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Essay: Recent Developments in Minnesota Dram Shop Law

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RECENT DEVELOPMENTS IN MINNESOTA DRAM SHOP LAW

Christopher E. Celichowski[†] and Michael T. Johnson^{††}

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I. INTRODUCTION

Minnesota's Civil Damages Act is a creature of statute without counterpart in common law.¹ The Act, referred to as the "Dram Shop Act," is highly penal in nature and is intended to provide remedies for damages attributable to commercial lenders' illegal sale of intoxicating liquors.² Since the Act's inception more than ninety-two years ago, Minnesota courts traditionally have construed it in a strict fashion. Over its long evolution, the "duet" of legislative action and court interpretation served to clarify several ambiguities within the Act. Despite precise and oftentimes circumstantial application, certain ambiguities remain. The following article will—in the context of recent Minnesota Dram Shop decisions—analyze the ambiguities in Dram Shop law and recommend clarifications in these areas.

II. ELEMENTS OF PROOF

To establish a claim under Minnesota's Dram Shop Act, a plaintiff must prove the following five elements:³

1. An illegal sale of intoxicating liquor, including 3.2 beer or "strong" beer;

1. See MINN. STAT. § 340A.801 subd. 1 (2002); *Fitzer v. Bloom*, 253 N.W.2d 395, 403 (Minn. 1977) (holding that because the legislature has provided a remedy for the illegal sale of intoxicating liquor in the Civil Damages Act, the legislature has preempted the field and has provided the exclusive remedy in the act). A common-law cause of action for negligence will be allowed only where the act does not apply. *Id.*

2. See *Vill. of Brooten v. Cudahy Packing Co.*, 291 F.2d 284, 301 (8th Cir. 1961) (stating that "[t]he statute was intended to provide remedies unknown to the common law for certain losses attributable to illegal acts in connection with the dispensation of intoxicating liquor and the Legislature was content, as a matter of its measure of social justice, to place upon those who benefit by that trade the burden occasioned by these illegalities"); see also *Cady v. Coleman*, 315 N.W.2d 593, 596 (Minn. 1982) (holding that the definition in the Civil Damages Act that "'any person' who sells or barbers liquor means a person in the business of providing liquor, and not a social host who happens to receive some consideration from his guests in return for drinks he provides"). The statute has been expanded in recent years to provide limited social host liability against persons 21 or older who provide alcohol to a person younger than 21. See MINN. STAT. § 340A.90 (2002) (originally enacted as Act of Aug. 1, 2000, ch. 423, § 1, 2000 Minn. Laws 884).

3. MINN. STAT. § 340A.802 (2002). See *Hartwig v. Loyal Order of Moose*, 253 Minn. 347, 356, 91 N.W.2d 794, 801 (Minn. 1958) (holding that "[i]t is elementary that before plaintiffs are entitled to recover in these cases they must show by competent proof that defendants . . . unlawfully furnished intoxicating liquor . . . which caused or contributed to . . . intoxication and that the same was a proximate cause of the injuries . . .").

2. The illegal sale caused or contributed to the alleged intoxicated person's (AIP's) condition;
3. Plaintiff's injuries were caused by the AIP's intoxication;
4. Plaintiff sustained damages recoverable under the Act; and
5. Defendant received written notice of plaintiff's intent to make a claim for damages within 240 days of the date plaintiff entered into an attorney-client relationship regarding the claim.⁴

A. *Illegal Sales*

The Civil Damages Act expressly imposes Dram Shop liability for "illegally selling" alcoholic beverages.⁵ It applies to the "sale" of any alcoholic beverage with at least one-half of 1 percent alcohol by volume.⁶ The Act itself does not define what is illegal, but Minnesota courts developed a focused analysis to determine whether a particular liquor sale imposes Dram Shop liability. The court reviews: (1) whether the sale was in violation of a provision of Chapter 340A, and if so (2) whether the violation was substantially related to the purposes sought to be achieved by the Civil Damages Act. The Minnesota Supreme Court observed that this analysis furthers the legislature's intent to curtail illegal sales impacting "the public's access to and consumption of alcoholic beverages."⁷

The appellate courts' interpretation of the Act has resulted in a lengthy list of sales considered illegal for purposes of a Dram Shop action. Statutory violations that may give rise to a liquor liability claim include: (1) sales to obviously intoxicated persons,⁸ (2) sales to minors,⁹ and (3) miscellaneous others including (a) sales after hours,¹⁰ (b) sales on

4. MINN. STAT. § 340A.802, subd. 2 (2002). In the case of claims for contribution or indemnity, the notice must be served within 120 days after the injury occurs or within sixty days after receiving written notice of a claim for contribution or indemnity, whichever is applicable. *Id.*

5. MINN. STAT. § 340A.801, subd. 1 (2002).

6. MINN. STAT. § 340A.101, subd. 2 (2002).

7. *Rambaum v. Swisher*, 435 N.W.2d 19, 21-22 (Minn. 1989).

8. MINN. STAT. § 340A.502 (2002).

9. MINN. STAT. § 340A.503 (2002). Any sale or furnishment of alcohol to a minor constitutes an "illegal act" under the dram shop statute. In actions involving minors, the plaintiff need not prove that the minor was intoxicated when the sale was made because the sale itself is illegal.

10. MINN. STAT. § 340A.504 (2002). A liquor vendor selling intoxicating liquor after hours is "illegally selling" intoxicating liquor. *See Hollerich v. Good Thunder*, 340 N.W.2d 665, 668 (Minn. 1983) (holding that "the prohibition against after-hour sales is

prohibited days,¹¹ (c) sales at prohibited locations,¹² (d) sales to nonmembers of a private club,¹³ and (e) sales by vendors of “on sale” liquor license to patrons that the vendor knows or should know will consume alcoholic beverages off premises.¹⁴

Although the legacy of Dram Shop jurisprudence has effectively identified particular violations, the level of evidentiary proof to establish an illegal sale has not been well defined in all categories of illegal sales. In 2002, Minnesota Dram Shop decisions focused on sales to “obviously intoxicated” persons.

1. *Sales to “obviously intoxicated” persons (Minn. Stat. § 340A.502)*

“No person may sell, give, furnish, or in any way procure for another alcoholic beverages for the use of an obviously intoxicated person.”¹⁵ This statutory prohibition applies only if intoxication is “observable in appearance or behavior of the person to whom the intoxicating liquor is furnished.”¹⁶ In *Strand v. Village of Watson*,¹⁷ the Minnesota Supreme Court adopted the following definition of “obvious intoxication”: “[T]here must be such outward manifestation of intoxication that a person using his reasonable powers of observation can see or should see that such person has become intoxicated.”¹⁸

In other words, a finding of obvious intoxication does not require proof of any specified amount of drinking or any degree of intoxication, but requires proof the AIP has “lost control to any extent of his mental or physical faculties and that such condition is, or should be, observable or apparent to the seller” at the time of the alleged illegal sale.¹⁹ Common

sufficiently related to the purposes of the Dramshop Act so that such sales by a vendor constitute ‘illegally selling’ within the meaning of the Act”).

11. MINN. STAT. § 340A.504. The sale of alcohol is prohibited on certain days and at certain times. A sale on a prohibited day is analogous to a sale after hours and is an “illegal sale” *per se*.

12. MINN. STAT. § 340A.412, subd. 4 (2002) (prohibiting the sale of intoxicating liquors in specified locations).

13. MINN. STAT. § 340A.404, subd. 1(4) (2002) (allowing some municipalities to issue “on-sale” licenses to clubs). These licenses permit sales to members and bona fide guests only. *Id.* Therefore, a sale to a non-member or bona fide guest is illegal.

14. MINN. STAT. § 340A.101, subd. 21 (2002) (limiting consumption of alcoholic beverages sold under an on-sale liquor license to the licensed premises only).

15. MINN. STAT. § 340A.502 (2002).

16. *Mjos v. Howard Lake*, 287 Minn. 427, 432, 178 N.W.2d 862, 867 (Minn. 1970).

17. 245 Minn. 414, 72 N.W.2d 609 (Minn. 1955).

18. *Id.* at 422, 72 N.W.2d at 615.

19. *Murphy v. Hennen*, 264 Minn. 457, 463, 119 N.W.2d 489, 493 (Minn. 1963).

indices of obvious intoxication include: slurred speech, unsteady gait, unusually loud or boisterous speech, and bloodshot eyes.

A blood test or urinalysis is evidence in an “obvious intoxication” case but does not conclusively establish obvious intoxication.²⁰ The Minnesota Supreme Court has confirmed a high blood-alcohol reading—via blood test or urinalysis test—does not, as a matter of law, establish obvious intoxication.²¹ “Obvious intoxication” is an issue to be decided by the fact finder. No particular evidence is given more or less weight as a matter of law, but all evidence is left for the jury or judge to balance.

In the unpublished case of *Stevens ex rel. Stevens v. Makitalo*, the Minnesota Court of Appeals reviewed a jury instruction regarding the definition of “obviously intoxicated.”²² In *Stevens*, plaintiffs argued they were entitled to a judgment notwithstanding the verdict (JNOV) because the evidence demonstrated Makitalo exhibited signs of obvious intoxication when served by the Eagle’s Nest Resort bartender.²³ Plaintiffs also contended the district court erroneously instructed the jury regarding the definition of “obviously intoxicated.”²⁴ The disputed jury instruction included the following sentence: “A person is not obviously intoxicated within the meaning of the Dram Shop statute simply by virtue of having reached a certain blood alcohol content level.”²⁵

In upholding the district court’s judgment and instruction, the Minnesota Court of Appeals held, “[C]ontrary to appellants’ assertion, this instruction did not advise the jury that blood alcohol content could not be considered as circumstantial evidence of a person’s intoxication.”²⁶ The *Stevens* court observed, “[T]he Minnesota Supreme Court has stated that a high blood alcohol reading alone is not sufficient

20. See *Strand*, 245 Minn. at 422-23, 72 N.W.2d at 615-16 (holding that “[c]ircumstantial evidence may help to establish the essential fact [‘obvious’ or ‘visible’ intoxication], but there must be evidence from which it reasonably may be inferred that the essential fact [‘obvious’ or ‘visible’ intoxication] did exist”).

21. See *Seeley v. Sobczak*, 281 N.W.2d 368, 370-71 (Minn. 1979) (holding that it was improper to presume that a certain blood-alcohol content establishes “obvious intoxication” as a matter of law, where the alleged intoxicated person possessed a blood-alcohol content of 0.269 percent).

22. No. C7-01-1791, 2002 WL 1315827 (Minn. Ct. App. June 18, 2002). Unpublished opinions of the court of appeals are not precedential, not controlling, and often are treated as having limited value. See MINN. STAT. § 480A.08, subd. 3(c) (1998). However, unpublished opinions may be cited as persuasive authority. *Id.*

23. *Id.* at *1.

24. *Id.* at *1-2.

25. *Id.* at *2.

26. *Id.*

as a matter of law to establish obvious intoxication.”²⁷

As an unpublished case, *Stevens* has no precedential effect and should not be cited for legal propositions. However, the case reveals the Minnesota appellate courts’ general deference to the finder of fact where “obvious intoxication” is at issue. Therefore, a jury or judge may find that someone was “obviously intoxicated” by virtue of any relevant evidence, such as testimony from a toxicologist or eyewitness testimony regarding the physical and mental state of the AIP. As long as the fact finder does not conclude “obvious intoxication” solely on the basis of the AIP’s reported blood-alcohol content and absent some other circumstantial or direct evidence, the decision of that fact finder will stand.

While blood-alcohol content alone does not translate into “obvious intoxication” as a matter of law, the recent, unpublished case of *DeSanti v. Youngs* indicates an illegal sale to an “obviously intoxicated” person can be found solely on the basis of circumstantial evidence.²⁸ More precisely, the *DeSanti* court, in the absence of direct testimony or evidence establishing an illegal sale, permitted the jury to infer an illegal sale occurred based on circumstantial evidence (toxicological testimony based on blood alcohol content, consumption history, and AIP’s testimony regarding his behavior and level of intoxication).

In *DeSanti*, appellee Youngs arrived at appellants’ bar (The Barn) at approximately 12:30 p.m. on August 1, 1999 for “customer appreciation day.”²⁹ The Barn’s liquor license allows only the sale of 3.2 beer, but The Barn allows patrons to bring their own hard alcohol to mix with soda and other “set-ups.”³⁰ Youngs brought with him a 750-milliliter bottle of Black Velvet whiskey.³¹ “At trial, Youngs testified that he had eight to ten drinks from the bottle of Black Velvet”³² The bartender testified that around 6:00 p.m. she saw Youngs with a half full bottle of whiskey.³³ “Young’s last recollection at The Barn is playing horseshoes”³⁴ Youngs testified that at this point “he ‘wasn’t doing very good with the horseshoes,’ and the he was ‘landing short, being way

27. *Id.* (citing *Seeley v. Sobczak*, 281 N.W.2d 368, 371 (Minn. 1979)).

28. No. C8-02-1311, 2003 WL 139393 (Minn. Ct. App. Jan. 21, 2003).

29. *Id.* at *1.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

off.’³⁵ Youngs, apparently feeling that good luck from holding horseshoes all afternoon would allow him to drive home safely, left The Barn in his vehicle at approximately 7:00 p.m., then struck Victoria DeSanti as she rode her bicycle on County Road 18.³⁶ “Youngs was arrested, and his blood alcohol content (BAC) measured .32 [percent].”³⁷ At trial plaintiff’s toxicologist testified that “once Youngs’ BAC reached .20 [percent], signs of intoxication would have been evident.”³⁸

The Youngs court confirmed the standard for obvious intoxication is whether a person could reasonably see that the buyer was intoxicated.³⁹ Despite arguments from The Barn that the circumstantial evidence offered cannot alone sustain a “reasonable inference that an illegal sale occurred,”⁴⁰ the *Desanti* court held that “circumstantial evidence supports a reasonable inference that The Barn sold Youngs alcohol while he was obviously intoxicated”⁴¹ The court based this conclusion on “(1) the testimony about Youngs’ deterioration in motor skills while at The Barn, (2) the evidence of Young’s BAC when he was arrested, and (3) the toxicologist’s testimony regarding the level of BAC at which Youngs would have shown signs of intoxication.”⁴²

Evaluating the verdict in light of the lack of direct evidence that Youngs purchased beer from The Barn,⁴³ the *DeSanti* court explained, “Where circumstantial evidence reasonably permits different inferences, the choice of the inference to be drawn rests with the factfinder.”⁴⁴ Specifically, “along with the evidence that he drank one-half of the bottle of whiskey, we must consider how Youngs’ BAC reached .32 [percent].”⁴⁵ The toxicologist “testified that 12 to 14 beers would contain the same amount of alcohol as one-half of the bottle of whiskey, and that consuming both would have brought Youngs’s BAC to at least .32 [percent].”⁴⁶ The court stated, “The jury could infer from this

35. *Id.*

36. *Id.*

37. *Id.* at *2.

38. *Id.* at *4.

39. *Id.* at *5 (citing *Jewett v. Deutsch*, 437 N.W.2d 717, 720 (Minn. Ct. App. 1989)).

40. *DeSanti*, No. C8-02-1311 at *5.

41. *Id.*

42. *Id.* at *6.

43. *Id.* at *7.

44. *Id.* (citing *Fogarty v. Martin Hotel Co.*, 257 Minn. 398, 403, 101 N.W.2d 601, 605 (Minn. 1960)).

45. *DeSanti*, No. C8-02-1311 at *7.

46. *Id.*

testimony that one-half of the bottle of whiskey would not be sufficient to bring Youngs' BAC to .32 [percent]."⁴⁷ The court found that "[f]rom the evidence presented, beer sold at The Barn was the only alternative alcohol source available to Youngs."⁴⁸

The court recognized that "no single person's testimony presents direct evidence of an illegal sale."⁴⁹ Nevertheless, the court concluded that all of the circumstantial evidence viewed together in a light most favorable to the verdict permitted a reasonable inference that Youngs was obviously intoxicated.⁵⁰

In *DeSanti*, the court of appeals demonstrated deference to the jury's decision regarding "obvious intoxication," allowing the fact finder to make any "reasonable inference" possible in light of the "totality of evidence."⁵¹ The decision underscored the fact-sensitive and subjective nature of deciding the issue of "obvious intoxication."

B. Causation

Upon determination an illegal sale occurred, the Civil Damages Act requires a plaintiff to present sufficient evidence to satisfy two causation questions: (1) was the illegal sale a cause of the intoxication, and if so (2) was the intoxication a cause of plaintiff's injuries?⁵²

From a historical and developmental perspective, this two-step causation analysis reflects a slow departure from the "proximate contributing cause standard" initially codified in 1952 under Minnesota Statutes section 340.95.⁵³ Subsequent cases confirm that judicial interpretation of this proximate cause standard required a plaintiff to show a defendant illegally sold liquor that "caused" intoxication and proximately caused plaintiff's injuries.⁵⁴ However, following these cases, Minnesota courts avoided the occasion to expressly require that the causal relationships be proximate until the Minnesota Supreme Court

47. *Id.* at *8.

48. *Id.*

49. *Id.* at *10.

50. *Id.* at *10-11.

51. *Id.*

52. *Rambaum v. Swisher*, 435 N.W.2d 19, 21 (Minn. 1989).

53. MINN. STAT. § 340.95 (1952) (repealed, 1985 ch. 305 art. 13 § 1; renumbered 340A.801).

54. *See Hahn v. City of Ortonville*, 238 Minn. 428, 432, 57 N.W.2d 254, 258-59 (1953) (liquor illegally sold need not be sole cause of intoxication; enough for liquor to be a proximately contributing cause); *see also Strand v. Vill. of Watson*, 245 Minn. 414, 419, 72 N.W.2d 609, 614 (1955) (intoxication must be the proximate cause of plaintiff's injuries).

briefly revisited the issue in *Kryzer v. Champlin American Legion No. 600*.⁵⁵ In *Kryzer*, an intoxicated plaintiff injured her wrist while being forcibly removed from the bar by an employee.⁵⁶ Relying on case law from 1882,⁵⁷ the *Kryzer* court rejected the “but for” causation test and made a distinction between the “occasion” and the “cause” of an injury.⁵⁸ The court clarified that, while plaintiff’s intoxication may have been the “occasion” for her ejection from the bar, it did not “cause” the injury to her wrist; rather, the act of the bar employee who ejected the plaintiff was the cause of her injury.⁵⁹

Following *Kryzer*, the causation standard appears to require a direct causal relationship between a person’s intoxication and the injury, demonstrated by a proximate-cause analysis rather than a “but for” test. Interestingly, Minnesota’s civil jury instructions for Civil Damages Act cases define direct cause as “a cause that had a substantial part in bringing about” the plaintiff’s injury.⁶⁰ The supreme court has applied the substantial-factor test to determine whether a cause is direct.⁶¹

1. *The Illegal Sale Caused or Contributed to the Intoxication*

Once a plaintiff establishes an illegal sale of alcoholic beverages, he or she must also prove the illegal sale caused or contributed to the alleged intoxicated person’s (AIP’s) intoxication.⁶² The illegally sold alcohol need not be the sole cause of intoxication.⁶³ In evaluating whether the illegal sale contributed to the intoxication, the fact finder must determine whether the totality of the circumstances demonstrates a “practical and substantial relationship” between the illegal sale and subsequent intoxication.⁶⁴

55. *Kryzer v. Champlin Am. Legion No. 600*, 494 N.W.2d 35, 37 (Minn. 1992).

56. *Id.* at 36.

57. *Id.* at 37 (citing *Nelson v. Chicago, Milwaukee & St. Paul Ry. Co.*, 30 Minn. 74, 14 N.W. 360 (1882)).

58. *Kryzer*, 494 N.W.2d at 37.

59. *Id.*

60. MINNESOTA DIST. JUDGES ASS’N COMM. ON JURY INSTRUCTION GUIDES, MINNESOTA JURY INSTRUCTION GUIDES (Civil) JIG 45.30 (Michael K. Steenson & Peter B. Knapp, rep.) in 4 MINN. PRACTICE 1, 268 (4th ed. 1999).

61. *Id.* at § 27.10.

62. *See Weber v. Au*, 512 N.W.2d 348, 350 (Minn. Ct. App. 1994) (holding that “the civil liability statute requires a causal connection between the intoxication and the injury, not just the sale and the injury”).

63. *See Murphy v. Hennen*, 264 Minn. 457, 463, 119 N.W.2d 489, 493 (1963) (“It is enough if such intoxicants combine with other intoxicants that may have been legally sold or furnished to be a concurring or proximately contributing cause”).

64. *See Kvanli v. Vill. of Watson*, 272 Minn. 481, 484, 139 N.W.2d 275, 277

This standard is sufficiently broad to address the various Dram Shop violations and the requisite illegal sale-intoxication nexus. Like a fishing net cast in the sea, however, this broad standard may snare some alcohol vendors that, as a matter of common sense and public policy, should not be held liable under the Act. For example, a bar that served the AIP a *de minimus* or negligible amount of alcohol could be found liable for making an “illegal sale” to an “obviously intoxicated person” even when its sale had little or no practical effect on the AIP’s intoxication or the plaintiff’s injuries. Does the sale of a bottle of beer to a patron exhibiting borderline evidence of impairment—which is then only half-consumed in five minutes by the patron before he leaves the bar, gets in his car and strikes a pedestrian crossing the street to the bar—create Dram Shop liability? Should it?

The appellate courts have yet to provide clear guidance in this area. There are no Minnesota cases specifically addressing such situations. At best, Minnesota courts have touched this issue on a cursory level.⁶⁵ In *Hahn v. City of Ortonville*, the supreme court held that liquor purchased at a municipal liquor store three or four hours earlier was a proximate cause of an assailant’s intoxication, despite considerable post-sale consumption of alcohol obtained elsewhere prior to the assault.⁶⁶

In *Murphy v. Hennen*, the supreme court reaffirmed that illegally sold intoxicants need be only a contributing cause to the resulting intoxication.⁶⁷ In that case, an illegal sale was made to a minor who then gave the alcohol to an adult.⁶⁸ The adult later became intoxicated and caused a motor vehicle accident.⁶⁹ Once again, despite holding the sale contributed to the intoxication, the *Murphy* court noted that a time lapse or other variable existing between a sale and consumption “may negate causation as a matter of law.”⁷⁰

Finally, in *Kvanli*, a minor purchased an amount of alcohol from a liquor store and shared the alcohol with another minor, who caused a subsequent motor vehicle accident.⁷¹ Although the court affirmed the

(1965).

65. See *Hahn v. City of Ortonville*, 238 Minn. 428, 57 N.W.2d 254 (1953); *Murphy*, 264 Minn. 457, 119 N.W.2d 489; *Kvanli*, 272 Minn. 481, 139 N.W.2d 275.

66. See *Hahn*, 238 Minn. at 430-32, 57 N.W.2d at 258.

67. 264 Minn. at 463, 119 N.W.2d at 493.

68. *Id.* at 459, 199 N.W.2d at 490.

69. *Id.*

70. *Id.* at 463, 119 N.W.2d at 493; see also *Swinfin v. Lowry*, 37 Minn. 345, 346, 34 N.W. 22, 22 (1887) (holding that damages are too remote where defendant furnished alcohol to an intoxicated person who then acted voluntarily to assault plaintiff).

71. *Kvanli v. Vill. of Watson*, 272 Minn. 481, 483, 139 N.W.2d 275, 277 (1965).

finding of a causal connection between the sale and intoxication,⁷² the *Kvanli* court held that time lapses or the occurrence of other intervening events “could make the relationship between the sale and use too tenuous to permit a finding of causal relationship.”⁷³

Although the *Hahn*, *Murphy*, and *Kvanli* decisions set forth a general causation framework to link an illegal sale to the intoxication, the decisions do not provide clear instruction on delineating “*de minimus*” versus “material” consumption. From a practical standpoint, Minnesota Dram Shop law remains without legislative guidance (or judicial interpretation) to separate negligible alcohol service from service actually “causing or contributing to” intoxication.

In assessing this issue, Minnesota could turn to other jurisdictions for guidance. Specifically, the Illinois Liquor Control Act,⁷⁴ which is strikingly similar in expressing “cause” language and subsequent case law interpretation of the term, provides useful instruction.

Similar to the Minnesota Civil Damages Act, the Illinois Liquor Control Act provides a cause of action for every person whose injury was in consequence of the intoxication of another and that the liquor service contributed to the intoxication.⁷⁵ Once again, like the Minnesota Civil Damages Act, the Illinois Liquor Control Act reflects a legislative intent to shift responsibility for damages occasioned by the use of alcohol on to those who profit from its sale.⁷⁶ Prior to 1971, Article VI, section 14 of the Act provided in pertinent part: “Every person who is injured in person or property by any intoxicated person, has a right of action . . . severally or jointly, against any person who by selling or giving alcoholic liquor, causes the intoxication, in whole or part, of such person.”⁷⁷

Based on the above provision, recovery was permissible under Illinois law upon showing of consumption in a particular Dram Shop and a resulting intoxication.⁷⁸ As originally codified, the threshold burden

72. *Id.* at 484-85, 139 N.W.2d at 278.

73. *Id.*

74. § 235 ILL. COMP. STAT. 5/1-1-5/12-4 (2003).

75. *Id.* at 5/6-21.

76. *Cf. Carlson v. Thompson*, 615 N.W.2d 387, 389 (Minn. Ct. App. 2000) (stating the fundamental purpose of Civil Damages Act is “to uphold liability in respect to people engaged in business, making profit in the provision of liquor”) *with Kingston v. Turner*, 505 N.E.2d 320, 325 (Ill. 1987) (observing that the legislative intent of the Dram Shop Act is to place the responsibility for damages occasioned by the use of alcohol on those who profit from its sale (citing Comment, *The Illinois Dram Shop Act: The Effect of the 1971 Amendment*, 74 U. ILL. L. F. 466, 477 (1974))).

77. *Kingston*, 505 N.E.2d at 325 (citing ILL. REV. STAT. 1969, ch. 43, par. 135).

78. *Kingston*, 505 N.E.2d at 325.

for recovery was a showing the injury was in consequence of another's intoxication and that the liquor served "contributed in some degree, no matter how slight," to the intoxication.⁷⁹

However, following the 1971 amendment, the Illinois legislature eliminated the "in whole or part" language from the statute.⁸⁰ As noted in subsequent scholarly review, the amendment was not intended to alter the legislative intent and instead reflected an attempt to narrow liability under the provision.⁸¹ Under the amended provision, recovery was allowed only against a person who, "by selling or giving alcoholic liquor, causes the intoxication."⁸²

In light of the amendment, Illinois courts quickly clarified the causal requirement that the sale or provision of alcohol to the person causing injuries must materially contribute to the intoxication.⁸³ In *Thompson v. Tranberg*, the Illinois Court of Appeals stated:

We have concluded that the legislative intention in the use of the word "causes" in the Dram Shop Act is best effectuated by a focus on whether the defendant's conduct was a material and substantial factor in producing or contributing to produce the intoxication It seems fair to conclude that the intent of the legislature with respect to the 1971 amendment was to eliminate the possibility that dram shop liability could be founded on any consumption of alcohol no matter how slight but to impose liability only when intoxication could be said as a matter of fact to have been caused by the dram shop.⁸⁴

Following *Thompson*, the Illinois Supreme Court in *Nelson v. Araiza* concluded the amended provisions applied because the defendant "must have caused the intoxication and not merely have furnished a negligible amount of liquor."⁸⁵ After *Nelson*, Illinois courts provided

79. See *Osborn v. Leuffgen*, 45 N.E.2d 622, 625 (Ill. 1943).

80. See ILL. REV. STAT. 1983, ch. 43, par. 135 (1971).

81. See Comment, *The Illinois Dram Shop Act: The Effect of the 1971 Amendment*, 74 U. Ill. L.F. 466, 477 (1977).

82. See ILL. REV. STAT. 1983, ch. 43, par. 135 (1977).

83. See *Kingston v. Turner*, 505 N.E.2d 320 (Ill. 1987); *Nelson v. Araiza*, 372 N.E.2d 637, 639-40 (Ill. 1978) (holding that serving a negligible amount of alcoholic liquor does not constitute causing intoxication within the meaning of the statute); *Mohr v. Jilg*, 586 N.E.2d 807 (Ill. App. Ct. 1992); *Henry v. Bloomington Third Ward Cmty. Club*, 411 N.E.2d 540 (Ill. App. Ct. 1980); *Thompson v. Tranberg*, 360 N.E.2d 108 (Ill. App. Ct. 1977); *Caruso v. Kazense*, 313 N.E.2d 689, 697 (Ill. App. Ct. 1974) (stating the amendment imposes liability only on the person who "caused the intoxication rather than on any person who contributed to such condition").

84. 360 N.E.2d at 111.

85. 372 N.E.2d at 639.

further clarification of what constituted a material contribution so as to “cause the intoxication” in *Henry v. Bloomington Third Ward Community Club*,⁸⁶ *Kingston v. Turner*,⁸⁷ and *Mohr v. Jilg*.⁸⁸

In *Henry*, the Illinois Appellate Court held that a bar’s liability for serving a small amount of alcohol to an already intoxicated person is a jury question, and evidence of such intoxication based solely on the plaintiff’s personal opinion was sufficient to present a jury question.⁸⁹ In that case, plaintiff Charles Henry and his brothers began drinking in a tavern when Elmer Thomas (and a companion) entered the bar and ordered one ounce of alcoholic liquor.⁹⁰ The plaintiff later testified Thomas appeared intoxicated before receiving the liquor based on his gait and unsteady appearance.⁹¹ Following minimal consumption of the liquor, Thomas and his companion assaulted Henry and his brothers, shooting Henry in the hip.⁹² Henry brought suit under the Dram Shop Act for personal injuries and the circuit court granted a directed verdict in favor of the tavern.⁹³

In reversing the directed verdict, the *Henry* court affirmed that “a dramshop which serves a negligible amount of liquor to a sober person would clearly not have ‘caused’ that person’s intoxication” under the Act.⁹⁴ However, whether liability exists under the Act in light of plaintiff’s testimony that the patron was intoxicated upon service is a jury question.⁹⁵ Specifically, the jury’s function in such cases is to determine whether the actions of the Dram Shop in providing service was a “material and substantial factor” in exacerbating his state of intoxication.⁹⁶

Later, in *Kingston*, the Illinois Supreme Court held it was possible for the jury to find that an individual was intoxicated at the time of the accident, but his intoxication was not caused by either of the two bars in which he drank, when no clear evidence was presented proving he drank more than a negligible amount at either bar.⁹⁷ Here, John Berry and

86. 411 N.E.2d 540.

87. 505 N.E.2d 320.

88. 586 N.E.2d 807.

89. 411 N.E.2d at 543.

90. *Id.* at 541.

91. *See id.*

92. *Id.* at 541-42.

93. *Id.* at 541.

94. *Id.* at 543.

95. *Id.*

96. *Id.*

97. 505 N.E.2d 320.

companions traveled among three taverns on his motorcycle over a three-hour period, during which time Berry consumed a total of four, twelve-ounce tap beers. Evidence from companions and eyewitnesses suggested Berry was feeling the effects of the alcohol at the time of his departure.⁹⁸ Upon leaving the last tavern with a companion, Berry's motorcycle struck plaintiff Kingston's vehicle, killing Kingston. Following suit by Kingston's heirs under the Act, the jury returned a verdict in favor of defendants, which the appellate court reversed.⁹⁹

Discussing the impropriety of the jury instruction relating to causation, the *Kingston* court explained that the amended Liquor Control Act "cause" provision does not equate the terms "result" and "cause." Instead, guided by the previous *Thompson* holding, the *Kingston* court instructed that "cause" refers to conduct that was "*a material and substantial factor in producing or contributing to produce the intoxication.*"¹⁰⁰ Consequently, the cause provision did not apply to *de minimus* contributions to a party's intoxication, and merely furnishing a negligible amount of alcohol was no longer a sufficient basis for liability. Therefore, although alcohol furnished at two separate taverns may cause a single intoxication, a tavern may not be held liable for a *de minimus* contribution to an individual's intoxication.¹⁰¹

Most recently, the Illinois Appellate Court in *Mohr* held that a tavern that admittedly sold a relatively small amount of alcohol to a customer immediately before the customer left the parking lot and collided with plaintiff's vehicle was liable under the Liquor Control Act.¹⁰² In that case, Defendant Dorothy Jilg consumed two twelve-ounce cans of beer at the Oasis Bar over a two-hour period. The plaintiff presented no evidence to suggest Jilg was already intoxicated when served, and the testimony conflicted concerning her subsequent intoxication. Ultimately, the jury returned a verdict in favor of the Oasis. The plaintiff appealed the decision.

Despite the holding, the *Mohr* court reasoned from *Thompson* and *Kingston* that to "cause" the intoxication of an individual, more than a negligible amount of alcohol is required.¹⁰³ More importantly, the court considered the situation in which a patron enters a Dram Shop in an

98. *See id.* at 323.

99. *Id.*

100. *Id.* at 327.

101. *Id.*

102. *Mohr v. Jilg*, 586 N.E.2d 807 (Ill. App. Ct. 1992).

103. *Id.* at 807.

intoxicated state and consumes a relatively small amount of alcohol. In such cases, the Mohr court reasoned liability is unsupported for the second tavern because the alcohol consumed contributed only a negligible amount to the intoxication.¹⁰⁴ In discussing such circumstances, the court affirmed that while alcohol furnished at two separate taverns may both cause a patron's intoxication, a tavern may not be held liable for a *de minimus* contribution to an individual's intoxication.¹⁰⁵

Similar to the Minnesota Civil Damages Act, the Illinois Liquor Control Act is remedial legislation designed to shift responsibility for damages occasioned by the use of alcohol on those who profit from its sale. In addition, the Minnesota and Illinois statutes are strikingly similar regarding their expression of "cause" language and subsequent case law interpretation of the term. Both require that the liquor sale cause the intoxication, and qualify the "material and substantial" cause contributing to the intoxication.

Faced with a causation standard similar to Minnesota's, Illinois courts have created a clearer definition of the amount of alcohol that materially contributes to an intoxication and that therefore constitutes a contributing cause of that intoxication. Illinois law provides well-reasoned authority that the provision of a negligible amount of alcohol to an intoxicated person—where service was provided elsewhere—does not result in liability because the alcohol consumed contributed only a negligible amount to the intoxication. When presented with the appropriate set of facts, Minnesota's appellate courts should do the same, adopting Illinois' standard that the illegal sale be "a material and substantial factor in providing or contributing to produce the intoxication."¹⁰⁶

2. *The Intoxication Caused the Injury*

The claimant bears the burden of establishing that the illegal sale was the proximate cause of his or her damages.¹⁰⁷ As discussed above,

104. *Id.* at 810.

105. *Id.*

106. *Kingston v. Turner* 505 N.E.2d 320, 327 (Ill. 1987).

107. *Kryzer v. Champlin Am. Legion No. 600*, 494 N.W.2d 35, 36 (Minn. 1992) (citing *Adamson v. Dougherty*, 248 Minn. 535, 542, 81 N.W.2d 110, 115 (1957)). *See also Hastings v. United Pac. Ins. Co.*, 396 N.W.2d 682, 684 (Minn. Ct. App. 1986) (finding that a plaintiff who crosses over the center line of the highway into an alleged intoxicated person may fail to establish a causal connection between his injuries and the illegal sale to the AIP).

in *Kryzer v. Champlin American Legion No. 600*, the Minnesota Supreme Court rejected a “but for” causation test to this element of a Dram Shop claim.¹⁰⁸

The Minnesota Court of Appeals recently discussed proximate cause in an unpublished case, *Brockman v. Beacons Sports Bar & Grill*.¹⁰⁹ Brockman, Price, and Brockman’s cousin were drinking at Beacons Sports Bar & Grill (Beacons) in Duluth, Minnesota.¹¹⁰ Price consumed beer and one Windsor Coke mixed drink before leaving Beacons with Brockman and the others.¹¹¹ “Price drove erratically, went through a stop sign, and then backed into a ditch As Brockman and his cousin tried to push Price’s car out of the ditch, the car moved backward and pinned Brockman against a retaining wall, causing a severe crush-type injury to his left thigh and perineum Brockman was hospitalized for about a month.”¹¹² He left the hospital with a small, open wound, which later became infected.¹¹³ Brockman underwent surgery to drain the infection; he died of sudden, unexpected cardiovascular collapse during administration of general anesthesia.¹¹⁴

Brockman’s father sued Beacons, alleging a violation of Minnesota’s Dram Shop Act.¹¹⁵ The trial court granted Beacons’ motion for summary judgment, ruling that the evidence was insufficient to establish that Beacons made an illegal sale and that the illegal sale proximately caused Brockman’s death. Brockman’s father appealed.¹¹⁶

The Minnesota Court of Appeals reversed and began its analysis in *Brockman* noting “[t]he person bringing the action must show that the illegal sale caused the intoxication, and the intoxication was the ‘proximate cause’ of the injuries sustained.”¹¹⁷ Consequences that “follow in an unbroken sequence from the original wrongful act, without an intervening efficient cause, are natural and proximate, and the original wrongdoer is responsible for these consequences even when the particular result is not foreseeable.”¹¹⁸ The court noted, “the concept of

108. 494 N.W.2d at 37.

109. *Brockman v. Beacons Sports Bar & Grill*, No. C8-02-76, slip op. (Minn. Ct. App. Sept. 10, 2002).

110. *Id.* at 2.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 3.

116. *Id.*

117. *Id.* (citing *Kryzer*, 494 N.W.2d at 36).

118. *Brockman*, No. C8-02-76, slip op. at 4 (citing *Dellwo v. Pearson*, 259 Minn.

proximate cause has always encompassed unforeseen medical complications that develop from the original injury.”¹¹⁹ In addition, the court of appeals found, “Brockman sustained injuries that required extended hospitalization, necessitated surgery that required a general anesthetic, and the administration of anesthesia triggered the circulatory arrest that resulted in Brockman’s death.”¹²⁰ It added the observation that “proximate cause also encompasses the aggravation of the original injury caused by the administration of necessary medical care.”¹²¹

The *Brockman* court, summing up its reversal of the trial court’s decision, concluded:

The evidence establishes that, at the time of the surgery, Brockman was an otherwise healthy, 25-year-old man. It is undisputed that the surgery was a reasonable and necessary procedure to treat injuries sustained in the car accident. The medical evidence supports a claim that the administration of anesthesia was responsible for triggering the circulatory arrest. On these facts, the evidence is sufficient to create a triable issue on proximate cause, it was therefore error to grant summary judgment on that issue.¹²²

The Minnesota Supreme Court has yet to embrace (or precisely define) a formal proximate cause standard in the Dram Shop context. However, the *Brockman* holding may forecast the future of which proximate cause analysis will govern.

The *Brockman* court’s analysis focuses on common-law negligence principles, which emphasize the hindsight (substantial factor) rather than foresight (foreseeability) to determine whether the necessary causal link exists between the intoxication and the ultimate injury. Although the *Brockman* decision seems limited to more attenuated (and less direct) circumstance and is of no precedential value, it certainly signals traditional common-law principles may predominate proximate cause analyses until the Minnesota Supreme Court weighs in on this issue. In these authors’ humble opinion, until that time, similar “unbroken chains”

452, 454-55, 107 N.W.2d 859, 861-62 (1961)).

119. *Brockman*, No. C8-02-76, slip op. at 4; see *Keegan v. Mpls. & St. Louis R.R. Co.*, 76 Minn. 90, 91, 78 N.W. 965, 965 (1899) (establishing that the negligence of the defendant was the proximate cause of the injury and, therefore, determining whether or not the result that followed was reasonably anticipated is immaterial).

120. *Brockman*, No. C8-02-76, slip op. at 4.

121. *Id.* at 4-5 (citing *Couillar v. Charles T. Miller Hosp.*, 253 Minn. 418, 422, 92 N.W.2d 96, 99 (1958)) (recognizing that the original tortfeasor remains responsible for proximate results of act even though injury is more serious as a result of medical care)).

122. *Brockman*, No. C8-02-76, slip op. at 6.

may shackle liquor establishments (and their insurers) to increased Dram Shop related liability.

III. PROCEDURAL GUIDELINES

A. *Who May Bring a Claim?*

Minnesota Statutes section 340A.801 provides a right of action for “a spouse, child, parent, guardian, employer, or other person injured in person, property, or means of support, or who incurs other pecuniary loss”¹²³ The Minnesota Supreme Court held the term “other person” refers to any other person injured by the intoxication of another if that injured person played no role in the intoxication.¹²⁴

In the case of *Haugland v. Mapleview Lounge Bottleshop, Inc.*, the court discussed who is empowered to bring a claim under the Civil Damages Act.¹²⁵ On February 20, 1999, Robert John Donovan, Sr. died in an automobile accident, leaving his son and Haugland, his son’s maternal aunt.¹²⁶ On February 12, 2001, Haugland served a summons and complaint on Mapleview Lounge Bottleshop, Inc. (Mapleview Lounge), asserting claims under Minnesota Statutes sections 340A.801 and 340A.802.¹²⁷ “The caption of the complaint identified the plaintiff as ‘Debra K. Haugland, as trustee for the next of kin of Robert John Donovan, Sr.’”¹²⁸ The trial court granted Mapleview Lounge’s motion to dismiss on the ground “that the action for injury to Donovan’s survivors could not be brought in the name of a trustee for the next of kin, and the complaint could not be amended to name the real party in interest because the applicable two-year statute of limitations had expired.”¹²⁹ Haugland appealed to the Minnesota Court of Appeals.

Affirming the trial court, the court of appeals held that under the Dram Shop Act a plaintiff must prove she suffered damages and must bring the claim in her own name.¹³⁰ The court noted, “Haugland’s complaint . . . does not allege that Haugland suffered any loss, as trustee or in any other capacity Therefore [Haugland] . . . did not have a

123. MINN. STAT. § 340A.801 (2002).

124. *Lefto v. Hoggsbreath Enters., Inc.*, 581 N.W.2d 855, 857 (Minn. 1998).

125. 643 N.W.2d 618 (Minn. Ct. App. 2002).

126. *Id.* at 620.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 622 (citing *Beck v. Groe*, 245 Minn. 28, 45, 70 N.W.2d 886, 898 (1995)).

right of action under the Civil Damages Act.”¹³¹

The Minnesota Supreme Court reversed.¹³² In permitting amendment of the complaint, the supreme court focused on Minnesota’s status as a “notice pleading” state and the lack of prejudice in permitting amendment. Justice Page, writing for the unanimous court, reasoned that although the original, improperly captioned complaint did not identify a proper party, the complaint provided the defendant with legally sufficient notice of a civil damages action.¹³³ As the proposed amendment arose out of the same occurrence set forth in the original complaint, Minnesota Rule of Civil Procedure 15.01 permitted amendment.¹³⁴

Haugland is the Minnesota Supreme Court’s first decision interpreting the Civil Damages Act since 2001. The case’s relevance lies in its clarification of the procedural peculiarities of the Civil Damages Act. Haugland’s claim would have withstood dismissal had she brought the action in the name of the injured party, not in her own name as trustee of the injured party. Alternatively, the claim apparently would have survived if Haugland would have simply alleged personal loss or injury in her complaint.

IV. TIMING REQUIREMENTS

A. *Written Notice of Claim*

Minnesota Statutes section 340A.802, subdivisions 1 and 2, require written notice of injury to licensed retailers or municipal liquor stores when a Dram Shop action is contemplated against one of these entities.¹³⁵ The notice of claim requirement states:

In the case of a claim for damages, the notice must be served by the claimant’s attorney within 240 days of the date of entering an attorney-client relationship with the person in regard to the claim. In the case of claims for contribution or indemnity, the notice must be served within 120 days after the injury occurs or within 60 days after receiving written notice of a claim for contribution or indemnity, whichever is applicable. No action for damage or for contribution or indemnity may be

131. *Hauglund*, 643 N.W.2d at 622.

132. *Hauglund ex rel. Donovan v. Mapleview Lounge & Bottleshop, Inc.*, 666 N.W.2d 689 (Minn. 2003).

133. *Id.* at 694.

134. MINN. R. CIV. P. 15.01.

135. MINN. STAT. § 340A.802, subd. 2 (2002).

maintained unless the notice has been given.¹³⁶

A plaintiff who brings a claim under the Dram Shop Act bears the burden of proving the licensee had notice of a possible claim within the statutory notice period.¹³⁷ In *Wood v. Diamonds Sports Bar & Grill, Inc.*, the Minnesota Court of Appeals took up the question of whether a civil complaint alone can satisfy the notice requirement.¹³⁸

Jolane Wood's boyfriend suffered injuries in an automobile accident after leaving Diamonds Sports Bar & Grill (Diamonds), where he was drinking.¹³⁹ Wood, who eventually married the boyfriend, filed a Dram Shop claim against Diamonds under the Civil Damages Act.¹⁴⁰ Wood's attorney served a summons and complaint on Diamonds, containing the information required by the notice statute, within 240 days after entering into an attorney-client relationship with Wood.¹⁴¹ However, after the accident and before she initiated the Dram Shop action, Wood retained another attorney to file bankruptcy. The bankruptcy attorney provided no written notice of a Dram Shop claim to Diamonds.¹⁴² Diamonds moved for summary judgment, arguing Wood failed to give proper notice: "(1) by not serving notice within 240 days after entering into an attorney-client relationship with the bankruptcy attorney and (2) by not serving notice before serving the complaint."¹⁴³ The district court denied Diamonds' motion and Diamonds appealed.¹⁴⁴

The court of appeals recounted the Civil Damages Act's notice requirement:

A person who claims damages . . . from a licensed retailer of alcoholic beverages . . . for or because of an injury within the scope of section 340A.801 must give written notice to the licensee . . . stating:

- (1) the time and date when and person to whom the alcoholic beverages were sold or bartered;
- (2) the name and address of the person or persons who were injured or whose property was damaged; and
- (3) the approximate time and date, and the place where the

136. *Id.*

137. *Schulte v. Corner Club Bar*, 544 N.W.2d 486, 488 (Minn. 1996).

138. 654 N.W.2d 704 (Minn. Ct. App. 2002).

139. *Id.* at 706.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

injury to person or property occurred.¹⁴⁵

Furthermore,

In the case of a claim for damages, the notice must be served by the claimant's attorney within 240 days of the date of entering an attorney-client relationship with the person in regard to the claim.¹⁴⁶

The court of appeals affirmed the trial court's denial of Diamond's motion for summary judgment, observing that nothing in the statute precluded giving the required notice via service of a complaint that provided the information required by statute within 240 days after an attorney is retained.¹⁴⁷ Diamonds argued that the purpose of the notice requirement is to allow the licensee time to conduct a prelitigation investigation of the facts.¹⁴⁸ While recognizing the supreme court's observance that the notice requirement helps provide Dram Shops with an early opportunity to investigate claims, the *Wood* court noted, "Diamonds admits that, if a process server were to hand to a licensee notice first and then a summons and complaint containing the same factual information seconds later, the notice requirement would be satisfied."¹⁴⁹ The court stated, "This would be an absurd triumph of form over substance, and we must presume that the legislature did not intend such a result."¹⁵⁰ The court held that "service of a complaint that contains the information described in section 340A.802, subdivision 1, within the 240-day specified in section 340A.802, subdivision 2, satisfies the dram-shop notice requirement."¹⁵¹

B. Statute of Limitations

In Minnesota, a plaintiff must commence an action within the time periods provided in Minnesota Statutes section 541.01, except where a statute prescribes a different limitation.¹⁵² The Civil Damages Act

145. *Id.* at 707 (citing MINN. STAT. § 340A.802, subd. 1 (2002)).

146. *Wood*, 654 N.W.2d at 707 (citing MINN. STAT. § 340A.802, subd. 2). Because Diamonds failed to raise in its main brief the issue of whether the bankruptcy attorney should have provided notice of Wood's Dram Shop claim, the issue was not properly before the court and was not addressed.

147. *Wood*, 654 N.W.2d at 708.

148. *Id.*

149. *Id.* at 708-09.

150. *Id.*; see MINN. STAT. § 645.17(2) (2002).

151. *Wood*, 654 N.W.2d at 709 (citing *Wegan v. Vill. of Lexington*, 309 N.W.2d 273, 280 (Minn. 1981)).

152. MINN. STAT. § 541.01 (2002). "In ascertaining the intention of the legislature

states, "No action may be maintained under Section § 340A.801 unless commenced within two years after injury."¹⁵³ However, two specific instances have addressed the application of the limitations requirements in the Civil Damages Act: (1) claims made by minors, and (2) the notice requirements for contribution and indemnity claims by tortfeasors against liquor vendors.

Pursuant to Minnesota Statutes section 541.15(a)(1), the statutes of limitations for most claims brought by minors are tolled until they reach age 19.¹⁵⁴ However, as noted above, the statute of limitations under the Civil Damages Act requires actions to be brought within two years of the injury and does not address tolling of the limitation period.¹⁵⁵ The Minnesota Supreme Court in *Whitener ex rel. Miller v. Dahl* addressed the discrepancy between the minority tolling statute and the Civil Damages Act.¹⁵⁶

Sandra Bower spent the night drinking at the Flowing Well Supper Club and suffered fatal injuries in a car accident after leaving the club.¹⁵⁷ Her four minor children filed a lawsuit against Flowing Well asserting claims under the Minnesota Civil Damages Act for damages resulting from respondent's allegedly illegal sale of alcohol to their mother hours before her death in a car accident.¹⁵⁸ They served suit on the bar on April 1, 1999, more than three years after Sandra Bowers' fatal accident.¹⁵⁹ Flowing Well moved for summary judgment because the plaintiffs commenced the action after the two-year limitation under Minnesota Statutes section 340A.802, subdivision 2.¹⁶⁰ The plaintiffs objected, arguing their action was timely under the minority-tolling statute, Minnesota Statutes section 541.15(a)(1).¹⁶¹ Flowing Well came up dry when the trial court denied its motion and certified the question: "Is the statute of limitations, for the cause of action of the minor children pursuant to Minn. Stat. § 340A.801 et seq., tolled pursuant to Minn. Stat.

the courts may be guided by the following presumptions: (1) The legislature does not intend a result that is absurd, impossible of execution, or unreasonable . . ." MINN. STAT. § 645.17 (2002).

153. MINN. STAT. § 340A.801 (2002).

154. MINN. STAT. § 541.15(a)(1) (2002).

155. MINN. STAT. § 340A.802, subd. 2 (2002).

156. 625 N.W.2d 827 (Minn. 2001).

157. *Id.* at 828.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

§ 541.15?”¹⁶² The Minnesota Court of Appeals concluded the minor plaintiffs’ claims were not barred; therefore, the two-year statute of limitations barred their claims. The supreme court affirmed.¹⁶³

The supreme court began its analysis in *Whitener* recognizing the apparent conflict between Minnesota’s minority-tolling statute and the Civil Damages Act.¹⁶⁴ “The minority-tolling statute creates a general exception to statutes of limitations for claims of minors, and provides . . . that the running of the statute of limitations on a cause of action shall be suspended as to a minor plaintiff until one year after the minor reaches age eighteen.”¹⁶⁵ “The Civil Damages Act . . . contains its own statute of limitations requiring commencement of an action within two years after the date of injury.”¹⁶⁶ Citing *Cashman v. Hedberg*,¹⁶⁷ the state’s highest court observed that it would make no exception to the limitations period provided by a statute granting a statutorily created right unless that statute contains a clause stating general tolling statutes or other exceptions apply.¹⁶⁸ The court implicitly adopted the court of appeals’ review of the indicia of legislative intent, noting:

[B]ecause the minority-tolling statute was enacted long before the Civil Damages Act, the legislature could not have intended the tolling statute to apply to a statutorily-created cause of action not then in existence. The court noted we have long held that because the right to bring an action for wrongful death is granted by statute in derogation of the common law, it is conditioned upon compliance with the statute of limitations contained in the statute creating the right.¹⁶⁹

In finding the four minor plaintiffs failed to timely commence their action, the supreme court found ample evidence the legislature did not intend to allow the minor tolling statute to extend the Civil Damages Act two-year statute of limitations.¹⁷⁰

The case of *Wollan v. Jahnz*¹⁷¹ addressed the applicability of a six-year statute of limitations to a claim under the Civil Damages Act, Minnesota Statutes section 340A.801, subdivision 6 for providing

162. *Id.*

163. *Id.*

164. *Id.* (citing MINN. STAT. §§ 541.15(a), 340A.801-.802 (2000)).

165. *Whitener*, 625 N.W.2d at 828-29 (citing MINN. STAT. § 541.15(a) (2000)).

166. *Whitener*, 625 N.W.2d at 829.

167. 215 Minn. 463, 467, 10 N.W.2d 388, 391 (1943).

168. *Whitener*, 625 N.W.2d at 829.

169. *Id.* at 829-30 (citing *Cashman*, 215 Minn. at 467-72, 10 N.W.2d at 391-93).

170. *Whitener*, 625 N.W.2d at 833-34.

171. 656 N.W.2d 416 (Minn. Ct. App. 2003).

alcohol to a minor who then injures another.¹⁷² Grizzly's Sports Bar hosted an employee Christmas party and provided alcoholic beverages to Jahnz, an employee younger than 21, who then became intoxicated.¹⁷³ Later, Jahnz was driving a snowmobile with Wollan as a passenger when the snowmobile flipped, injuring Wollan.¹⁷⁴ Wollan sued Jahnz in 1998 and in August 2001 sought to amend the complaint to include Grizzly's Sports Bar (Grizzly's) and its owners under Minnesota Statutes section 340A.801, subdivision 6.¹⁷⁵ Grizzly's moved to dismiss the case based on the two-year statute of limitations.¹⁷⁶ Wollan argued the two-year limitations period did not apply to her claim and that it was timely based on the six-year limitation period for common-law negligence actions under Minnesota Statutes section 541.05, subdivision 1(5).¹⁷⁷ The trial court granted Grizzly's motion to dismiss.¹⁷⁸ Wollan appealed.¹⁷⁹

The Minnesota Court of Appeals began its analysis by noting the judicial and legislative history of claims brought by minors related to the illegal provision of alcohol.¹⁸⁰ In 1985, the Minnesota Supreme Court held in *Holmquist v. Miller*¹⁸¹ that "a social host is not liable in a common-law action for negligently serving alcohol to a minor."¹⁸² Reacting to the supreme court's decision in *Holmquist*, the Minnesota Legislature amended the Civil Damages Act to provide: "Nothing in this chapter precludes common law tort claims against any person 21 years or older who knowingly provides or furnishes alcoholic beverages to a person under the age of 21 years."¹⁸³

In light of its legislative and judicial heritage, the *Wollan* court reasoned Minnesota Statutes section 340A.801, subdivision 6 did not create a new cause of action and merely granted permission to apply common-law negligence principles to service-to-minor-related tort

172. MINN. STAT. § 340A.801, subd. 6 (2002) ("Nothing in this chapter precludes common law tort claims against any person 21 years old or older who knowingly provides or furnishes alcoholic beverages to a person under the age of 21 years.")

173. *Wollan*, 656 N.W.2d at 417.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* at 418.

181. 367 N.W.2d 468 (Minn. 1985).

182. *Wollan*, 656 N.W.2d at 418 (citing *Holmquist*, 367 N.W.2d at 472).

183. *Wollan*, 656 N.W.2d at 418 (citing MINN. STAT. § 340A.801, subd. 6 (2002)); *VanWagner v. Mattison*, 533 N.W.2d 75, 79 (Minn. Ct. App. 1995).

claims.¹⁸⁴ More precisely, subdivision 6's tacit approval of common law actions (against both social hosts and other alcohol vendors) validated ongoing application of the six-year statute of limitations under Minnesota Statutes section 541.05, subdivision 1(5).

At first blush, it may be difficult to reconcile the decisions in *Haugland*, *Wood*, *Whitener*, and *Wollan*. Upon a closer analysis, however, the cases are distinguishable and reflect the appellate court's desire to strictly construe and curb the scope of legislatively created causes of action, while at the same time providing injured parties the opportunity to pursue their claims despite purported technical deficiencies. Although *Wood* and *Haugland* were decided by different appellate courts and involved interpretations of different procedural provisions of the Civil Damages Act, both cases reflect an underlying judicial distaste for depriving Dram Shop plaintiffs of their claims based solely on procedural technicalities. The supreme court's decision in *Haugland* goes further in this regard than the court of appeals ruling in *Wood*, but both are defensible decisions given the public policy underlying the Civil Damages Act and the rationale employed by both reviewing bodies. Similarly, the court of appeals' decision in *Wollan* reflects a careful and purposeful preservation of common law claims against potential liquor vendors and providers, based solely on the common-law pedigree of the claims. The supreme court's ruling in *Whitener* maintained the court's long-standing policy of strictly adhering to the language of statutes creating causes of action not recognized at common law even in the face of arguably harsh results.

V. DAMAGES

A. Loss of Means of Support

Courts have defined "loss of means of support" as an "actual diminution in the plaintiff's standard of living."¹⁸⁵ It is not limited to damages to which the injured party had a legal right; the plaintiff may recover for any and all damages.¹⁸⁶

184. *Wollan*, 656 N.W.2d at 418. It is difficult to understand this analysis. If the common law did not recognize tort claims for providing a minor with alcoholic beverages in the first place, a statute that permits something that never existed should be a nullity.

185. *Fitzer v. Bloom*, 253 N.W.2d 395, 404 (Minn. 1977) (citing *Herbes v. Vill. of Holdingford*, 267 Minn. 75, 84, 125 N.W.2d 426, 432 (1963)).

186. *Fitzer*, 253 N.W.2d at 398.

In *Britamco Underwriters, Inc. v. A & A Liquors of St. Cloud*, the Minnesota Court of Appeals clarified the meaning of “loss-of-means-of-support” under Minnesota Statutes section 340A.801.¹⁸⁷ The plaintiff, who alleged damages because of A & A’s violation of the Civil Damages Act, moved for a declaration that he was entitled to loss-of-means-of-support coverage under A & A’s liquor-liability policy for the reduction in his standard of living pursuant to Minnesota Statutes section 340A.801.¹⁸⁸ The district court denied his motion and he appealed.¹⁸⁹

Plaintiff contended the district court erred by concluding that under the Civil Damages Act, he could not recover for “loss of means of support” and “bodily-injury” damages.¹⁹⁰ The court of appeals affirmed the trial court.¹⁹¹ It noted the Civil Damages Act “is both penal and remedial because while the statute serves to punish an offending vendor and deter others from making illegal sales of liquor, it also serves to compensate those who would under ordinary circumstances or other tort principles obtain no recovery for their injuries.”¹⁹²

Therefore, the court reasoned, the statute requires a liquor establishment to carry an insurance policy containing minimum limits for both bodily injury *and* “loss of support.”¹⁹³ Nevertheless, the court concluded the Civil Damages Act did not allow appellant to claim loss-of-support damages for himself.¹⁹⁴ The court observed that, “Minn. Stat. § 340A.801, subd. 1, which is the only provision that confers a cause of action under the Civil Damages Act, does not include the injured person.”¹⁹⁵ Although the statute did not define means of support, the court found that this phrase “incorporates within it the requirement that a claimant be a dependent.”¹⁹⁶ The court bolstered its conclusion by noting “no reported Minnesota cases have ever granted ‘loss-of-means-of-support’ damages to the injured ‘breadwinner.’ Rather, the loss-of-

187. 649 N.W.2d 867 (Minn. Ct. App. 2002).

188. *Id.* at 869.

189. *Id.*

190. *Id.* at 871.

191. *Id.*

192. *Id.* (citing *Hannah v. Chmielewski, Inc.*, 323 N.W.2d 781, 784 (Minn. 1982)).

193. *Britamco*, 649 N.W.2d at 871 (citing MINN. STAT. § 340A.409, subd. 1(1) (2000)).

194. *Britamco*, 649 N.W.2d at 871.

195. *Id.* at 872.

196. *Id.*; see *Jones v. Fisher*, 309 N.W.2d 726, 730 (Minn. 1981) (comparing the damages of Dram Shop claims to the damages for wrongful death claims, the court states that the damages that are common for both the negligent tortfeasors and the Dram Shop tortfeasors are those damages that will compensate the surviving spouse and children for loss of means of support).

support cases have involved dependents.”¹⁹⁷

B. *Pecuniary Loss*

In 1982, the legislature amended the Civil Damages Act to allow recovery of pecuniary losses in addition to damages for injury to person, property, and means of support. The phrase “pecuniary loss” means damages for loss of advice, comfort, assistance, and protection.¹⁹⁸ A claim for “pecuniary loss” is an independent action brought by a spouse who is dependent on the other person’s support.¹⁹⁹

In the recent, unpublished case of *DeSanti v. Youngs*, the Minnesota Court of Appeals clarified the issue of pecuniary loss damages and held they are not limited to Dram Shop claims resulting in death.²⁰⁰ In *DeSanti*, the jury found both The Barn and Youngs negligent and apportioned 50% fault to each.²⁰¹ The Barn moved for JNOV or, alternatively, a new trial.²⁰² The trial court denied The Barn’s motion and entered judgment against it for \$628,274.94, which included \$200,000 awarded to John DeSanti for pecuniary loss.²⁰³ The Barn appealed.

On appeal, The Barn argued that pecuniary loss should apply only to Civil Damages Act cases where the individual for whom a loss is claimed is dead.²⁰⁴ Affirming the trial court, the Minnesota Court of Appeals began its analysis of the case quoting the Civil Damages Act, which provides, in pertinent part,

A spouse, child, parent, guardian, employer, or other person injured in person, property, or means of support, or who incurs other *pecuniary loss* by an intoxicated person or by the intoxication of another person, has a right of action in the person’s own name for all damages sustained against a person who caused the intoxication of that person by illegally selling alcoholic beverages.²⁰⁵

It further noted, “Pecuniary loss damages include loss of aid,

197. *Britamco*, 649 N.W.2d at 872.

198. *Brault v. Acceptance Indem. Ins. Co.*, 538 N.W.2d 144, 148 (Minn. Ct. App. 1995).

199. *Id.*

200. *DeSanti v. Youngs*, No. C8-02-1311, slip op. (Minn. Ct. App. Jan. 21, 2003).

201. *Id.* at 4.

202. *Id.*

203. *Id.*

204. *Id.* at 11.

205. *Id.* (citing MINN. STAT. § 340A.801, subd. 1 (2002) (alteration in original)).

advice, comfort, and protection.”²⁰⁶ Noting it previously addressed the same issue in *Coolidge v. St. Paul Fire & Marine Ins. Co.*, the Minnesota Court of Appeals held that “[t]he term ‘pecuniary loss’ has a common and approved definition, which contains no limitation to ‘death’ cases.”²⁰⁷ The court observed the statutory language analyzed in *Coolidge* had not changed;²⁰⁸ therefore, it concluded the Civil Damages Act contained no ambiguity regarding how pecuniary loss damages may be applied. Plaintiffs were not barred from recovering pecuniary loss damages even though the party directly injured by the AIP remained alive.

Perhaps no area in Minnesota’s Dram Shop jurisprudence is as fraught with ambiguity and uncertainty as the interplay between the damages allowed under the statute and the provisions of the liquor liability policies designed to provide coverage for Dram Shop claims. It all began with the Minnesota Court of Appeals’ decision in *Brault v. Acceptance Indem. Ins. Co.*²⁰⁹

The Dram Shop Act requires that liquor purveyors maintain an insurance policy providing \$50,000/\$100,000 in liability coverage for bodily injury and \$50,000/\$100,000 coverage for loss of means of support.²¹⁰ In 1987, the Minnesota Legislature modified the Dram Shop Act to add to the list of injuries recovery of “pecuniary” losses in addition to damages for injury to person, property, and means of support. The 1987 modification essentially “grafted” pecuniary loss damages into the Act as a type of recoverable damages, but the legislature did not expressly indicate whether “pecuniary loss” damages were a category *separate from* statutorily required loss of means of support coverage and/or bodily injury coverage. In *Brault*, the Minnesota Court of Appeals was asked to determine the extent of coverage offered by two different liquor liability policies. The first, from Acceptance Indemnity Insurance Co., was determined by the court to be ambiguous because the insuring clause, which made no reference to the phrase “pecuniary loss,” promised to cover the bar for “all” amounts the bar was obligated to pay resulting from liability under the Civil Damages Act.²¹¹ Since the policy

206. *DeSanti*, No. C8-02-1311, slip op. at 11 (citing *Coolidge v. St. Paul Fire & Marine Ins. Co.*, 523 N.W.2d 5, 6 (Minn. Ct. App. 1994)).

207. *DeSanti*, No. C8-02-1311, slip op. at 11-12 (citing *Coolidge*, 523 N.W.2d at 7).

208. *DeSanti*, No. C8-02-1311, slip op. at 12; see MINN. STAT. § 340A.801, subd. 1 (2002).

209. 538 N.W.2d 144 (Minn. Ct. App. 1995).

210. MINN. STAT. ANN. § 340A.409, subd. 1(1).

211. *Brault*, 538 N.W.2d at 148.

did not provide a limit for “pecuniary loss,” the court concluded the aggregate liability limits (\$300,000) applied.²¹² Similarly, the *Brault* court found the second policy at issue, promulgated by Empire Fire & Marine Insurance Co., did not adequately delineate between coverage for pecuniary loss and bodily injury damages.²¹³ Empire argued pecuniary loss damages were payable subject to the bodily injury limits of \$50,000, but the court of appeals brusquely dismissed this argument by noting “[p]ecuniary loss is not bodily injury”²¹⁴ As with the Acceptance policy, it found the \$300,000 aggregate policy limits applied.²¹⁵

Reading between the lines of *Brault*, the court’s primary issue with the underlying policy was its failure to account for a specific separate item of damages (pecuniary loss) permitted under the Minnesota Dram Shop Act. In reaction to *Brault*, many insurers modified the language in their policies to provide that loss of means of support includes damages for pecuniary loss. Some practitioners do not believe these modifications adequately address the so-called *Brault* issue, contending that in many instances these attempts improperly dilute statutory minimum coverage for “loss of means of support.”²¹⁶ To date, no Minnesota appellate courts have reviewed whether such attempted policy modifications would pass muster under *Brault* or not.

Insurers dissatisfied or concerned about the validity of adding “pecuniary loss” to a policy’s coverage limits for “loss of means of support” may want to consider having their policies separately define “pecuniary loss” and include separate limits of liability for “pecuniary loss” damages.²¹⁷ The statute, as currently written, does not provide any minimum limits for pecuniary loss as in the case of “loss of means of support” and “bodily injury,” both of which require minimum limits of \$50,000 per person and \$100,000 per occurrence. An insurer could simply add pecuniary loss as a category of coverage distinct from bodily injury and loss of means of support. Theoretically, the insurer could establish any limit it felt reasonable because the statute defines only pecuniary loss as the measure of damages but does not establish a

212. *Id.*

213. *Id.* at 148-49.

214. *Id.* at 149.

215. *Id.*

216. See Leo Feeney and Patricia Yoedicke, *Obtaining Maximum Dram Shop Coverage for Innocent Victims*, MINNESOTA TRIAL LAWYER, Winter 1998, Vol. 23, No. 1, at 14.

217. We are indebted to our colleague, Mark Condon, for his ideas and suggestions in this regard.

minimum required insurance coverage limit for it. A safe approach would be to add a separate coverage limit of \$50,000 per person and \$100,000 per occurrence. As the insurer adopting such an approach would potentially be accepting more risk and exposure, it would have to adjust premiums accordingly.

Perhaps a better approach would be for the legislature to amend the Civil Damages Act to address the *Brault* problem. As the Civil Damages Act provides a statutory cause of action for claims generally not recognized under the common law, the legislature has very broad discretion in delineating the scope of damages awarded and the minimum insurance coverage limits for those damages. The easiest and cleanest way to do so would involve amending the statute to specifically provide that the statutory minimum limits for “loss of means of support” encompass “pecuniary loss” damages. If the legislature, in its judgment, believed such an approach diminished the ability of plaintiffs to recover “pecuniary loss” damages, it could increase the statutory minimum for “loss of means of support.”

Another approach could involve eliminating the separate statutory minimum limits for “bodily injury” and “loss of means of support” and establish single, unitary minimum limits for *all* damages recoverable under the Civil Damages Act. For example, the minimum limits could be \$100,000 per person, \$200,000 per occurrence and \$300,000 aggregate.²¹⁸

VI. COMPARATIVE FAULT

In the waning days of the 2003 legislative session, the Minnesota Legislature approved an amendment to Minnesota Statutes 604.02, subdivision 1 that substantially alters Minnesota law with regard to joint and several liability. The amendment, which applies to “claims arising from events that occur on or after August 1, 2003,” reads as follows:

Subdivision 1. [JOINT LIABILITY.] When two or more persons are severally liable, contributions to awards shall be in proportion to the percentage of fault attributable to each, except that the following persons are jointly and severally liable for the whole award:

218. Obviously, the legislature would have to consider many factors in adopting such an approach, including the public policy underlying the CDA, the nature and extent of damages suffered by plaintiffs in these cases, and the impact on liquor liability insurance availability and cost.

- (1) a person whose fault is greater than 50 percent;
- (2) two or more persons who act in a common scheme or plan that results in injury;
- (3) a person who commits an intentional tort; or
- (4) a person whose liability arises under chapters 18B—pesticide control, 115—water pollution control, 115A—waste management, 115B—environmental response and liability, 115C—leaking underground storage tanks, and 299J—pipeline safety, public nuisance law for damage to the environment or the public health, any other environmental or public health law, or any environmental or public health ordinance or program of a municipality as defined in section 466.01.

Before the amendment, Minnesota's comparative fault law provided different limitations on joint and several liability.²¹⁹ For example, a person whose apportioned fault was 15% or less could be jointly and severally responsible for no more than four times her apportioned share of fault.²²⁰ For example, if a defendant was found 10% at fault, she could be jointly and severally liable for no more than 40% of an entire award or verdict. If, however, that defendant were found 16% or more at fault, she could be responsible for the entire award. Minnesota's prior comparative fault statute also included a "cap" on joint and several liability for municipalities, which provides that if municipalities were less than 35% at fault, they could be held responsible for no more than two times the allocated fault.²²¹ For example, if a city were found 20% at fault, it could be held responsible for no more than 40% of a verdict subject, of course, to any other caps on municipal tort liability. On the other hand, if that city were found 36% at fault, it could be responsible for the entire verdict, again subject to any municipal tort liability caps.

Under the new joint and several liability statute, it appears neither a person nor a municipality could be held jointly and severally responsible for an entire award unless the person or municipality were found 51% or more at fault.²²² The implications of this change in Minnesota's comparative fault landscape are enormous. Drunken drivers, who cause

219. MINN. STAT. § 604.02, subd. 1 (2002).

220. *Id.*

221. *Id.*

222. MINN. STAT. § 604.02, subd. 1 (2003). The new statute also provides for joint and several liability where two or more persons act in a common scheme or plan resulting in injury, a person commits an intentional tort, or a person incurs liability under various specified environmental, public nuisance, and public health statutes. *Id.*

the vast majority of carnage leading to Minnesota Dram Shop cases, often have no insurance or carry the statutory minimum “30/60” limits. Plaintiffs, whether they suffer bodily injury or pecuniary loss/loss of means of support, often have potential damages far exceeding the relatively modest insurance limits of the AIP/drunken driver. The incentive to pursue Dram Shop claims against a bar, which may carry insurance limits ranging from the statutory minimum of “50/100/300” to \$1 million or more in such situations, is plain on its face. Before this amendment, a bar found 16% responsible for the plaintiff’s injuries could be jointly and severally liable for the entire verdict. Following the amendment, if the accident occurs on or after August 1, 2003, and the bar is 50% or less responsible for plaintiff’s damages, that bar will be responsible only for its apportioned share of fault. The following example illustrates the huge impact this change will have on a typical Dram Shop case.²²³

1. Assume a jury made the following allocation of fault between the AIP/drunken driver, Bill Turnipp, and the Happy Tap bar: AIP, 80% at fault and Happy Tap 20% at fault. (Plaintiff was not at fault.) Furthermore, assume the AIP’s auto liability limits are \$30,000 and the bar’s applicable liquor liability limits are \$100,000. Finally, assume the plaintiff has \$100,000 in damages.

2. If the accident causing the plaintiff’s damages and incurring defendants’ liability occurred before August 1, 2003, the defendants would pay the verdict as follows. The AIP would pay \$30,000. The Happy Tap, although only 20% at fault, would be jointly and severally liable for the remaining damages awarded, or \$70,000.²²⁴

3. If the accident causing the plaintiff’s damages and incurring defendants’ liability occurred after August 1, 2003, the defendants would pay the verdict as follows: the AIP would pay \$30,000, and the Happy Tap, 20% at fault, would pay no more than its allocated share of fault—in this hypothetical case, \$20,000.²²⁵ The plaintiff has \$50,000 in damages

223. As anyone who has practiced in this area can tell the reader, there is no such thing as a “typical” Dram Shop case. The cast of characters and the setting for the case all illustrate the maxim that “truth is stranger than fiction.”

224. Happy Tap paid \$50,000 more than it should have and, after paying the verdict, Happy Tap could try to collect the \$50,000 from AIP Turnipp. In most circumstances, however, that is not possible because the AIP has no assets and is otherwise judgment-proof. Hence, the phrase, “You cannot get blood from a Turnipp.”

225. The authors, unwilling to tread on the political minefield left in the wake of the

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unrecoverable from either party.²²⁶

VII. CONCLUSION

The Minnesota Legislature has attempted to remedy the damages inflicted on innocent parties by illegal sales of liquor to drunken drivers and others by creating the Civil Damages Act and molding it with subsequent legislative enactments. As the preceding analysis demonstrates, however, Minnesota's appellate courts continue to valiantly struggle to define the boundaries of the Act. The legislature, as the progenitor of an Act in providing a remedy unavailable at common law, bears the ultimate responsibility and remains best-suited to addressing ambiguities and problems with the Civil Damages Act.

legislature's amendment of the comparative fault statute, do not offer any judgment about whether the amendment is "fair or unfair," "good or bad," etc. The hypothetical is offered merely to illustrate the impact of this amendment on plaintiffs and defendants involved in civil claims asserted under the Civil Damages Act.

It should be noted that this analysis does not apply in so-called "dead drunk" cases, where the AIP dies and his family or other party brings a Dram Shop claim. Under the Minnesota Court of Appeals decision in *Bushland*, the AIP's comparative fault is not imputed to his survivors. *Bushland v. Corner Pocket & Billiard Lounge, Inc.*, 462 N.W.2d 615 (Minn. App. 1990). *See also* *Paulson v. Lapa, Inc.*, 450 N.W.2d 373 (Minn. App. 1990).

226. *See supra* note 208.