

PUBLIC HEARING

before

COMMISSION ON ALCOHOLIC BEVERAGE LIABILITY

on

(Social Host Liability)

ASSEMBLY BILL 43

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

ASSEMBLY BILL 347

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

SENATE BILL 2122

(Limits the scope of host liability for drunk driving by guests)

Held:
April 25, 1985
Linden City Hall
Linden, New Jersey

MEMBERS OF COMMISSION PRESENT:

Senator Raymond Lesniak, Chairman
Assemblyman Joseph L. Bocchini, Jr., Vice Chairman
Senator Gerald Cardinale
Assemblyman Newton E. Miller
Murray A. Laiks, Esq.
Elmer J. Herrmann, Jr., Esq.
Lawrence Toborowsky
Richard Levinson

ALSO PRESENT:

Geraldine Weltman
Office of Legislative Services
Aide, Commission on Alcoholic Beverage Liability

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New Jersey State Library

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New Jersey State Library



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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.

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.

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.

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.

SENATE, No. 2122

STATE OF NEW JERSEY

INTRODUCED SEPTEMBER 13, 1984

By Senators CARDINALE, FELDMAN, CONNORS, LASKIN, HAGEDORN, FORAN, CONTILLO, HURLEY, McMANIMON, DiFRANCESCO, DORSEY, EWING, DUMONT, BASSANO, GORMLEY, SAXTON, HIRKALA, BUBBA and GARIBALDI

Referred to Committee on Law, Public Safety and Defense

AN ACT concerning limitations on actions against persons providing alcoholic beverages to others 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. As used in this act:

2 "Visibly intoxicated" means a degree of intoxication, accom-
3 panied by an act or series of actions or some other clearly un-
4 mistakable sign of intoxication. Evidence of failure to pass a test
5 to determine the presence of alcohol in the blood or urine shall be
6 insufficient, in the absence of corroborating evidence, of visible
7 intoxication within the meaning of this act.

1 2. No action at law, either for injury to the person or for injury
2 to real or personal property, arising out of a motor vehicle accident
3 caused by the negligent or otherwise illegal operation of a vehicle
4 resulting from the excessive consumption of alcoholic beverages,
5 shall lie against any person, or the estate of any person, for having
6 provided alcoholic beverages to any driver at or over the autho-
7 rized age for the purchase and consumption of alcoholic beverages,
8 except where:

9 a. The person furnished the alcoholic beverages as a licensee
10 or as the employee of a licensee under Title 33 of the Revised
11 Statutes, and knew or had reasonable cause to know that the pur-

12 chaser was visibly intoxicated and knew or should have known
13 that the person would operate a motor vehicle reasonably soon
14 thereafter; or

15 b. Where the person is not a licensee or employee of a licensee
16 under Title 33 of the Revised Statutes, the person willfully and
17 knowingly, manifesting extreme indifference to the rights of others,
18 served the alcoholic beverages to a person who was visibly intoxi-
19 cated in his presence, and who he knew or should have known
20 would operate a motor vehicle reasonably soon thereafter.

1 3. This act shall take effect immediately.

STATEMENT

This bill would substantially limit the scope of host liability recently created by the New Jersey Supreme Court in *Kelly v. Gwinnet*, A-96/97 (1984), in which the court extended liability for injuries arising out of a motor vehicle accident caused by an intoxicated driver to a social host who served drinks to the driver prior to the accident. That case was and is without precedent anywhere in the country.

In opening the door to social host liability the court utilized ordinary standards of negligence and placed no limitations on the amount of a potential recovery. Thus, the way is clear for the court to easily extend this liability far beyond the particular circumstances of this case. The consequences of such a decision require immediate legislative action.

First, the decision will create an immediate climate of fear and uncertainty with the general public. Homeowners' and apartment-dwellers' insurance rates will inevitably rise. And they will rise for those who do not serve alcoholic beverages and those who serve alcoholic beverages responsibly, as well as for those who serve alcoholic beverages in an irresponsible manner. Many apartment dwellers do not carry insurance and thus would be subject to unlimited individual liability. And if they cannot afford it, they surely would be financially ruined by an unlimited liability lawsuit.

Secondly, the decision will subject individuals to unlimited liability situations where they may bear only marginal, or at best partial responsibility, but because of limitations of proof of independent or intervening factors they will be forced to shoulder the burden. For instance, a social host has no effective way of proving that a guest did not drink immediately before leaving his home. Nor could he prove if the guest ingested any form of drugs in addition to the alcohol he had served. Social guests do not ordinarily announce how many drinks they have had on arrival, and

many problem drinkers are quite effective at masking their level of consumption, thus further complicating the situations of proof in these cases.

While this decision only speaks in terms of "visible intoxication," the only proof is a level of intoxication measured by a test taken sometime subsequent to the serving of the drinks, a test which ordinarily would only be one given to determine the blood-alcohol level, not the presence of drugs.

Because a social host is not the party at fault for the accident, and because there are other, much more direct avenues of redress for injured parties, it seems grossly unfair to hold hosts responsible except in extreme circumstances where their behavior is egregious and their culpability is manifest.

This bill, therefore, would require, in order to establish liability on the part of a social host, that he willfully and knowingly, manifesting extreme indifference to the rights of others, serve a visibly intoxicated person, knowing in all likelihood that the guest would be driving a car within a reasonable period of time.

The standard for an alcoholic beverage license holder, however, would be substantially less, and it would require license holders to refuse to provide alcoholic beverages to visibly intoxicated persons.

SENATOR RAYMOND LESNIAK (Chairman): I call to order the first hearing of the Commission on Alcoholic Beverage Liability. This Commission was formed pursuant to a legislative resolution to study and make recommendations on the responsibilities of private hosts in serving alcoholic beverages to guests, to find effective ways to reduce alcohol-related accidents and injuries, to justly compensate victims of these accidents, to study the impact of social host liability on homeowners' and renters' insurance, to make a distinction between the duties of private hosts and those of alcoholic beverage licensees, and to address any other topic related to the issue of social host liability.

Those areas were the subjects we outlined in our organizational meeting pursuant to the resolution authorizing this Commission.

I would like to introduce the members of the Commission: I am Senator Raymond Lesniak from the 20th Legislative District; to my left is Senator Gerald Cardinale from the 39th Legislative District; next to him is Assemblyman Newton Miller from the 34th Legislative District -- by the way, I want to thank you two gentlemen for traveling such a long distance to be here -- Murray Laiks from Passaic County -- Murray, raise your hand so everyone will know who you are. Oh, there are name plates up here. The other members are Elmer Herrmann, Lawrence Toborowsky, and Richard Levinson. To Mr. Levinson's right is Garry Furnari, whom I have appointed general counsel to this Commission. Behind me is Gerrie Weltman, staff member from the Office of Legislative Services, who has been appointed as secretary to this Commission.

At the outset, I would like to thank the City of Linden for affording us the opportunity to use the facilities here. I would like to thank and acknowledge the presence of Val Imbriaco, who is the City Clerk. Val, thank you very much.

We are going to have a second hearing which has already been scheduled for Thursday, May 9, again between the hours of 7:30 p.m. and 9:30 p.m. It will be held in the City of Hackensack, but the exact location has not yet been determined. We may have a third hearing if the Commission decides it is warranted, which would be at a location in South Jersey.

The people who have notified us ahead of time that they would like to testify here, or whom we sought out, are Dr. David Lester from the Rutgers University Alcohol Studies Program and Dave Evans from the New Jersey Department of Health, Division on Alcoholism. In place of Major Anthony Blanda, who couldn't make it tonight, will be Lt. Fred Lane and Capt. Ed Marinelli from the Division of State Police Breath Testing Unit; Byron Kath from the Northeast Public Safety Institute; Donna Ferrante and Terry Corvino from Mothers Against Drunk Driving; and, Carmen Giletto and Wilbur Smith from the New Jersey Licensed Beverage Association.

By the way, if you hear Senator Cardinale sneeze a couple of times, it is because he is sick. He looks a little pale, so if he has to leave early, he certainly will be excused. I want to thank him for making a special effort to come tonight.

If there is anyone else who wishes to testify tonight -- Gerrie, if you would go down here to my right -- please give your name to our secretary. If you are with an organization or are representing an organization, please give that information to Gerrie. Is there anyone else who would like to testify whom I have not mentioned? (no response) Okay.

Would any member of the Commission like to make any comments at this point? (negative response) Okay, we will get on with the testimony.

First, we would like to hear from Dr. David Lester from the Rutgers University Alcohol Studies Program. Dr. Lester, thank you very much for taking the time to come tonight and for affording us your professional opinion on this subject.

DR. DAVID LESTER: Thank you, Senator Lesniak. It is a pleasure to be here.

I think what the Commission is faced with essentially is a definition of "visably or recognizably intoxicated persons" by nonprofessional observers -- that is, social hosts. There are three points I would like to make.

SENATOR LESNIAK: Doctor, before you get into the substance of your testimony, will you give us a very brief synopsis of your experience in this regard?

DR. LESTER Yes. I have a doctorate in organic chemistry that I received a number of years ago -- 45 years ago, to be exact -- from Yale University. For the past 45 years, I have been connected with what is now the Center for Alcohol Studies at Rutgers University. We were at Yale from 1949 to 1962.

Besides being a biochemist, I am a member of the graduate faculty in psychology at Rutgers University. For two years -- from 1980 to 1982 -- I was Director of Graduate Studies for the Program in Pharmacology and Toxicology, which deals with drugs. For a period five years -- from 1978 to 1983 -- I was Scientific Director of the National Alcohol Research Center at Rutgers, which is pursuing a long-term longitudinal study of the development of alcoholism.

I have published extensively in this area with regard to the biochemistry of alcohol and the effects of alcohol in both humans and various animal species. I have conducted extensive research in this area also.

SENATOR LESNJAK: You certainly qualify to testify, Doctor.
(laughter)

DR. LESTER: If you have any other questions with regard to my professional competence, I would be very happy to answer them.

SENATOR LESNJAK: I just wanted to make sure we got that on the record, which will be transcribed and available to the general public, and which we will take into consideration in our deliberations. Thank you very much, Doctor; please go on.

DR. LESTER: As I started to say at the beginning, I think it is pretty clear to all of us that alcohol is an intoxicating agent. I think it is also clear to us that the more alcohol there is circulating in the tissues of the body, the greater the effects of the alcohol. The specific effects we are concerned about are not whether alcohol causes liver cirrhosis or various other impairments, but the impairments it causes to the central nervous system which are visible to us in the form of intoxication -- that is to say, the effects of alcohol on gross and fine motor performance: the ability of an individual, as a result of taking alcohol, to sit, stand, and walk; his ability to handle papers; his ability to hold a glass without tremor;

and, his ability to not fumble. If any of you have seen the Police Alcohol Influence Reports, you know that the police always look for an individual who fumbles for his license in getting it out of his billfold. This becomes -- at least for certain police officers -- an indication of whether or not an individual is under the influence of alcohol. Gross and fine motor performance is a visible sign that does not necessarily have to be tested. You can see it by the individual's ability to walk, stand, or sit and whether or not he is performing in a normal manner -- whether he, in fact, has been impaired or his performance degraded in any way as a result of his intake of alcohol.

The second thing is the effect on speech. Alcohol has increasing effects on speech, articulation, and the manner and subject content of what the individual says -- that is, his coherence. It also has an effect on the amount of speech. Most people increase what they have to say under the influence of alcohol. Changes in speech and speech patterns are a criterion that one can use to determine whether or not that individual has been affected by alcohol.

The third thing that can be seen is the effect on behavior. I think all of us here understand that alcohol, by whatever mechanism, loosens the inhibitions so that individuals are apt to do things that they might ordinarily restrain themselves from doing when they are sober. A whole variety of things can take place. In this particular aspect of the Commission's search for some sort of solution to this problem, I think I would like to point out a distinction that ought to be made between the social host and the licensee.

It seems to me that a social host is in a position where he is serving or providing alcohol to an individual whom he knows. He can make a better judgment as to whether that individual's behavior has changed than a licensee can. A licensee has a stranger come into his bar and he doesn't know what his normal behavior is and how he responds to other people -- whether he is normally aggressive or whether he is normally quiet. The social host, on the other hand, has an advantage in this respect. Even though he may be an essentially inexperienced observer of intoxication, he is an experienced observer of the people he invites into his home.

Those are really the three things which are grossly evident by just observation, without the performance of any tests. I don't need to tell you that there are any number of very sensitive tests which have been devised and have been used experimentally by the police, and which can tell if an individual has been affected by alcohol at levels which may not produce the visible signs of intoxication that I am talking about. It has been my experience from reading thousands of police reports, from seeing hundreds of video tapes of individuals who have been arrested for drunken driving, etc., that by and large, at levels which the statutes of this State say indicate impairment or under the influence on the part of a driver, also show observable, grossly evident signs of intoxication.

One tenth of one percent, which is the level used in this State for deciding if an individual is under the influence, is also a level at which there are signs and symptoms of intoxication which can be seen without the necessity of any particular tests -- that is, walking a straight line, touching a finger to the nose, etc.

It is my own belief that at levels 50% higher, even the naive observer will have no difficulty determining if an individual is intoxicated or sober. In my opinion, that is true whether or not that individual is a light drinker, a moderate drinker, or a heavy drinker. There are numerous studies which show that at levels above .15% -- that is 50% higher-- That means that seven or eight ounces of 80-proof whiskey are circulating in the blood of an adult male. That is a lot of alcohol. At these levels, even the naive observer will have no difficulty distinguishing the fact that that individual is under the influence and is exhibiting one or more signs and symptoms of intoxication of one or more of the three categories that I believe are the categories which show the signs of visible intoxication.

I would like to make one more comment, and that is, I have had a chance to examine the three legislative proposals that have been introduced. I find it difficult to make the distinction that some of these proposals make. The proposals indicate that what the Commission, or what the Legislature, is concerned with is drunken driving. The fact is, gentlemen, there are many cases in this State where

individuals are intoxicated, do not drive an automobile, but are hit by an automobile, and it is the pedestrian's fault. There are many cases in this State where an individual is intoxicated and gets himself into trouble, whether he falls off a high-voltage utility tower or whether he sits on a railroad track and gets hit by a train. There are numerous cases of this kind, and they don't necessarily involve the operation of a motor vehicle, but they do involve, or may involve, the responsibility of a social host who serves that individual -- provides alcohol to that individual -- and then the individual, as a result of his intoxication, although he does not necessarily drive a motor car, may damage himself or others in some way.

SENATOR LESNIAK: We are talking about adults. At least in terms of adults, are you venturing an opinion as to whose responsibility it is over that adult's behavior, whether it be the social host who serves the drink or the person himself if he goes out and injures himself? You aren't venturing an opinion on that, are you?

DR. LESTER: Oh, I don't want, for a moment, to make you think it is my opinion that the person who gets himself intoxicated isn't responsible for his actions. It seems to me that there are other responsibilities too.

SENATOR LESNIAK: Senator Cardinale?

SENATOR CARDINALE: You mentioned the responsibility of the social host. Excuse my voice; if it gets too difficult to understand me, please ask me to repeat my remarks. I'll be very slow in speaking, which is uncharacteristic of me.

SENATOR LESNIAK: And, he hasn't been drinking. (laughter)

SENATOR CARDINALE: How do you know? (laughter) You talked about what I seem to understand is a widening responsibility. The court decision which led to the creation of this Commission dealt only with the operation of a motor vehicle, and it made the social host liable for acts in terms of the operation of a motor vehicle on the part of an intoxicated guest.

I seem to hear from your testimony that you feel our goal ought to be to widen that responsibility. Is that correct?

DR. LESTER: No, it seems to me that the present statutes, in effect, say that at least as far as the licensee is concerned, he shall not serve an intoxicated individual, and he shall bear some liability for the actions of that intoxicated individual, whether that individual drives a horse and buggy, an automobile, or tries to cross the street when he shouldn't and gets hit by a car. The present law, in my opinion, says there is a wide liability. I can imagine very easily that if the Supreme Court of this State had been faced with a pedestrian-- Before a man got into his car, if he had walked out into traffic and had gotten hit, they might very well have made the same finding.

SENATOR LESNIAK: And, they may.

DR. LESTER: And, they may, but what I am saying is, the present law, as I understand it, places a very wide responsibility on the licensee.

SENATOR CARDINALE: Doctor, where did you find that law?

DR. LESTER: Pardon me?

SENATOR CARDINALE: Where did you find that law?

SENATOR LESNIAK: That is a Supreme Court Common Law holding. Doctor, in that regard--

DR. LESTER: (interrupting) Well, I don't want to appear as a legal expert here, but I am saying that that is my understanding.

SENATOR CARDINALE: The point I was about to make, Doctor, is that the law you are quoting is not a statute. You are quoting what is commonly known as case law -- law that has been made by a court. Even in that case, while we are not charged with studying the responsibility of the licensee, the responsibility of the licensee has not been established by statute.

SENATOR LESNIAK: What he is saying is, don't blame that one on the Legislature. (laughter) Actually, in another vein, we can't take credit for it.

DR. LESTER: I'm not blaming anyone.

MR. LEVINSON: Well, it is not set by law, but administratively it certainly is, Senator, by the Administrative Code.

DR. LESTER: It isn't just operating a motor vehicle for which someone can be held liable.

MR. LEVINSON: The Administrative Code certainly would make licensees liable for serving intoxicated people, and that is where the courts get their laws. That is where the derivation of the various court decisions is.

SENATOR LESNIAK: Doctor, although this isn't within your exact realm of expertise, you said that there is a responsibility on the part of a licensee or a social host towards that person, if he injures himself. Would you also say that that person has some responsibility over his own actions, as well? Is that accurate?

DR. LESTER: I think so.

SENATOR LESNIAK: Okay. Are there any other questions? Assemblyman?

ASSEMBLYMAN MILLER: Would you care to comment on the different effects alcohol would have upon people of different weight or frame structure -- let's say a person who is 250 pounds versus a person who is 100 pounds -- as far as this .1 is concerned? I would make the assumption that a person who is twice the weight would be able to drink more than the person who didn't weigh as much because of his body capacity. Is that a true assumption?

DR. LESTER: Yes, that is exactly correct. The person who weighs twice as much, in order to attain the same circulating blood alcohol level -- which is the important thing -- is going to be required to drink twice as much to attain the same concentration. It is the concentration that is important.

Certainly, a child is going to require much less than an adult.

ASSEMBLYMAN MILLER: So, I guess what you are saying is, I should weigh twice as much if I want two manhattans instead of one.

DR. LESTER: Yes, that is absolutely correct.

ASSEMBLYMAN MILLER: Thank you.

SENATOR LESNIAK: Doctor, as far as the issue we are confronted with is concerned, we are really not involved in a numbers game, are we? We are talking about the ability to recognize someone's reduced capacity to either drive a vehicle or act in a socially

responsible manner. Isn't that correct? Isn't that really the key issue?

DR. LESTER: That is correct. That is key.

SENATOR LESNIAK: And, that wouldn't matter whether he had .1, .5, or .2, except for the fact that the ability of a person to recognize that would change. Isn't that correct? What I am trying to say is, isn't -- I had to categorize your testimony, but -- it a fact that what you are basically saying is, the licensee or the social host doesn't really have to make a number count, but by visual observation, he can have the ability to determine whether someone is impaired to the extent that he may be in danger?

DR. LESTER: Yes, I think the first thing is, he has to make a visual observation. It seems to me that both parties -- the social host and the licensee -- have to be conscious of what their guests or patrons are drinking, and to constantly estimate what liability they may have placed upon them, and the risks they may have to assume. I don't think anyone can avoid that. I think all of us who have been hosts at parties, certainly, are looking to see to it that no damages are suffered by anyone at the party. The host certainly should be put in the position where law or no law -- Supreme Court decision or not -- that he might feel some twinge of guilt if a guest of his went out and damaged himself or others.

MR. LEVINSON: What you are telling us, Doctor, is, as I understand it, when someone is alcoholically impaired, the individual, whether he be a licensee or a social host, can tell. Isn't that the crux of your testimony?

DR. LESTER: Yes, that is the crux of my testimony. The point is, what criteria does he use? It seems to me that the criteria are the three I have given. How does that individual behave in interaction with other people at a party, for example -- in interaction with other people at the bar? What is his speech like? Is he coherent? Is he able to articulate something? Is he responsive to questions, or does he talk about something else? How much talking is he doing? Is it different than what he does normally? Then, what is his motor performance like? Is he spilling his drinks; is he bumping

into people; is he falling down? You name all the things that an intoxicated individual is liable to do, and I think most of us have seen people like that. It seems to me that the social host is in a special position, because of knowing the guest he has invited, to make a judgment as to whether that individual's actions are different than they normally would be.

MR. HERRMANN: Doctor, what if the social host himself is intoxicated? That would seem to diminish his ability to make these determinations, would it not?

DR. LESTER: Well, certainly it would.

MR. HERRMANN: What is your feeling about that?

DR. LESTER: It seems to me that the responsibility he is assuming in that case might be even greater. Obviously, the consciousness of people has to be raised to the point where they are going to have to say, "Look, I don't want to be responsible for the actions of my guests, which in some way are connected with me." Certainly, everyone in this situation has some responsibility.

MR. TOBOROSWKY: Let me ask you, what would happen if-- You are talking the social host's liability when serving someone drinks. What would happen if you had a situation where you were making your own drinks and the host was circulating and moving around the house? What would be the situation if these people were making their own drinks, and you really didn't have a number count as to how many?

DR. LESTER: I agree. It seems to me that in that instance, his responsibility would be diminished to some extent. But, he still has to see how his guest are acting and behaving. He has some responsibility because he is providing the drinks.

MR. TOBOROSWKY: But, in most cases you would be inspecting your guests. Where do you see that, especially with a large number of guests? How can you really evaluate these persons' conditions?

DR. LESTER: It may be very difficult. In fact, one of the legislative proposals here talks about the host showing extreme indifference to what is going on. Well, the opposite of that is, he must not be indifferent to what is going on at the party. If not positively showing extreme indifference, it seems to me that you have

to demand that the social host show some evidence of keeping track of the well-being of his guests and of other people who may suffer later.

I don't say it is easy, and it seems to me that every case is going to be different. My knowledge of the New Jersey Supreme Court decision and the specific case involved is that it was certainly a case of extreme indifference. The individual was plied with liquor. I believe the Supreme Court also said that it had to be a very egregious situation. It wasn't just a slight evidence of intoxication that had to be exhibited, but some clear-cut definitive evidence of intoxication -- obviously, grossly, and clearly visible.

SENATOR LESNIAK: Doctor, I don't know if that is correct. I believe the Supreme Court said that negligence must be shown.

MR. LEVINSON: Pretty much so, yes.

SENATOR LESNIAK: That is the reasonable man's or reasonable person's standard.

ASSEMBLYMAN BOCCHINI: Isn't that Kelly versus Gwinnell?

SENATOR LESNIAK: Yes.

MR. LAIKS: Dr. Lester, in Kelly, I think the court said he had 13 drinks, or something like that. If I understand your testimony, you indicated that a person of average intelligence should be able to determine when someone has had .1, or is what we consider to be intoxicated. Do you truly believe that the average person can make that decision?

DR. LESTER: Well, what I am saying is that the adult male weighing 150 pounds is going to have to drink at least seven ounces of 80-proof whiskey in order to be at a level of .15%.

MR. LAIKS: Over what period of time?

DR. LESTER: What I am trying to say is, at the cutting point, even the most naive, unprofessional observer would say, "That individual is not sober."

MR. LAIKS: Is there a period of time within which that has to be consumed?

DR. LESTER: Yes, two hours.

MR. LAIKS: Two hours?

DR. LESTER: Yes. Now, that is a lot whiskey, I think. I'm not saying that the average individual is going to say, after two beers, "My, he is drunk." That is not the case. I am talking about the consumption of a very large amount of an intoxicating beverage. As you know, the statutes, more or less throughout the country, say that .15% is going to be the level.

ASSEMBLYMAN BOCCHINI: It is .15%?

DR. LESTER: Yes, it is .15%. That means that at that point, in a 150-pound male, the amount of alcohol in more than seven ounces of whiskey is actually circulating in his body. He would have had to drink more than that because he has metabolized it; it has disappeared from other routes -- urine, breath, whatever -- so, he must have had more. That is why I am giving the figure of eight or nine ounces that would have had to be consumed in a two-hour period in order to reach that level. That is the level at which, in my opinion, you have to say, "That individual is not sober."

SENATOR CARDINALE: Doctor, are those statements you made based on controlled scientific studies that have been made?

DR. LESTER: Are you talking about the .15%?

SENATOR CARDINALE: No, I'm talking about the total range. Have there been studies done, for instance, that have related given levels of blood alcohol to the visible behavior of an individual?

DR. LESTER: No, there have been very few studies of that kind. I'm giving this as a result of my personal experience over many years in seeing individuals who received either no amounts of alcohol or, in all cases, have had concentrations in their blood determined. Certainly, there hasn't really been more than that. There has only been one study that I know of, which I don't think was terribly authoritative, which spoke to this question.

Even that study, I would say, indicates that at levels of .15% and above, there would be no question in anyone's mind -- the most professionally trained police officer, or anyone picked at random off the street -- who would say, "That individual is showing signs of intoxication."

SENATOR CARDINALE: Conversely, when people are not legally drunk for the purposes of driving a motor vehicle, don't they sometimes show visible signs of intoxication? In other words, at levels lower than .1?

DR. LESTER: Oh yes, there are plenty of individuals who I have seen at levels of .05% who show signs of intoxication. I think that may meet the standard of talking about extreme indifference. If you can see it at .05%, by golly, you are going to see it at .15%.

SENATOR CARDINALE: The machines we use to test the alcohol level are generally the machines that are in most common use. They test both air and lungs.

DR. LESTER: That is right.

SENATOR CARDINALE: It has come to my attention, although we have court decisions which have specifically validated the Breathalyzer type of machines in New Jersey, that there are some people in your field who indicate that the relationship between blood alcohol and the measurements taken by air-based machines are not always accurate. Do you have any information with respect to that which you would like to share with the Commission?

DR. LESTER: Well, I've been trying to make that point in this State for many years. Despite the legal validations of the Breathalyzer, I don't think that is an acceptable scientific validation for a very simple reason: It has nothing to do with social host or anything else obviously. The machines are calibrated at intervals of approximately every three months. That presumably serves for that period. No analytical chemist -- and, I count myself as one of them -- would accept a calibration like that. If we are going to do an analysis, we would calibrate the machine at the time the analysis is done.

In fact, the New Jersey Police laboratories, when they are presented with tissue, blood samples, or urine samples for analysis -- whether it is for alcohol or anything else -- calibrate the machine at the time they do the test. They do duplicates, etc. Those are accurate and reliable indicators. I think the Breathalyzer, and the people of this State, are being shortchanged in a way by not having

municipalities and the municipal police officers who do the Breathalyzers calibrate the machine every time they use it on someone who is charged with driving under the influence. It is easy enough to do, but it isn't being done. I think that is the responsibility of the Attorney General's office.

SENATOR CARDINALE: Do you know if there is a simple blood test that can be utilized at roadside in an efficient manner to directly measure blood alcohol?

DR. LESTER: Well, you can't measure blood alcohol directly without taking it out, but there is absolutely nothing wrong scientifically with using the breath sample. We used breath samples -- I have -- long before the Breathalyzer came on the market. It has ample scientific, physiological validation. There is no problem with using breath samples. If you are saying, is there a simple device to take breath and analyze it on the spot, the answer is yes, there will be soon.

SENATOR CARDINALE: No, no, I am saying to take the blood and analyze it on the spot.

DR. LESTER: No, no.

SENATOR CARDINALE: The reason I asked the question is because of two objections that have been raised to me during the last several months with respect to -- I have no way of knowing, but I have you here, so perhaps I can get an answer -- certain groups of people who have occupational disabilities that occur over a period of time, such as painters. Some of those people have told me that they will test on the Breathalyzer at a much higher reading than the alcohol they have consumed because they are engaged in that occupation. Have you even crossed that? Is there any validity to that?

DR. LESTER: Yes, there is some validity to that because there are a substantial number of calm-downs which are used as solvents in paints, and they will interfere with the Breathalyzer readings. I don't think there is any question about that. Whether that actually happens is another matter. You would have to have been exposed to that solvent over a sufficient period of time with a high enough concentration, and then be tested almost right away.

The fact of the matter is that I didn't experiment 20 or 30 years ago with regard to how much alcohol you could get into your system from inhaling it. It is mighty difficult to get very much into your system.

SENATOR CARDINALE: I think you have answered that aspect of the question, and I don't want to unduly belabor this. I recently heard an attorney from Florida, who has made a practice of defending drunken driving cases, make a claim -- I have no way of knowing if he is scientifically accurate or not; it may be a rare person -- but, some people's normal physiology would give them a reading on the Breathalyzer of having far lower levels of alcohol in their blood. Has that been your experience? Is there any scientific justification, or is that merely a legal argument that has been presented?

DR. LESTER: That is a legal argument. I heard of one case, which presumably happened in Japan, where a man said that whenever he ate pasta, it fermented in the stomach and he got drunk. That was nonsense, and so is this. If you are going to get a reading of .1% on the Breathalyzer, believe me, it is because there is an awful lot of alcohol circulating in you.

SENATOR LESNIAK: Are there any other questions?

ASSEMBLYMAN MILLER: I have another one, if I may. Doctor, is it true that an alcoholic is able to consume more alcohol than a social drinker before showing outward signs of intoxication?

DR. LESTER: Yes, to some extent. I think if the alcoholic has severe liver cirrhosis, then that may not be true.

Let's talk about a heavy drinker who is experienced. Yes, he is going to have more tolerance to alcohol, and he is going to show lesser signs and symptoms at the same levels of circulating alcohol.

ASSEMBLYMAN MILLER: Therefore, the host or hostess could be serving someone who is an alcoholic, but he or she doesn't realize he is an alcoholic. His alcoholic content could then be .1 or above, and never be detected by the host. He could still be stopped outside the party and fail the Breathalyzer test.

DR. LESTER: Well, he is going to be stopped, I presume, for some reason. It could be because he hit a parked car or a telephone poll, or he may have run into the other lane.

ASSEMBLYMAN MILLER: How about one of the DWI checkpoints? He is perfectly okay to drive the car, but the officer pokes his head in the car, smells alcohol, and runs the test on him. The result is a .11.

DR. LESTER: In that case, Assemblyman, there is no liability on the host. The man hasn't injured anyone.

ASSEMBLYMAN MILLER: That is true.

DR. LESTER: There have been no injuries, so there is no liability. Presumably, if he hadn't been stopped, he would have been able to navigate his way home without any problem.

ASSEMBLYMAN MILLER: Let's take the assumption one point further and say he does get involved in an accident through maybe no fault of his own -- hit in the rear, or something like that -- and they smell alcohol on his breath and test him. Isn't this really a case where the man has control of his faculties, but he is picked up and charged with being intoxicated when, in effect, he has just flunked the test, but he has everything else going for him?

DR. LESTER: Well, I don't see any problem with that. It seems to me that there has to be some evidence that there were grossly visible signs of intoxication while he was at the party.

SENATOR LESNIAK: Doctor, if I may respond, we have to make the distinction and be careful -- I know it is difficult in many instances -- not to confuse the issue of driving while intoxicated and the rules that apply to that, which were laid down by the State of New Jersey, and the common law on torts and negligence that has been laid down.

If someone is hit in the rear and he is drunk, he is going to be the plaintiff and not the defendant. You still have to prove negligence in any event, so that ought to be clear. That person could be .30, and if he was stopped at a red light and was hit in the rear, it would not be that person's fault. So, we do have to make that distinction.

DR. LESTER: Yes, you would have to show proof that he was, in fact, exhibiting signs and symptoms of intoxication while he was being served.

SENATOR LESNIAK: That is another element that would have to be proved, as well.

MR. LAIKS: Doctor, is there a delay before the alcohol is visible in the blood stream?

DR. LESTER: Well, it takes time for-- Let me put it this way: When alcohol enters the stomach, very little of it crosses the stomach membrane to get into the blood. It has to be emptied into the small intestine where it is very rapidly transferred into the blood. I think we all know that if you take a cocktail on an empty stomach, the effects are felt within seconds -- certainly within a few minutes. It is a fairly rapid process. Now, all of it doesn't get into the blood like that.

MR. LAIKS: How rapid is it? I'm trying to find out if a person can appear to be perfectly all right when he leaves the home, but after a certain period of time, the blood level rises and he is no longer all right.

DR. LESTER: That certainly could happen. I can envision a situation where someone doesn't drink anything at a party, and just before leaving, he downs two doubles and walks out. He may have been as sober as the Senator (laughter) when he left the party, but a half hour later, he could have an elevated blood alcohol. That is an extreme case.

SENATOR LESNIAK: Doctor, under those circumstances, the host would not be liable in a court of law. Is that correct?

DR. LESTER: I wouldn't think so.

MR. LEVINSON: No, that is not gross negligence.

SENATOR LESNIAK: That is not negligence. By the way, I would like to introduce the Vice Chairman of this Committee, Assemblyman Bocchini. I want to state clearly for the record that I would not have voted for him as Vice Chairman if I had known he smoked. (laughter)

AUDIENCE: There is a "No Smoking" sign.

ASSEMBLYMAN BOCCHINI: Where is it?

AUDIENCE: The fire department has a "No Smoking" sign right in front of us.

SENATOR LESNIAK: Thank you.

ASSEMBLYMAN BOCCHINI: It is nice to have conscientious people with us.

SENATOR LESNIAK: Sorry, Assemblyman, go ahead.

ASSEMBLYMAN BOCCHINI: That is all right. First of all, in relation to some of the scenarios and the way I analyzed Kelly verses Gwinnell, I would think that you just don't know, because the court said, "We've taken this case on this set of circumstances with these particular facts, and this is our decision. We will analyze and determine if and when other cases of this nature get to us." When it comes to trying to pigeonhole fact after fact, and what could or would happen, I think that is part of the heart of the problem for our being here.

The citizenry of this State, based on that Supreme Court decision, in my estimation, are, at their best, when they open their doors for a party, in a crap shoot. They really don't know what could happen to them.

Doctor, since I am a municipal prosecutor, I have had the opportunity on several occasions to review some of your reports, and I have listened to your testimony here this evening. However, I find something contradictory in relation to testimony regarding observations that I heard in my own Assembly Committee. The trooper's name escapes me, but there is a trooper who oversees the training of State Police officers with regard to drunken driving observations, in addition to the use of the Breathalyzer. He indicated in his testimony, if my memory serves me correctly, that there is an approximately 40-hour course given to troopers and law enforcement officers throughout the State concerning observations. He indicated, to the best of my recollection, on the record that you can have a situation where a person is .15%, and it is very possible -- without any reservation on his part -- to say that a lay person would have a very difficult time making an observation as to intoxication.

With regard to a police officer, a trooper, or another law enforcement officer, what usually draws his attention to a person is the manner in which that person is operating a motor vehicle. I don't know how much was talked about prior to my arrival with regard to being

outside the vehicle, but my concern is with the home setting -- the social setting -- and the lay person looking at someone and trying to determine if that person has had too much to drink.

I presume you have had an opportunity to view tapes of intoxicated persons. I have had that same opportunity. If you watch some of these people walk that line and do the finger-to-nose test with a trained eye, you notice the things that are wrong. I remember when the tapes first came out, I was prosecuting, and I started to observe those tapes. When I looked at some of them, I said, "Well, that doesn't look that bad." You are talking about people who are at .14% or .15%.

If I understood you correctly, you indicated to this Commission that you thought those types of people would be readily noticed in a social setting. Is that correct?

DR. LESTER: Let me make the following points: First is with regard to the police officer who finds that the reason an individual is arrested is because there is some untoward operation of the motor vehicle. That individual is a whole person. Why is there untoward operation of the automobile? Why does he weave and cross over the center line, or whatever? He does that because he has an impairment of his motor function. He isn't reacting right; he isn't seeing right; he can't judge speed and direction. There are a lot of things that go into that.

That individual is no different when he is outside of the motor vehicle than when he is in someone's living room walking around and talking. Obviously, he isn't going to run off the road, but he may bump into the man or woman next to him, or he may be a little tipsy -- that is, he may stagger a little bit or be a little unstable on his feet. He is going to exhibit signs which are appropriate to the circumstance in which he finds himself in the living room.

Obviously, he is going to do something else when he is operating a motor vehicle. He is going to run off the road or do something to attract an officer's attention to him.

I think what we are dealing with here is, if the individual doesn't show signs of intoxication, then there is no liability. It

seems to me that someone has to state that that individual was staggering, hitting people, or talking loudly -- exhibiting signs and symptoms -- and the host continued to serve him. I think that is the touchstone -- whether it is .14 or .18.

SENATOR LESNIAK: Thank you, Doctor. Are there any other questions from the Commission members?

MR. TOBOROSWKY: Yes, I would like to ask him one more question. Nothing was mentioned about a party at someone's private house and drugs. How would drugs affect you with regard to these machines?

DR. LESTER: Well--

MR. TOBOROSWKY: (interrupting) Suppose a person had one or two drinks -- one or two beers -- but, there were drugs at the party, whether it be cocaine, marijuana, or whatever? Would that affect you regarding these machines?

DR. LESTER: It certainly would not affect the reading on the Breathalyzer, and it certainly would not affect the analysis of a blood sample. That would reveal the amount of alcohol circulating in you, but it seems to me the important question is, is it going to affect visible signs of intoxication? Many of these drugs will. They will act together with alcohol.

The host doesn't know if the individual has had two drinks or 10 drinks, but he seems to be acting--

SENATOR LESNIAK: (interrupting) Doctor, those drugs would enhance the signs of impairment, wouldn't they?

DR. LESTER: Yes.

SENATOR LESNIAK: They wouldn't suppress those signs in any way, would they? Are there any drugs you can take to make you perform--

DR. LESTER: (interrupting) Well, possibly amphetamines, cocaine, or something like that, but those are fairly short-acting.

SENATOR LESNIAK: But, they are fairly widespread these days; isn't that correct?

DR. LESTER: I don't think so. I have seen literally a thousand analyses in this State at autopsies of individuals who

suffered violent deaths, and the major drug present is alcohol. There may be traces of marijuana. I only know of one case where cocaine was found. Sometimes you find Valium. That is about it.

The problem, I think, is alcohol, not any of these drugs. Certainly, if an individual takes drugs and drinks two beers, he is going to be more intoxicated than if he just restrained himself to the two beers. It seems to me that the duty of the host, if the guest is intoxicated, is not to serve him anymore beer.

MR. TOBOROSWKY: How about the person--

DR. LESTER: (interrupting) By the same token, Senator, if a guest comes into someone's home and is already intoxicated, the host doesn't have to make a determination of what he is intoxicated from. Maybe the intoxication is from nitrous oxide, but regardless, he shouldn't serve him. That is it.

MR. TOBOROSWKY: How about the person who had a few drinks at his home and is on the borderline? He is not really intoxicated, but he isn't far away from it. Suppose he had some marijuana or cocaine in his car and that puts him over the line?

DR. LESTER: I come back to what I said before. It seems to me that there has to be some evidence that the individual is intoxicated while in the host's home.

SENATOR LESNIAK: That is correct.

DR. LESTER: After all, a person can leave perfectly sober, but an hour later, he can have an accident. The host certainly can't be held responsible for what that individual did in the intervening hour. There has to be some evidence of culpability on the part of the host.

SENATOR LESNIAK: I don't want to get into legal issues with you, Doctor. It is not as clear-cut as that. We'll get into that later. Are there any other questions from the Commission members? (negative response)

Doctor, I want to thank you very much for taking the time to lend your expertise to this Commission.

DR. LESTER: Thank you.

SENATOR LESNIAK: By the way, is there anyone here from the Department of Insurance? (affirmative response from audience)

We won't do it tonight, but at the next hearing in Hackensack, we would like a representative from the Department of Insurance to testify, if only to answer the many questions that the Commission members have with regard to insurance and the impact of the Supreme Court's decision on the availability of insurance rates and coverage. All of the members of this Commission have expressed a keen interest in those issues that only the Department of Insurance can provide the answers to. Please ask Commissioner Gluck or one of her representatives to be prepared to answer those questions at the next hearing. Okay? (Department of Insurance representative in audience nods affirmatively) Thank you very much.

The next person to testify is Dave Evans from the New Jersey Department of Health, Division on Alcoholism. Mr. Evans, welcome to the hearing.

DAVID EVANS: I will briefly state my qualifications. I am here representing the Commissioner of Health, Dr. Goldstein. I am the Chief of the Intoxicated Driver Criminal Justice Programs for the New Jersey Division of Alcoholism, and I am responsible for the State's post-conviction Drunk Driving Program. This unit was previously under the jurisdiction of the Division of Motor Vehicles, but it is now within the Department of Health.

I am an attorney, a graduate of Rutgers Law School, and I also maintain a private law practice. In the past, I have represented drunk drivers. I am the former Chairman of the New Jersey Bar Association's Committee on Alcoholism.

SENATOR LESNIAK: You have represented people who have been accused of drunk driving?

MR. EVANS: Right, accused of drunk driving. Pardon me. I am the current Chairman of the American Bar Association's Alcoholism and Drug Reform Committee, and I am the American Bar Association's Chair of the ABA Advisory Commission on Youth Alcohol and Drug Problems. I am the author of two books, one on alcoholism and the law, and one on the legal aspects of juvenile drug and alcohol abuse. I have published numerous articles, and I am on the faculty of the Rutgers Center of Alcohol Studies summer school where I teach a course on alcohol and crime and a course on alcohol and the law.

I am also a homeowner and a father, so I think I am qualified to speak before the Commission.

Let me just say that it is the position of Commissioner Goldstein that we are in favor of extending liability to persons who knowingly serve alcoholic beverages to persons who are intoxicated, and who then may drive an automobile. It is the Commissioner's position that this applies both to the social host and to the licensee.

You have a document in front of you from the President's Commission on Drunk Driving, and I would like to point out that this is also their position. They were talking about dram shop laws; this was before the Gwinnell case, but they said that these laws implicitly establish the necessity of place and responsibility on the part of the seller or server, whether he be a commercial or an individual host. Dram shop laws also reenforce the principle that others have a responsibility to prevent intoxicated individuals from driving.

It is basically the position of the Department of Health that we are our brothers' and sisters' keepers when it comes to drinking and driving, and that we all share that responsibility.

I would like to state that I think the main reason for public difficulty with social host liability is because they misunderstand the case. I received a lot evidence about this over the Christmas holidays. As all of my friends know, I run the State's Drunk Driving Program. I don't know if I was invited to fewer parties as a result of this, but people were uncomfortable. They were watching what they were doing and alcohol abuse was cut down.

We believe it is important and necessary for this State's health to decrease the consumption of alcohol. Even in people who are not alcoholic, alcohol can have a destructive effect. It is an irritant to the central nervous system; it causes accidents and deaths. Our society, as a whole, should be more responsible with alcohol use.

In particular, I see this in traveling around the country with the American Bar Association Youth Advisory Commission. We have been holding hearings around the country. You have my sympathy because I know what it is like to sit through hours of testimony. I have seen

what is happening to the nation's children, and as a result of hearing all this testimony, one of the things we are going to ask to have as an official ABA policy is that lawyers set the example. At American Bar Association functions, it will be a requirement that nonalcoholic beverages be served, and that the legal professional also take on the responsibility of helping lawyers who have alcohol and drug problems.

We believe the best way to prevent juvenile alcohol and drug abuse is for adults to set the example. That is something that will be before the ABA House of Delegates in July, and I have a feeling it is going to pass.

SENATOR LESNIAK: Would that apply to judicial conferences, as well?

MR. EVANS: That is out of my-- I would think so, yes. I don't know if we will be able to get that as a formal ABA policy, but we will certainly take a whack at it.

ASSEMBLYMAN BOCCHINI: May I get this straight? At the next American Bar Association convention, there won't be any alcoholic beverages?

MR. EVANS: No, there will be a resolution presented to the ABA House of Delegates -- something to the effect that lawyers have a responsibility as role models to the nation's youth, and as part of that, we will ask the ABA to serve nonalcoholic beverages at ABA functions, so that people are not put in the position that--

ASSEMBLYMAN BOCCHINI: (interrupting) In addition to?

MR. EVANS: Yes, in addition to alcohol; that is right.

ASSEMBLYMAN BOCCHINI: Oh. (laughter) I can just picture a room full of lawyers bellying up to a glass of fruit juice.

SENATOR LESNIAK: Ten years ago, I was part of a protest of the State Bar Association having its function at the Playboy Club. I didn't think that was a good example, so I can empathize with that position.

MR. EVANS: I said that would be as an alternative.

SENATOR LESNIAK: Can you be more specific on the Commissioner's position on "knowingly serve" in terms of what "knowingly serve" would mean?

MR. EVANS: Yes. You have something in front of you. The Commissioner has not had time to do this in-depth, but I would like to offer you some personal research I did on this. They are the papers you have in front of you which say, "Apparently Intoxicated." By the way, for the last year and a half, I have been training bar owners on their legal liability. I have used that as an example.

I got the definition of "apparently intoxicated" from the ABC versus Zane case. Let me read it to you quickly: "The term 'apparently' refers to the observable manifestations or symptoms of excessive indulgence in alcoholic beverages. It portrays a person so far into the influence of alcoholic beverages that his conduct and demeanor have departed from the normal pattern of behavior."

After that, I looked at the reported cases at the Division on Alcoholic Beverage Control disciplinary hearings where licensees were disciplined, fined, etc., for serving apparently intoxicated persons. In the interest of good taste, I won't read what I found. I can see from the smiles on some of your faces that some of you are reading them.

ASSEMBLYMAN BOCCHINI: I'm enjoying this as much this time as I did the last time.

MR. EVANS: Thank you. By the way, I wasn't selective; I didn't pick out the worst cases. I have those cases here if you would like to see them.

ASSEMBLYMAN BOCCHINI: I like the citations.

MR. EVANS: I have a number of them here, and I would be happy to give them to you.

SENATOR LESNIAK: Loud and vulgar seems to describe the last Assembly session. (laughter)

MR. EVANS: These are situations where--

ASSEMBLYMAN BOCCHINI: At least our house meets. (laughter)

SENATOR LESNIAK: I'm sorry; go ahead.

MR. EVANS: This is the only authority I could find under New Jersey law for some guidance in what is apparently or not apparently intoxicated. You'll see in these situations that people were pretty far under the influence of alcohol. It was not a gray area where some

alcoholic who has learned to overcome his observable manifestations of alcoholism or intoxication slips by someone. These are fairly apparent situations. I don't think anyone would disagree that these people were intoxicated.

For the people in the audience, there are copies of this over on the table if you would like to read it later.

I think the Commissioner's position is that certainly it is not reasonable to give alcohol to someone who meets these criteria, whether you are a licensee or a social host. I think we would be in favor of a standard of "visibly intoxicated" or "apparently intoxicated," using criteria similar to this.

We also believe that the public can be educated about this. Right now, bar owners are being educated about it. You have a document, and although it is a little bit crude, it is something that is put out by Middlesex County regarding alcoholism; it is for bartenders only. It gives them some guidelines on how to slow down people's drinking. Then, of course, the thing that is most difficult is, what do you say to someone when you want him to stop drinking? This document has six or seven statements listed that you can make to someone in a non-offensive way to get him to cut down.

Our Division has been doing this kind of public education for a long time. You also have that little booklet in front of you, which states how many drinks a person can drink at a certain body weight before he is over the legal level of intoxication.

Our Division -- I'll put this on the record right now -- will be happy and privileged to begin an educational program using pamphlets, the public media, etc. to make the public aware of what "apparently" or "visibly intoxicated," means, or to make clearer to them the holding in the Gwinnell case.

We have Councils on Alcoholism throughout the State. Every county has a county alcoholism coordinator. This year, 1985, 30,000 people who are going through my Drunk Driving Program will receive this training.

I would be happy to make a copy of our curriculum available to the Commission.

We have a number of hours in which every drunk driver will learn about blood alcohol levels, what is social drinking versus problem drinking, body weights -- they are going to be given charts -- and, all kinds of information. That is a start, and we can reach many, many more thousands of people by doing this sort of thing.

I have a few other comments. We sympathize with the bar owners, and we would like to work with them. We are not interested in people going out of business. As I said at the Assemblyman's hearing, my grandfather and great-grandfather were both bar owners, and my mother grew up living above a bar. We are not interested in hurting these people.

The majority of bar owners are responsible people who care about their fellow citizens, and they have been working with us. Perhaps Donna Ferrante can tell you about some of the programs that they have been doing in conjunction with the bar owners to train them and to make them aware of what they can do -- to set up alternatives to deal with people who are in emergency, life-threatening situations, getting them home in taxis, alternate rides, or any number of things that can be done.

Let me just say that the social host liability has made New Jersey the leader in the nation. It has attracted a lot of attention. Again, I have been traveling around the country to these ABA hearings. We heard all about it down in Georgia, out in Los Angeles, and in other areas of the country. We had a hearing in Princeton. There is a lot of interest in it. People who are interested in helping children and are interested in drunk driving are now seeking to change the law in their states, to bring it in line with New Jersey. It is not the first time that New Jersey has served as a leader in the area of law.

I would urge you to stay with the social host liability. I think it is effective, and people will be able to testify to you about what has happened with drunk driving in New Jersey. The mortality rate has gone down significantly, particularly the mortality rate of juveniles. I think we need to hold the line, but I think we need to define it a little bit more. We need to educate the public, and we need to provide proper insurance for bar owners. The Commissioner of Insurance has some very good ideas in that regard.

SENATOR LESNIAK: I wish she would share them with us.

ASSEMBLYMAN BOCCHINI: You must have spoken to her since I had my meeting.

MR. EVANS: Well, I read her testimony, and she came up with a couple of different things.

ASSEMBLYMAN BOCCHINI: You read her testimony already? I haven't even gotten the transcript.

MR. EVANS: I'll be happy to share it with you. I have a copy of her testimony from the last hearing.

ASSEMBLYMAN BOCCHINI: I'm only Chairman of the Committee; I'm glad you have the transcript. I'd appreciate a copy. (laughter)

MR. EVANS: I don't want to speak for another department though.

SENATOR LESNIAK: You just did.

MR. EVANS: All right. Let me just say that I think they have some wonderful ideas.

Let me also say that New Jersey has made the AA grapevine. This (holding up magazine) is the monthly magazine of Alcoholics Anonymous that goes out to probably one million alcoholics around the world. New Jersey has been highlighted in it, and it is attracting an awful lot of attention. We think it is a great thing, and we hope you stay with it.

Thank you.

SENATOR LESNIAK: Assemblyman Bocchini is going to take over the chair for a few minutes.

ASSEMBLYMAN BOCCHINI: I'm familiar with a lot of what you said at the last Committee hearing, and I am sure the Commission members may have some questions. However, do you have any particular suggestions with regard to, should we legislate, or shouldn't we legislate? If we should legislate, how should we do it, and to what areas should it be directed?

The educational process, I believe, is commendable on your part, and I sincerely admire you for that. However, does the Commissioner of Health or do you have any feeling regarding a legislative initiative that the Senate and the Assembly might consider? I'm not asking for a bill; I'm just--

MR. EVANS: (interrupting) Yes. This position has not been presented to the Commissioner, so I can't speak for her on that. The only thing I am authorized to speak about is the fact that we are opposed to the bill which would wipe out the social host and the licensee host liability.

Regarding the other bill, which would set limits on that, again, we are opposed to anything that would wipe out the liability. If limits are to be sought on liability, we want to make sure they are adequate to protect the victims.

The Commissioner of Insurance brought up the idea that there might be a certain limit, but for a catastrophic injury, there would be a special thing that would take care of that.

We are concerned about the victims. I used to represent drunk drivers, and I used to think it was a joke. I am a former public defender, and I used to represent murderers, rapists, you name it. I can remember laughing one time when a fourth-offender drunk driver drove to my office. He hasn't had his license in years, and he wasn't going to have it for years. I thought it was funny.

Then I got this job, and became exposed to people. The turning point for me was having lunch with a man whose daughter had been killed by a drunk driver, and I had just become a father. He talked about going downstairs, opening up the hall closet where they had kept their clothes, seeing something that had belonged to his daughter, and the feelings of grief came back again. I have never looked back since talking to that man, and I have never doubted what I was doing. So, I think the victims need to be adequately compensated. Let's take care of the bar owners, but let's take care of the victims too. I think they are important.

ASSEMBLYMAN BOCCHINI: Are there any questions of Mr. Evans? Senator?

SENATOR CARDINALE: You commented on your Department's position with respect to the two Assembly bills, but you haven't commented on the Senate bill. Do you have a position on it?

MR. EVANS: No, not yet. I will get a copy of that, and we will take a position on those.

SENATOR CARDINALE: With respect to the positions you have taken, I think as Assemblyman Bocchini indicated, there can be no argument with the health considerations and with the human considerations that you put forward. This Commission and the sponsors of the bills do not take issue with that.

The question that I think this Commission is going to have to resolve is, what kinds of standards are going to have to be applied before we are willing to impose third-party liability in these instances? No one, including those who have suggested that there be absolutely no social host liability-- The standards shouldn't be misinterpreted as being in favor of irresponsible actions on the part of anyone.

I'm a little troubled by the position of your Department, and let me tell you exactly from where that trouble comes.

You have given us a whole sheet. No one could argue with these standards -- whether you want to call it "apparent intoxication" or "visible intoxication." These standards are standards that any reasonable person would have to accept. Frankly, I would find these standards difficult to put in a bill because I don't think they cover enough in terms of situations. These are very extreme circumstances.

I think that perhaps in the Kelly versus Gwinnell case, many of these symptoms were not present, if any of them were.

This is a far cry from the impression that we get from your testimony. The impression we get from your testimony is that you would like -- maybe I misunderstood you -- a very wide liability to be extended to social hosts. What I get from this sheet is a very narrow extension of liability to social hosts. Maybe you can clarify that for me.

MR. EVANS: As I said, the sheet I gave you is not something that has been before the Commissioner of Health. This is something I did on my own; it is personal research.

The Commissioner has said that the serving of alcohol to someone who is apparently or obviously intoxicated is-- As to who sets that standard, it could be done legislatively. We would certainly be willing to work with you to come up with some standards. It also could

be left to a judge and a jury who would hear all the evidence in the case, and then come up with a decision. That has been a principle of law for a long time. Whether or not someone is intoxicated is a matter of common observation. We might just want to leave the matter to the jury system, and do nothing legislatively about it.

SENATOR CARDINALE: With all due respect to you, Counselor, there is a purpose for the Legislature, and the very purpose of the Legislature is to establish standards of reasonable behavior that everyone is expected to adhere to. We could, theoretically, by the same token abolish all the laws and let judges and juries decide everything. We haven't chosen to live in that kind of system. There were people once who did. They were in Spain, and that took place during the Inquisition years. I don't think it worked very well.

MR. EVANS: Well, certainly, we are not advocating something like that. As I said, there are two alternatives: The Legislature can do it -- we would be happy to work with you to develop those standards -- or it can be left to a judge and a jury.

SENATOR CARDINALE: I hope you will look at the Senate bill and give us your comments with respect to it.

MR. EVANS: We certainly will.

MR. TOBOROSWKY: I have something to say, Mr. Chairman. You just mentioned the jury system. How about the cases that never make it to the jury -- the cases that are settled, but still affect insurance rates? Most of the time, insurance companies are more than willing to settle, depending upon how much the suit involves, rather than face a jury, even though maybe there isn't any negligence on anyone's part. They just don't want to take that risk of facing a jury. Certainly, I am against that.

I believe there should be legislation. You also mentioned that New Jersey has become the focal point of the nation. The ABA talked about our laws and this decision, but I imagine it depends on which side of the fence you are on. If you are a lawyer, maybe that is good, but if you are the individual host or the licensee who is getting sued, I don't think we would consider that such a great situation to be in. That is my opinion.

MR. EVANS: I think you have to decide what is really important. When I looked at the legislation that would limit liability, I thought about other entities in our society where we have limited liability. They have been charitable institutions, hospitals, and people who were providing a valuable public service. We want them to continue with that valuable public service and be free from liability.

If we impose a limit of liability on bar owners, are we equating them with charitable institutions and hospitals? Is that the choice we are making? Who is more important?

MR. TOBOROSWKY: You say, who is more important? My thinking is, what is fair to everyone? It is more important to be fair to everyone and make this a just system to live under. You know, important to whom?

MR. EVANS: Well, I would refer you to the language of the Supreme Court in the Gwinnell case. There is a statement which says they recognize that their decision is going to have a great impact on social situations, and that drinking situations are regarded by many as being important. However, we believe, and I quote, "The added assurance of just compensation to the victims of drunken driving, as well as the added deterrent effect in the rule on such driving outweighs the importance of those other values. If there be a loss, it is well worth the gain."

The Court goes on to say that when they are talking about drinking and merriment at parties--

SENATOR LESNIAK: (interrupting) Excuse me, excuse me, excuse me. We are here to hear your testimony, not to hear a repeat of the Court's decision.

MR. EVANS: Okay. Well, they are talking about the innocent people who have been damaged by irresponsible alcohol use. They consider that more important.

SENATOR LESNIAK: Mr. Levinson?

MR. LEVINSON: Sir, do you believe the law in the Kelly case will cut down on the number of serious injuries and deaths on the highways?

MR. EVANS: Yes, I do.

MR. LEVINSON: All right. Would you also agree to that extent -- unlike what Mr. Toborowsky said -- that law such as Kelly will probably mean less lawsuits rather than more? The more drunken drivers, the more lawsuits, I would presume. Do you agree with that?

MR. EVANS: I'm not exactly sure of the question.

SENATOR LESNIAK: The question is, if there are less drunken drivers on the road, wouldn't that result in less lawsuits?

MR. LEVINSON: Rather than more lawsuits.

MR. EVANS: I don't know. There are so many variables. You know, the thing--

ASSEMBLYMAN BOCCHINI: (interrupting) I think you would see a flood--

MR. EVANS: (interrupting) The thing about social host liability suits has been--

SENATOR LESNIAK: (interrupting) You are not asking the questions, Assemblyman.

MR. EVANS: As to the question of whether or not it will reduce deaths, I believe it will. Again, this has been a principle of our law for a long time. We have imposed social host liability for years regarding the serving of minors. No one raised any objections to that; everyone realized it was very worthwhile regarding kids. Why do we expose adults to more--

MR. LEVINSON: (interrupting) Sir, isn't it true that a great number of accidents are caused as a result of drunken driving?

MR. EVANS: Yes, that is true.

MR. LEVINSON: Therefore, the less drunken driving we have, the less accidents we will have. Isn't that correct?

MR. EVANS: Yes, it would seem to be that way, but it is also dependent on the rate of enforcement.

I talked to a Russian psychiatrist yesterday, and he told me that they had fewer cars in Russia. Fewer people drive in Russia because they can't afford cars; they don't get cars until they are in their 30s or 40s. They have 10% of our cars, but they equal our drunk driving fatality rate. There is less drunk driving there in terms of the numbers of people, but there are more fatalities.

There are a lot of variables that go into that, but the social host, I think, is a valuable tool. It is not the total picture. We need to work on enforcement, education, and changing public attitudes in addition to that.

SENATOR CARDINALE: You indicated that the social host liability principle will result in fewer incidents of drunk driving, fewer fatalities, and fewer other injuries. Would raising the drinking age to 30 do that?

MR. EVANS: Well, I-- My boss once raised the point of raising it to 85. In fact, the people who are at the greatest danger are, I believe, in the 18 to 25 age category. We settled at 21 because that was simply a settlement.

Twenty-one is the age of majority because in Medieval times -- I researched this from my books, so I know it is true -- men were thought old enough to wear heavy armor at the age of 21. That is where we got it from, in case anyone is wondering.

We would save lives if we raised the age to 25 or 30, that is true. But, we settled at 21 because they thought that would be acceptable.

SENATOR CARDINALE: Would we save lives if we abolished alcohol entirely?

MR. EVANS: Yes. In fact, prohibition did work; it is a myth that it did not. The incidence of alcohol problems during the period of prohibition went down. I can refer you to a book by Professor Mark Lender called "Alcohol Problems in America." He proves, in fact, that prohibition did work.

The reason we abolished prohibition was because it was during the Depression and we needed the tax revenue. It had caused an increase in crime, and that is why we got rid of it.

SENATOR CARDINALE: Which of those three possibilities do you feel would result in the greatest decrease in fatalities on the highways -- absolute prohibition, raising the age to 30, or social host liability? (laughter)

MR. EVANS: I think that put in the position of advocating prohibition, as I said earlier, our position is that our whole society would benefit if people drank less.

SENATOR LESNIAK: This is Counselor Cardinale over here.
(laughter)

SENATOR CARDINALE: My point, Counselor, is this: It is obvious--

MR. EVANS: (interrupting) My point is that I don't want to be quoted in the papers as being a prohibitionist.

SENATOR CARDINALE: (continuing) --that anything which increases responsibility is good.

MR. EVANS: That is right.

SENATOR CARDINALE: Anything which causes people to be less responsible is bad.

MR. EVANS: I think so.

SENATOR CARDINALE: In establishing laws, we have trade-offs of one thing for another. What we are trying to understand seriously from you is, within the area in which you are testifying, what kind of good are we going to have to balance against other kinds of problems which are going to be created by the law? I am not being facetious with these questions, but I did want them on the record.

MR. EVANS: Okay. I think the problems this law creates are minimal compared to the benefits.

Now, what are the problems? Well, there are some insurance problems. Homeowners aren't that affected by it. I am a homeowner, and I have a \$1 million umbrella policy. It covers any social host liability that I may have. Most homeowners have that.

The problem with the bar owners--

SENATOR CARDINALE: (interrupting) Counselor, the Senator has been very kind in letting me open another area, but I would really like to hear about insurance problems from the insurance people, etc. You are testifying here as someone from the Department of Health, and I can recognize the expertise of the Commissioner of Health in his area.

MR. EVANS: I really think that is the only problem -- the insurance problem. I think the benefits are that people are more responsible about parties, and they have developed a better caring attitude about each other. They look out for each other now.

Of all the things that I've been involved with for seven years as far as alcoholism is concerned, I've never seen anything over the Christmas holidays that had the impact of this case. We have spent millions of dollars in education, treatment, and everything else, and this is the thing that really did the job over the holidays.

We hit people in their pocketbooks. We can pass all kinds of laws, but when people think they are going to have to pay for something they do, and they think about losing their homes, etc., as I have thought about that, then they are going to be more careful. I am more careful when I serve alcohol in my home as a result of this. I don't see how that is a loss to anyone.

SENATOR LESNIAK: Thank you. Are there any other questions?
(negative response) Okay, thank you, Mr. Evans.

SENATOR LESNIAK: We have two gentlemen here from the Division of State Police to answer any questions from the Commission. I don't know if that is necessary, since Dr. Lester really covered this area very thoroughly. However, I want to thank Captain Edward Marinelli and Lieutenant Fred Lane for being here. Do either of you have a statement to make?

LT. FRED LANE: No, sir.

SENATOR LESNIAK: They are from the Breath Testing Unit, Division of State Police. Do any Commission members have any questions to ask these gentlemen?

SENATOR CARDINALE: Only one.

SENATOR LESNIAK: Okay. Senator Cardinale has a question, so would you both come up to the witness table, please? (gentlemen comply) Senator Cardinale?

SENATOR CARDINALE: Thank you, Mr. Chairman. Gentlemen. let me tell you the area I am interested in, and maybe you can just speak to that area without my asking you specific questions.

The questions that pop up whenever we talk about this are: "What kinds of standards can we establish? When is someone visibly intoxicated? Can a layman recognize visible intoxication?" We have heard statements on both sides of the issue. Assemblyman Bocchini has spoken about some information that was given before his Committee. You

are doing this on a day-by-day basis. Are you sometimes surprised when you get readings on people who are more under the influence of alcohol, or who are less under the influence of alcohol, than you would have thought from your observations?

LT. LANE: Senator, I have been in the Breath Testing Program since 1966 and I can't begin to tell you how many tests I have conducted during our five-day courses, during my career as a trooper making arrests, etc. I am probably the worst guesser in the world when it comes to pinpointing a specific reading. I have yet to see anyone who could look at an individual and say that his blood alcohol reading was .12%, .14%, or .15%. This gaze nystagmus, which someone mentioned, is only 78% accurate, and that is with expert training. The only time you can tell that someone is intoxicated is if he is obviously intoxicated. When someone has reached that point--

SENATOR LESNIAK: (interrupting) In your experience, at what level does that occur? At what level of intoxication does someone become "visibly intoxicated?"

LT. LANE: It depends on the individual. Some individuals at .10 fool me. I have listened to testimony regarding chemicals affecting the Breathalyzer. I have yet to see that happen, although I have investigated a number of claims and have tested a number of people in that regard. One incident involved an exterminator. He worked for the State, and they thought the reading came from his association with job chemicals. I went to Ancora Hospital, in fact, to test this individual. However, prior to allowing him to do his chemical test I zeroed him out, which I always do for any individual in that type of testing. He was a .10. I would have bet, my house probably that the guy was sober at that time, but he was a .10. I held him and computed how long it would take to zero him out. He stayed completely in my care and custody, never left my sight, until he was zeroed out, or until I thought he was zeroed out.

At the time of the test, I gave him the mouthpiece connected to the intake tube, and his hand shook like this (witness demonstrates). He was an alcoholic, but at .10 he was calm, steady, and I would say as sober as I was that day. I couldn't tell, but he

was an alcoholic. So, with the gaze nystagmus, you could probably tell, with some degree of accuracy, what his reading was or if he was under the influence, but you would need specific, specialized training. Our dealings with these people come into play when they drive a vehicle. There is no one, no one in this room, no one in the world, that I know of, in all the testing that has been conducted, who can operate a motor vehicle safely or without any physical signs of impairment at a .10 -- probably even at a .08 or .07.

I have tried to answer your question but I don't know if I have.

SENATOR CARDINALE: You answered my question exactly as it was put to you.

SENATOR LESNIAK: Exactly as he wanted you to. (laughter)
Assemblyman Bocchini?

ASSEMBLYMAN BOCCHINI: Did you hear my questions to Dr. Lester?

LT. LANE Yes.

ASSEMBLYMAN BOCCHINI: And you heard my statement regarding the 40-hour course which the troopers take. Is that a correct interpretation?

LT. LANE: You're right on target.

ASSEMBLYMAN BOCCHINI: All right. I believe there is also a 40-hour course they take, in addition to just observation, for the Breathalyzer. Is that right?

LT. LANE We have a DWI course -- driving while intoxicated -- where we go through a number of films and training for observations, drinking and driving clues, minor clues, subtle clues, where these individuals with low blood alcohol readings make slight driving errors. Okay? Then we have the 40-hour breath course where we train people to be breath test operators.

ASSEMBLYMAN BOCCHINI: So, absent your indication of obviously intoxicated, you can't necessarily presume that a person at .15 would be indicative of being obviously intoxicated in a social setting. Is that a fair characterization?

LT. LANE: No, I believe that is what you pointed out by watching video tapes, etc.

ASSEMBLYMAN BOCCHINI: Yes.

LT. LANE: You're right; you're absolutely right. You look at drunk, under the influence, and intoxicated; we're looking for under the influence, the guy who cannot drive a car properly.

ASSEMBLYMAN BOCCHINI: So, wouldn't you say it's a harder, or a more difficult burden on a social host to be able to tell if a person is under some type of an influence, as opposed to a trained trooper or police officer, who is out on the road looking for manifestations in driving versus a person sitting in a tavern, sitting at your daughter's wedding, or in a back yard somewhere?

LT. LANE: I can't let that go by without saying this: If you are looking for a host to be an expert, you are not going to find too many hosts who are experts. If you are looking for a host to determine a person's inability to walk, talk, and perform properly, I would say that the average person could do that. But, if you are looking at a host who has been drinking along with his guests, you're not going to find one who can determine the condition of his guests. He thinks his guests are okay because he thinks he is okay.

ASSEMBLYMAN BOCCHINI: Sure.

LT. LANE: That's another problem.

ASSEMBLYMAN BOCCHINI: That is the heart of the problem at the same time. The host may be able to detect the obvious -- the slur, the stagger, the stumble. All right? He is not going to be able to necessarily detect that about the person who is not exhibiting those things, who an officer may find on the road, crossing the shoulder, crossing the center line, you know, making erratic movements. The officer will stop the car, smell the alcoholic beverage on his breath, have probable cause, and the thing starts to move along. The host may never have seen any of that; he is not going to see that. This guy is going to walk out the door and say, "See you, pal," the host will say, "See you, buddy," and the guest gets in his car. Then something happens, and there is an accident.

What happens? It is going to be traced back, and the same way the tavern owner gets stuck, the homeowner is going to get stuck. What I am trying to get to is, I think it becomes apparent, or

hopefully it will become apparent, gentlemen, as you go along, that there is going to have to be some type of a standard, not just for that host but for that person. Life is a two-way street. The host is going to have a responsibility, the tavern is going to have a responsibility, and I think it is about time that we start to also say, "You" -- the person -- "have a certain responsibility." How we are going to achieve that, I am not quite certain, because that is where it gets tough.

MR. LEVINSON: If I may?

SENATOR LESNIAK: Mr. Levinson, do you have a question?

MR. LEVINSON: Yes.

LT. LANE: May I continue, Senator?

SENATOR LESNIAK: I don't know if there was a question.

LT. LANE: I thought Assemblyman Bocchini was driving at something.

MR. LEVINSON: I have a question.

SENATOR LESNIAK Lt. Lane, you go ahead for the moment.

LT. LANE: We have conducted courses. We have attempted to train members of the municipal court system -- 30 or 40 newly appointed judges. We gave individuals "X" number of drinks, and we knew they were going to be in a .10, .09 .08 or .07 situation. A number of these newly appointed judges said that these individuals were sober. They said, "In no way is he under the influence. I would allow him to drive me home." I wouldn't let that guy drive me from this wall to that wall in traffic. So, you are going to get that with everybody. If you get 20 people, 18 will say -- or 15 for that matter -- "He is under the influence," but you are going to get five who say, "That guy is perfectly all right." That is not your problem, but that is the problem on the whole.

SENATOR LESNIAK: Now, Mr. Levinson.

MR. LEVINSON We already know about the responsibility of the individual. The individual is responsible, and always has been, Assemblyman. So we don't really have to worry about that here. The individual who is out driving drunk is responsible. We are not talking about someone else.

ASSEMBLYMAN BOCCHINI Wait a second. When an individual is out driving drunk and hits a pole, you are not talking third-party liability. Okay? Possibly he can still go back after the social host--

MR. LEVINSON: (interrupting) Possibly.

ASSEMBLYMAN BOCCHINI: (continuing) -- and definitely, under case law, he can go back after the tavern owner.

MR. LEVINSON: Criminally he is liable, or quasi-criminally, and civilly he could be liable if he hurt someone else. We know about the liability of the person who is really drunk. I don't think that is what we are here for.

ASSEMBLYMAN BOCCHINI: Yes, but there is a difference; there is a subtle difference.

SENATOR LESNIAK: Just a second, we are not here to debate amongst Commission members.

MR. LEVINSON: I would just like to ask the trooper-- Of course, the advantage that the host has over you is that he has had an opportunity to know that the man was drinking and, presumably, how much. That is the advantage he has over you when you are stopping the car. Correct? That is a help in determining whether or not the man is intoxicated.

LT. LANE: I would think you would have to make a couple of assumptions before I could even agree with that statement. The host would have to know that the individual was absolutely sober when he walked through the door. I don't want to take a stand on this one way or another. Don't misunderstand what I am saying, but I can't answer the hypothetical question you are throwing at me.

MR. LEVINSON: All I am saying is--

LT. LANE: (interrupting) Number one, you would have to know that the individual was absolutely sober, had nothing to drink when he walked in your door. Number two, you would have to mix every drink; you would have to know the specific amount of alcohol you were pouring into this individual. Number three, you would have to be able to estimate his body weight. Number four, you would have to know something about his burn-off rate. All right? Mr. Levinson, I don't

know what field you are in, but what I am trying to tell you is this: I can't do it; I cannot do it, and I have been in this business since 1966.

MR. LEVINSON: All I am asking you, sir, is, if you saw someone drinking and you saw him have a number of drinks, wouldn't you be in a better position to judge than if you didn't see him?

LT. LANE: Oh, okay, I'll go along with that part of it.

MR. LEVINSON: That's all; that's all.

LT. LANE But, again, to make a determination about whether he was under the influence or not--

MR. LEVINSON: (interrupting) I say you would be in a better position to make a determination.

SENATOR LESNIAK: Senator Cardinale has one question.

SENATOR CARDINALE: You apprehend people all the time who are suspected of drunken driving, and you have some experience in the area of heavy drinkers who subsequently drive. I once read a study which indicated that an enormous number of people admitted to drinking while driving.

LT. LANE: In the vehicle?

SENATOR CARDINALE: Yes, in the vehicle. Can you enlighten us at all as to what percentage of heavy drinkers might drink while in a vehicle after leaving a host's home?

LT. LANE No, sir, I cannot.

SENATOR CARDINALE: Okay.

SENATOR LESNIAK: Do we have any other questions from the Commission members? (negative response) Okay, thank you very much; that was very good testimony.

We are going to have to move along, or we will be thrown out of the building. May we have Mr. Byron Kath from the Northeastern Public Safety Institute? Byron, that was not meant as an admonition to you, but to the Commission members, including myself.

Will you please state, very briefly, in what capacity you are testifying tonight?

BYRON KATH: Sure. I was asked to testify because I teach improved sobriety testing to police officers throughout the State. I have been

a police officer in East Brunswick Township for almost 15 years. Presently, I am in the Traffic Safety Division. Besides instructing in the improved sobriety testing program, I teach accident causation analysis, which is an advance accident reconstruction course, basically for fatal accident investigations throughout the State, through the Northeastern Public Institute, and advance accident investigation for the Middlesex Police Academy through the Prosecutor's office.

When I first took the course in improved sobriety testing, it was in upstate New York. The National Highway Traffic Safety Administration conducted a 10-year study and found that out of four drunks who are actually stopped on the street, only one is being arrested. That is because of the inability of the police officer to detect the degree of intoxication. The police officers out on the street have a problem detecting .10 up to .14. Besides the low reading of the intoxicated driver, the officers have a problem with the everyday functioning alcoholic. As you heard in testimony here, they look very good. They function that way; they go through their daily lives trying to look straight.

So, after spending \$3 million and 10 years, they came up, in conjunction with the Maryland State Police, with a course which divides attention for sobriety testing. They found that an intoxicated driver can fix his attention on one thing. If you divide that attention, you can see signs of his intoxication. Also, they came up with the horizontal gaze nystagmus, which is the involuntary jittering of the eye. Everyone has nystagmus in his eyes. When you induce alcohol into your system, it makes it more pronounced. It is a point system that a police officer is taught to judge, whereby he can come up with a conclusion about whether a person is above or below a .10. That in itself, throughout this whole country, is found to be a minimum 77% accurate.

In this survey, they found that the present sobriety tests that most of us are using -- the finger to nose, the alphabet, etc. -- are only 30% effective. Now you can see why the police officer, not only in this State, but throughout the country, is letting go three out of four drunks who are being stopped. The officers can't tell.

They came up with a divided attention test, which is called the "walk and turn." It divides the attention several times, just as you would in driving. In driving, your attention is divided several times -- stops, left turns, slowing down, and the steering process. It is the same thing with the one-legged stand. That is also a divided attention test. It is an instructional phase and then a walking stage, where you have to perform the test. The person can be observed, especially since we are in a world of video. He is observed while he is trying to comprehend other instructions you are giving him. You can see that the person will start before he is told to start, trying to play catch-up. So, these things are very effective.

This course instructs the police officers, and you would be surprised how accurate they become. Now, I gave you stats as far as the horizontal gaze nystagmus being 77%. That is throughout the whole country. The Maryland State Police found it to be 93%. out of 2,500 drunks who have been tested with this. The National Highway Traffic Safety Administration hopes that this will be a standardized course throughout the whole country. Northeastern has three of the ten instructors who were trained in New Jersey teaching this course, only because the other seven are not qualified to teach. A method of instruction course is a requirement by the Police Training Commission, and the other seven do not have it at present.

They are trying to reach out. They received a grant of \$6,000 from the Office of Highway Safety. At present, over 40 officers have been trained. They became department instructors, so they can do in-service training.

SENATOR LESNIAK: If I may, we are certainly not going to be able to extend that training to social hosts.

MR. KATH: Well, the point I would like to make is, you talked about whether you could recognize a person who is a .10 or a low-reading drunk. Believe me, if police officers can't, I doubt that the public can.

SENATOR LESNIAK: Would you say, though, that a person with a reading of .15 could be presumed to show recognizable signs of intoxication?

MR. KATH: A functioning alcoholic could be a 20 and you wouldn't know.

SENATOR LESNIAK: Presumed to be?

MR. KATH: Right.

SENATOR LESNIAK: Presumed to be doesn't mean the exception. It would be, for instance, a rebuttable presumption. If I were a functioning alcoholic, I could prove, "Hey, I'm a functioning alcoholic." No, in most cases--

MR. KATH: (interrupting) In most cases, we have found that if a person has a .15, you will be able to detect it.

SENATOR LESNIAK: And, the lay person would be able to detect it?

MR. KATH: More than likely, unless the person was completely naive. In training sessions, we have--

SENATOR LESNIAK: (interrupting) But, below that you would say that you certainly could not presume that one way or the other?

MR. KATH: A trained police officer would have difficulty. If I may, the last course I taught was in Burlington. We had four drinkers, and they ranged in readings from .10 to .13. The officers who were attending that class knew the drinkers; they were from the Burlington area. They were also told that one might be a ringer, one who only had one or two drinks. The volunteer drinkers were told not to tell how much they drank. One officer who was a volunteer drank 18 ounces of 80 proof Dewars mixed with water. That is nine drinks. His reading was a .10. He weighed 240 pounds. The other gentleman drank 16 ounces; he was a .11. He drank Jack Daniels 90 proof. When they were tested by the officers, when they were given the standard sobriety tests -- now these officers knew these individuals, they had drank, socialized, and played baseball with these people -- every one of them, when asked, said that they would have cut them loose if they had stopped them on the road. They were not able to tell. Only because they used the horizontal gaze nystagmus and the two divided attention tests did they, in fact, come up with readings before they were given out to them. And they judged that the persons were, in fact, a .10 and a .11. So, you can see the increase in accuracy. I'm not saying that

is the answer; what I am saying is that as far as a police officer's training is concerned, it certainly gives him the greatest tool he's had since the Breathalyzer, and I have been a Breathalyzer officer for 11 years.

As far as the hostess bill is concerned, I have had the opportunity of going to schools. What I teach, especially to high school kids-- I used to show them films; I showed them a Breathalyzer; and, I went over the penalties and fines involved. When the bell rang, they woke up. Now when I talk about the hostess bill, I beat the bell. They are awake, because what I am saying hits home as far as the reading of news clippings is concerned. In my experience going into the schools and teaching, this hits home to the parents and to the students, the high school students.

SENATOR LESNIAK: So, it has been your experience in terms of speaking to children and adults that the Supreme Court's decision has had a good effect in terms of alcohol abuse and drunken driving?

MR. KATH: That is what I found. Going back prior to that, as I told you, the bell used to ring and wake the kids up when the class was over. Now, they are awake before the bell, because I read them news clippings, I go over the bill, and they sit on the edge of their seats. I beat the bell for the first time, so that says something.

SENATOR LESNIAK Are there any questions?

ASSEMBLYMAN MILLER: Yes. On point one, is there any margin for error on a reading? I have heard of cases where a person has gone before a court with a .1 and the lawyer has been able to prove one way or another that the .1 wasn't good enough, didn't hold up, there was something wrong with the machine, or whatever.

MR. KATH: I think what you are referring to is backstrapulating the reading. What they do is, the defense attorney will hire a so-called expert who will try to backstrapulate the reading, especially if there was some time between when the person was stopped and when, in fact, the reading was taken. They will show that at the time the person was on his way up, he was a .10 when tested. but back then he was maybe an .06 or .07. I think that is what you are referring to.

ASSEMBLYMAN MILLER: Okay.

SENATOR CARDINALE: What kind of a progression is that?

MR. KATH: Pardon me?

SENATOR CARDINALE: Over what period of time from the last drink does the reading continue to rise?

MR. KATH: Under normal conditions, it doesn't. In other words, from the time of arrest to the time that the person is given a reading, you won't see--

SENATOR CARDINALE: (interrupting) No, I'm talking about from the time of the last drink to the time of testing.

MR. KATH: Okay. We have to give them 30 minutes in-between drinks before we give them the test to make sure that all the alcohol dissipates in the mouth. So, from the last drink-- We have a sheet that was made up through studies and it gives information. The National Highway Traffic Administration spent \$3 million on studies. They are out of the United States Department of Transportation. I would be glad to mail you the address so you can send for this sheet. I think it would answer a lot of the questions you asked Dr. Lester.

SENATOR CARDINALE: I have just one final question; you can answer it yes or no. Is it possible for someone to leave a home, having had a drink 10 minutes or so before leaving, or five minutes before leaving, and not be intoxicated when he leaves, but be intoxicated 20 minutes later or 30 minutes later while he is still driving on the highway?

MR. KATH: No. The effects may seem more pronounced from the fact that he hit the air, maybe he had the heater on, that type of thing, but as far as a person being, say, a .06 at a party, with the host seeing that the person only had one or two drinks, and then on his way home the person winds up being over a .10, no.

SENATOR LESNIAK: If he had a double or a triple for the road, he could.

MR. KATH: Oh, if he was drinking on the way.

SENATOR LESNIAK: No, no, if he drank just before he left. If he were, for instance, a .10, and you--

MR. KATH: (interrupting) It would depend on the body weight. If a large person who weighed over 200 pounds had a double, if the person was a .06, it wouldn't really affect him. I gave an example where a person who was 240 pounds had to drink 18 ounces within two hours. We had other drinkers who were female, and it only took six ounces to bring them up to a .12.

ASSEMBLYMAN BOCCHINI: Which proves that us round people make better company. (laughter)

SENATOR LESNIAK: Are there any other questions from the Commission? (negative response) Thank you very much for your expert testimony.

MR. KATH: You're welcome.

ASSEMBLYMAN BOCCHINI: I thought the Senator asked that. Senator, I believe your question was, "What is the rate of absorption?" I believe the maximum is one hour from the last drink.

SENATOR CARDINALE: The obvious point I am making, Assemblyman, is that the social host is being held liable for an action. That action is the action of giving a drink to someone. The last drink he gives to the individual is given at some point in time. It may be less than an hour before he leaves the home.

ASSEMBLYMAN BOCCHINI: I understand.

SENATOR CARDINALE: So, the person may leave the home sober, but that drink is still being absorbed. I was interested in the time element.

ASSEMBLYMAN BOCCHINI: Yes, and I think it can make a difference, from the time you have the last drink until the point in time when something occurs.

SENATOR LESNIAK: We will be debating these issues in executive session when we get around to it, after we have heard all of the testimony. The next persons to testify will be the two people from Mothers Against Drunk Drivers, Donna Ferrante and Terry Corvino. Will you both come up, please? We have afforded many other people an opportunity to be heard, and we certainly would like to hear from you as well.

DONNA FERRANTE: I am not going to be too long. In an attempt to answer the subject material that was in your meeting notice, we have put together a short statement which basically gives MADD's position in the State of New Jersey on host liability.

SENATOR LESNIAK: Do you have a copy of the statement?

MS. FERRANTE: I have one extra copy of the statement that you are welcome to.

SENATOR LESNIAK: I think maybe the hearing reporters would like a copy of your statement. It helps them.

MS. FERRANTE: Alcohol related crashes can be, and are being, reduced by convincing the public that drinking and driving is socially unacceptable behavior. This attitude change is being accomplished through education, starting in kindergarten and continuing through high school, college, and into adulthood. This is a long-term project, and in the interim, public awareness programs must be promoted in an effort to educate those adults who have already completed their school years. In addition to education, we must provide a deterrent to the antisocial behavior of driving under the influence through stiff penalties and strict enforcement of our DWI laws.

Since 1982, when New Jersey began its program of education, community awareness, penalties, and strict enforcement, we have reduced the number of alcohol-related fatalities, according to the Office of Highway Safety, by 47%. The program is working.

The social host liability ruling handed down by our New Jersey Supreme Court has become an important part of this program because it has resulted in increased public awareness of the drunk driving problem. In our opinion, this ruling is not attempting to legislate morals: it is directing social hosts to take reasonable measures to ensure that their guests do not drive drunk. We are really talking about negligence. In this society, when we act in a negligent manner, we can be held accountable. This ruling only gives the victim the right to sue. A civil process must determine the outcome, and the victim must prove his or her case.

The social host should be held responsible for allowing someone in his/her home to: (a) become visibly and obviously

intoxicated, and then (b), knowingly allow him to get behind the wheel of a car. We are not talking about being able to accurately determine a person's exact blood alcohol concentration. We are talking about the fact that any responsible host who is paying attention to his or her guests can certainly tell if a guest is exhibiting obvious, visible signs of intoxication, and should never allow that guest to then get into a car and drive away.

There is no question that an adult is certainly responsible for his or her own actions, and should be held accountable for those actions. By directing social hosts to act responsibly in the serving of alcoholic beverages, we are not taking responsibility away from the drunk driver -- he will still bear the full criminal sanctions. He will also bear at least a portion of the civil sanctions. However, when a third party directly contributes to conduct which results in injury or death to an innocent victim, then that party must share the cost of the damage. The only just compensation for the innocent victim is to assure payment of all medical bills and related care costs for those who are injured and payment of all the debts and obligations of those who are killed. Payment of those costs must be borne by those who caused or contributed to the crash. We must not allow our system to revictimize the victim by placing the financial burden back on their shoulders. After all, they did not ask to be injured or killed.

As for the impact of social host liability on homeowners' or renters' insurance policy premiums, there has been none. To date, we have seen only a few cases come to our attention. Where is the influx of cases everyone was predicting? There is no proof to justify any increased costs in insurance premiums under the guise of "possible" suits. New Jersey has an Insurance Commissioner whose responsibility it is to see that this does not happen.

Finally, if you intend to be a social host, then society must demand that you be a responsible one. Have a good time; eat, drink, and be merry; but, don't drink and drive, and don't let your guests drive drunk either. Take reasonable precautions and you need not worry about being sued.

SENATOR LESNIAK: How do you feel about the drunk persons themselves suing the person who served them for their own interests?

MS. FERRANTE: I did not come here to advocate for the rights of the drunk driver. I came here to advocate for the rights of the victim.

SENATOR LESNIAK: Okay, good answer. Are there any questions? Assemblyman Bocchini?

ASSEMBLYMAN BOCCHINI: I will yield to the Senator.

SENATOR CARDINALE: The language you used with respect to the conditions upon which you feel the host should be held liable is very similar to the language in 2.b. of the Senate bill. Have you had an opportunity to look at the Senate bill on the subject?

MS. FERRANTE: Yes, sir.

SENATOR LESNIAK: We're talking about Senator Cardinale's bill, right?

SENATOR CARDINALE: Well, it has 21 cosponsors.

SENATOR LESNIAK: Senator Cardinale plus 20.

SENATOR CARDINALE: Yet, I have been led to believe that the organization for which you are speaking is opposed to that bill. Can you put those two facts into some kind of a perspective?

MS. FERRANTE: Okay. We are of the opinion that that bill narrows the ability of the victim to sue by more than a sufficient amount.

SENATOR CARDINALE: And yet, the same conditions of suit are the conditions to which you testified here. I don't understand then why, if you are taking a position that those ought to be the conditions of suit, and that is what the bill does, you feel that the bill narrows it too much, since it does exactly what you have indicated ought to be done.

MS. FERRANTE: If you would like to identify or define the term "obviously and visibly," that's fine, but I don't think it has to be defined to the point where a person-- You have me at a disadvantage here. I am trying to say this so that you, as an attorney--

SENATOR CARDINALE: (interrupting) I'm not an attorney.

ASSEMBLYMAN BOCCHINI: He's worse; he's a dentist.
(laughter)

MS. FERRANTE: Attorneys have an amazing way of telling you that the word "knowingly" does not mean that you had to know he went out to drive a car. The word "knowingly" means that not only did you know that he was going to get into a car, you also knew that he was going to drive it down the road and hit someone. The term "recklessly," in legal terminology, does not mean, and does not bear any resemblance to, Webster's definition of the word "recklessly." So, if your bill is written in layman's language and you say, "must be obviously intoxicated, exhibit physical signs of intoxication, and the host, in addition, must have known that this person would, in all likelihood, be driving a car, because he left with keys in his hand, because he came by car," then fine; that's okay. But, don't make it so tough for a victim that the guy is going to have to be unconscious when he gets in his car before a victim is entitled to sue.

What we're saying is, you should define the term "visibly intoxicated."

SENATOR CARDINALE: I would like to share with you--

SENATOR LESNIAK: (interrupting) I'll read it. Visibly intoxicated is defined in the legislation referred to by Senator Cardinale as meaning: "A degree of intoxication accompanied by an act or series of actions or some other clearly unmistakable sign of intoxication." It goes on further to state: "Evidence of failure to pass a test to determine the presence of alcohol or urine shall be insufficient in the absence of corroborating evidence of visible intoxication within the meaning of this act."

MS. FERRANTE: I have no problem with the last part of that because, as my statement said, we are not talking about numbers. If a person is .10 or .12 and, as Assemblyman Bocchini said, walks out the door and says, "Good-bye, I'll see you later," if he doesn't trip over the doorstep and doesn't trip over his tongue, then no, the host should not be held responsible in that instance.

SENATOR LESNIAK: But the problem with the law, the way the rules of evidence are, is that that would be admissible evidence, and from that, you can draw an inference that there were visible signs, absent legislation to the contrary.

MS. FERRANTE: And, absent legislation to the contrary, a person with a .20 or a .25-- You'll never convince me that even I, with no training in alcoholism, could not tell if a person stumbles, if a person cannot talk to me coherently. Those are visible signs of intoxication. If he is only a .12 or if he is a .23, it doesn't really matter. My liability is in that he exhibits those signs of intoxication.

SENATOR CARDINALE: Now, you said that you like the second portion of that paragraph. You seem to have a reservation about the first portion. As the author, I understand the first portion to mean what you seem to want it to mean. I would like to understand what problem you have with the exact language.

SENATOR LESNIAK: The problem I have is with the word "unmistakable."

MS. FERRANTE: Yes, "unmistakable" and "clearly."

SENATOR CARDINALE: You want "unclear evidence." What kind of unclear--

MS. FERRANTE: (interrupting) No. If you read that, what it says is, "he must have clearly known."

SENATOR LESNIAK: Okay.

MS. FERRANTE: And "unmistakable." So, "I tripped over the rug; I really wasn't drunk." You know, there are--

SENATOR LESNIAK: (interrupting) That would be the turning point, as you see it in the legislation.

MS. FERRANTE: Yes.

SENATOR LESNIAK: Okay.

SENATOR CARDINALE: If we can get your approval of this legislation by the removal of two words, I think we will have accomplished a great deal at this hearing. (laughter)

SENATOR LESNIAK: Are there any other questions?

ASSEMBLYMAN MILLER: Just a comment, Senator.

SENATOR LESNIAK: Oh, by the way, Assemblyman Bocchini, did you withdraw your question?

ASSEMBLYMAN BOCCHINI: Yes.

SENATOR LESNIAK: Thank you. Assemblyman Miller?

ASSEMBLYMAN MILLER: I just have a comment. I could not have written a better presentation myself. I am pretty much in approval with your approach. However, you mentioned something about insurance, and said you have not heard about any insurance problems. Maybe we haven't heard about too many of them yet as far as hostess liability is concerned, but it is certainly evident as far as license liability is concerned.

MS. FERRANTE: That is correct.

ASSEMBLYMAN MILLER: I have heard of one place where the insurance has gone from \$25,000 to \$125,000 within months. There is only one outfit, as I understand it, in the State of New Jersey which now insures, and I understand that as of April 15, they were not going to insure anymore. So, people are hurting.

MS. FERRANTE: I heard of one that went from \$1,500 to \$9,700 within weeks.

SENATOR LESNIAK: Assemblyman, I would ask you to reserve your inquiries on insurance until we have our next hearing.

ASSEMBLYMAN MILLER: I was referring here to a comment made by Ms. Ferrante that we haven't seen any evidence on insurance. I'm sure you will see it if it keeps going the way it is going.

MS. FERRANTE: I think the answer to that question is that liquor liability insurance is not regulated by our Insurance Commission. However, homeowners' liability insurance is regulated. In order to increase premiums, the insurance company must demonstrate a need for the increase in those premiums.

SENATOR LESNIAK: By experience.

MS. FERRANTE: So far there has been no demonstration because there has been no need.

ASSEMBLYMAN BOCCHINI: The Commissioner testified at our hearings, Senators and Commissioners, that in 1982 the Governor signed into law the deregulation of commercial insurance. Subsequent thereto, there has been no track record on liquor liability.

MR. LEVINSON: May I ask one question?

SENATOR LESNIAK: Sure, Mr. Levinson.

MR. LEVINSON: How do you feel about the Chief Justice's standard: "We therefore hold that a host who serves liquor to an adult social guest, knowing both that the guest is intoxicated and will thereafter be operating a motor vehicle, is liable for injuries inflicted on a third party as a result of the negligent operation of the motor vehicle by the adult guest, when such negligence is caused by intoxication." Do you like that standard?

MS. FERRANTE: I sure do.

MR. LEVINSON: Do you like that standard better than Senator Cardinale's bill?

MS. FERRANTE: Yes, sir.

SENATOR LESNIAK: Next witness. (laughter)

SENATOR LESNIAK: Thank you very much.

MS. FERRANTE: Thank you.

SENATOR LESNIAK: Our next witnesses, from the New Jersey Licensed Beverage Association, are Carmen Giletto and Wilbur Smith. Mr. Giletto and Mr. Smith, you certainly will have an opportunity to be heard here, but I want you to understand that our mandate is toward the host liability issue. I know there are certain issues that cross through both fields. So, with that short admonition, you are invited to lend your comments to our Commission.

CARMEN GILETTO: My comments are going to be basically for the host. Let me give you a little history about myself first of all. I am the President of the New Jersey Licensed Beverage Association, but I am also a licensee who operates a restaurant and cocktail lounge. My father was in the business and my brothers and sisters were in the business. I have over 35 years experience in the business. Probably in my lifetime, I have served millions of drinks. Not only did I own a place for 20 years, but I have managed places, and have worked as a bartender and a waiter. I have probably been in every phase of the industry.

Basically, what I am trying to tell you is, as far as being an expert, I would consider myself an expert in the service of alcoholic beverages. Through the years, I have found that there are an awful lot of people who consume alcohol, but who never show visible

signs of intoxication. I'm talking about people who are not alcoholics, but who drink on a daily basis. Just because a person consumes on a daily basis, that doesn't make him an alcoholic. There are different tolerances, and, yes, there are people who can be visibly or noticeably intoxicated. For instance, there are people who will spill a drink or who will get a little more vocal while consuming. But, the everyday drinker does not show these signs, and he does consume. If it is difficult for me, a person with 35 years' experience, it is certainly extremely difficult for a social host to be able to tell when someone comes into his house, especially when he is enjoying the beverage of moderation with that person. Even if the person was worthy of some expertise, he still couldn't tell how far or how much this person-- He couldn't tell how the person would perform after leaving his home or his establishment.

There were studies made at the University of Colorado. In fact, Rutgers has made studies, and those studies show that different people have different tolerances. Also, there are different phases for the human body getting to a point of intoxication, on different days, or a person may consume different foods. For instance, milk versus a heavy meal with bread and red meat, or a fish meal with maybe sweet soda, would let the alcohol go through the body at a different time. A person can leave an establishment, take the alcohol with him, and then ferment to his intoxicated point.

I know you are not going to listen to testimony pertaining to our industry, but I would like to make mention of some things that happened in the insurance phase of our industry which will probably happen with the social hosts. With that, I would like to introduce Mr. Wilbur Smith. Wilbur can enlighten you on some of the--

SENATOR LESNIAK: (interrupting) What I find interesting is that the skyrocketing premiums seem to coincide with our deregulation of the industry. So, there may be factors involved here other than liquor liability which may be affecting your premiums.

WILBUR SMITH: Most of my life was spent as an underwriter on personal and commercial lines for one of the largest casualty companies in the business. Prior to retiring, I got involved in the liquor business with my family.

SENATOR LESNIAK: So, you uniquely qualify to testify tonight.

MR. SMITH: The question is, should I have stayed in the insurance business?

I would just like to give you some input on the licensee, the social host, and the employee. I will give you a typed copy of these comments; I'll send it to you by mail so that you will have everything for the record.

SENATOR LESNIAK: May I ask you to please summarize your comments, only because the time is late?

MR. SMITH: This won't take long. The licensee, from a business standpoint, because of liability imposed by the present law and the lack of an insurance market, has been placed in a position of little or no future. The industry is one of the highest contributors of tax to the State and Federal governments. We also provide one of the largest markets of employment.

The social host has a problem of defense, with a possibility of inadequate limits of insurance and even a limited market at a price for the latter. Eight or nine years ago, the licensee was paying around \$100 per year for liquor law liability based on a gross of \$100,000 and a limited liability of \$300,000. In this relatively short period of time, the premiums have increased to an amount that the average licensee is unable to pay, plus the fact that the number of insurance companies writing liquor law liability has been reduced to just a few. The commercial rates were deregulated in 1978. As a result, the insurance companies can charge whatever they want. They do not have to submit their rates for prior approval to the Insurance Department.

Presently, about 40% of our licensees are uninsured, and as each month passes, the percentage increases. You can see that from the list I gave you. The premiums and these risks are properly identified. You can see what they paid last year and what they are paying, or are being asked to pay this year.

SENATOR LESNIAK: Is the crux of your testimony that the homeowner or the tenant buying tenants' insurance may be faced with a similar circumstance somewhere down the road?

MR. SMITH: Yes, definitely.

SENATOR LESNIAK: Okay. Do we have any questions from the Commission? (no response)

MR. SMITH: I would just like to add a few comments here. There is a side issue which affects the business. I am sure you are acquainted with it, but it will have to be handled as a separate study. It is the limits of liability on the automobile, the 15 and 30.

SENATOR LESNIAK: Do you mean the minimum coverage?

MR. SMITH: I mean automobile, correct. Our State law is 15 and 30. This is an inadequate limit whether DWI is involved or not. What do we do when a girl with minimum limits is involved in a serious accident where no drinking has taken place? There is no public outcry of sympathy for the third party. We also have 600,000 drivers without insurance and without licenses. I bring this to your attention because it plays an important part in liquor law liability claims, both for the licensee and for the social host. I am sure you are acquainted with it from a claims' standpoint, because when an individual with that limit is involved in a claim, it isn't adequate, and you are looking for something else. This is what has happened in recent years. The lawyer has come after the licensee or the social host.

So, this has to be looked at as a separate study because it is a very serious problem, whether you hear DWI or not, for the third-party claim.

About four years ago, legislators mandated an educational program, from kindergarten through high school. The visual text and the materials which have been prepared by the college professors are excellent, but we are not putting them to use. Until we start teaching the younger generation the proper use of alcoholic beverages in moderation, we are really not going to solve the problem. We are going to continue to do the same things we have been doing for years.

I appeal to you to support legislation to put the responsibility where it belongs and to implement an educational program in all of our schools. Thank you.

SENATOR LESNIAK: Are there any questions? (negative response) Thank you both very much.

MR. TOBOROWSKY: I was just going to say with regard to the numbers he gave us, were there claims against these companies?

MR. SMITH: I can't quite hear you.

MR. GILETTO: Just one.

MR. SMITH: The second one on the list is the only one that has a claim.

SENATOR LESNIAK: Okay. I am going to request that insurance company representatives, as well as Department of Insurance representatives, be present at the next hearing.

MR. GILETTO: Thank you.

SENATOR LESNIAK: Thank you. We have one other witness, Nancy VanCourt, President of Remove Intoxicated Drivers. Nancy, we are going to be thrown out of here in a few minutes.

NANCY VanCOURT: I have no prepared statement, so I will be brief.

SENATOR LESNIAK: I want to give you an opportunity to be heard, but we don't want to get locked in either.

MS. VanCOURT: Right; I want to get home too. As you said, I am President of Remove Intoxicated Drivers. I present you with no expertise; I am just a concerned person who is involved in the education and awareness effort.

I just want you gentlemen to be aware that the Office of Highway Safety has approved a grant. We have not received the money yet, but it is for \$10,000, which we will use to educate the public on the host liability law and how to go about holding a party in a responsible manner. Our material will also have a copy of the summation of the case law.

SENATOR LESNIAK: How do you feel about the decision as it affects the social host and social behavior in the State of New Jersey?

MS. VanCOURT: I think it is a very positive thing. I think it has made people aware of their responsibilities. I think there is a bit of paranoia involved, only because they are not aware of all of the particulars. That is what we hope to provide through this campaign.

SENATOR CARDINALE: May I ask a question?

SENATOR LESNIAK: Sure, Senator Cardinale.

SENATOR CARDINALE: It has been my experience that there is a great divergence of opinion with respect to what that decision really means in specific terms. I wonder how you are going to draw up the guidelines you are going to give to people. Are you going to use the broadest interpretations, or are you going to use the narrowest interpretations? It was a dissenting opinion even within the Supreme Court. One justice said, "You know, this is a very far-ranging opinion, and the majority rules with scant knowledge and little care about the consequences of what it is doing here." Given that, how is your organization going to guide people, absent some more defined rules that would -- even if they were the widest -- at least tell people exactly what they could and what they could not do? That is a puzzle to me. Maybe to end the evening on a lighter note--

SENATOR LESNIAK: (interrupting) This is from the Senator who was going to leave early because he didn't feel well.

SENATOR CARDINALE: Would you not feel that your organization, if it misadvises people-- How would you feel about your organization being held as, maybe not a third person, but perhaps a fourth person liable in an incident like this? I am not being facetious; that is a very analogous kind of a situation.

SENATOR LESNIAK: Senator, I don't think she has to answer that.

MS. VanCOURT: If I may, I would like to.

SENATOR CARDINALE: I'm not even asking for an answer.

SENATOR LESNIAK: Regarding the second half of that question, there is no legal duty involved here. So, I don't think they have to worry about getting into a lawsuit.

MS. VanCOURT: By the way, we are a corporation, and we are insured.

However, we are not addressing that area. Our suggestions concern how to hold a party: Don't serve salty snacks; use a shot glass, rather than just pouring liquor from the bottle into the glass; and, have an hour at the end of the party where you are not serving alcoholic beverages, but where you provide nonalcoholic alternatives. Those are the sort of suggestions we are putting out; not suggestions

about what to recognize or where the liability is. I would like to see something in a piece of legislation where you would take the definitions that the gentleman from the Department of Health presented, and really define at least some minimal guidelines as to what you mean by "visibly intoxicated and physically impaired."

I think those things should be included because they can't be legally argued, if they are defined.

SENATOR CARDINALE: Have you looked at the Senate bill?

MS. VanCOURT: I have not; I am aware of its existence, but I have not seen a copy.

SENATOR LESNIAK: We are going to work the Senate bill over. Are there any questions from the Commission? (negative response) Okay, thank you very much, Ms. VanCourt. Good luck with your work.

MS. VanCOURT: May I make one final comment?

SENATOR LESNIAK: Sure.

MS. VanCOURT: At future meetings, could you have better directions? I got to Linden at 7:30, and I got here at ten of eight.

SENATOR LESNIAK: Complain to Gerrie Weltman. Gerrie will take all of the complaints about directions. (laughter)

Thank you very much for coming, Commissioners. The hearing is adjourned.

(HEARING CONCLUDED)

