One Strike and You’re Out: Alcohol in the Major League Baseball Clubhouse

ABSTRACT

In the past decade, much has been written about Major League Baseball’s (MLB) mistaken policies regarding performance-enhancing substance abuse by players. MLB executives are shortsighted, however, if they believe that steroids are the only substances being abused by players. Along with performance-enhancing drugs, professional baseball has a long-standing history of alcohol abuse. Steroids may provide better headlines—Congress has never held an investigation into alcohol abuse by professional athletes—but professional baseball faces a real danger from the unchecked liability of allowing players to overindulge at the ballpark and drive home shortly thereafter. By serving beer in the clubhouse after games, clubs are subjecting themselves, their players, and the public to undue danger.

This Note asks whether an MLB club would be vicariously liable for injuries to third parties resulting from the drunk driving of players who drank club-provided alcohol following a game. To address this question, the Note first will show that baseball and alcohol have a long and often negative history. Subsequently, it discusses the legal framework for third-party liability, describing three formulations of vicarious liability that may create liability for the clubs. Next, this Note argues that MLB clubs could be held liable under both standard theories of third-party liability as well as respondeat superior employer liability. Finally, this Note proposes potential and easy solutions to MLB’s problem.
On January 11, 2008, Major League Baseball announced that it had formed a department of investigations to look into allegations of its players’ illegal drug use. The department’s inception was a key recommendation following former Senator George Mitchell’s two-year investigation into the use of performance-enhancing drugs in baseball and the subsequently issued “Mitchell Report.” Like Senator Mitchell’s investigation, the department was designed to review Major League Baseball policy and to help Major League Baseball clubs purge themselves of substance abuse.

In addition to searching for the use of illegal substances, the investigation was an attempt by Major League Baseball to distance itself from its unfortunate place in the “steroids era.” Many fans,
including Henry Waxman, congressman from California and the chairman of the House Committee on Oversight and Government Reform, blamed Major League Baseball and the Major League Baseball Player’s Association for “looking the other way” while players broke the law by using performance-enhancing drugs. With public and congressional pressure squarely on league executives, Major League Baseball was convinced to go to expensive lengths to ensure that it would not be held liable for future instances of player drug use (a practice many conflate with cheating).

Major League Baseball executives were shortsighted, however, if they believed that steroids were the only substances being abused by players. Along with performance-enhancing drugs, professional baseball has a long-standing history of alcohol abuse. Steroid abuse may be the more newsworthy topic—Congress has never held an investigation into alcohol abuse by professional athletes—but professional baseball faces a real danger from the unchecked liability of allowing players to overindulge at the ballpark and drive home shortly thereafter. By serving beer in the clubhouse after games, clubs are subjecting themselves, their players, and the public to undue danger. If an accident were to occur, clubs may be vicariously liable for injuries caused by players driving drunk. Major League Baseball should address the issue of alcohol in the clubhouse now and not wait for a congressional investigation or public hearing.

This Note will address this topic by investigating potential liability for the clubs. Specifically, the Note asks whether a Major League Baseball club would be vicariously liable for injuries to third parties resulting from the drunk driving of players who drank club-provided alcohol following a game. To address this question, the Note first will show that baseball and alcohol have a long and often negative history. Subsequently, it discusses the legal framework for third-party liability, describing three formulations of vicarious liability that may create liability for the clubs. Next, this Note argues that Major League Baseball clubs could be held liable under both standard theories of third-party liability as well as respondeat superior employer liability. Finally, this Note proposes potential and easy solutions to Major League Baseball’s problem.


5. Id.

I. MAJOR LEAGUE BASEBALL AND A HISTORY OF ALCOHOL ABUSE

In 2006 Josh Hancock fulfilled a childhood dream when he won a World Series ring as a relief pitcher with the St. Louis Cardinals. In 2007 Josh Hancock died at the age of twenty-nine. His death was tragic, but many critics of Major League Baseball would say it was inevitable.

On April 29, 2007, following the Cardinals’ afternoon loss to the Chicago Cubs, Hancock spent the evening at Mike Shannon’s Steak and Seafood Restaurant. It is uncertain when Hancock left the restaurant, but patrons interviewed by the police reported that the pitcher appeared inebriated. Later that evening at twelve thirty, Hancock drove his Ford Explorer into the back of a parked tow truck on Interstate 40 in St. Louis. Police estimate that Hancock was travelling in excess of sixty-five miles per hour and that he died instantaneously. Following the crash, it was discovered that Hancock’s blood-alcohol level was 0.157, nearly twice the legal limit in Missouri.

Following the tragedy and the news that alcohol may have played a part in the crash, Hancock’s family brought suit against Mike Shannon’s, the St. Louis Cardinals, and Eddie’s Towing, the St. Louis company that owned the tow truck involved in the crash. The lawsuit claimed that the tow truck was negligently parked on the highway and that the accident would not have occurred but for Mike Shannon’s negligent over-serving of alcohol. The Cardinals’ general manager, Walt Jocketty, denied the Cardinals’ liability for their players’ off-the-field behavior. “There’s a lot of guys who like to have a cocktail now and then, and maybe some more than others,” Jocketty

9. Id.
11. Id.
12. Id.
14. Id.
16. Id.
said after the accident. Jocketty was correct that the Cardinals probably could not have prevented this accident; indeed, the Hancock family dropped the lawsuit just weeks after it was brought. Still, the accident and the ensuing lawsuit were evidence of a mounting problem—the prevalence of alcohol in Major League Baseball. Hancock’s death was shocking to the baseball community, but it was just the latest in a long history of baseball players and alcohol-related incidents. Some of the most well-known “baseball and alcohol” facts include:

**1882**: The American Association (now the American League) was formed in response to the existing National League’s ban on alcohol at ballparks.

**1915**: George Herman “Babe” Ruth hit his first home run. During his 22 Major League seasons, Ruth hit 714 more home runs and, allegedly, drank at least as many beers during his games. Among his many iconic nicknames: the Sultan of Swill.

**1995**: Hall of Fame hitter, baseball legend, and the game’s most notorious alcoholic, Mickey Mantle, died of liver cancer.

**1998**: New York Yankees pitcher David Wells became the fifteenth pitcher in Major League Baseball history to throw a perfect game. Wells proudly admitted that he pitched the game with one of the worst hangovers of his life.

**2002**: San Diego Padres outfielder Mike Darr died in a single-car drunk-driving accident.

**2007**: Weeks before Hancock’s death, St. Louis Cardinals manager Tony LaRussa was charged with driving under the influence

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18. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
after he was found asleep, slouched over his steering wheel, at a stoplight.25

II. ALCOHOL IN THE MAJOR LEAGUE BASEBALL CLUBHOUSE

The events cited above may seem like isolated, off-the-field incidents, but the Hancock tragedy was an unfortunate reminder of alcohol’s pervasive presence in Major League Baseball. Unlike other professional sports, Major League Baseball allows athletes to drink beer in the clubhouse following a game.26 Much like attorneys after a hard day in court, many baseball players wind down with a beer after a hard day on the field.27 The pronounced difference between the lawyer and the ballplayer, however, is that most law firms do not purchase, supply, and encourage the use of alcohol for their employees on a nightly basis.28

The notion of the “player lounge” is unique to baseball. The “clubhouse” is an inherent baseball tradition, central to baseball’s internal social culture. Other sports have locker rooms; baseball has clubhouses.29 And because of the length of the season and the frequent travel required, the clubhouse becomes a home-away-from-home for many players.30 As described by one nostalgic sportswriter, “[T]he clubhouse is baseball’s biosphere, a self-contained world where players lounge, bond, fight, play, eat, kibbitz, give each other ‘hot feet’ and occasionally knock over a table of food in fits of rage.”31

Whether in a team’s home stadium or on the road, the clubhouse is part relaxation lounge, part bar, and part restaurant.32 Clubhouse attendants cater to the players’ every need and provide

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25. Id.
27. In the words of Florida Marlins catcher Matt Treanor, “[A] lot of guys after a long day or a long game they’d have a beer in the sauna or the hot tub.” Tom D’Angelo, Beer Ball: A Young Pitcher’s Death While Drunk Behind the Wheel After a Game Has Raised New Questions About the Tight Bond Between Baseball and Suds, THE PALM BEACH POST, May 10, 2007, at 10.
30. Id.
31. Id.
32. Id.
food and beverages after every game. Though expected, this food and alcohol is not free. Most players pay between $50 and $150 per night for the all-you-can-eat buffet and bar. Not every club includes the option of beer at clubhouse meals, but Major League Baseball allows clubs to set their own policies.

This practice differs greatly from those in other sports in which alcohol is strictly forbidden at team events. The National Football League bans alcohol from locker rooms and any team training facility. The National Basketball Association and National Hockey League do not have express policies against alcohol in clubhouses, but most teams do not make beer regularly available for players. “For a player to crack a beer at the end of a game would be . . . shocking,” explains Alex Gilchrist, spokesman for the National Hockey League’s Anaheim Ducks. “His teammates would be all over him before anyone else would.”

Baseball players, however, see nothing wrong with a teammate enjoying a beer after a game. Clubhouse beers are a time-honored tradition and part of the “feel of the game.” “We’re grown men,” says Atlanta Braves pitcher Tim Hudson, often considered one of the smartest players in the game. The Pittsburg Pirates’ first basemen Adam LaRoche agrees: “How can you say we can’t have a beer, yet everybody in the stands can have them?”

Opponents of clubhouse drinking argue that the problem is not simply allowing players to drink. Rather, issues arise because teams supply endless amounts of alcohol after games, knowing that most players will drive home afterwards. Moreover, the opponents

33. Id.
35. D’Angelo, supra note 27.
37. Id. (explaining that the ban on alcohol is so strict that Super Bowl champions are prohibited from even spraying champagne in celebration of their win).
38. Id.
39. Id.
40. See id.
41. See id.
42. Id.
43. Id.
45. Id.
explain, Major League Baseball does nothing to prevent or dissuade this behavior. 46 Major League Baseball rules mandate a fifty-game suspension for the first positive test of anabolic steroids but impose no penalty for players cited for drunk driving. 47 "Major League Baseball is well short of the American public in its behavior toward alcohol," says Chuck Hurley, chief executive of Mothers Against Drunk Driving. "The last I looked, there were a lot more people killed by drunk drivers than by steroids." 48

Due to such social and political pressures, baseball clubs are beginning to seriously consider their potential liability stemming from their unchecked service of alcohol to players after games. 49 Beyond losing a player to injury or death, the clubs may find themselves vicariously liable for damages resulting from a player’s alcohol-influenced conduct. Knowing that players likely will drive home after consuming team-provided alcohol, clubs should reconsider their legal liability for injuries both to players and to potential third parties. According to one baseball risk manager, “[T]he legal liability associated with providing alcohol to a player who later got into a fatal accident would be both financially and reputationally disastrous for any club.” 50

III. THIRD PARTY LIABILITY

Third party liability derives from an actor’s failure to comply with an affirmative duty. 51 According to the Restatement (Second) of Torts, “If the actor does an act, and subsequently realizes or should realize that it has created an unreasonable risk of causing physical harm to another, he is under a duty to exercise reasonable care to prevent the risk from taking effect.” 52 Third-party liability is frequently an issue when individuals act under the influence of alcohol served to them by others. A common factual scenario illustrating alcohol-related third party liability is as follows: A serves alcohol to B

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46. See id.
47. Id.
48. Id.
52. RESTATEMENT (SECOND) OF TORTS § 321(1) (1965).
and negligently fails to prevent B from injuring C. The negligent act of serving alcohol can potentially generate three forms of third-party liability: (1) private social host liability, (2) dram shop liability, and (3) respondeat superior liability.

A. Private Social Host Liability

Private social-host liability generally involves an injury caused by an actor’s alcohol-induced negligence that is a result of his consumption of alcohol at a private social gathering. In such a case, the individual hosting the party may be liable for injuries to third parties directly caused by the intoxicated acts of his guest—most commonly, drunk driving. The legal standard in such cases requires that (1) the social host knew or should have known that his guest was drunk, (2) he nevertheless supplied the guest with an alcoholic drink, and (3) the guest injured a third party while driving his vehicle in an intoxicated state.

The seminal case of private social host liability is McGuiggan v. New England Telephone and Telegraph Co. In McGuiggan, the plaintiffs hosted a graduation party for their son and his friends at which alcohol was served. The plaintiffs’ son was later killed when his head, stuck out of the window of a car driven by an allegedly intoxicated party guest, struck a telephone pole owned by the defendant telephone company. Among their defenses, the telephone company argued that the plaintiffs were themselves liable for the accident, having served alcohol to the driver of the vehicle when they knew or should have known that he would later drive. The Supreme Court of Massachusetts, however, found that the McGuiggans were not liable for the accident because they did not and could not have known that the driver was intoxicated.

Following McGuiggan, courts have attempted to distinguish situations involving guests served directly from the host from situations in which guests serve themselves with host-provided

53. See, e.g., id.
54. See James P. Ponsetto, Dramshop and Social Host Liability, Massachusetts Continuing Legal Education, Chapter 6: Massachusetts Premises Liability (on file with author).
55. See id.
57. See 496 N.E.2d at 141.
58. See id. at 142.
59. See id. at 142 n.4.
60. See id. at 141.
In *Ullwick v. DeChristopher*, guests were asked to bring their own alcoholic beverages to a party. In that case, the Supreme Court of Massachusetts determined that the defendant social host was not liable for injuries to a third person because the host neither supplied nor provided the alcohol. The court found that “policy considerations support[ed] the imposition of liability only in cases where the host can control and therefore regulate the supply of alcohol.”

**B. Dram Shop Liability**

In addition to private social host liability, many states also have statutes creating dram shop liability, a type of civil liability imposed on commercial sellers of alcoholic beverages for personal injuries caused by intoxicated customers. These so-called “dram shop acts” are designed to heighten the responsibility of commercial sellers of alcohol. The typical factual scenario involves a suit by a plaintiff for injuries sustained in a crash caused by an intoxicated driver against a commercial establishment that had served alcohol to the driver even though he appeared obviously intoxicated. The primary difference between dram-shop liability and private social-host liability is that the dram-shop acts impose liability even if the serving establishment did not know or should have known that the intoxicated patron would later operate a motor vehicle. This difference amounts to fewer prima facie requirements and more frequent liability for commercial establishments under dram shop acts.

The Supreme Court of Massachusetts upheld this heightened standard in *Cimino v. The Milford Keg*. The court confirmed that foreseeability of the patron operating a vehicle is not an element of dram shop liability. In that case, an intoxicated patron of The Milford Keg ran over and killed a nine-year-old while driving home.

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63. *See id.* at 958.
64. *Id.* at 957.
65. BLACK'S LAW DICTIONARY 59 (8th ed. 2004).
67. *Id.*
68. Ponsetto, *supra* note 54.
69. *Id.*
71. *Id.* at 923.
from the bar. Although the bar claimed that it could not have known that the patron would drive home after drinking, the court nonetheless found the bar liable because the bar continued to serve the guest despite his obvious intoxication. The court commented that “the consequences of serving liquor to an intoxicated motorist, in light of the universal use of automobiles and the increasing frequency of accidents involving drunk drivers, are foreseeable to a tavern owner.”

C. Respondeat Superior Liability

Employers can also be subject to third-party liability for negligently failing to prevent employees from injuring others while in the course of their duties as employees. This liability of the master for his servant is generally referred to as “respondeat superior.” This theory of third-party liability derives from the principle that the master should be responsible for the actions of his servant when the servant is acting under the control of and for the benefit of the master. In such cases, the liability imposed upon the employer does not immunize the careless employee; rather, respondeat superior functions to impose liability on both the employer and the employee.

The common law doctrine of respondeat superior is formalized in the Restatement (Second) of Torts. For an employee’s actions to create liability for his employer, the injured party must prove that the employee was under the control of the employer at the time of the employee’s negligent and injurious act. The Restatement requires that the employee be on the premises of the employer to constitute adequate proof of the element of employer control. Furthermore, the injured party must prove that the employer knew or should have known that he had the ability to control the employee and understood the necessity of his control over the employee.

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72. Id. at 924.
73. Id. at 927.
74. Id. at 925 (citing Ono v. Applegate, 612 P.2d 533, 540 (Haw. 1980)).
75. See GOLDBERG ET AL., supra note 51.
76. See id.
77. See id.
78. See id.
80. Id.
81. Id.
82. Id.
Ira S. Bushey & Sons, Inc. v. United States helped establish the common law doctrine of respondeat superior. In that case, the owner of a dry dock brought suit against the United States after a coast guardsman living aboard a ship became intoxicated, acted negligently, and damaged the dry dock. Although the U.S. Coast Guard argued that the guardsman was solely responsible for his actions, Judge Friendly of the Second Circuit found that the accident and the circumstances surrounding the accident should have been foreseeable to the U.S. Coast Guard. Judge Friendly opined that the United States should have recognized that, when it allowed the guardsman to become intoxicated aboard its ship, actions such as the one that took place in this case are likely to occur. Thus, by holding the United States liable for the guardsman’s negligence through the doctrine of respondeat superior, Judge Friendly was upholding the “deeply rooted sentiment that a business enterprise cannot justly disclaim responsibility for accidents which may fairly be said to be characteristic of its activities.”

The same logic should hold in the case of professional sports teams. Following the tragic death of Josh Hancock and the increased public scrutiny that his death brought upon professional baseball, Major League Baseball should investigate its potential third-party liability for future incidents involving its players and alcohol. Considering the lengthy tradition of baseball and alcohol consumption, as well as the clubs’ support for the postgame buffet and bar, it is only a matter of time before an intoxicated player injures an innocent third party. The injured party may claim that the player’s employer is liable for all or part of his damages. In the following section, this Note will address such a claim by examining what liability, if any, a Major League Baseball club exposes itself to when it serves alcohol to a player following a game and that player later injures a third party while driving intoxicated.

83. See Ira S. Bushey & Sons, Inc. v. United States, 398 F.2d 167, 171 (2nd Cir. 1968).
84. Id. at 169-70.
85. Id. at 171-72.
86. See id. at 171.
87. Id.
IV. MAJOR LEAGUE BASEBALL’S POTENTIAL LIABILITY FOR INJURIES TO THIRD PARTIES CAUSED BY INTOXICATED PLAYERS

The general rule at common law was that it was not a tort for employers to serve or sell alcohol to their employees.\(^{88}\) Furthermore, no cause of action existed against an employer by a party injured by the intoxication of an employee solely because the employee had just left an employer-sponsored event.\(^{89}\) Most courts held that negligence derived from the act of the employee’s consumption rather than the employer’s service of alcohol.\(^{90}\) An 1886 decision speaks to this point:

> [T]he death of the deceased was not ‘caused’ so much by the wrongful act of the defendants in [providing] him whiskey, as by his own act in drinking it after being [provided] to him. The only wrongful act imputed to the defendants was the selling, or giving, as the case may be, of intoxicating liquors to the deceased . . . knowing he was a man of intemperate habits . . . . But this was only the remote, not the proximate or intermediate, cause of the death . . . . Had it not been for the drinking of the liquor, after the [provision], which was a secondary or intervening cause co-operating to produce the fatal result, and was the act of deceased, not of defendants, the sale itself would have proved entirely harmless.\(^{91}\)

Applying this general rule, Major League Baseball clubs would not be liable for damages caused by executive, “front-office” employees becoming intoxicated from alcohol served at a club’s social event.\(^{92}\) Though the club would have provided the alcohol, any negligence from this act would be superseded by the intervening negligence of the executive employee.\(^{93}\) Common law recognizes that adults should be liable for their own decisions to overindulge.\(^{94}\) The adult executive, having decided to drink in excess, would himself be liable for any damage caused as a result of his intoxicated behavior.\(^{95}\)

The liability analysis is more complex, however, when the intoxicated employee is a baseball player and the alcohol was served to the player in the clubhouse. A player and an executive have different expectations and roles, and, likewise, a club’s duty towards

\(^{88}\) See David M. Holliday, Annotation, Intoxicating Liquors: Employer’s Liability for Furnishing or Permitting Liquor on Social Occasion, 51 A.L.R. 4th 1048 §2(a) (1987).

\(^{89}\) See id.

\(^{90}\) See id.

\(^{91}\) King v. Henkie, 80 Ala. 505, 510 (Ala. 1886), overruled by Buchanan v. Merger Enterprises, Inc., 463 So.2d 121 (Ala. 1984) (affirming that proprietor of bar and his employees were not liable for the death or damage caused by an intoxicated patron).

\(^{92}\) The term “front office” generally refers to the business management team and executive baseball personnel of the Club. This group includes the General Manager, President, COO, accountant, sales staff, marketing team, stadium maintenance, etc.

\(^{93}\) See Holliday, supra note 88.

\(^{94}\) See id.

\(^{95}\) Id.
the ballplayer is different from its duty towards the executive. Major League Baseball players are unique in comparison to other types of employees and to other professional athletes in general. As discussed above, the length of the baseball season, the frequency of consecutive games, and the required travel make baseball players more reliant on their employers for necessities like food and drink than the average employee or even other professional athletes.96

For example, a professional football player in the National Football League plays four preseason and sixteen regular season games over five months.97 Of these games, half are played in the player's home city.98 Though practice schedules differ per team, the average player is expected to participate in team events five days a week.99 When teams do travel, most players are away from home for no more than four days.100 Conversely, Major League Baseball players play 25 preseason and 162 regular season games over 6 months.101 Teams may travel for up to sixteen days at a time and frequently play more than twenty-five games in one month.102 On the road and at home games, most players eat at least one daily meal in the clubhouse.103 These meals may consist of any variety of food, but alcohol is almost always included following a game.104 As opposed to the occasional executive function in a typical workplace, the postgame banquet is a regular occurrence in a Major League Baseball clubhouse. The service of alcohol is not an occasional event, but rather an expected, standing delivery.

For these reasons, baseball clubs should not fall under the general rule of no liability when baseball players, intoxicated from alcohol served in the clubhouse, cause injury to third parties. In such instances, clubs should be liable to third parties for either a breach of an affirmative duty to deter a foreseeable tortious act by their players or for their players' negligence under the theory of respondeat superior.

96. See supra text accompanying notes 30-44.
98. Id.
99. Id.
100. Id.
102. Id. In June 2008, the St. Louis Cardinals played twenty-seven games in thirty days and were away from home for all but nine of those days. 2008 Cardinals Schedule, http://stlouis.cardinals.mlb.com/schedule/index.jsp?c_id=stl&m=6&y=2008 (last visited Jan. 11, 2009).
103. Stone, supra note 29.
104. Id.
A. Breach of an Affirmative Duty

As stated above, the standard for third-party liability derives from an affirmative duty to deter foreseeable harm to third parties: “If the actor does an act, and subsequently realizes or should realize that it has created an unreasonable risk of causing physical harm to another, he is under a duty to exercise reasonable care to prevent the risk from taking effect.”\(^{105}\) In the case of negligently over-serving alcohol to an employee, the theory of negligence can be illustrated by the following scenario: employer A serves alcohol to employee B when it is foreseeable that serving alcohol to employee B may result in harm to some third party C.\(^{106}\)

In *Baird v. Roach*, the Ohio Court of Appeals articulated a formulation of third-party duty of care.\(^{107}\) In that case, the plaintiff sought to recover damages sustained when an intoxicated driver struck the vehicle she was driving.\(^{108}\) The intoxicated driver had recently left a social function during which his employer, Roach, served him alcohol despite knowing that he would drive home after the party.\(^{109}\) In overturning the lower court’s grant of summary judgment for Roach, the court recognized that the employer could be considered the proximate cause of the plaintiff’s injury if it was foreseeable that employees would drive home after over-indulging in alcohol.\(^{110}\) The court noted that it was for the fact-finder to decide if the employer knew or reasonably should have known that the driver would operate a vehicle after the party.\(^{111}\) The court made clear that “[l]iability would be imposed only where the host knew that the person to whom the liquor was furnished would consume it and either was, or would become, intoxicated and would probably act in such a manner while intoxicated as to create an unreasonable risk of harm to third persons.”\(^{112}\)

The Washington State Court of Appeals clarified the control element of the liability analysis in *Halligan v. Pupo*, noting that the employer’s liability did not depend on how the employer furnishes alcohol to employees.\(^{113}\) In *Halligan*, the defendant argued that it was

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106. *Goldberg et al., supra* note 51.
108. *Id.* at 1231.
109. *Id.*
110. *Id.* at 1233.
111. *Id.*
112. *Id.*
not liable for injuries caused by an intoxicated employee leaving a
company social function because the employee had served himself
alcohol from bottles of wine placed on tables at the beginning of the
company function. In overturning the lower court’s grant of
summary judgment for the employer, the court reasoned that “the
manner in which [the employee] was served is of no consequence.”
Rather, the relevant inquiry was whether the employer had the
authority to control or restrict the amount of alcohol consumed.

In the case of Major League Baseball clubs, it is reasonably
foreseeable that serving endless amounts of alcohol to baseball players
after games will create an “unreasonable risk of harm to third
persons.” Clubs know that their players drink, and they know
which players are more likely to abuse alcohol. The clubs also
know, or could easily determine, which players drive themselves home
after games. Most importantly, the clubs have complete control
over how much alcohol is served, and to whom, in the clubhouse. Therefore, it should be an easy task for clubs to determine which of
their players are drinking, how much they have consumed, and which
of the players will soon be driving. With the experience of having 162
games a season, the clubs should be able to foresee which players will
overindulge in team-provided alcohol before driving, thus creating an
undue risk to third parties.

This Note does not present new evidence that driving while
under the influence of alcohol creates a foreseeable and unreasonable
risk of harm to third persons. The dangers of drunk-driving are well
known and publicized. Indeed, learning the dangers of drunk
driving is part of the mandatory curriculum in every public
elementary, middle, and high school in the United States.

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114. *Id.*
115. *Id.* at 1298.
116. *Id.* at 1298-99.
119. Most teams maintain private parking lots for players and team officials. These
parking lots are attended by club security, and it would not be difficult to record which
players drove themselves to the ballpark that day. Though an honor system may also work,
a simple security checklist of drivers would be easy and practical.
120. Stone, *supra* note 29.
121. See, e.g., Mothers Against Drunk Driving, http://www.madd.org (last visited
Jan. 11, 2009).
122. See *id.*
Furthermore, in the past five years alone there has been an “epidemic of high-profile alcohol-related misbehavior in professional sports.”123

B. Breach of Duty Based on a Special Relationship: Another Look at Respondeat Superior

Major League Baseball clubs also owe a duty to third parties because of the special relationship that the clubs have with their players. The Restatement (Second) of Torts indicates that “[t]here is no duty to control the conduct of a third person as to prevent him from causing physical harm to another unless . . . a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person’s conduct.”124 Among these “special relationships” is the duty of the employer to control in some circumstances the behavior of his employees.125 The liability of the employer for the negligence of his employee is embedded in the theory of respondeat superior.126

The Restatement (Second) of Torts outlines the elements of employer liability under the doctrine of respondeat superior:

A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if (a) the servant (i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant . . . and (b) the master (i) knows or has reason to know that he has the ability to control his servant, and (ii) knows or should know of the necessity and opportunity for exercising such control.127

Like the general standard discussed above in Part IV(A), the key elements of respondeat superior are the employer’s control over the employee and the foreseeability of harm resulting from the employee’s action.128

Before addressing the other elements of the Restatement’s definition, it must be noted that participating in postgame buffets falls within the players’ scope of employment to establish employer liability under respondeat superior. Definitions of the scope of employment vary by state, but most states’ statutes provide broad allowances for

123. Schmuck, supra note 118.
124. RESTATEMENT (SECOND) OF TORTS § 315(b) (1965).
125. Id. at § 317.
126. Id.
127. Id.
128. Id.
what employee actions constitute “employment.” The respondeat-superior statute of New Mexico closely follows the Restatement (Second) of Torts and is representative of common thought on this issue. According to New Mexico law, an act of an employee is within the scope of employment if the act was “fairly and naturally incidental to the employer’s business assigned to the employee,” and the act was performed with the goal of furthering the employer’s interest.

Because Major League Baseball players are served alcohol only after the conclusion of games, participation in the postgame buffet should be considered within the players’ scope of employment by the club. As discussed above in Part II, player participation in postgame buffets is a common and expected practice in Major League Baseball. Following the game, players join in the clubhouse for food and beverages provided by the club. This meal may be considered a necessity when the players visit another city, but even at home, tradition dictates that the postgame buffet is “fairly and naturally incidental to the employer’s business assigned to the employee”—playing baseball.

The clubhouse buffet is offered by the club with the goal of furthering the club’s interest in the continued operation and success of the team. As discussed in Part II, the clubhouse is the “biosphere” for the players. Players may eat, bond, and relax in the clubhouse, but time is also spent on the business of baseball. Following the game, medical staff attend to recuperating players, video staff work with players to review and to prepare for the following night’s game, and managers speak to the assembled team. For these reasons, the clubhouse is not only a place of relaxation but also serves as a place to further the club’s business interests.

1. Servant Upon Premises and Privileged to Enter

The theory of respondeat superior under the Restatement requires that the employee’s negligent behavior occur while on the


131. Id.

132. See Stone, supra note 29.

133. See id.

134. See N.M.U.J.I., supra note 130.

135. Stone, supra note 29.

136. Id.

137. Id.
premises of the employer.\textsuperscript{138} Courts have extended the boundaries of the employer’s premises, however, when tortious acts begin on the employer’s premises and result in injury elsewhere.\textsuperscript{139} In such cases, “a temporal analysis will not do—in other words, employer liability cannot be avoided merely because the employee has left” the geographic origin of his negligent behavior.\textsuperscript{140} In cases of drunk driving, the employee’s negligence occurs at the time of overconsumption.\textsuperscript{141} Though the motor vehicle accident might occur off the premises of the employer, the employee’s decision to overindulge and drive has been made while on the premises.\textsuperscript{142}

In \textit{Sheftic v. Marecki}, the Superior Court of Connecticut, in denying the defendant’s motion for summary judgment, disavowed the “premises requirement” to find liability under respondeat superior in certain cases.\textsuperscript{143} In that case, Marecki’s employee became intoxicated while on the employer’s premises and later damaged the plaintiff’s vehicle while driving drunk.\textsuperscript{144} In denying the employer’s assertion that it could not control the actions of the employee while he was off the premises, the court invoked theories of responsibility and foreseeability to find liability.\textsuperscript{145} Since the negligent act of drinking occurred on the employer’s premises and it was, according to the court, foreseeable that the employee’s drinking would lead to drunk driving, proximate cause for the accident did not dissipate solely because of the crossing of geographic boundaries.\textsuperscript{146}

In the case of a baseball player in the clubhouse, the player’s decision to consume alcohol and his decision to drive after drinking are made while on the club’s premises. While the injury resulting from drunk driving may occur on a highway miles from the club’s premises, the negligent act for which the club is liable occurred while the employee was in the clubhouse.

\begin{itemize}
\item \textsuperscript{138} See \textit{id}.
\item \textsuperscript{139} See Dairy Rd. Partners v. Island Ins. Co., 992 P.2d 93 (Haw. 2000) (employee found to be within the scope of employment as he drove home after consuming alcohol at work); Greer v. Ferrizz, 118 A.D.2d 536 (N.Y. App. Div. 1986) (employer found liable for employee’s wrongful death after employee drank excessively at work under employer’s supervision).
\item \textsuperscript{140} Sheftic v. Marecki, 25 Conn. L. Rptr. 584 (Conn. Super. Ct. 1999).
\item \textsuperscript{141} See Dairy Rd. Partners, 992 P.2d at 93.
\item \textsuperscript{142} See \textit{id}.
\item \textsuperscript{143} Sheftic, 25 Conn. L. Rptr. at 584.
\item \textsuperscript{144} \textit{Id}.
\item \textsuperscript{145} \textit{Id}.
\item \textsuperscript{146} \textit{Id}.
\end{itemize}
2. Master Knows He Can Control Servant

In the absence of a special relationship, an employer has no general duty to protect third parties from the behavior of his employees. However, liability may be imposed on an employer when he knows or should have known that he had the ability to control the behavior of his employees in a certain instance. Since the master is presumed to have some degree of control over the actions of the servant, “it is a general common law notion that one who is in a position to exercise some general control over the situation must exercise it or bear the loss.” Liability is predicated on the employer’s ability to control and limit the autonomy of the employee with respect to actions designed to benefit the employer.

In Stropes by Taylor v. Heritage House Children’s Center of Shelbyville, Inc., the Indiana Supreme Court reversed a grant of summary judgment for the defendant employer because it found that the employer’s level of control over the employee was a genuine issue of material fact in determining the employer’s liability under the doctrine of respondeat superior. In that case, the guardian of a mentally disabled resident sued the hospital employer for damages after a nurse’s aide allegedly sexually assaulted the resident while providing his daily bath. In reversing the grant of summary judgment, the court noted that the plaintiff bore the burden of proving that the hospital had control over the actions of the nurse. If proven, the hospital would be liable for damages to the patient because the actions of the nurse were committed while performing an act for the benefit of the hospital as a caretaker of the resident.

147. Restatement (Second) of Torts § 315 (1965).
148. Id. at § 317 (b).
150. Stropes, 547 N.E.2d at 253.
151. Id. at 245.
152. Id.
153. Id. at 247.
154. See id. at 253; see also Nat’l Can Corp. v. Jovanovich, 503 N.E.2d 1224 (Ind. Ct. App. 1987) (holding that a corporation was liable for manager’s intentionally tortious decision not to assign employee to “light work” because manager was under control of corporation for such decisions); Owens v. McLeroy, Litzler, Rutherford, Bauer & Friday, P.C., 235 S.W.3d 388 (Tex. App. 2007) (noting that plaintiff must first prove before an in-depth review of respondeat superior is appropriate that law firm maintained adequate control of employed attorney).
Major League Baseball clubs have the ability to control the behavior of their players because they control the source of the potentially negligent behavior. Clubs organize and provide the food and beverages served during postgame buffets. Furthermore, clubs have the authority to create and enforce their own policies regarding alcohol in the clubhouse. Clubs control the supply of beer, have the ability to control the amount consumed by the players, and, therefore, control the risk of potentially negligent behavior after players have left the ballpark.

3. Master Knows the Necessity For Exercising Control

The final requirement for a finding of liability under the doctrine of respondeat superior is that the employer knew or should have known the necessity for exercising control over the employee’s behavior. The requirement mirrors the foreseeability requirement that is an element of the traditional theory of third-party liability. If the employer did not and should not have known that his employee had created a risk, that employer could not have contributed to the proximate cause of the later injury. As such, this final requirement is most akin to the common law tort of negligent supervision of servants.

In Whelan v. Albertson’s, Inc., the Court of Appeals of Oregon clarified the requirement of the employer’s knowledge prior to a finding of liability under the doctrine of respondeat superior. The plaintiff brought suit against co-workers for intentional infliction of emotional distress and claimed that his employer, Albertson’s, was liable for failure to train employees regarding harassment and for failure to properly supervise the other employees. The court noted, however, that the plaintiff failed to prove that Albertson’s knew or should have known about the harassment. Since no report had ever been made and no complaints had arisen concerning these co-workers, the court found that Albertson’s had no duty to deter an injury it could not have foreseen. Although the plaintiff established the other

155. Stone, supra note 29.
156. Newberry, supra note 36.
158. Id.
159. Id.
160. Id.
162. Id.
163. Id. at 891.
164. Id. at 892.
elements of respondeat superior, the requirement of employer knowledge was not proven.\textsuperscript{165}

Any party injured by an intoxicated baseball player would have to prove that the Major League Baseball club knew or should have known the inherent danger of drunk driving. However, it would be disingenuous for any club to argue that it did not know that drinking and driving poses a serious threat both to drivers and third parties. Major League Baseball clearly recognizes this danger in relation to its fans as it has set policies to deter fans from drinking and driving.\textsuperscript{166} At every major-league ballpark and in most minor-league ballparks, clubs stop serving alcohol during the seventh inning.\textsuperscript{167} This policy is designed to deter fans from over-drinking and to provide time for alcohol to dissipate in the fans' bloodstreams prior to driving home.\textsuperscript{168} Major League Baseball's policy, designed to protect its fans, offers clear evidence that the game’s executives are aware of the risks associated with drinking and driving. Certainly then, the clubs understand the importance of stopping players from drinking and driving as well.

4. Respondeat Superior in Cases of Alcohol-Related Injury to Third Persons

The application of these elements of respondeat superior is evident in the Supreme Court of Hawaii case of \textit{Wong-Leong v. Hawaiian Independent Refinery, Inc.}\textsuperscript{169} In that case, administrators of estates of victims in an automobile accident brought suit against Hawaiian Independent Refinery, Inc. (HIRI) after one of its employees became intoxicated at work, drove home, and caused a head-on collision with the decedents.\textsuperscript{170} Importantly, the employee had become

\textsuperscript{165} Id. at 893; see also Destefano v. Grabrian, 763 P.2d 275, 283 (Colo. 1988) (noting that in order to prove liability under respondeat superior plaintiff must prove that diocese knew or should have known that priest who sexually harassed plaintiff posed a danger to church members); Williamson v. Eclipse Motor Lines, 62 N.E.2d 339, 342 (Ohio 1945) (noting that although all other elements of respondeat superior had been met employer could not be held liable for damages incurred during automobile accident because plaintiff failed to prove that employer had knowledge of employee's poor driving habits).


\textsuperscript{167} Id.

\textsuperscript{168} Id.


\textsuperscript{170} Id.
intoxicated while celebrating his recent promotion. Following HIRI
tradition, the employee and others celebrated the happy event by
drinking alcohol on the worksite following the end of their shifts.
After the celebration, the inebriated employee left the worksite in the
presence of his co-workers and employers, and his drunk driving led to
the deaths of the decedents.

In reversing the lower court’s granting of summary judgment
for HIRI, the Hawaii Supreme Court held that HIRI should be liable
for the injuries according to the doctrine of respondeat superior.
The court found that the employee was on the HIRI premises when he
began to drink and was on HIRI premises when he decided to drive
despite his intoxication. Further, HIRI knew that the party was
taking place, knew that the employee would become intoxicated (as
was custom), and knew of the dangers of drunk driving. Finally, the
court noted that although the party occurred after the employees’
workday had ended, the “party was a custom incidental to the
enterprise rather than a purely social function... as a morale builder
for the employees.” As such, though the party was a celebration of
individual performance and an opportunity for employees to bond and
relax, there is no doubt that such parties were for company purposes
and were under company control.

V. SOLUTION

Major League Baseball clubs cannot continue to ignore the
potential liability created by their service of alcohol in clubhouses. If a
player were to become drunk at a postgame buffet and injure a third
party while driving intoxicated, the injured party would have a strong
case against the club. Either through standard third-party liability or
the doctrine of respondeat superior, clubs may likely find themselves
vicariously liable for the negligent actions of their players. This Note
proposes three simple solutions for Major League Baseball and the
individual clubs: (1) Major League Baseball should ban alcohol from
the clubhouse, (2) clubs should discourage drunk driving by including

171. Id.
172. Id. at 542-43.
173. Id.
174. Id.
175. Id. at 546.
176. Id. at 548.
177. Id. at 549.
178. See id.
morals clauses in player contracts, and/or (3) clubs should provide transportation from the ballpark for players who drink.

The simplest and most extreme solution for Major League Baseball clubs would be to model their own policies after those of other professional sports leagues and ban alcohol from the clubhouses. Though this move would surely anger some players and would likely face opposition from the Major League Baseball Players’ Association, clubs clearly have discretion to ban alcohol from their premises. For those players who still wish to drink after a game, there are always bars surrounding ballparks—and frequently inside the ballpark as well. Instead of risking liability, Major League Baseball should require that players who wish to drink obtain their alcohol elsewhere.

Second, Major League Baseball clubs would be well advised to include morals clauses regarding drunk driving in player contracts. A morals clause is “a form of termination clause [that] enumerates a variety of specific reasons for termination” to protect one party’s image from the actions of the other party. Such clauses are often used in sports to protect players from potentially dangerous activities. The National Football League has famously reprimanded a number of star players for negligent behavior, including a famous 2006 case in which Pittsburgh Steelers quarterback Ben Roethlisberger nearly invalidated a $40 million contract when he breached a clause in his contract that forbade him from riding a motorcycle.

Major League Baseball clubs should follow the National Football League’s model and demand morals clauses for all player contracts. Such clauses should state that Major League Baseball players would be subject to league- or club-imposed sanctions if convicted of driving under the influence of alcohol or other controlled substances. Though the league should not demand automatic termination for drunk driving, a mandatory penalty should be established. This move would dissuade players from driving drunk, would signal professional baseball’s concern for public safety, and may serve as protection for the clubs in potential future legal action. If sued for vicarious liability after a player’s drunk driving, clubs could

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179. See supra text accompanying notes 37-39.
180. See supra text accompanying notes 37-39.
183. Id.
potentially negate their liability by demonstrating that they have publicly and formally taken steps to prevent such actions by the players.

Finally, if alcohol is to remain, clubs should discourage drunk driving by providing transportation for players who drink alcohol in the clubhouse. If clubs are unwilling to remove alcohol from the clubhouse, they could at least provide transportation home for players known to have been drinking. The cost of a Town Car rental is reasonable under both public-policy and risk-management rationales. In fact, this is so obvious a solution that it has a decades-old tag line: “friends don’t let friends drive drunk.”

VI. CONCLUSION

It is difficult to understand why Major League Baseball, an organization so maligned for its mishandling of substance abuse, would continue to take such a head-in-the-sand approach to the problem of alcohol abuse. With its history of larger-than-life alcoholics and alcohol-industry support—note the sponsors of the ballparks of the St. Louis Cardinals (Busch Stadium) and Milwaukee Brewers (Miller Park)—professional baseball should be well acquainted with the dangers of drinking and driving. Instead, Major League Baseball and its clubs are pretending that there is nothing wrong with providing players never-ending alcohol every night after work.

It is unbelievable that Major League Baseball and the Major League Baseball Players’ Association would not want to take a more proactive approach to halting alcohol abuse among players. Following the “steroid era,” numerous congressional hearings, and the Mitchell Report, professional baseball should be taking extraordinary steps to clean up its image and to avoid further public embarrassment. Foregoing an opportunity to ban alcohol from the clubhouse and to set a positive model for responsible drinking, America’s “national pastime” has instead developed a hands-off approach.

Major League Baseball and its clubs are taking an unnecessary risk by providing alcohol and permitting drinking in the clubhouse following games. Served at the workplace, in the clear furtherance of workplace goals, and with the knowledge that danger exists for drunk driving, postgame beer is negligently provided to players, consequently making clubs liable under the doctrine of respondeat


185. Hiro, supra note 6.
superior. Furthermore, it could be argued—although not in this Note—that Major League Baseball’s actions constitute negligent behavior simply because it should be foreseeable to the reasonable person that consistently providing alcohol to individuals who will soon be driving will result in drunk driving and possible injury. The Restatement (Second) of Torts’ definition of third-party liability could certainly be applied to the clubs’ act of serving alcohol to its players each night: “If the actor does an act, and subsequently realizes or should realize that it has created an unreasonable risk of causing physical harm to another, he is under a duty to exercise reasonable care to prevent the risk from taking effect.”

Major League Baseball can correct its negligent course of action by adopting easy and obvious policies regarding its players’ alcohol use. This Note does not call for a renewed era of Prohibition for baseball players, but rather a more reasonable approach to the foreseeable risks of drinking and driving. It is in the Major League Baseball clubs’ best interest to protect themselves, their players, and their fans from drunk driving. If nothing else, we should expect Major League Baseball to follow the same basic advice it promotes to fans during most games: don’t drink and drive.

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186. See supra Part III.C.
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