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COMMENTS

APPLICATION OF DRAM SHOP ACTS TO NON-COMMERCIAL SUPPLIERS OF LIQUOR

Ross v. Ross, 294 Minn. 115, 200 N.W. 2d 149 (1972)

Defendant purchased liquor for his minor brother, who consumed the liquor and was killed in an automobile accident caused by his intoxication. Decedent's parents and decedent's son successfully sued under Minnesota's dram shop act, the Minnesota Civil Damage Act. On appeal to the Minnesota Supreme Court, defendant contended that he was not a proper defendant under the Civil Damage Act because he was not a commercial seller of liquor. Held: Persons not in the business of selling intoxicating liquor are liable under the Minnesota Civil Damage Act for damages caused by their illegal furnishing of

Every husband, wife, child, parent, guardian, employer, or other person who is injured in person or property, or means of support, by any intoxicated person, or by the intoxication of any person, has a right of action, in his own name, against any person who, by illegally selling, bartering or giving intoxicating liquors, caused the intoxication of such person, for all damages sustained; and all damages recovered by a minor under this section shall be paid either to such minor or to his parent, guardian, or next friend, as the court directs; and all suits for damages under this section shall be by civil action in any court of this state having jurisdiction thereof.

Subdivision 1. It shall be unlawful for any person, except a licensed pharmacist to sell, give, barter, furnish, deliver, or dispose of, in any manner, either directly or indirectly, any spirituous, vinous, malt, or fermented liquors in any quantity, for any purpose, whatever, to any minor person, or to any intoxicated person, or to any public prostitute.
Subdivision 2. It shall be unlawful for any person except a licensed pharmacist to sell, give, barter, furnish or dispose of, in any manner, either directly or indirectly, any spirituous, vinous, malt or fermented liquors in any quantity, for any purpose, whatever, to any spendthrift, habitual drunkard, or improvident person, within one year after written notice by any peace officer, parent, guardian, master, employer, relative, or by any person annoyed or injured by the intoxication of such spendthrift, habitual drunkard, or improvident person, forbidding the sale of liquor to any such spendthrift, habitual drunkard, or improvident person.
Subdivision 3. Whoever shall in any way procure liquor for the use of any person named in this section shall be deemed to have sold it to such person. Any person violating any of the provisions of this section is guilty of a gross misdemeanor.

Minn. Stat. Ann. § 340.79 (1972) states:
Any person who shall give to, procure or purchase, intoxicating liquors for any minor person or other person to whom the sale of intoxicating liquors is by law
liquor.\textsuperscript{3}

At common law, one who sold or furnished liquor to an able-bodied individual could not be held liable for damages resulting from the consumer's intoxication.\textsuperscript{4} Legislatures, responding to pressure from the temperance movement, created this liability by enacting dram shop laws.\textsuperscript{5} Most dram shop acts currently in force provide a potentially broad base for liability by permitting "any person! to recover for damages to his "person, property, or means of support."\textsuperscript{6} Moreover, the defendant's actions need not be the sole cause of the consumer's intoxication, but need only contribute to it.\textsuperscript{7} Liability usually is limited, however, by the requirement that the liquor be illegally given or sold,\textsuperscript{8} and a few states expressly limit liability to those who sell liquor.\textsuperscript{9}

forbidden, is guilty of a gross misdemeanor and, upon conviction, shall be punished in accordance with the laws of the state.


Although the motivating force behind the enactment of dram shop laws was the public's desire to discourage the sale of liquor, courts have disagreed whether the purpose of the acts is to compensate the injured person or to penalize the liquor supplier. Many courts have tried to effectuate both purposes by construing the acts as attempts both to advance the remedy and suppress the mischief. Whatever the objective attributed to dram shop acts, courts have limited liability thereunder by allowing set-offs for damages recovered under another theory and by denying recovery of damages for pain.

10. See note 5 supra and accompanying text.
13. See, e.g., Village of Brooten v. Cudahy Packing Co., 291 F.2d 284 (8th Cir. 1961); Lester v. Bugni, 316 Ill. App. 19, 44 N.E.2d 68 (1942); Williams v. Klemensrud, 197 N.W.2d 614 (Iowa 1972); Wendelin v. Russell, 259 Iowa 1152, 147 N.W.2d 188 (1966); Hahn v. City of Ortonville, 238 Minn. 428, 57 N.W.2d 254 (1953); Iszler v. Jorda, 80 N.W.2d 665 (N.D. 1957).
14. See, e.g., Laznovsky v. Furdanowicz, 22 Conn. Supp. 297, 170 A.2d 734 (Sup. Ct. 1961) (plaintiff's settlement of cause of action against intoxicated motorist was good defense for barkeeper in dram shop action); Kurth v. Amee, Inc., 3 Ill. App. 2d 105, 70 N.W.2d 886 (1951) (proper procedure for assessing damages in action under dram shop act is to determine the total damages and then reduce them by amount received in return for covenant not to sue); Shiflett v. Madison, 105 Ill. App. 2d 306, 278 N.E.2d 162 (1972) (proper procedure after assessing damages in action under dram shop act is to determine the total damages and then reduce them by amount received in return for covenant not to sue); Shiflett v. Madison, 105 Ill. App. 2d 382, 245 N.E.2d 567 (1969) (trial court erred in framing instructions to jury so that plaintiff might recover his lost income in an action in his name and in action brought by him for the benefit of his wife); Larabell v. Schuknecht, 308 Mich. 419, 14 N.W.2d 50 (1944) (defendant tavern keeper entitled to mitigate damages by amount paid plaintiff for covenant not to sue tavern proprietors who had also served person causing the injury); Ritter v. Village of Appleton, 254 Minn. 30, 93 N.W.2d 683 (1958) (compromise and settlement under wrongful death act and releases discharging automobile drivers did not bar actions under the Civil Damage Act, but defendant is entitled to diminish recovery against him by amounts otherwise received); Hartwig v. Moose Lodge 1246, 253 Minn. 347, 91 N.W.2d 794 (1958) (trial court committed reversible error in not allowing defendants to show prior recovery of damages in wrongful death act). But see Playford v. Perich, 2 Misc. 2d 170, 152 N.Y.S.2d 201 (Sup. Ct. 1956).
and suffering. Some courts have emphasized the penal aspects of dram shop acts by allowing recovery of exemplary damages and by denying defendants the opportunity to recover from the intoxicated person.

The scope and impact of most dram shop acts has been limited by judicial decisions. Thus, courts have refused recovery when an intoxicated person has injured himself, even though dram shop acts do not expressly preclude such recovery. Recovery also has been denied when the plaintiff has participated in the drinking activities of the person whose act produced the injury, as well as when the


liquor has been consumed off the supplier's premises by a person other than the purchaser. 20 At least one jurisdiction has refused recovery to plaintiffs who incurred damages outside the state in which the person causing the damages had purchased and consumed liquor. 21 Moreover, courts in a few jurisdictions have limited liability to vendors of liquor, although the dram shop acts in these jurisdictions are not so limited. 22


Courts differ as to the degree of participation in the drinking activities of the person who causes the harm that will preclude a plaintiff from recovering. See Regent v. Bell, 77 Ill. 593 (1875); Holcomb v. Hornback, 51 Ill. App. 2d 84, 200 N.E.2d 745 (1964); Forsberg v. Around Town Club, 316 Ill. App. 661, 45 N.E.2d 513 (1942); James v. Wicker, 309 Ill. App. 397, 33 N.E.2d 169 (1941); Berge v. Harris, 170 N.W.2d 621 (Iowa 1966); Hempstead v. Minneapolis Sheraton Corp., 283 Minn. 1, 166 N.W.2d 95 (1969); Mitchell v. The Shoals, Inc., 19 N.Y.2d 338, 227 N.E.2d 21 (1967).


In contrast to the decisions in most states, Minnesota courts usually construe the state's dram shop act to permit recovery by the plain-
tiff.23 Thus, Minnesota courts have allowed recovery when the liquor was purchased in Minnesota and the injury occurred out-
side the state;24 when the vendor was a municipal corporation;25 when

held liable for the death of one of the consumers under Law of March 20, 1862, ch. 47, § 2, [1862] Iowa Acts 50 (now IOWA CODE ANN. § 123.9 (Supp. 1973)). The statute provided for a right of action against “any person who shall, by selling in-
toxicating liquors cause the intoxication of such person . . . .” The court did not consider, however, the question whether the defendants were proper defendants under the statute.


In Miller v. Owens-Illinois Glass Co., 48 Ill. App. 2d 412, 422-23, 199 N.E.2d 300, 306 (1964), the court reasoned that the legislature did not intend to include social suppliers of liquor because to do so “would open the floodgates of litigation as to almost every happening where someone was injured.” Liability under the Illinois statute does not depend upon an illegal transfer.

The Michigan decisions purport to rely on the “general rule” that dram shop acts are not directed at non-vendors of liquor. Behnke v. Pierson, 21 Mich. App. 219, 175 N.W.2d 303 (1970); LeGault v. Klebba, 7 Mich. App. 640, 152 N.W.2d 712 (1967). The statutory scheme of the Michigan act suggests that this limitation on liability accords with the intent of the legislature. Mich. STAT. ANN. § 18.993 (Supp. 1973) is apparently directed at commercial vendors of liquor. It provides for the posting of a bond as a condition precedent to obtaining a license, prescribes the form for the bond, and contains a provision for civil liability similar to the Minnesota Civil Damage Act that includes principals and sureties on the bond as possible defendants.

Furthermore, the courts in Harris, Cruse, and Miller held that provisions that extend liability under the dram shop act to persons who “give” liquor are directed at vendors who attempt to avoid the consequences of the act by claiming they gave, not sold, liquor.

25. Hahn v. City of Ortonville, 238 Minn. 428, 57 N.W.2d 254 (1953). Numerous suits have been brought against municipalities. E.g., Cameron v. City of Fridley, 293 Minn. 110, 197 N.W.2d 233 (1972); Heveron v. Village of Belgrade, 288 Minn. 395, 181 N.W.2d 692 (1970); Trail v. Village of Elk River, 286 Minn. 380, 175 N.W.2d 916 (1970).
the person who sold or served the liquor failed to take affirmative steps
to ascertain whether the consumer was intoxicated before serving him;26
and when the person who purchased the liquor transferred it to another
who caused the harm.27 Furthermore, Minnesota courts, apparently
unconcerned with penalizing the supplier of liquor, have given the
supplier the right of indemnification against the intoxicated person.28

Although the Minnesota Supreme Court in Ross ostensibly based
its holding on a legislative intent to impose liability on persons who
merely furnish liquor and who are not engaged in its sale, the decision
probably represents an extension of the court's own policy of compen-
sating an individual injured because of the intoxication of another.
The Civil Damage Act, in its statutory context, gives little indication
whether the legislature intended to impose liability on non-commer-
cial suppliers of liquor. Furthermore, if section 340.951 of the Min-
nesota Statutes,29 which describes the notice requirements for actions

26. See Cameron v. City of Fridley, 293 Minn. 110, 197 N.W.2d 233 (1972); Kluger
v. Gallett, 288 Minn. 11, 178 N.W.2d 900 (1970); Mjos v. Village of Howard Lake, 287
Minn. 427, 178 N.W.2d 862 (1970).

Laws 1167, by deleting a clause that made liquor sales to minors, habitual drunkards,
or obviously intoxicated persons illegal. MINN. STAT. ANN. § 340.73 (1972), which
made sales to an intoxicated person, rather than an "obviously" intoxicated person,
illegal, was in effect at that time. In 1971 the legislature added a new provision to
Law of April 25, 1949, ch. 654, § 3, [1949] Minn. Laws 1167:

Persons denied access. No intoxicating liquor shall be sold, furnished, or de-
ivered for any purpose to any minor or to any person obviously intoxicated or
to any of the persons to whom sale is prohibited by statute.

This provision in essence reflects both standards of intoxication. While the provi-
sion expressly adopts the "obviously intoxicated" standard that had been deleted in
1969, the reference in the last phrase—"prohibited by statute"—to MINN. STAT. ANN.
§ 340.73 (1972), necessarily incorporates the simple "intoxicated" standard of that
statute.

27. See Trail v. Village of Elk River, 286 Minn. 380, 175 N.W.2d 916 (1970);
Kvanli v. Village of Watson, 272 Minn. 481, 139 N.W.2d 275 (1965); Murphy v. Hen-
nen, 264 Minn. 457, 119 N.W.2d 489 (1963); accord, Judge v. Jordan, 81 Iowa 519,
46 N.W. 1077 (1890).

28. Skaja v. Andrews Hotel Co., 281 Minn. 417, 161 N.W.2d 658 (1968); Farmers
thus have recognized that indemnification does not affect the injured person's com-
pensation.

29. MINN. STAT. ANN. § 340.951 (1972):

From and after July 1, 1969, every person who claims damages from any mu-
icipality owning and operating a municipal liquor store or from the licensee of
any licensed liquor establishment for or on account of any injury within the
scope of Minnesota Statutes, Section 340.95, shall give a written notice to the
brought under the Civil Damage Act, were intended to be coextensive with the Civil Damage Act, then the Ross decision is contrary to legislative intent because section 340.951 applies only to municipal and licensed private liquor establishments.

The court in Ross chose to maximize the possibility of recovery in situations where injury is caused by the illegal supplying of liquor. Although the application of the Civil Damage Act to Ross-type situations may fall short of its compensatory goal because of the financial inadequacy of the social supplier of liquor, the injured person, nevertheless, is at least assured of a cause of action.

Since the statutory requirement that liquor be illegally transferred now is satisfied merely by serving liquor to an intoxicated person or a minor, Ross suggests the possibility of recovery under the dram shop act every time liquor is served and injury results. Whether Ross actually will deter persons from serving liquor to minors and intoxicated persons will depend upon whether social suppliers of liquor are aware of their possible liability and whether they would be willing to risk such liability.


31. Although the burden on the supplier may be passed on through indemnification, see note 28 supra and accompanying text, this still may not adequately satisfy the compensatory objective of the Ross decision.

Arguably, liability should be restricted to the liquor industry, which not only profits from the sale of liquor, but can bear the burden more easily than a private individual. Ross v. Ross, 294 Minn. 115, 125, 200 N.W.2d 149, 155 (1972) (Rogosheske, J., concurring specially); Note, Liability Under the Minnesota Civil Damage Act, 46 MINN. L. REV. 169, 185 (1961).

32. The court in Ross distinguished Miller v. Owens-Illinois Glass Co., 48 Ill. App. 2d 412, 199 N.E.2d 300 (1964), and the Illinois statute, because under the Illinois statute liability does not require an illegal transfer. 294 Minn. at 120, 200 N.W.2d at 152. But as long as an illegal transfer includes giving liquor to an intoxicated person, and since one is required to take affirmative steps to ascertain whether an individual is intoxicated, see note 26 supra and accompanying text, the scope of the Minnesota statute will in effect be almost as broad as the Illinois statute.

33. The deterrent effect of dram shop acts on the liquor industry, as opposed to social suppliers of liquor, probably is slight because most vendors carry insurance. Note, Liability Under the Minnesota Civil Damage Act, 46 MINN. L. REV. 169, 176-77 (1961).