, or surcharges, based just on that aspect. I don't think there is any doubt in my mind. That is one of the concerns I really have. The consumer, again, is going to be hurt very badly by that. That is one of the questions presented to us, whether we, in fact, must limit that decision to try to head off that type of thing. That is the great concern I have.

COMMISSIONER GLUCK: I think, Assemblyman, that is why, given the amount of time and the options we at the Department think are open to us -- and we are open to discussing, you know, any kind of solutions, as you are, to these problems, all of you-- That is why we recommended the cap, because we see it as a potential of, you know, as all the other liability insurance. I know that is not a position that may be one that is going to be a favorite position of a lot of people in this State, but nevertheless, if there is another way to handle it, we will be more than happy to look at it.

I don't know that the Supreme Court decision -- I am not an attorney, as you know -- specifically went into the policy per se. I don't think it even addressed whether the policies covered or didn't cover. We are assuming that it is covered.

ASSEMBLYMAN SCHUBER: What is interesting though, Hazel, on that, when you made the comment, I guess half facetiously, that they didn't consult you, I think they should have.

COMMISSIONER GLUCK: I was at the Lottery then; maybe that was the reason.

ASSEMBLYMAN SCHUBER: The majority and the minority, or the dissent in this particular case, both make some interesting suppositions on insurance based on what attorneys argued in front of them at the decision. In my mind, that is quite curious. I think there should have been more information based on that, since insurance coverage seems to revolve around some aspects of this decision. If you read that, both Justice Wilentz and Justice Garibaldi made comments on insurance coverage. Justice Garibaldi indicated to us, however, that she does not have enough knowledge on it, that she didn't really want to comment, but that she does think it is a problem. I think the majority indicated that from what they had heard in the argument, they thought it was covered, as has been indicated. But, to me, there are potential problems on this down the pike for the consumer.

COMMISSIONER GLUCK: I agree with you.

ASSEMBLYMAN BOCCHINI: Bob?

ASSEMBLYMAN MARTIN: You say that right now apparently most homeowners' coverage, or maybe all homeowners' coverage, would provide for social host liability. What, if anything, is to prevent a company from disengaging and excluding this type of coverage in its homeowners' policies?

COMMISSIONER GLUCK: Joe, go ahead.

MR. KENNEY: Coverage under your homeowner's policy is what we are talking about, and that is regulated. It is not under the commercial deregulated situation. For a company to make a filing to remove certain coverages that the Commissioner regulates, she would have to agree to that. There may be a public hearing and that kind of stuff, but the final decision on that is the Commissioner's. Now, if that is against public interest, or statistics do not support the removal of that coverage, then, of course, the company will not get that through.

As an aside to that, there has never been, in my review of this matter, any removal of the coverage under the homeowner's policy, the liability policy, from third-party claims. I think if you talk to a defense counsel, he will tell you that they have to do the same thing now that they had to do-- They had to do the same thing before the Supreme Court decision as they have to do now and prove negligence. So, the coverage has been there. There have been claims made against the liability portion of the homeowner's policy. So I, for one, would be very surprised if the statistics under the homeowner's policy are so dramatic that the company would rush in for rate increases or some amendment of their filing.

ASSEMBLYMAN BOCCHINI: Joe, if I may, in my discussions, also, with some people, I have found in relation to local attorneys in the Mercer County area, in discussing this with them, that they sort of chuckled to the extent that they said, "You know, the social host liability is now a timely topic that you read about, but we have been dealing with it for years and years in trying cases. It is just that, for whatever reasons, it has drawn more media attention and public awareness in recent history." I pointed out a case that we had settled. There was no big deal in our office. I even laughed when I started to read the decision. I said, 'Gee whiz, I never knew we were involved in such significant social litigation,' so to speak."

Hazel, you also mentioned something as far as being covered under a homeowner's policy. If a company wanted to remove that, could they just arbitrarily remove it, or do you have to review that?

COMMISSIONER GLUCK: No, they would have to file and we would have to review it.

MR. KENNEY: It is regulated.

ASSEMBLYMAN BOCCHINI: So, there would be notice on that if they wanted to remove it?

COMMISSIONER GLUCK: Yes, absolutely.

ASSEMBLYMAN BOCCHINI: As an example, I have a homeowner's policy, and for my office an umbrella policy; I have more policies than I care to read, I think. In relation to that -- and I am speaking from a layman's standpoint for the most part -- the average citizen can be

assured that if he has a homeowner's policy at present, this type of coverage is under the homeowner's policy.

COMMISSIONER GLUCK: As we understand it.

ASSEMBLYMAN BOCCHINI: I think that is significant. It is built into whatever the rate is they are paying?

COMMISSIONER GLUCK: If there would be a change, they would have to come to the Department of Insurance.

ASSEMBLYMAN BOCCHINI: Someone from the Legislative Services' staff mentioned to me that when he was discussing this with some insurance companies, and so forth, they pointed out that they thought they were more concerned with a person who had a pool in his back yard than someone who had -- I never thought about it, but I guess a lot of people have pools in their back yards -- a picnic on the fourth of July in his back yard, because the possibility of an injury in a pool is more prevalent when you use it every day through the summer, as compared to a fourth of July picnic.

Joining us at this time is someone who just scurried in from, I guess, some type of an event up in Hudson County, the Vice Chairman of the Assembly Law, Public Safety and Defense Committee, Assemblyman LaRocca.

ASSEMBLYMAN LaROCCA: I'm sorry I'm late, but I think I came in just at the right time. This subject matter of whether or not you are covered by the homeowner's policy is very important. I have polled about a dozen defense counsels from big law firms in the last week or so, and I can get any kind of an opinion, both sides, and these are experts. This morning, at the affair I attended, two prominent attorneys from Hudson County were there. One said, "Nick, I'll give you all the cases where the homeowner's policy does not cover it." The other one said, "Nick, I'll give you all the cases that it does cover." So, there you are.

I called my insurance broker and a few other insurance brokers, and I can assure you that the insurance industry absolutely knows nothing about it. The insurance agents are not attuned; maybe I have a dumb agent, but I doubt it. (laughter) No, I'm being very honest here because this is a very serious subject. Of course, what do

many of the homeowners have -- \$50,000, \$30,000, \$20,000, some may have \$100,000 -- and you say an umbrella may cover? Well, umbrellas are not easy to get. In fact, I can tell you with my umbrella, because I am involved and because I need the coverage, I get a hard time. I am more exposed. So, it is a serious problem that this may be pulled out of homeowners one way or the other. I got the tail end of the statement from the Commissioner that they will know about it, and they will advise everyone. I am heartened by that, but at the same time, I am very much worried because the attorneys don't know and the insurance agents don't know how to advise people. This is something that we should consider seriously. Thank you.

ASSEMBLYMAN BOCCHINI: Thank you. Frank?

ASSEMBLYMAN PELLY: I have several questions, Mr. Chairman. Mrs. Gluck, in your testimony you spoke about Assembly Bill 347. Specifically dealing with the cap on liability, is the concept of putting a cap on liability precedent setting? I'm really not into insurance to a substantial degree, and I am wondering about that.

COMMISSIONER GLUCK: I don't think this State has it. Other states--

ASSEMBLYMAN PELLY: (interrupting) I'm talking about in New Jersey.

COMMISSIONER GLUCK: I don't know. I don't think there is any cap on liability.

ASSEMBLYMAN BOCCHINI: No, I don't think so.

COMMISSIONER GLUCK: I think it would be precedent setting in New Jersey, yes.

ASSEMBLYMAN PELLY: It would be precedent setting?

COMMISSIONER GLUCK: Yes.

ASSEMBLYMAN PELLY: Okay. Have you anticipated or thought about putting a cap on other forms of liability in an effort toward cost containment, such as medical liability, etc.?

COMMISSIONER GLUCK: Well, there have been a lot of discussions about the capping of liability. It would probably take legislation, as I understand it. It is not a subject dear to a lot of people's hearts from what Assemblyman LaRocca was just talking about.

There are people who think that if you cap liability, people who are seriously injured, or whatever, are not going to be able to get the moneys they deserve. We have talked about this in other areas; we have discussed this with pollution liability. We have talked about the fact that if all of the people who are going to remove asbestos, for instance, from the schools this summer, do it according to the state of the art that the Department of Health has set up in their regulations, which is supposed to be the strongest in the country -- and I have no reason to doubt that -- if all that is met, the insurance companies have said to us, "Well then, if we meet all of that, why 30 years down the road will we be subject to having someone put a claim in?" That is a good question. We have been wrestling with that since I have been in the Department regarding all liability, but we haven't-- I think this is the first time the Department has taken a step toward that in this particular bill -- agreeing with it.

ASSEMBLYMAN PELLY: In your testimony, you suggested that there be a total limit of \$500,000 which is indexed to inflation. Are you specifically suggesting that the \$10,000 cap for injury or personal property also be at \$500,000?

COMMISSIONER GLUCK: No.

ASSEMBLYMAN PELLY: You're saying that should remain at \$10,000?

MR. KENNEY: Are you talking about personal property?

ASSEMBLYMAN PELLY: Yes.

MR. KENNEY: You're not talking about the body?

ASSEMBLYMAN PELLY: Right. I'm seeking clarification. You're suggesting that the \$75,000 per person for death or personal injury and the \$150,000 total be increased to a maximum of \$500,000 in either event, and you are not addressing the issue of injury to real or personal property.

COMMISSIONER GLUCK: Yes, we didn't make a judgment on that.

ASSEMBLYMAN PELLY: You didn't address that; you didn't make a judgment?

COMMISSIONER GLUCK: No. We can supply you with it if you feel it is necessary. We can talk about it.

ASSEMBLYMAN PELLY: Have you noticed that -- maybe it is too soon to tell -- homeowners' liability has increased as a result of the Supreme Court decision? Have you noticed any movement in that direction?

MR. KENNEY: We have no records on that, but I think because of inflation, you are going to— Insurance companies now are going to offer their insureds information that inflation has pushed their property up, and with the cost of repairs, they are going to say, "Increase it." People who are aware of this responsibility are just going to automatically increase it. I don't think it is a result of the Supreme Court's decision in this particular case making them responsible. I would assume if I had low liability limits and I read this and was concerned, I would, but I don't think there are any statistics now to show that increases in this coverage are a direct result of the Supreme Court decision.

COMMISSIONER GLUCK: The other thing I heard was that they were going to be offering higher deductibles in order to balance out the cost of the policy.

ASSEMBLYMAN PELLY: As an option, to reduce premiums.

COMMISSIONER GLUCK: Yes.

ASSEMBLYMAN PELLY: Are you suggesting that the insurance industry is probably going to be educating people on the need for increasing their liability, and you don't see increased rates forthcoming as a result of--

COMMISSIONER GLUCK: (interrupting) Well, I don't know if you--

MR. KENNEY: (interrupting) Only because you have increased your limits. I don't think as a result of the possible or potential exposure. I have not seen the kind of statistics that would warrant any type of increase on the same coverage you have now.

COMMISSIONER GLUCK: See, the problem is, by the time we get the statistics in, it is like going in -- it is not a terrific analogy -- for a cardiogram, all right? Everything is fine, and two days later you have a heart attack. We can only tell you what we have at present, and what we have at present is precious little information, you know,

vis-a-vis what is going to happen in the future with regard to that homeowner's policy. We can only— What we are saying is, it is conjecture and a certain amount of assumption, presumption, or whatever.

ASSEMBLYMAN PELLY: Would you suggest that the Commercial Deregulation Act of 1982 be rescinded?

COMMISSIONER GLUCK: We've talked about it. I don't know at this juncture that I can intelligently address that. The rescinding of that act, from the point of view of the Department, vis-a-vis it's own staff, would be a problem right now, let alone the public policy part of it. It may be that we need to take a look at that in the near future and decide whether, in fact, we should be doing it. I can tell you right now, Assemblyman, that we don't have the staff, nor do we have the physical facility at this point -- although I'm sure that if the State made an effort we could always rent space -- to handle that. That is without the public policy side of it.

So, if the Legislature, in its wisdom, eventually decided to do that, we would just have to make preparations in order to monitor all those lines we are not monitoring now.

ASSEMBLYMAN PELLY: Irrespective of your staff and space constraints, would you say it is a good idea to rescind that?

COMMISSIONER GLUCK: I can't make that statement now. If you give us an opportunity to come back sometime in the future, if you allow us to take a look at it -- we have been talking about it on and off -- we will give you a direct answer. We are just not prepared to do that today.

ASSEMBLYMAN PELLY: We've heard today-- All of us are hearing about the increase, and we will be hearing more on the increase of liability insurance for tavern owners. Some have said it has gone up four or five times in recent years. Have you found that to be accurate?

MR. KENNEY: There is considerable liability coverage under your commercial general liability policy. Now, under the Commercial Deregulated Rate Act, there are about four or five areas that come under the provisions of that which permit companies to charge what they

want -- a risk which has premiums of \$10,000 or more or exotic risks, which are special risks that are on the Commissioner's list -- and that is without regard to premium. Regarding liability under the CDL policy, with the competitive situation from, oh, 1978 on up through 1984, or the present time, the companies undercut each other. As a result of undercutting each other, they did not properly underwrite the risk. So, in addition to losing money from the lack of proper underwriting, they did not balance it out with their investment income. Five or six years ago, interest rates were high, so everyone could make up any shortfalls by returns on investment. So, if they didn't do that, their interest rates dropped and they found themselves losing money. They did not underwrite a particular risk properly and, in fact, one of the municipalities I checked on for 1983 had a total package of liability, auto, workers' comp, and fire, that was \$105,000 for that year. For 1983, the manual rate for that risk should have been \$636,000.

There is just no way in the world you are going to be profitable or remain financially solid with that kind of an imbalance. This is what is happening in the entire liability area, including liquor law liability. It was dirt cheap, no one properly underwrote it, and now they are trying to make up for the lack of underwriting. Hence, you are going to have court decisions -- which have frightened them -- where there is coverage being thrown into a policy where it was not intended, and you are going to get sky-high rates.

COMMISSIONER GLUCK: Let me add something. This is not liquor law liability, but recently it was brought to our attention that we have a lot of condominium associations in this State. There was a particular senior condominium association where they had 2,400-some-odd homes or condominiums in the association. Their coverage, their liability, from the walls out, three common elements, ran something like \$73,000. They were cancelled by their company, and they went out to shop. What they have now is "\$270,000." So, you can see-- We're saying it's not just here. We're starting to pick up pockets all across the line.

ASSEMBLYMAN PELLY: Going back to the liquor law liability insurance— Please bear with me; I really have a very limited knowledge of insurance and the insurance industry. I'm sure I am going to be struck out before the end of the day. In any event, are you suggesting that the reason for the tavern owners' liability premiums being increased so much is not because of the fact that they are subject to more litigation, but, in fact, due to perhaps poor business practices on the part of the insurance companies in the past? Or, their feeling that, "Well, this might be a great opportunity to increase the poor tavern owners' insurance rates substantially because we have a Supreme Court decision that just came out. This would be an opportune time to increase it four or five times, and blame it on the Supreme Court decision, rather than the fact that maybe we haven't done what we should have done. Maybe we haven't made the proper investments in the past. Maybe we haven't charged the correct rates in the past and have forgotten about it. This is an opportunity to recoup our losses, rather than really dealing with it aboveboard."

MR. KENNEY: I think you understand the total picture very well. (laughter) Yes, it is a smattering of all of that. You just can't pull out one aspect of it. You have hit five or six critical areas which have all resulted in a very untenable situation. If you say that an insurance company did not properly underwrite a risk, resulting in liability losses or improper reserving and the whole works which at least existed, yes, that means it is poor management. Some companies apparently, because of the competitive nature of this market, were sort of thrown into it because if they didn't, their competitor would. It was one of those things where, "I am going to charge this" and "This guy charges that," and whamo, everyone is trying to do it.

ASSEMBLYMAN BOCCHINI: The bottom line was, as opposed to creating a more competitive market, you closed down a market and, as a result, the person who got the short end of the stick was the tavern owner.

COMMISSIONER GLUCK: In this instance, yes.

MR. KENNEY: But there is a smattering of all of it; you have hit it right on the head.

ASSEMBLYMAN PELLY: I appreciate the opportunity to be enlightened this afternoon. I thank you both very much.

ASSEMBLYMAN BOCCHINI: Nick?

ASSEMBLYMAN LaROCCA: I don't want to harp on this particular subject, but I would like to get a reaction, if possible, before it comes to our Banking Committee, about whether there is any way the Department can, either through regulation or an educational program, and very, very, very soon, alert the industry, alert the people, alert the brokers that there is a problem and that they should do something about it. I am very serious about this because no one knows that they may have small limits, that there are problems, whether they are covered or not covered. I think there should be some kind of an educational program. When it comes down to rates, I think Justice Marie Garibaldi, in her dissenting opinion, was very clear about it. I think anyone would be remiss if he or she didn't follow it.

She said: "It is unrealistic to believe that insurance rates will not rise in response to the ruling and that many homeowners may not have enough insurance to protect them from losing--"

COMMISSIONER GLUCK: (interrupting) That is what we said. That is what the analogy was about the cardiogram. You know, we can only tell you what is now.

ASSEMBLYMAN LaROCCA: Is it possible that your Department could do something practical for the benefit of the public without waiting until your statistics come in? You're right, but the statistics will come in a year from now. In the meantime, during this waiting period, there will be many homeowners who are going to be stuck.

MR. KENNEY: Right now, Assemblyman, we have to proceed as though you are not going to do anything legislatively. There is a problem—

ASSEMBLYMAN LaROCCA: (interrupting) Don't kid yourself into believing that.

MR. KENNEY: No, no. I'm saying that we have to proceed in the best way we can to help to relieve the situation, not that you won't. I'm saying that we can't rely on that. We have to try to do

something with the tools we have. Are you talking the social host problem or the tavern owners?

ASSEMBLYMAN LaROCCA: Just the social host problem right now.

MR. KENNEY: Regarding the social host, what we're saying is, unless an insurance policy excludes third-party coverage under the liquor law liability, it is covered.

ASSEMBLYMAN LaROCCA: Why don't the agents and the industry know that, or the people?

MR. KENNEY: I came up with the educational requirements for a license, and I don't understand it either. They are supposed to be able to read policies.

ASSEMBLYMAN BOCCHINI: I know you have a meeting at three o'clock which we don't want to see you miss because, Lord knows, we need that additional carrier in this State at this point in time. I have a couple of other questions. I don't know if you are aware of it, but from what I have been able to establish from Legislative Services, they have talked to about 2,100 liquor businesses which are now without this type of insurance in the State of New Jersey.

COMMISSIONER GLUCK: No.

MR. KENNEY: No, that's not true. They panicked on that. Occidental, which arranged for an orderly withdrawal of those 2,100, told the agent or the broker, "Don't write any new business after April 1. We will renew all of your business up to April 15." Now, I took a look at that list of 2,100, and that is exactly what has happened. I checked that out. The agent panicked. But, in any event, his business is going to be covered. We suspect a great many of the businesses will be covered as soon as we get these companies on board.

ASSEMBLYMAN BOCCHINI: Do we know -- maybe this is a better question to address to Bob Pinard, or John Vassallo, if he gets here -- how many licensed retail beverage establishments we have, incorporating into that the restaurants?

MR. KENNEY: Oh, you have a ton of them. You have approximately 8,000 tavern owners, 4,000 package stores, the Restaurant Association -- I don't have a figure on that -- but, I am thinking a total of between 15,000 and 20,000.

COMMISSIONER GLUCK: I think they are all represented here today.

ASSEMBLYMAN BOCCHINI: Do you know how many presently carry or do not carry any type of—

MR. KENNEY: (interrupting) No, we don't.

MS. SZILAGYI: We may be able to find out about that.

ASSEMBLYMAN BOCCHINI: Okay. Carmen, do you have that number?

**CARMEN GILETTO (from audience):** There are about 12,000 licensees, including clubs and package stores, throughout the State. There are 8,000 retail consumption licensees and about 2,500 package dealers. The other 2,300 are (remainder inaudible since Mr. Giletto was speaking from the audience without a microphone).

ASSEMBLYMAN BOCCHINI: Do you know how many are operating without insurance?

MR. GILETTO: We feel that about 40% of our consumption licensees do not have third-party liability insurance.

ASSEMBLYMAN BOCCHINI: Okay. We'll hear more from you in a bit, but that was just something that came to mind.

Are there any other questions for Commissioner Gluck or Mr. Kenney? (no response) I'm sure I'll think of something after you leave, Commissioner.

COMMISSIONER GLUCK: Well, I'll be around.

MR. KENNEY: We'll take care of it.

COMMISSIONER GLUCK: We both have to go, but if there is anything you need from us, please let me know.

ASSEMBLYMAN BOCCHINI: On behalf of the Committee, allow me to say that we appreciate your candor and we appreciate your being here. I have developed a feeling, or at least a sense of an ability to work with you in relation to this particular problem. We will truly be looking for your guidance. I can assure you that you will probably be hearing from the Social Host Liability Commission concerning a meeting that will be forthcoming. Our Committee will probably be meeting in more detail concerning this, and we may request you to come back with some additional information for us.

COMMISSIONER GLUCK: Fine.

ASSEMBLYMAN BOCCHINI: There is no time of day that someone can't be reached for emergency purposes. If you have something that warrants consideration for legislation, please let us know, and we will sit down with you and do whatever we can, as well.

COMMISSIONER GLUCK: Thank you very much; we appreciate that.

MR. KENNEY: Thank you.

ASSEMBLYMAN BOCCHINI: We appreciate you as well. You were very enlightening.

Mr. David Evans, New Jersey Department of Health.

**DAVID EVANS:** Mr. Chairman and members of the Committee: I am here today to represent the Commissioner of Health, Richard Goldstein. I work for the Division of Alcoholism within the Department of Health; I am Chief of the Intoxicated Driver Programs. My unit now includes the former Bureau of Alcohol Countermeasures which was in the Division of Motor Vehicles. I am responsible for the drunk driver when the courts get finished with him. I run the Evaluation, Education, and Treatment Referral Program for all the drunk drivers in the State.

We have looked at both of these bills and, at the outset, may I say that Commissioner Goldstein is in favor of imposing liability on those who knowingly serve alcoholic beverages to persons who are intoxicated. This liability should apply both to social hosts and to alcoholic beverage licensees.

I would like to note that this is also the opinion of the Presidential Commission on Drunk Driving, and you have a copy of the Commission's Report in front of you which relates the dram shop laws. They say: "These laws implicitly establish the necessity of placing responsibility on the part of the seller or server, whether they be commercial or individual hosts." Such is the statement on the part of the President's Commission favoring social host and commercial seller liability.

As far as Assembly Bill 43 goes, the Commissioner of Health is opposed to it. This bill relieves social hosts from all liability. We believe that this is a poor policy for the health of the citizens of New Jersey. This bill implies that when it comes to serving alcohol to people who may pose a threat on the highways, we are not our brother's

keeper. We feel that we are our brother's keeper, and our sister's keeper. We feel that anyone who personally serves alcohol to someone whose judgment is impaired by alcohol to the point where he is intoxicated is posing a danger on the public highways knowing that that person may then drive an automobile.

I think one of the problems with the Kelly versus Gwinnell case and why there has been a social outcry about it, is that the case is simply misunderstood. It is very narrowly applied. It only applies to situations where you have a personal service to a visibly intoxicated person who you know is going to drive an automobile. I think that is part of the problem.

I would like to go on record here by saying that our Division would be happy to put out educational materials or a pamphlet for the public explaining what this case is all about. It doesn't apply to a party situation -- and that is where most people are concerned -- where they don't personally serve the guests.

I would like to read something from the Supreme Court opinion, and I think this pretty well sums up how we feel about Kelly versus Gwinnell. The Court said they recognize the concern that their 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 social gatherings and 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. If there be a loss, it is well worth the gain. From the point of view of looking at the problem of drunken driving in New Jersey, if there is a loss and a change in some of our accepted standards of behavior regarding the serving of alcohol, that loss is well worth the gain in lives and freedom from injury that may result.

Now, concerning Assembly Bill 347, we think that the issue of caps needs further study. One thing we would like to point out to you is that this bill equates social hosts with alcoholic beverage

licensees. I guess the assumption is that a cap on one applies to a cap on the other. If caps are to be set, we think there should be a different cap for the licensee than for the social host. The cap for--

ASSEMBLYMAN BOCCHINI: (interrupting) Based on what criteria?

MR. EVANS: Excuse me?

ASSEMBLYMAN BOCCHINI: I don't mean to interrupt you in the middle of your presentation, but based on what criteria?

MR. EVANS: Based on the criteria that the licensee is engaged in a licensed profession in this State, that the selling of alcoholic beverages is a privilege, not a right, and that society has recognized for hundreds of years that that sort of a commercial enterprise needs to be controlled.

ASSEMBLYMAN BOCCHINI: No, no, I take those things as a common understanding. I'm thinking along another line. I'm sorry I interrupted.

MR. EVANS: Usually, in the law of negligence, we look at foreseeability, and I think that a licensee has a greater knowledge of the foreseeability of his actions than does a social host. Licensees are aware that regulations are binding on them; they should all have received copies. They know that there are certain things they can and cannot do, whereas a social host may not know those things. That is why I think a higher cap should be put on the licensee.

ASSEMBLYMAN BOCCHINI: Do you have a suggested cap?

MR. EVANS: No, we don't. We think that needs further study. However, it is the opinion of the Commissioner that if there is a cap, it should be enough to adequately compensate the victims of injury, including catastrophic injury.

ASSEMBLYMAN BOCCHINI: I'm sure that the Bar Association will agree with you.

MR. EVANS: Yes, I believe they are going to comment on this. There is one other thing we would like to make you aware of. I have not done a detailed study of this, but it is my knowledge of the law that the only institutions that generally receive some kind of legislative limit on liability are charitable institutions. I would

like you to ask yourselves the question: Are we equating sellers of alcoholic beverages with charitable institutions? The reason we put limits on their liability is because they perform a valuable public service, not that tavern owners do not perform a valuable public service. My great-grandfather and grandfather were tavern owners, and my mother grew up on top of a tavern. I know they were honorable people. We are not in favor of putting anyone out of business who obeys the law and does a responsible job of administering his business. But are we saying by imposing a limit on liability-- Are we equating service of alcohol with physicians, for example, who might perform a valuable public service and who might deserve a cap on liability? In any case, if a cap must be imposed, it should be something that will adequately compensate victims.

Another point I would like to make-- I have provided you with a copy of the New Jersey Administrative Code that governs the conduct of licensees and the use of licensed premises. The law holds that a licensee cannot serve alcohol to someone who is apparently intoxicated. I did some research into the Alcoholic Beverage Control disciplinary cases and looked at the definition of "apparently intoxicated." You find it before you on the second page. "The term 'apparently' refers to the observable manifestations or symptoms of excessive indulgence in alcoholic beverages. It portrays a person so far under the influence of alcoholic beverages that his conduct and demeanor have departed from the normal pattern of behavior." I took excerpts from various cases where "apparently intoxicated" was defined in the case. In the interest of good taste, I will not read them, but you can see that, at least as far as the Alcoholic Beverage Control goes, they have not disciplined people unless the patron was really grossly intoxicated and it was very, very clear that that person was having trouble.

You will hear from bar owners that it is unfair to impose this standard on them, and I offer as proof that it is not unfair, that, in fact, the cases holding them liable have only been the really grossly negligent cases.

We think the best approach to cut down on bar owner liability is for bar owners to take a risk management approach. Our Division will be happy to train any bar owners or groups of bar owners in risk management and the different alternatives they can take to cut down on their liability. We are already doing that, and we will be happy to do it in the future. We will train them in how to tell if someone is intoxicated. We will train them on alternative ways of dealing with intoxicated people. We will be happy to do that at any time. They can just call the Division and we will set up the training. Thank you very much.

ASSEMBLYMAN BOCCHINI: Who are you going to train?

MR. EVANS: We have a training program right now for bar owners and servers of alcoholic beverages -- licensees -- to train them in what their legal responsibilities are and in how to detect if someone is apparently intoxicated. We will train them also on ways of dealing with intoxicated patrons and on how to say, "You've had enough. Please do something else."

ASSEMBLYMAN BOCCHINI: Let me ask you this: What do you do, in fairness to a bar owner who sees someone he wants to cut off and does the right thing-- What does he do then?

MR. EVANS: He simply tells the patron, "Sir, I think you have had too much to drink."

ASSEMBLYMAN BOCCHINI: You mean the consumer?

MR. EVANS: Yes, the consumer, or the patron. He may give him an alternate drink. If the person is in public and is intoxicated, the Alcoholic Treatment and Rehabilitation Act, which is N.J.S.A. 26:2B-7 permits the police to take a visibly intoxicated person who is in a public place into treatment against his will. That law has been on the books since 1976. If someone is intoxicated in a public place, the bar owner can call the police and have the person taken to a detoxification program.

ASSEMBLYMAN SCHUBER: Isn't that impractical? Really, sir, I appreciate that what you are saying is true, but isn't that impractical? What businessman is going to do that?

MR. EVANS: Well, I think a businessman who wants to protect his business from a lawsuit will. There are alternative methods--

ASSEMBLYMAN SCHUBER: (interrupting) I personally do not feel that that is practical.

MR. EVANS: Well, I am not an expert in the training. We have other people in our Division who provide the training, and I'm sure they could appear before you and explain how it is done. There are ways of talking to patrons, ways of not offending the patrons, and arranging for alternative rides home. Some counties have what are called "Service Forces," which provide rides for intoxicated people. They can develop relationships with taxi services. There are a number of things that can be done.

ASSEMBLYMAN SCHUBER: I have no problem with that. I know those things have worked successfully, but I think that some of the other stuff is just impractical, really.

MR. EVANS: I am just giving you the alternatives under the law.

ASSEMBLYMAN BOCCHINI: If I may, Mr. Evans, is your training program intended to extend into the homeowners' situation as well?

MR. EVANS: We could provide training for homeowners. As I said earlier, we would be happy to come out with a pamphlet or some educational materials of similar nature for homeowners. As a matter of fact, we could provide these things to the insurance companies which write homeowners' policies.

ASSEMBLYMAN BOCCHINI: Let's take the standard as set forth statutorily under N.J.S.A. 39:4-50.10 on intoxication. I serve as a municipal prosecutor, Bob serves as a municipal prosecutor, and in reading through some of your observable manifestations and symptoms of intoxication -- I don't know if you glanced through those, Bob -- from my experience in defense and in prosecuting at the municipal level, I would say, unequivocally, from what I can see here, that probably in most instances, if they were under a Breathalyzer, it would be well over a .10.

ASSEMBLYMAN MARTIN: Well, unfortunately, there are very few times you will have a situation where someone climbs on top of a cigarette machine. I mean, some of them are obvious, but in most cases-- If someone comes into a tavern and he has already been

consuming alcohol and then he is served two drinks before the server, or whoever it is, realizes and pays special attention to him, I see a real problem. At that point in time, your solution is that they call the police in order to protect themselves from liability.

MR. EVANS: No, I said that that was an option available to bar owners. I also listed a number of other options. By the way, as I said earlier--

ASSEMBLYMAN MARTIN: (interrupting) Practically, if they came there by automobile, most likely they are going to want to attempt to go home by automobile. What do you do to restrain them? I don't see any clear, practical alternative.

MR. EVANS: Again, I am not an expert in the training, but I know there are techniques that exist. I would be happy to have the people who do the training for our Division provide you with that information. But, there are well-established techniques. By the way, the training is being done in connection with people from the alcoholic beverage industry, who have also developed these techniques. This is not something we just thought up. May I also make a--

ASSEMBLYMAN MARTIN: (interrupting) The problem is, the clear cases don't-- I can see where something can be done if someone sits in a tavern for two hours and, as you suggest, has possibly four or five gin and tonics. You can probably take cognizance of that. But, there are so many other cases which are much tougher. I think what the Chairman and I are familiar with are situations where it is not -- at least from my experience -- possible to be able to determine from visible appearance alone, outside of a Breathalyzer machine, that someone is under the influence of alcohol, and yet, if he gets behind the wheel of an automobile, in the driver's seat, he really does manifest difficulties with his reflexes.

MR. EVANS: I think the Supreme Court in the Kelly versus Gwinnell case took that into consideration. As I said earlier, you have to make two points before you can find a bar owner liable. Number one, you have to prove personal service, and number two, you have to prove the person was visibly intoxicated. The burden of proof is on the person suing the bar. If they can't prove that the bar owner knew they were visibly intoxicated, they do not win the case.

ASSEMBLYMAN MARTIN: The interesting thing to me in Kelly versus Gwinnell was that they went back and used the Breathalyzer machine to establish and say, "Therefore, the person must have been visibly intoxicated." They did not use the physical symptoms that someone observed. They went back to the machine. In my experience, the machine and someone's visible appearance don't always match up.

MR. EVANS: If I understand the case, that was really an evidentiary question. The host in that case said he only had two or three drinks, and the Breathalyzer was used to impeach his credibility that, in fact, he had not just had two or three drinks. They could not have gotten that blood alcohol level with just two or three drinks. That is what the social host said.

The attorney who handled that case, the Kelly/Gwinnell case is here, and I think he can probably comment further on that. I think he will be testifying later.

ASSEMBLYMAN BOCCHINI: Which one did he represent?

MR. EVANS: He represented Kelly.

ASSEMBLYMAN BOCCHINI: The plaintiff?

MR. EVANS: Correct.

ASSEMBLYMAN PELLY: On Page 3 of the decision, Gwinnell was subjected to a blood test, which indicated a blood alcohol concentration of .286, nearly three times--

ASSEMBLYMAN MARTIN: (interrupting) I have no problem with the clear-cut cases. We're talking about situations where it is .10 or higher, where it is very difficult, in my experience, to be able to, in some cases, show that someone is physically under the influence, at least to that level. The other thing about this case is, there were some factual problems. The person said he hadn't been consuming beforehand. I am concerned about situations such as I mentioned before, where someone may be drinking before he gets into a tavern, or even someone in the social host situation, where the person comes into someone's home. When someone serves a drink, it does take a while for him to be able to determine to what extent someone may be inebriated.

The other practical problem is that it takes time -- usually an hour to an hour and a half -- before you physically reach the

symptoms, before the alcohol gets into your bloodstream and you have the highest amount of reflex problems.

ASSEMBLYMAN BOCCHINI: If I may, before we go into too much detail on the Breathalyzer, etc., we have two troopers with us. One is Sergeant Shopland who, if I am correct, oversees much of the Breath Test Unit for the State Police here in New Jersey. Sergeant, I would like to hear from you next. I think it would be timely to dovetail your testimony behind that of Mr. Evans.

ASSEMBLYMAN SCHUBER: Mr. Chairman, I just have one question.

ASSEMBLYMAN BOCCHINI: If I may, Pat, Assemblyman LaRocca has a question first.

ASSEMBLYMAN LaROCCA: Following your suggestion, I am not going to do more cross-examining of this witness, but I would like to make a comment on what you think -- or what the Commissioner thinks -- about guidelines for a host. Is he really serious when he says you can have a training program for all the hosts, for all of us, about what to do and what not to do? Do you think that is really practical?

MR. EVANS: Yes, sir, I do. I think we have access to the public media. Right now, we put out a number of educational materials on drunk driving.

ASSEMBLYMAN LaROCCA: How do we detect one who is drunk? How do I know, how do the people of the public know whether a person had three drinks at another party?

ASSEMBLYMAN BOCCHINI: I want to stop this line of questioning.

ASSEMBLYMAN LaROCCA: That's all. I just wanted to make a comment. I am not going to do any further questioning.

MR. EVANS: I think we can do it.

ASSEMBLYMAN SCHUBER: Mr. Chairman, I have a strict question on that.

ASSEMBLYMAN BOCCHINI: All right, Pat.

ASSEMBLYMAN SCHUBER: I just want to ask you a question. You commented on two of the bills. There is a third bill here that Senator Cardinale has introduced which sets up, I think, probably a little bit of a different standard of liability with regard to the social host. I

was wondering if you would care to comment on that, if you have read it, or, second of all, do you believe there is a necessity or that there should be as far as the legislation that this Committee may want to consider, for a difference in the standard of liability for the social host as opposed to the licensee?

ASSEMBLYMAN BOCCHINI: I think he testified to that.

MR. EVANS: In answer to the first question, yes. If I may just comment a little bit about the--

ASSEMBLYMAN SCHUBER: (interrupting) Senator Cardinale's bill.

MR. EVANS: Yes, I'm sorry. I haven't read that bill, nor do I believe the Commissioner of Health has read it. But, I believe his position is that there should be a different standard applied to licensees and social hosts. By the way, if I may just make a comment about the observable manifestations of intoxication, it has been a matter of law for a long time. I would be happy to give you the cases on that. A person's level of intoxication, or whether or not someone is intoxicated, is a matter that doesn't require--

ASSEMBLYMAN LaROCCA: (interrupting) The public doesn't read cases.

MR. EVANS: Well, I think we can educate them through the media and through educational pamphlets. We are working on drunk driving right now.

ASSEMBLYMAN BOCCHINI: I appreciate that. Have you ever had the opportunity to view any video tapes or defend any drunk driving cases?

MR. EVANS: Yes.

ASSEMBLYMAN BOCCHINI: Then you are familiar with that process. Keeping that in mind, if you have nothing further to add at this time-- Sergeant, I did want to call you, but I found out we have someone who has flown in from out of State who has to catch a four o'clock plane. Don't everyone all of a sudden end up with a plane they have to catch. (laughter) If I may, Mr. Evans, I would like to have Mr. Michael J. Velotta now, from the Allstate Insurance Company. Mr. Velotta, it is nice to have you with us this afternoon. Please

proceed. Do not construe my absence as meaning I do not want to listen to you; please construe it for where I'm going, because I have to.

**MICHAEL J. VELOTTA:** Thank you, Mr. Chairman. Members of the Committee: My name is Mike Velotta; I am with Allstate Insurance Company and am from its home offices in North Brook, Illinois. We have taken no position on any of the three bills that are before the Committee. You might ask, "Well, why are you here today?" Really, we want to explore the public policy issues that underlie the whole area of social host liability. We would like to make sure that all of the factors, at least some of the facts, are discussed in the policy decision that you, as legislators, are going to have to make for the State.

The public policy decision on whether to change the liability that was set up in Kelly versus Gwinnell is before you, whether there should be a duty on the social host to avoid serving his guests alcoholic beverages where he knows that a person is drunk, or will become drunk, and then thereafter drive. In creating this duty, the Supreme Court also set about creating a liability. Now, our concern, and one that we hope will be explored in the context of this debate, is this liability and its costs. A new liability was created, that is, a social host is now liable to the injured party in a State that has joined several. That means that the host, as well as the driver, are each responsible fully for any award that would be recovered by the injured person; that is, the person can recover from the host, as well as the driver who actually injured him.

So, we want to make sure you understand that that liability, we think, is probably covered by the homeowner's policy and the personal umbrella policies we write in the State. I think we are either the second or third largest homeowners' writers in the State. We write quite a bit of business under our personal umbrella policies. So, we think that as a result of that opinion, we have created a new liability situation in the State. This is what we hope you will address: Who is going to pay for the extra awards and the defense costs that ultimately are going to be added to the homeowners' premiums and the pub policy premiums in the State of New Jersey? I think that is part of the decision you have to consider.

Our problem as a company is, we are torn between two competing interests. One is the cost interest; the other is, we have been firmly entrenched and involved in supporting efforts to remove drunk drivers from the roads. That is another way of cutting down costs for everyone in the State. So, that, again, is probably one of the reasons we have taken no firm position on any of these bills, because we have the same public policy concerns that you are going to be faced with; that is, we want to get drunk drivers off the road. At the same time, we want to at least have you consider, as part of your debate, the additional cost you are going to put in by imposing this new liability.

Looking at the costs themselves right now, Allstate currently, since I guess last summer, June or July, when the decision came down, has about 11 or 12 cases that come under the Kelly versus Gwinnell decision. We are in the process of defending some of those. Currently, as I think Commissioner Gluck indicated, there is nothing in Allstate's rates, either the homeowners' rates or the pub rates, to reflect that new liability. We simply don't know yet; it is too early. As those costs are incurred, and as we have some basis for projecting future costs to come out of those kinds of decisions, then I think it is entirely appropriate and predictable that we will include those costs in future homeowners' premiums, as well as in pub premiums.

We anticipate that it would be a fairly low-frequency type of claim, but of high severity. In other words, it is not going to occur very often, but when it does occur, it could be fairly significant.

Looking just for a moment at the coverages that are available to the injured party, that is the person who is injured by the drunk driver, you have to remember -- and this is one thing I hope you will focus on -- that this is an automobile situation. In New Jersey, everyone who drives is required to have Personal Injury Protection. Everyone refers to that as PIP. In New Jersey, that is unlimited by either dollar amount or time amount for all medical expenses. It also has a provision for wage losses and replacement services at different levels, depending on what the person has bought. When you have a car situation, if you have two drivers, the drunk driver and the victim,

they both have two policies. They have their own policy, plus they have the policy of the drunk driver. If you are in a situation even where the drunk driver is uninsured, the injured driver has his own PIP policy for his own medical benefits, for his wage loss, for his replacement services, and any other benefits that are provided.

In a situation where you have a drunk driver and a pedestrian, the pedestrian is covered by the driver's PIP; so, again, he has benefits. The only situation where you don't have a specific policy to come against is where there is an uninsured driver and a pedestrian. Again, the Unsatisfied Claim and Judgment Fund provides for recovery of liability claims, so you would be in a liability situation. You probably wouldn't be in a first-party PIP situation, but there would be a fund to recover against in a liability situation.

I want you to take that factor into consideration. What you are really talking about in Kelly versus Gwinnell is a situation where you have uncompensated economic injuries, that is, wage loss that is above and beyond what is provided by PIP, and pain and suffering. Those are the kinds of things you're talking about in the liability. So, you have to remember, if you decide as a public policy decision that you want to overturn the liability in Kelly versus Gwinnell, that you are not leaving the injured party without basically any coverages or ways to take care of his catastrophic medical injuries and some wage loss. That is a factor you ought to consider in your public policy determinations.

One of the key things you have to come up with and decide about from a public policy standpoint is, is a social host liability situation desirable? That is, is that a way to address the problem of getting drunk drivers off the road? Are there other means of handling that situation without looking at increasing the liability for the social host to take care of it? If you are looking at true deterrents, one thing you ought to look at if you are going to consider alternatives is having the liability that is going to be attendant to Gwinnell not insurable. Right now, you are talking about drivers, you know, to whatever part that that decision, or the fact that they have insurance, makes in the decision to drink or not to drink and drive.

Maybe another kind of incentive would be to realize that that person doesn't have liability insurance, and that it is coming out of his pocket from dollar one. That is just a consideration that I throw in as long as you are looking at the social policy. Is that a way to deter drunk drivers?

The last point I would like to bring before you is the California experience. The California Supreme Court, in April, 1978, imposed social host liability very, very similar to the Kelly decision. The Legislature in California, in September, overturned that decision, and provided for both licensees and social hosts that the giving away, serving, selling, etc. of alcoholic beverages did not provide liability. They specified that the proximate cause, that is, the legal cause for drinking and being intoxicated was the consumption of alcohol, not the serving of alcohol. I simply wanted to bring these facts to the Committee's attention. I hope they will become a part of, and are fully explored in, whatever public policy decisions you make.

With that, I conclude my comments. I would be glad to try to answer any questions you may have.

ASSEMBLYMAN LaROCCA: I would like to go back to my original question. I know you are one of the counsels to Allstate. You said you think the homeowner's covers. Is that a calculated legal decision, is it a practical one, or isn't it too clear?

MR. VELOTTA: My problem, Assemblyman, is that I'm not sure.

ASSEMBLYMAN LaROCCA: As a lawyer, I can understand your problem.

MR. VELOTTA: Yes, but I'm not sure. You can probably get as many opinions on this as you have lawyers. I think we believe, and we are proceeding under the assumption, that there probably is liability and we are in defending cases. I think future court cases are going to have to determine that because those are some of the unanswered areas from Kelly. Since a homeowner policy is an all-risk policy generally, unless it is specifically excluded, there is usually coverage for it. I think that is the approach we have been proceeding under.

ASSEMBLYMAN MARTIN: Isn't it--

ASSEMBLYMAN LaROCCA: (interrupting) Number two -- I have just one more question.

ASSEMBLYMAN MARTIN: Okay. I have a related question.

ASSEMBLYMAN LaROCCA: All right.

ASSEMBLYMAN MARTIN: Isn't it fair to say that while you may be covered, what existed before this time was the fact that Allstate, and probably many other insurance carriers, took the position that under existing law, there was no cause of action; so, therefore, there were no liability rates? It has only been because the Court has specifically affirmed the fact, under Kelly, that there is liability in this circumstance, which triggers the fact that you would be liable because of the way the Insurance Commissioner presents the circumstances: Unless you are specifically excluded you are, in fact, included.

MR. VELOTTA: Right. You answered the question. I think there were probably people and lawyers, in the practical day-to-day handling of lawsuits, who recognized that the question of liability was there. Some lawyers said, "Well, it was there," and some lawyers said, "It wasn't there." The Supreme Court simply answered that question -- it's there. But, you're right. From that standpoint, at least the issue of whether or not there was liability of the social host was removed, to the extent that individuals were operating under the assumption that they had no liability as social hosts for serving alcoholic beverages. That is now changed. You have, for certain, liability imposed, and therefore that is the change.

ASSEMBLYMAN LaROCCA: Mr. Chairman?

ASSEMBLYMAN BOCCHINI: Assemblyman LaRocca.

ASSEMBLYMAN LaROCCA: Do you believe the statement that Justice Garibaldi made that it would be naive to think that the rates would not increase?

MR. VELOTTA: I think that is an accurate statement. I think it is absolutely naive to believe that. Any time you create a new liability and incur new costs, someone has to pay for it.

ASSEMBLYMAN LaROCCA: To me, that seems self-centered. I have another question which is a little legal. Do you think an auto

insurer could subrogate its medical claims under the homeowner's insurance policy, under the Kelly case? I won't hold it against you.

MR. VELOTTA: In all candor, I simply don't know.

ASSEMBLYMAN BOCCHINI: We have George Chamlin with us, and he may very well tell us. George, who may have stepped out for a moment, was the attorney for the plaintiff in that case. In all probability, I would presume that the standard medical coverages under insurance took care of that, as in most automobile negligence cases. Then when they brought Zak in-- I guess Zak was the third-party defendant in this; I don't know if subsequent to that they tried to subrogate. It would be interesting to find out.

I'm sorry, Assemblyman LaRocca; please continue.

ASSEMBLYMAN LaROCCA: He has appeared before our Banking Committee many times, but he faces the issues.

ASSEMBLYMAN BOCCHINI: Are there any other questions? (no response)

MR. VELOTTA: Thank you, Mr. Chairman. I appreciate your kindness in recognizing my problem, too.

ASSEMBLYMAN BOCCHINI: Thank you. Have a safe flight. Make sure you have insurance. (laughter)

May we have Sergeant Shopland and Trooper Cambria from the New Jersey State Police? You know, I was talking earlier today about the fact that there is a lot made out of what people observe about intoxication. If you can, as a result of what you were able to listen to today, I think the Committee members, the people from the media, and the other people interested in where these hearings are going, would like to know what the training is, so to speak, what you find to be the case in your everyday dealings with drunk driving here in the State of New Jersey, and what your feelings are about basic observations of persons who are intoxicated. Sergeant?

**SGT. ALFRED L. SHOPLAND:** Yes, sir. First a little on our background. Both Tom and I are with the Breath Test Unit of the New Jersey State Police. It is our sole function; we are not doing routine patrol anymore. We are more or less solely into the training aspect of the program.

I have been in the State Police for 17 years, the past 10 of which have been involved in the Breath Test Unit. For the past three years, it has been my job to train all police officers -- local, county, and State -- throughout the State of New Jersey in the area of breath testing and recognizing people under the influence of alcohol.

It is my opinion from observations I have made over the years that it is very difficult to tell from what a person manifests physically and that which is observable to a police officer or anyone else whether or not a person is under the influence of alcohol. It is very difficult to tell whether he is at the .10 level, slightly above the .10 level, or slightly below the .10 level, which, as I think everyone knows, is the legal definition of what constitutes operating a vehicle under the influence of alcohol.

Just from observations, balance tests, and so forth and so on, if an individual is anywhere close to .10, it is difficult to make any determination at that level, above, or below.

ASSEMBLYMAN BOCCHINI: Taking the person outside of the driving instance, in a social setting, at a party, in a tavern -- all right? -- a person who one might perceive-- Please stop me at any point where I am inaccurate in the representation I'm making. My understanding is that the consumption time for maximum exposure is one hour from your last drink.

SGT. SHOPLAND: Yes, sir.

ASSEMBLYMAN BOCCHINI: All right. Now, take any scenario, but for the sake of conversation, let's take a person who weighs 150 pounds, who has four or five drinks in a three-hour period. He then leaves a party, all things being equal, and has an accident on his way home. The ride happens to be about 45 minutes to an hour away, and maybe he finished his last drink 15 minutes before he left the party. He then has an accident 40 minutes later, you have him on the Breathalyzer at that point, and he achieves a reading.

SGT. SHOPLAND: Yes, sir.

ASSEMBLYMAN BOCCHINI: Is it fair to think that a person, one hour before, or 40 minutes before on these close ones, would be in a position to give a call, so to speak, that, "I think this guy is intoxicated," or "I think this lady is intoxicated"?

SGT. SHOPLAND: In my opinion, it is not fair to expect anyone to give an opinion such as that solely on observations he made in a social setting at a party that was going on. Even under the conditions you specified, the number of drinks and the size of the drinks would be critical. There are all kinds of different variables that enter in.

ASSEMBLYMAN BOCCHINI: I'm sorry, I should have said I was presuming one ounce, you know, one measured ounce of 80 proof.

SGT. SHOPLAND: Right. Okay, four ounces of 80 proof over a three-hour period would not get a person anywhere close to .10. As I was saying, there are all types of variables that enter in with regard to how high a blood alcohol level the individual will ultimately attain one hour after the last drink. You have stomach contents to consider; you have the weight, size, and body make-up of the individual; and, you have the strength and the amount of the alcohol consumed. All of these enter into the total picture. So, I would say it would be practically impossible for an individual not knowing about all of these things or exactly what they are, through simple observations of what the person is manifesting physically and mentally, to determine whether or not he is at the .10 level. You may be able to say from your observations, "Yes, I think he is slightly impaired, and I believe he has been drinking," but as far as saying he was at the legal limit, that would not be possible.

ASSEMBLYMAN BOCCHINI: If I may, from what Mr. Evans from the Department of Health put in front of us, from the Administrative Code I believe, it indicates that, "The term 'apparently' refers to the observable manifestations or symptoms of excessive indulgence in alcoholic beverages." Translated that means, it is obvious that someone drank too much. "It portrays a person so far under the influence of alcoholic beverages that his conduct and demeanor have departed from the normal pattern of behavior." He cites an ABC case. Then he goes into some observable manifestations and symptoms of intoxication taken from disciplinary cases. He cites things such as: difficulty in standing, staggering, use of profanity, loud and boisterous, urinating on a van in front of the premises, and attempting to climb on top of a cigarette machine.

Now obviously, I wouldn't think that person was apparently intoxicated. He was obviously ripped. But would you, based on that, have a feeling if you were going to use the Breathalyzer-- Would you have a guess about what type of a reading you would get from that test, assuming he was drinking? I am not trying to bring drugs or anything into this. I mean, does that sound like a description of your .10?

SGT. SHOPLAND: It could be; it may be or it may not be. Even with those bizarre acts going on, the acts this individual was performing, he may still be under the .10 legal limit.

ASSEMBLYMAN BOCCHINI: But, let me ask you this, because I am curious. I mean, I have my opinions, but--

SGT. SHOPLAND: (interrupting) I would say that most people performing those stunts would be above the .10.

ASSEMBLYMAN BOCCHINI: But there are others. I don't say this because Mr. Evans left; I actually wanted to call you right after Mr. Evans, but because the insurance representative had to leave, we delayed calling you.

Gentlemen, do you have any questions for the troopers? Bob?

ASSEMBLYMAN MARTIN: Yes. The Commissioner seemed to find fault with my problem of not being able to determine whether someone was under the influence at .10, or even as high, in my experience, as a .15. Just so we are clear on some of the facts, I had the privilege, if you will, of prosecuting a drunk driving case this Monday that took four hours, in which the defendant was over the legal limit of .10. Yet, we had a video tape on which the person performed and, as the judge commented in a reserved decision-- I don't know whether he found the person guilty or not; I wish I did. He said he would respond in a week, that he wanted to review the evidence. He had that much trouble with the case. But, the person was at about a .11 or .12, and yet they were able to make a video tape at which the judge commented that the person looked as though he could do it better than most people he had seen who he had found guilty in many cases. Would you find it to be true from your experience that that can frequently occur?

SGT. SHOPLAND: Yes, sir, it does.

ASSEMBLYMAN MARTIN: There was an expert in the case, a Mr. Zolman, and those of us who are in the business of either defending or prosecuting drunk driving cases know that he is recognized as being, if not the foremost, one of the foremost experts in the field. He stated in this case that it takes an hour to an hour and a half for the alcohol to reach its highest impact as far as getting into the bloodstream. In this case, he said, because the person during the time of consumption had, in fact, been eating food, it could be as long as two hours before the impact would occur. Would you think that is generally the case?

SGT. SHOPLAND: I would put the hour and a half at the extreme limit. Most people seem to think that an hour is the accepted time after the last drink at which an individual will attain his highest BAC level.

ASSEMBLYMAN MARTIN: And with respect to weight, that is also a major consideration, isn't it? I mean, it will take someone with a greater weight a longer period of time before the alcohol is fully ingested into the bloodstream.

SGT. SHOPLAND: No, not really. The weight would have a bearing on the concentration of the alcohol in the body -- okay? -- the weight, the size, and the body make-up, plus the percentage of muscle versus fat. The weight would have a bearing on it, but not really--

ASSEMBLYMAN BOCCHINI: (interrupting) I might have to have a few more drinks than Nick, in the same period of time, for us both to be at an equal--

SGT. SHOPLAND: (interrupting) An equal BAC.

ASSEMBLYMAN BOCCHINI: An equal BAC, right.

SGT. SHOPLAND: Since you are a larger individual, it would take more ounces of the same type of a beverage to get you to the same level.

ASSEMBLYMAN MARTIN: Just one other question. As was stated by the Commissioner, I know that case law says that one can visibly, without a Breathalyzer and without a blood test, make a finding of guilty on someone being under the influence. But, when you make a

determination which does not rely solely on a machine or a blood test, how much of your reliance is dependent upon physical balance tests as opposed to just observations?

SGT. SHOPLAND: They are both very crucial. We try to emphasize to the officer we train to make his decision at the scene as to whether or not the individual is under the influence. The decision is made through general observations, overall observations, such as erratic driving, slurred speech, bloodshot eyes, the manner in which they present their credentials, if they have a problem finding their registration or license, fumbling with their hands -- all these things enter the picture. We also ask officers to try to get balance tests done at the scene to help with their observations when presenting their case.

ASSEMBLYMAN MARTIN: See, I guess my point is-- As far as I know, you are able to make a determination based upon operation of the vehicle, physical balance tests, a reading of either blood or Breathalyzer, and visual observations. If you take away those first three and you only have visual observations of the person, it becomes a much more difficult task.

SGT. SHOPLAND: Right. There are three elements we teach which have to be established. First, you have the individual who was actually operating the vehicle. The next thing is if there is some type of impairment of the subject that is observable on your part. And, the last element is that either alcohol or drugs are involved. The first and the last are relatively easy to establish. Usually it is an on-view, you have actually seen the individual operating the vehicle. So, you have operation established.

As far as alcohol being present, if you have the odor of an alcoholic beverage on the breath, you have the presence of alcohol. Now, the center one, whether or not you have impairment, is usually the tough one. This is gained through your observations, the erratic driving you testify to, swerving over into the opposite lane of traffic, and, after you get him stopped, the slurred speech, fumbling for his credentials, or any other bizarre things that may happen. One officer told me a week or two ago about a fellow he had out of the car

administering balance tests to, the guy bent over, and as he bent over he dropped his Marlboro cigarettes out of his pocket, and his eyeglasses also fell out on the pavement. He bent over to pick up his cigarettes and he crushed his eyeglasses as he stepped on them. So, observations such as this are crucial and we try to have the officers be alert for things such as this, general observations, as well as all the classic ones that are brought out time after time in court as far as balance, leaning for stability, feet wide apart for balance, and so forth and so on.

All these things enter into the officer's determination as to whether or not to make an arrest for operating under the influence.

ASSEMBLYMAN BOCCHINI: Sergeant, how much training goes into a trooper or a police officer in relation to preparation for working on a DWI task force, or the training of a trooper in general in relation to drunk driving offenses? Is there any set criteria, any number of specialty hours put into that?

SGT. SHOPLAND: Well, we offer two courses in the Division of State Police. They are both 40-hour courses. One pertains mostly to breath-testing operators to operate different types of breath-testing apparatus. That is the one I am involved with.

ASSEMBLYMAN BOCCHINI: How about as far as physical observations and things of a less technical nature, you know, the observations standpoint?

SGT. SHOPLAND: This is more the bailiwick of the other training team. There are two other sergeants involved in that.

ASSEMBLYMAN BOCCHINI: Do you know approximately how long a course that is?

SGT. SHOPLAND: That is a 40-hour course. The main goal of that course is to teach officers detection, apprehension, and conviction of people suspected of being under the influence of alcohol or drugs.

ASSEMBLYMAN BOCCHINI: So, is it a fair assumption on my part to think that the average citizen would not necessarily be as equipped to detect, in a social setting, or for that matter— We'll take the average citizen first. He would not be as equipped to recognize a person under the influence as easily as an officer would be.

SGT. SHOPLAND: Yes, sir, that would be a fair assumption.

ASSEMBLYMAN BOCCHINI: In the same sense, is it a fair assumption, even though a tavern owner, a restaurateur, or a beverage licensee is involved in the business and has the experience of serving customers, seeing customers, and so forth, that they would be less inclined to be able to detect a person's sobriety, or develop an opinion of it outside of the obvious cases, than a trooper or another trained police officer?

SGT. SHOPLAND: Yes, sir.

**TROOPER THOMAS J. CAMBRIA:** If I might add something to that, I think probably the most valuable experience that the police officer gets in the detection of drinking drivers comes from dealing with them on an everyday basis on the road and participating in drinking/driving arrests. That kind of exposure you can't talk of in terms of hours, minutes, or weeks. But that is certainly valuable exposure, and it certainly enables a police officer to assess the condition of a person who has been drinking as much as, or more than, any school or any course that he can go through. Again, that is the sort of experience that is not available to just anyone.

ASSEMBLYMAN BOCCHINI: Gentlemen, are there any other questions? (no response) Troopers, thank you. I appreciate your giving us your view of this particular problem. Thank you.

SGT. SHOPLAND: Thank you.

ASSEMBLYMAN BOCCHINI: Obviously, I am not going to get to everyone today. We are going to go until four-thirty, all right? If need be, we will try to arrange an agreed upon date to have another hearing, which I think is probably going to be necessary.

I would like to hear from someone from the industry, as far as the tavern owners are concerned. If I could, I would like to hear from Carmen Giletto, President of the New Jersey Licensed Beverage Association. Immediately following him, I would like to hear -- because I know he has been sitting here all afternoon -- George Chamlin, who was the attorney for the plaintiff in the Kelly case. How are you today, Carmen?

**CARMEN GILETTO:** Mr. Chairman, I want to thank you and your fellow Assemblyman for the opportunity to pass on some of our remarks to this

Committee. The gentleman who just passed out the literature in front of you is Wilbur Smith. He is the insurance chairman for our Association. You will see on some of the accounts (witness refers to printed material) that there are no names; there are account numbers for the insurance companies that handle these accounts. It shows you some of the escalated prices they had from year to year.

I don't want to be repetitious, so I will stand on a lot of the testimony—

ASSEMBLYMAN BOCCHINI: (interrupting) Is it coincidental that two of these accounts are in my legislative district? (laughter)

MR. GILETTO: (continuing) —you have heard verifying that there is a problem, and not only in our industry. There is also a civic problem. The people who are causing the problem -- the drunkards, may I say — are obnoxious persons whom we do not want in our establishments. You heard testimony that we are punished for serving people who are intoxicated; we stand to lose our licenses; and, we are subject to heavy fines. Not only that, but that type of person can disrupt your establishment and cause you to lose a great deal of business.

I must tell you about myself. Being of Italian extraction, I have been around alcohol as long as I can remember. Probably before I went to school, I was treated with a glass of wine and an egg, or something to keep me warm, because that was their philosophy. I never remember in all my lifetime anyone getting me drunk. It was always me taking care of myself. I don't think of anyone being forced to take the glass in his hand and pour it down his throat.

That leads me to tell you about our State raising the drinking age to 21, and telling us, the licensees, that we feel a person at the age of 21 is a responsible person, that he is at the age when he should be his own keeper, and that he shouldn't have to have someone else be his keeper. We feel responsibility for any type of drinking, whether it is drinking and driving, or drinking and walking, is totally up to the person who consumes the alcohol.

ASSEMBLYMAN BOCCHINI: Yes, but Carmen, let me stop you for just a second. I know you, and I know a lot of the people who are in the business who are here today, and I know for a fact that if you had someone in your establishment, you would cut him off.

MR. GILETTO: Yes.

ASSEMBLYMAN BOCCHINI: As would Steve, and Jo-Jo, and any of the other guys I happen to notice in here. I don't want you to paint a picture of yourself.

MR. GILETTO: All right, but what I'm saying is, yes, we are responsible people. I'm saying that the individual knows before we know that he has reached his limit; he should know his limit. The point I am trying to make is, the person who drinks and drives has an scapegoat. He has someone to look to: "I didn't do it; the devil made me do it," and who is the devil? The tavern owner is the devil. That is not a true picture. A person, when he comes into our establishment, has to conduct himself in an orderly manner. He has to drink moderately, the way we dispense our alcohol. We feel that the social host may not be as conscious as we, the licensees. The social host may be a little more sociable. He may take you into his house, maybe get the biggest glass he has in his cupboard, fill it with ice, and say, "Here, help yourself," whereas we, as licensees, will measure our drinks for two reasons: to make sure that we serve it moderately, and to make sure that we make a profit on our item.

There are other things that are happening in our industry that are hurting us a great deal. We see things happening where -- excuse me for saying this, I know there are a few attorneys on the panel -- lawyers are looking for deep pockets. They are looking for people to attack in order to reap their harvest. For instance, I was driving down to work the other day and I heard a commercial. The commercial sounded like an undertaker selling a funeral plot. His tone of voice was sort of preaching a sermon: "If you have been in an accident, or if you know anyone who has been in an accident involving drunken driving, come to our offices. We will defend you at no charge." This, to me, was an ambulance chaser looking to find someone to sue. What happens to citizens? What happens to people who aren't involved with drunken driving? Are we looking at them, or are we just looking at people who are involved with alcohol to attack? A person who drives an automobile is restricted to having \$15,000 and \$30,000 worth of insurance only. What happens if he cripples or maims somebody and he has nothing else but that insurance?

ASSEMBLYMAN BOCCHINI: You know, that is a good point.

MR. GILETTO: Who do you go after? Fifty percent of the accidents are not related to alcohol, so they say.

ASSEMBLYMAN BOCCHINI: You just made a good point. If I said that, some people would be quick to say, "That is a lawyer speaking." But the fact is -- putting the lawyer out of me for the moment -- there are amounts and coverages that people are forced to carry for the protection of their businesses, but we do have people, and all they are carrying is \$15,000 and \$25,000, or maybe nothing sometimes. You know, it's food for thought.

MR. GILETTO: Well, why are they looking for a deeper pocket? They are looking for a deeper pocket because they don't have enough to begin with to overcome the situation that the person was put into, or the damages they created, so they have to look for a deeper pocket. If the pocket was deep enough to begin with, they wouldn't look any further.

I know of some John Doe suits that have occurred throughout the State, where an attorney subpoenaed 10 taverns in an area, and didn't even know that the person wasn't in any of them. He was just in that specific area. For instance, in the Pemberton area, there were three taverns where the person had never been. They knew nothing of him. When it came out in the trial, the suit was against all of the taverns in the Pemberton area. The person who creates the accident uses someone else for a scapegoat too. That is the person who should be totally responsible for his actions.

How about the automobile itself? Maybe the automobile industry should be looked into a little bit. Maybe the automobiles are not as safe as people say they are. The people I see in accidents are always related to drinking and driving, but it is also driving and drinking. There may be things we can do so that a person could not operate a vehicle if he was impaired or if he was under the influence. I think California is experimenting with a computer type thing. When you turn the ignition on in the car a computer comes up, and you have to hit a certain number in order to get the car started. The number changes continuously; every time you miss, the number will change again. Maybe something like this should be looked at to correct the situation.

I'm sure this Committee isn't just here to look for benefits for insuring people for liability. I'm sure you are interested in correcting the drunken driving situation too.

ASSEMBLYMAN BOCCHINI: We are, but I think we are also concerned about -- at least I am concerned about from my own personal standpoint, Carmen-- I see, based on what you have shown in these few examples set forth on your material in front of me, on the premium deviation, where you go from a \$700 premium on a \$500,000 policy in 1984, to a \$100,000 policy in 1985 with a premium of \$7,500, a better than 1000% increase. If you look down at a number such as the one in Closter, they went from \$800 for a \$500,000 policy to \$8,050 in a one-year swing. I know the Commissioner has left, but please be certain that this ends up in the record.

They are the things that give me big, big problems because, you know, right, wrong, or somewhere in-between, that is outrageous. That just doesn't make sense from a standpoint of how-- When I look at these numbers -- I don't know what your feelings are, gentlemen -- but someone is getting really -- you know what. I have a feeling that in this instance, as far as the insurance question is concerned and what it is costing you for insurance, you are the guys who are getting you know what. Look, I have no sympathy for a person who does the wrong thing, and I don't think you do either, as far as an instance where someone becomes intoxicated and it becomes obvious, and you should have done something, but you didn't do something. All right? That is not the issue. The big issue here is, how are we going to go about correcting this? I think we are going to need some input from your people, Carmen, as to where you think this industry should go, or the Insurance Department should go, as far as rates are concerned. I know it has been made quite evident and clear here this afternoon that as a result of the deregulation in commercial insurance, the market that was supposed to have been competitive has turned out to be -- at least in my estimation -- destructive.

I would like to know, for example, what the feeling is of the tavern owners across the State -- the licensees across the State -- about the possibility of mandatory insurance for licensees statewide. You do the right thing; possibly the next guy doesn't. Do we open up a

larger market if we deregulate? At what limits do we put that? You might want to put a minimum amount that you could write, but you would also have the ability to buy excess coverage. I understand you can buy excess at a cheaper rate, compared to the initial amounts. I'm learning things as I go along here.

MR. GILETTO: We have the umbrella. Mr. Chairman, there is one thing that was told to me by some insurance people. We questioned the rates and we knew they were gouging us because, as you heard in testimony, there was only one company writing the insurance. You can rest assured that this company had an opportunity to actually — I won't use a harsh term -- gouge us.

We came to the conclusion with the people we met with that because of the enormous costs to represent a person who is being sued-- For instance, if a person has a third-party liability suit against him, it costs between \$10,000 and \$14,000 to defend him. The ratio breaks down to about a 75% win ratio and a 25% loss ratio.

ASSEMBLYMAN BOCCHINI: Where are you getting those statistics, Carmen?

MR. GILETTO: These statistics were from an insurance broker I spoke to. I'm using the terms, but they are not verified. The point I am trying to interject is, it costs so much to represent the person, that the costs are incurred by the person who is being defended. Now, if the person who is the plaintiff who lost a suit was liable to incur the costs that the defendant had in winning the suit, you wouldn't see so many picayune suits come up. When a person knows he doesn't have a chance to win a suit, he is not going to take a chance if it is going to cost him money to sue. But, if a person has someone behind him, he'll say, "Well, yes, let's take a chance. Let's sue him."

ASSEMBLYMAN BOCCHINI: I don't know about that, Carmen. If someone comes into a given law office and you analyze the case — I guess there are some people who would take anything in -- in that type of an instance most law firms will work off of a percentage of the recovery, as would be allowed under the rules as set forth by the Supreme Court here in New Jersey. If a case looks like a lemon, so to speak, or that it is not going to be a case where there will be a recovery, odds are that most attorneys, I would think, would probably

say, "Gee, you may think you have a case," doing it as politely as possible, but saying, "I don't think we could succeed in it. If you want to call Mr. Martin, go right ahead." Mr. Martin is going to send him to Mr. Schuber, and so forth.

MR. GILETTO: But, if the attorney knew it would be a bigger expense, I think he would find more lemons.

ASSEMBLYMAN MARTIN: I have one question. Where you list the increases as far as premiums from 1984 to 1985 are concerned, if we are going to use this as a reference, can you represent to us that these policyholders did not have any suits brought against them during that year?

ASSEMBLYMAN BOCCHINI: That is a good question.

MR. GILETTO: I will let Mr. Smith answer it.

WILBUR SMITH: No, not all of them. The second one is a pending suit.

ASSEMBLYMAN MARTIN: That would be DAN 215? (referring to list provided by Mr. Giletto)

MR. SMITH: Yes, the one in Boonton. They have a pending suit. The others, to my knowledge, and this was updated yesterday -- it's right up to the minute -- are claim free.

ASSEMBLYMAN BOCCHINI: Excuse me?

MR. SMITH: They are claim free.

ASSEMBLYMAN BOCCHINI: Oh, they're claim free.

MR. SMITH: Except for the second one, which is a pending case.

MR. GILETTO: My own personal third-party liability insurance was \$1,200 last year and it's \$5,500 this year. I didn't renew it yet; I can't afford it.

ASSEMBLYMAN LaROCCA: Mr. Chairman?

ASSEMBLYMAN BOCCHINI: Nick?

ASSEMBLYMAN LaROCCA: Are a number of insurance companies involved in doing the writing? Are there more than one, or quite a few?

MR. GILETTO: There was just one in the whole State writing it. We just found out today that there are two more companies that will pick it up. Commissioner Gluck has--

ASSEMBLYMAN LaROCCA: (interrupting) What is the rating of that company, do you know?

MR. GILETTO: The company that is writing us is a "C" company. Wilbur, you answer this.

MR. SMITH: I have not yet heard the rating on the company they just approved. It was held up until they put up additional financing to satisfy the Insurance Department. Insurance Commissioner Gluck mentioned today that they have been approved. We still have to find out what their assets are and what their rating is. However, let me say this: When you talk about rating, the best report is the guidebook for the insurance industry on rating. When they say an "A" or an "AA" rating, that does not satisfy me. The bottom line is what we look at, and that is their assets. For instance, take some of the companies which got into difficulty this past year that had a \$40 million asset. No way can a \$40 million company hold up in today's market, yet they were writing a lot of insurance, and that company is the company that was permitted to put its hand into the State fund to bail them out.

The other company, Integrity, had \$100 million, and that is still not enough money in today's market, with inflation, with the claims we are talking about, and the high value of claims.

ASSEMBLYMAN LaROCCA: To what do you attribute the difference in premiums, the raises from 1984 to 1985 on this sampling of account numbers you gave us? Is it the area, the number of people, or the number of claims? For instance, I see Boonton. Well, I know where that is.

MR. SMITH: It's up in Morris County.

ASSEMBLYMAN LaROCCA: There may be only four gin mills in Boonton, but it jumped from \$700 to \$7,500. Is it the location, the people, or are there more in East Brunswick than New Brunswick?

MR. SMITH: No. You heard a lot of very valuable comments from Insurance Commissioner Gluck and Assistant Commissioner Joe Kenney. Mr. Kenney mentioned that in 1978 they deregulated the commercial lines, so they have no control over what they are charging. Previously, they had to submit to the Insurance Department to get their premiums or rates approved before they could use them. What he was primarily talking about was premises liability and the package, not liquor law liability. Two years ago, the companies -- he said they

went out to cut each other's throats and they were cutting premiums ridiculously -- were looking for cash flow, and they made a big mistake because the market wasn't that good, my own company included, which lost money for two years. They all lost money on the commercial lines, and they admitted it. It really hurt because they were not doing it actuarially the way they should have been doing it. All they were looking for was cash flow.

But, let's talk about liquor law liability separately. Eight or nine years ago -- and that's not too far back -- we were paying in the neighborhood of \$100 for a \$300,000 limit, with a \$100,000 gross. I was paying \$85 for that eight or nine years ago. Now you can see the premiums we show you on that list within a period of eight or nine years. What has happened? The business hasn't changed that much, but the claim situation has changed. Once you start publicizing high judgments, that just escalates and brings on more and more. Prior to eight or nine years ago, we didn't have that claim situation problem, nor the legal problem, so to speak. But, little by little, it grew, and today it is really out of control. All we have to do is serve a person one drink, and if he goes out and has an accident, we're it.

ASSEMBLYMAN BOCCHINI: I failed to bring something else up with Hazel which I found unique, and there is a certain logic to it. I understand that premiums for liquor liability are based on the amount of sales. Is that correct?

MR. SMITH: That's correct. They set the rate per 100 and multiply that by your gross sales. But that rate per 100 in recent--

ASSEMBLYMAN BOCCHINI: (interrupting) No one has control over that.

MR. SMITH: That's right, sir. In recent years, they just pick it out of the air. They do whatever they want. When the companies are down to two and one, they have complete control. They have us in a bad position. They are in the driver's seat and they make the quotes. I said to the one in Boonton-- He has a pending claim, so they upped his premium 10 times, as you see on that sheet. They said, "Take it or leave it." They had already issued the policy. He said, "I can't afford to pay it." We're talking about a small tavern. They sent him a 30-day notice. The 30 days are up and he is without any insurance.

One of the things that hurts us -- and it was mentioned before by the Chairman -- is the low limit on automobiles, \$15,000 and \$30,000. The lawyers have told us repeatedly, "The automobile involved only has \$15,000 and \$30,000. That isn't any good to me. I have to come after you because you have the insurance with limits, or at least you have more money than the fellow who was driving the car who created the accident." A \$15,000 and \$30,000 limit creates a problem right at the beginning. You, being lawyers, understand that because \$15,000 and \$30,000 isn't going to do you any good in a claim that has serious injuries or a death. You are going to go after the liquor law liability.

As of today, I would say 40% of our licensees are without insurance. They are forced to be without it because of the premiums. This is not a good situation. Not only is the licensee unprotected, the employee is unprotected too. Now, when we have insurance, we repeatedly tell them at our meetings and in our newsletters, "The basic liquor law liability policy does not cover the employee." If you are a corporation, it covers the officers, but it doesn't cover the employees. You can endorse it for a couple of hundred dollars to cover everybody, and that is what we tell them to do so they do not leave an employee out on a limb if he happens to be the server. But now without insurance, nobody has anything. It's a very dangerous situation. I want to tell you, we're very scared. We can't afford to be in a position like this.

ASSEMBLYMAN LaROCCA: On the positive side, what suggestions do you have to relieve such a situation?

MR. SMITH: Well, we need legislation that will help the situation and will help to bring the insurance market back. The insurance market is not going to come back the way things are, and I don't blame them. They can't afford to come back.

ASSEMBLYMAN LaROCCA: Along what lines, not specifically, but—

MR. GILETTO: There are other states that-- Well, I think the exact amount is either 15 or 17 states which are similar to ours. There are states, such as Connecticut, which have a limitation of \$20,000. Our own Workmen's Compensation laws are in the \$20,000

bracket and a person can incur much more injury than that. California has abolished it completely. There are other states that are following the same pattern, and there are states that never had it.

I think maybe this Committee should take a very good look at a complete abolishment of third-party liability. Maybe the responsibility should be on the consumer, as it is in California.

ASSEMBLYMAN LaROCCA: Can you go into a little bit more detail as to what your organization, the Licensed Beverage Association, would prefer, so we can have something positive that at least you would like?

MR. SMITH: We haven't arrived at that point yet.

MR. GILETTO: I can tell you, we would prefer complete abolishment. We would prefer that the licensees that operate the motor vehicles, whether they drink or they do not drink, share the responsibility for the burden of the highways. The automobile is part of the problem; the driver is part of the problem. They claim that 50% of the accidents -- I don't know if that figure is authentic -- are caused by drunken driving. That means that 50% of the driving public isn't protected. So maybe we should look at the five million licensees, the people who have a driver's license, maybe paying a small amount such as \$5.00. That would generate \$15 million in the State to have a pool for people who are injured, and it could take care of our citizens whether they got hit by a drunken driver or a sober driver.

ASSEMBLYMAN LaROCCA: As an alternative to that, or another possibility, how would your organization feel about something like Workmen's Compensation maybe, to spread the risk?

MR. GILETTO: Providing it was reasonable and fair. But it couldn't stay specifically in our industry. It would have to stay with the driving public. We're talking about automobiles, we're talking about drivers, and we're talking about people getting hurt on highways. We want to protect everybody, I'm sure.

ASSEMBLYMAN BOCCHINI: Are there any questions from the other members of the Committee?

ASSEMBLYMAN SCHUBER: Mr. Chairman, I appreciate the problems. Obviously, one of the things Mr. Giletto has spoken about is