

MINNESOTA
DRAM SHOP LIABILITY
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Foreword

For nearly 30 years, Arthur Chapman has been widely recognized as one of Minnesota's preeminent law firms experienced in the defense of liquor liability or dram shop claims. In addition to chairing many of the most popular continuing legal education seminars in that area of law for two decades, our firm has published over 10 editions of a leading primer on Minnesota dram shop claims. That experience has given Arthur Chapman the distinction of authoring "Chapter 3 Minnesota Dram Shop Liability," contained in Volume 5A of *Minnesota Practice-Methods of Practice, Fourth Edition*, published in 2007. Thomson West has graciously agreed to allow our firm to make that chapter available to current and potential clients in the form of this *Desk Book*. We hope this *Desk Book* will serve as an educational and user-friendly tool for handling Minnesota dram shop claims. As you review this *Desk Book*, please feel free to contact any member of its liquor liability practice group with questions relating to claims handling in this fascinating, and challenging, area of the law.

Caution

This *Desk Book* provides general guidance with regard to legal issues generally associated with Minnesota dram shop claims. It is not intended as legal advice applicable to any particular situation.

About the Authors

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I. MINNESOTA DRAMSHOP LIABILITY: A HISTORICAL INTRODUCTION

The Minnesota Civil Damage Act, also known as the Dram Shop Act, is part of a larger set of regulatory statutes known as the Minnesota Liquor Act. This legislation represents an exercise of the State's police power for the purpose of protecting the health, safety, and welfare of its citizens from the harm caused by the abuse and misuse of alcoholic beverages. Other states have enacted similar regulatory provisions. This Chapter provides a brief historical overview of dram shop statutes generally, and the Minnesota Civil Damage Act specifically, which is helpful to understanding the purpose and operation of Minnesota's civil damage provision.

A. General Historical Commentary

The background of liquor legislation in the United States is an account which begins as early as our nation's history, and it is highly charged with emotion and bitterness. As early as 1829, Maine passed a local option statute giving the electorate in local political units the right to prohibit the sale of liquor in their respective jurisdictions.¹ In 1851, legislation followed which prohibited the sale of alcohol on a state-wide basis.² Thereafter, the Women's Christian Temperance Union, The National Prohibition Party, and the Anti-Saloon League all became predominant political forces at local levels.³ By 1918, thirty states had prohibited restricting liquor traffic, and twenty-eight states had prohibited the sale of alcohol entirely. State laws, known as "dram shop acts," were passed at the behest of temperance forces and were designed to express displeasure with the "drives" toward liquor traffic and to "provide against the evils . . . of intoxicating liquors."⁴

These statutes generally controlled the times, places, and persons to whom sales of alcohol could be made, and they required a bond conditioned upon adherence to such regulations. For example, it was not uncommon to prohibit sales on the Sabbath, and to require that the licensee maintain a quiet and orderly house without gambling.⁵ As the dram shop laws became stronger, new conditions were imposed upon the bond, such as the prohibition of sales to a "minor, student, intemperate person, or habitual drunkard."⁶ Additionally, the surety was often made liable to the extent of his bond for any damage or injury caused by or resulting from the violation of any of these conditions, although the liability of a dram shop owner who made the illegal sale might be greater than the amount of the bond.

The adoption of the Eighteenth Amendment to the United States Constitution accomplished prohibition nationwide on January 29, 1919.⁷ The Volstead Act,⁸ adopted on October 28, 1919,

¹ Richard B. Ogilvie, *History and Appraisal of the Illinois Dram Shop Act*, 1958 UNIVERSITY OF ILLINOIS LAW FORUM 175, 176-177.

² *Id.* at 176.

³ *Id.* at 176-177.

⁴ *Id.* at 177 (citing 4 Bogart and Thompson, *A Centennial History of Illinois Law* 43 (1920)).

⁵ See 1858 Minn. Laws, Chapter LXXIV.

⁶ 1905 Minn. Laws, Chapter 246.

⁷ U.S. Const. Amend. XVIII; see also *Wegan v. Village of Lexington*, 309 N.W.2d 273, 278-79 (Minn. 1981).

provided the means for enforcing this Amendment. It forbade the sale or transportation of “intoxicating liquor,” which it defined as any liquor which contained “one-half of one percent or more of alcohol by volume.”⁹ States had “concurrent” jurisdiction with the federal government, meaning that state laws continued to be effective as federal authorities enforced the Eighteenth Amendment using the machinery given them by the Volstead Act.

The nation’s great societal experiment with prohibition ended on December 5, 1933, with the ratification of the Twenty-First Amendment to the United States Constitution.¹⁰ Altogether, prohibition lasted only 14 years, a short period of time in the life of a nation, but a momentous one in the social history of the American people. Not since the middle of the Nineteenth Century, when slavery was the predominant issue, had any question been so widely debated, pursued with so much determination and idealism, and so bitterly contested as national prohibition. Although the prohibition debate arose suddenly, its way had been paved for over one hundred years.

Although the Twenty-First Amendment ended prohibition nationally, it did not universally quell support for strong liquor control legislation. Some states initially chose to remain dry, and many others adopted comprehensive liquor control legislation. For example, at least 32 states have adopted, and currently have, some form of civil damage provision.¹¹ Since the demise of prohibition, the trend has drifted more and more toward the statutory regulation of the sale of alcoholic beverages.

B. History of the Minnesota Civil Damage (Dram Shop) Act

The manufacture, sale, and distribution of alcohol in the State of Minnesota is currently controlled by Chapter 340A of Minnesota Statutes, sometimes referred to as the Liquor Act.¹² Civil actions against commercial liquor vendors, or dram shops, arising from the illegal sale of alcohol are currently governed exclusively by the civil damage provision of that Chapter,¹³ often

⁸ See 27 U.S.C. § 40 (1920), *repealed by* 27 U.S.C. § 64a (1933). The Volstead Act was written by Andrew J. Volstead, 1860-1947, a lawyer from Granite Falls, Minnesota, who was born in Goodhue County. Mr. Volstead was a member of the United States House of Representatives, representing the Seventh Minnesota District from the Fifty-Eighth to the Seventy-Sixth Congress.

⁹ *Wegan*, 309 at 278.

¹⁰ U.S. Const. Amend. XXI § 1.

¹¹ Ala. Code § 6-5-71; Alaska Stat. § 04.21.020; Ariz. Rev. Stat. § 4-311 and 4-312; Cal. Bus. & Pro. Code § 25602.1; Colo. Rev. Stat. § 12-47-801; Conn. Gen Stat. § 30-102; Fla. Stat. Ann. § 768.125; Ga. Code Ann. § 51-1-40; Idaho Code § 23-312; 235 ILCS 5/6-21; Ind. Code § 7.1-5-10-15.5; Iowa Code § 123.92; Me. Rev. Stat. Ann. Tit. 28-A § 2501 et seq; Mass. Gen. Laws Ann. ch. 231 § 85T; Mich. Comp. Laws § 436.1801; Minn. Stat. § 340A.801; Mo. Rev. Stat. § 537.053; Mont. Code Ann. § 27-1-710; Nev. Rev. Stat. § 41.1305; N.H. Rev. Stat. Ann. ch. 507-F; N.M. Stat. Ann. § 41-11-1; N.Y. Gen. Oblig. Law § 11-101; N.C. Gen. Stat. § 18B-121 (civil liability for damages caused by underage drinkers only); N.D. Cent. Code. § 5-01-06.1; Ohio Rev. Code Ann. § 4399.18; Or. Rev. Stat. § 471.565; Pa. Stat. Ann. tit. 47 § 4-497; R.I. Gen. Laws § 3-14-16; Tenn. Code Ann. § 57-10-102; Utah Code Ann. § 32A-14a-102; Vt. Stat. Ann. tit. 7, § 501; Wisc. Stat. § 125.035 (civil liability for damages caused by underage drinkers only) Wyo. Stat. § 12-8-301.

¹² See Minn. Stat. Chapter 340A (2004).

¹³ See *Beck v. Groe*, 245 Minn. 28, 33-34, 70 N.W.2d 886, 891 (1955).

referred to as the Civil Damage Act or the Dram Shop Act.¹⁴ Its genesis can be traced to legislation passed by the first Minnesota legislature, which convened in 1858.¹⁵ That legislation established a Board of Supervisors, who were the forerunners of the present-day County Commissioners. The Board of Supervisors had the authority to issue licenses for the sale of intoxicating beverages upon the payment of a license fee and the posting of a bond in the penal sum of \$1,000.00 for malt liquor. The bond provisions required the licensee to do business exclusively in the building described in the license, prohibited the sale of intoxicating beverages or malt liquors on Sunday, prohibited gambling in the licensee's establishment, and was conditioned upon the licensee keeping a quiet and orderly house. The statute also provided that a licensee who violated the conditions of the bond would be "liable for all damages done by persons intoxicated by liquors obtained from them."¹⁶ The 1887 version of the law included a condition in the bond that the licensee would not furnish liquor to a minor, but deleted reference to liability and damages.¹⁷ By 1911, the statute governing bonds for commercial liquor vendors was Chapter 246.¹⁸ That provision also provided that the licensee would not furnish liquor to minors as a condition of the bond by imposing this further liability: "The amount specified in such bond is declared to be a penalty, the amount recoverable to be measured by the actual damages."¹⁹ Before 1911, there was no civil cause of action in favor of persons injured by the illegal sale of alcohol.²⁰

In 1911, the Minnesota legislature adopted four entirely separate statutes. The first of these was Chapter 83, which made it a gross misdemeanor to sell liquor to designated groups, including minors and intoxicated persons.²¹ The second was Chapter 290, which made it a gross misdemeanor for any person to give intoxicating liquor to a minor and others to whom the sale would be illegal.²² The third was Chapter 369, making it a gross misdemeanor for persons to entice into a saloon minors or others to whom the sale of liquor is forbidden.²³ The fourth, Chapter 175, was a civil damage provision that entitled persons injured by intoxicated persons to commence a civil action against the commercial liquor vendor to recover damages proximately caused by the illegal sale of alcohol.²⁴

¹⁴See Minn. Stat. §§ 340A.801; see also *Hollerich v. City of Good Thunder*, 340 N.W.2d 665, 666-668 (Minn. 1983) (calling this provision as the Civil Damage Act or Dram Shop Act).

¹⁵See 1858 Minn. Laws, Chapter LXXIV.

¹⁶See *id.*, § 5.

¹⁷See 1887 Minn. Laws, Chapter 6, § 1.

¹⁸See 1905 Minn. Laws, Chapter 246.

¹⁹1905 Minn. Laws, Chapter 246.

²⁰See *Koehnen v. Dufuor*, 590 N.W.2d 107, 109 (Minn. 1999).

²¹See 1911 Minn. Laws Chapter 83.

²²See *id.*, Chapter 290.

²³See *id.*, Chapter 369.

²⁴See *id.*, Chapter 175, § 1, 1911 Minn. Laws 221 (codified as Minn. Stat. § 3200 (1913)).

The Civil Damage Act is purely a creature of statute.²⁵ It is the exclusive remedy against commercial vendors for injuries arising out of an illegal sale of alcoholic beverages.²⁶ Indeed, the Minnesota Supreme Court has held that the Civil Damage Act preempts the field of remedies for causes of action arising from the illegal service of alcohol to a person who subsequently causes injury to others.²⁷ This statement means that persons injured by an illegal sale of alcohol have no common law cause of action against a commercial liquor vendor.²⁸ Accordingly, any such claim must be established according to the provisions of Minnesota's Civil Damage Act in order to be valid.²⁹

The Minnesota Supreme Court stated in *Beck v. Groe* that the “civil damage law is one highly penal in its nature . . . and is to be strictly construed in the sense that it cannot be enlarged beyond its definite scope . . .”³⁰ Following *Beck*, the Minnesota Supreme Court began developing, and increasingly liberalizing, the remedial purposes of the Civil Damage Act. For example, the court said in *Ross v. Ross*: “The civil damage act is both penal and remedial, an inconsistency which we have recognized but resolved in favor of a liberal construction to suppress the mischief and advance the remedy.”³¹ The “mischief,” of course, refers to the “social ills resulting from intoxication.”³² The remedy is advanced by giving incentives to commercial liquor vendors to do everything in their power to avoid making illegal sales of alcohol,³³ and by compensating members of the public who are injured by such illegal sales.³⁴ Thus, the “strict construction” spoken of in *Beck*, ultimately gave way to “liberal construction” intended to accomplish the Civil Damage Act’s penal and remedial purposes.

Although Minnesota courts construe the Civil Damage Act liberally to accomplish its penal and remedial purpose, they continue to strictly construe the statute in terms of its scope. In *Urban v. American Legion Department of Minnesota*, the Minnesota Supreme Court addressed the issue of whether the American Legion’s Minnesota Department and National organization could be held vicariously liable for a post’s illegal sale of alcohol.³⁵ While the Minnesota Supreme Court noted that the Civil Damage Act may be construed liberally where its provisions are clear as to intent and purpose, the court reaffirmed its commitment to strictly construe the Act in terms of

²⁵ See *Beck*, 245 Minn. at 34, 70 N.W.2d at 891.

²⁶ *Fitzer v. Bloom*, 253 N.W.2d 395, 403 (Minn. 1977).

²⁷ See e.g., *Holmquist v. Miller*, 367 N.W.2d 468 (Minn. 1985); *Meany v. Newell*, 367 N.W.2d 472 (Minn. 1985).

²⁸ See *Village of Brooten v. Cudhay Packing Co.*, 191 F.2d 284 (8th Cir. 1961); *Koehnen*, 590 N.W.2d at 109; *Fitzer v. Bloom*, 253 N.W.2d 395, 403 (Minn. 1977); *Strand v. Village of Watson*, 245 Minn. 414, 421, 72 N.W.2d 609, 615 (1957) (decided with obvious intoxication standard. Overruled by statute in 1967. Statute repealed in 1985. Case is presently good law.); *Beck*, 245 Minn. at 33, 70 N.W.2d at 891.

²⁹ See *Beck*, 245 Minn. at 33-34, 70 N.W.2d at 891.

³⁰ 245 Minn. 28, 34, 70 N.W.2d 886, 891 (1955).

³¹ 294 Minn. 115, 120, 200 N.W.2d 149, 155 (1972).

³² See *Hahn v. City of Ortonville*, 238 Minn. 428, 436, 57 N.W.2d 254, 261 (1953); *Hollerich*, 340 N.W.2d at 668.

³³ See *Skaja v. Andrews Hotel Co.*, 281 Minn. 417, 423, 161 N.W.2d 657, 661 (1968).

³⁴ *Id.*, 281 Minn. at 422, 161 N.W.2d at 661.

³⁵ 723 N.W.2d 1, 3 (Minn. 2006).

its scope.³⁶ The Minnesota Supreme Court held that non-licensees, such as the American Legion's Minnesota Department and National organization, could not be vicariously liable for a post's illegal sale of alcohol, because the Liquor Act imposes liability only on liquor licensees for the illegal sale of alcohol.³⁷ The Minnesota Supreme Court held that because the Liquor Act imposes liability only on liquor licensees for the illegal sale of alcohol, non-licensees, such as the American Legion's Minnesota Department and National organization, could not be vicariously liable for a post's illegal sale of alcohol.³⁸ Thus, vicarious liability for the illegal distribution of alcohol under the Civil Damage Act is confined to alcohol licensees.³⁹

This discussion is intended to be a guide for handling liquor liability claims in Minnesota. It is not intended by any means to be an exhaustive explanation of the law. Rather, it is intended to highlight a few of the key issues that arise in dram shop claims in Minnesota with practice pointers and insight for persons who handle those claims. Chapter II of these materials discuss the elements of proof necessary to establish a civil damage claim in Minnesota. Chapter III discusses a variety of common issues that arise within the context of Minnesota dram shop claims. Those issues include what parties are entitled to make claims under the Civil Damage Act, and why naming the proper party plaintiff is critical to the success of a civil damage claim. Other common issues include the admissibility of blood alcohol concentration data, and the mechanics of comparative fault in civil damage cases. Chapter III also discusses subrogation and collateral source considerations, the right to recover damages from a commercial liquor vendor's bonding company, the extra-territorial application of the Act, minimum insurance requirements imposed upon commercial liquor vendors, and the effect of *Pierringer* releases when settling claims involving liquor. Chapter IV contains a short discussion of statutory and common law social host liability. The Appendices to these materials contain a variety of sample pleadings, including a sample notice of claim, a sample complaint, a sample answer, and sample interrogatories.⁴⁰ The appendices also include checklists of issues to be covered by plaintiff and defense attorneys when taking statements in cases where civil damage claims are involved.

³⁶ See *Urban*, 723 N.W.2d at 6.

³⁷ See *id.* at 7.

³⁸ See *id.* at 7.

³⁹ See *id.* at 2 (syllabus).

⁴⁰ Appropriate jury instructions and sample verdict forms are provided in 4 MINNESOTA JURY INSTRUCTION GUIDES-CIVIL FOURTH EDITION 318-339 (West 2006).

II. ELEMENTS OF PROOF UNDER MINNESOTA'S CIVIL DAMAGE ACT

A commercial liquor vendor's civil liability for damage caused by the illegal sale or furnishing of alcohol is set forth in the Civil Damage Act, which is part of the larger statutory scheme of Chapter 340A of Minnesota Statutes. The Civil Damage Act is codified at Minn. Stat. § 340A.801. It provides in relevant 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. All damages recovered by a minor under this section must be paid either to the minor or to the minor's parent, guardian, or next friend as the court directs.¹

This right of action created by this provision is subject to certain notice requirements set forth in Minn. Stat. § 340A.802. The notice requirements are discussed in greater detail later in this chapter.

The Minnesota Supreme Court has characterized the liability standard as one involving strict liability.² "The doctrine of strict liability may be distinguished from negligence or negligence per se in that liability results without a finding of fault."³ The Civil Damage Act, thus, imposes statutory strict liability by "creat[ing] a basis for recovery where none would otherwise exist" at common law.⁴

Five elements must be satisfied in order to establish a dram shop claim under the civil damage provision of Minnesota's Liquor Act. There must be:

1. An illegal sale or provision of intoxicating liquor;
2. The illegal sale caused or contributed to the allegedly intoxicated person's intoxication;
3. The intoxication was a proximate cause of the Plaintiff's injuries;
4. The Plaintiff sustained damages recoverable under the Civil Damage Act, Minn. Stat. § 340A.801; and
5. Proper notice of the claim was provided pursuant to the requirements of Minn. Stat. § 340A.802.

¹ Minn. Stat. § 340A.801, subd. 1.

² See *Dahl v. Northwestern National Bank of Minneapolis*, 265 Minn. 216, 220, 121 N.W.2d 321, 324 (1963).

³ *Seim v. Garavalia*, 306 N.W.2d 806, 810 (Minn. 1981) (discussing the difference between strict liability, statutory strict liability, negligence, and negligence per se within the context of Minn. Stat. § 347.22).

⁴ *Id.* at 811.

A plaintiff's failure to meet any one of these elements results in a judgment for the defendant dram shop and dismissal of the plaintiff's case. Motions for summary judgment usually challenge dram shop claims on the ground that the plaintiff has failed to satisfy either the first or the fifth elements by failing to prove the existence of an illegal sale or by failing to give the defendant proper notice of the claim. Issues of causation and damages, covered by the second, third, and fourth elements, are typically, but not always, jury issues.

A. Illegal Sale of Alcohol

According to the Civil Damage Act's express language, an illegal sale of alcohol is necessary to the existence of an actionable dram shop claim.⁵ According to the Liquor Act, an illegal sale includes:

1. sales to an obviously intoxicated persons;⁶
2. sales to minors;⁷
3. sales after hours and on prohibited days;⁸
4. sales at prohibited locations;⁹ and
5. sales to nonmembers of clubs.¹⁰

Whether a sale is illegal for purposes of the Civil Damage Act involves a two-step inquiry. The first question is whether the sale is in violation of a provision of Chapter 340A. If that question is answered affirmatively, the second question is whether the violation substantially related to the purposes sought to be achieved by the Civil Damage Act.¹¹ If both questions are answered affirmatively, the violation is an "illegal sale."

The Liquor Act, including its civil damage provision, governs the sale of any alcoholic beverage containing at least one-half of one percent alcohol by volume.¹² Prior to 1982, the liability of 3.2 taverns was governed by common law negligence principles. Following legislative amendments that became effective on March 23, 1982, sales of non-intoxicating malt liquor were brought within the framework of statutory provisions regulating the sale and distribution of alcohol,

⁵ See Minn. Stat. § 340A.801, subd. 1.

⁶ See *id.*, § 340A.502.

⁷ See *id.*, § 340A.503.

⁸ See *id.*, § 340A.504, subds. 1-3, 7.

⁹ See *id.*, § 340A.504, subd. 4-5.

¹⁰ See *id.*, § 340A.404.

¹¹ See *Rambaum v. Swisher*, 435 N.W.2d 19, 21 (Minn. 1989) (citing *Hollerich*, 340 N.W.2d at 669 and *Kvanli v. Village of Watson*, 272 Minn. 481, 484, 139 N.W.2d 275, 277 (1965)).

¹² See Minn. Stat. § 340A.101, subds. 2, 14, 19.

meaning that, the Civil Damage Act applies to “3.2 taverns” as well as to “hard liquor” taverns. Thus, the kinds of beverages regulated by Minnesota’s liquor control laws have changed slightly over the years.

While the Civil Damage Act has always prohibited the illegal *sale* of alcohol, it has not always prohibited the illegal *giving* of alcohol.¹³ Prior to 1977, the Civil Damage Act imposed liability on anyone who sold, bartered, furnished, or *gave* alcohol to an obviously intoxicated person.¹⁴ In 1977, however, the legislature eliminated causes of action which previously arose from a “giving” of alcoholic beverages.¹⁵ This amendment was a legislative reaction to the Minnesota Supreme Court’s decision in *Ross v. Ross*,¹⁶ wherein the court approved of civil damage claims against social hosts, private parties who serve alcohol in non-commercial situations. Although the clear legislative intent was to preclude claims against social hosts, the drafting left something to be desired. The amendment merely deleted the word “give” from the Civil Damage Act. That omission left open the possibility that a social host who sells or barter liquor could still have liability under the Act, whereas a commercial liquor vendor that gives liquor to obviously intoxicated persons or minors could escape liability. For a more extensive discussion of social host liability see Chapter Four, Common Law and Statutory Host Liability.

The Minnesota Supreme Court addressed this problem in two cases decided in 1982. In *Cole v. City of Spring Lake Park*,¹⁷ the court held that the Civil Damage Act preempted any action against a social host who gives liquor to guests. In *Cady v. Coleman*,¹⁸ the court held that a law firm that had allegedly “bartered” drinks at a social outing to a client in exchange for good will and future business could not be sued by various claimants injured in a subsequent automobile accident caused by the client’s intoxication. The *Cady* court stated:

The Legislature’s intent to restrict liability only to commercial vendors is sufficiently clear from its deletion from the Act of the word “giving.” “Any person” who sells or barter 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 receives.¹⁹

Thus, the Minnesota Supreme Court’s decisions in *Cole* and *Cady* meant that only *commercial liquor vendors* could have liability under the Civil Damage Act.

¹³ See Chapter IV. Common Law and Statutory Social Host Liability at 58 ff., *infra*.

¹⁴ See Minn. Stat. § 340.95 (1976).

¹⁵ See Minn. Stat. § 340.95 (1977); *Koehnen*, 590 N.W.2d at 109 (citing Act of June 2, 1977, ch. 390, § 1, 1977 Minn. Laws 887 (codified as Minn. Stat. § 340.95 (1978))).

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

¹⁷ 314 N.W.2d 836, 837-838 (1982).

¹⁸ 315 N.W.2d 593, 595-596 (Minn. 1982).

¹⁹ *Cady*, 315 N.W.2d at 596.

In 1985, the legislature repealed Minn. Stat. ' 340.95, the previous version of the Civil Damage Act, and replaced it with its current version codified as Minn. Stat. ' 340A.801.²⁰ The current version of the Civil Damage Act merely creates a civil cause of action for persons injured by the illegal sale of alcohol. What constitutes an “illegal sale” is determined by reference to other provisions of Chapter 340A. For example, Minn. Stat. ' 340A.502 makes it illegal for any person to “sell, give, furnish, or in any way procure for another alcoholic beverages for the use of an obviously intoxicated person.”²¹ Section 340A.503 makes it illegal “to sell, barter, furnish, or give alcoholic beverages to a person under 21 years of age.”²² This legislative change once again made it possible for commercial liquor vendors to be liable for damages arising from the unlawful *provision* of alcohol, regardless of whether an actual sale of alcohol had occurred.

This legislative change, however, did not mean that the Civil Damage Act once again applied to social hosts or persons other than commercial liquor vendors, as the Minnesota Supreme Court=s decisions in *Holmquist v. Miller*²³ and *Meany v. Newell*²⁴ make clear. In *Holmquist*, the court refused to hold a social host liable for furnishing alcoholic beverages to a minor, holding that the Civil Damage Act preempts claims against a social host for negligently serving alcohol to an adult or a minor who subsequently injures a third party.²⁵ In *Meany*, the court held that an employer was not a commercial liquor vendor and, therefore, not liable under the Civil Damage Act for providing alcoholic beverages to an obviously intoxicated employee at a Christmas party during normal working hours on the business premises and for allowing the employee to drive home in an intoxicated condition.²⁶ The *Meany* court also held that there was no common law cause of action against the employer.²⁷ Nevertheless, in 1990, the legislature added a provision to the Civil Damage Act which clarified that nothing in Chapter 340A precluded 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 21.²⁸

More recently, the legislature resurrected social host liability to a limited degree. In 2000, the legislature added a provision to the Liquor Act, which creates a *statutory* cause of action against social hosts who knowingly provide alcohol to minors.²⁹

²⁰ See *Kohnen*, 590 N.W.2d at 111.

²¹ See Minn. Stat. § 340A.502 (emphasis added).

²² See Minn. Stat. § 340A.503, subd. 2(1) (emphasis added).

²³ 367 N.W.2d 468 (Minn. 1985).

²⁴ 367 N.W.2d 472 (Minn. 1985).

²⁵ See *Holmquist*, 367 N.W.2d at 472.

²⁶ See *Meany*, 367 N.W.2d at 473-474.

²⁷ See *id.* at 474-475.

²⁸ See Act of May 3, 1990, ch. 555, § 10, 1990 Minn. Laws 1557, 1561 (codified as Minn. Stat. § 340A.801, subd. 6).

²⁹ See Minn. Stat. § 340A.90.

1. Sales to obviously intoxicated persons

Sales of alcohol to obviously intoxicated persons are prohibited by Minn. Stat. § 340A.502. It provides: “No person may sell, give, furnish, or in any way procure for another alcoholic beverages for the use of an obviously intoxicated person.”³⁰ This provision makes it unlawful for a commercial liquor vendor to provide alcohol to someone who is obviously intoxicated, regardless of whether the liquor is actually sold or merely furnished. Accordingly, for purposes of this discussion, the term “sale” includes the act of furnishing alcohol to someone without the exchange of money.

Sales to obviously intoxicated persons are the most common type of illegal sale one is likely to encounter in dram shop litigation. The phrase “obviously intoxicated” does not refer to, and should not be confused with, *legal* intoxication, which denotes a person whose blood alcohol concentration is 0.80 or greater.³¹ Someone is not considered obviously intoxicated for purposes of dram shop liability merely because that person spends an hour in a bar and has a “couple of beers.”³² Mere evidence that an individual has been drinking will not support an inference of obvious intoxication.³³ Rather, the Minnesota Supreme Court has defined the phrase “obvious intoxication” as “such an outward manifestation of intoxication that a person using his reasonable powers of observation can see or should see that such person has become intoxicated.”³⁴ It occurs whenever alcohol has caused a person to lose control in any manner to any extent the actions or motions of that person’s body.³⁵ Slurred speech, stumbling, rowdy behavior, slowed or impaired movements, and bloodshot eyes are examples of “outward manifestations of intoxication.”³⁶ Obvious intoxication is occasionally proven through direct, and more often through circumstantial, evidence.

a. Direct evidence of obvious intoxication

Obvious intoxication can be proven through direct evidence, which may come in the form of witnesses who testify to having seen the commercial liquor vendor serve alcohol to someone who exhibited signs of obvious intoxication. Occasionally, the best record of the AIP’s demeanor at the commercial liquor vendor’s establishment turns out to be a video tape. It is not unusual for commercial liquor vendors to use video surveillance to monitor activity both inside and outside the establishment. In prosecuting a dram shop case based on the sale of alcohol to an obviously intoxicated person, plaintiff’s counsel are wise to inquire through discovery whether the dram shop uses surveillance tapes to monitor its establishment and to request any such tapes that may

³⁰ Minn. Stat. § 340A.502.

³¹ See Minn. Stat. § 169A.20, subd. 1(6) (2004) (prohibiting the operation of a motor vehicle by someone who is legally intoxicated) and Minn. Stat. § 169A.03, subd. 2 (defining the phrase “alcohol concentration”).

³² *Filas v. Daher*, 300 Minn. 137, 139, 218 N.W.2d 467, 469 (1974).

³³ See *Gutwein v. Edwards*, 419 N.W.2d 809, 811-12 (Minn.App. 1988).

³⁴ *Strand v. Village of Watson*, 245 Minn. 414, 422, 72 N.W.2d 609, 615 (1955), superseded by statute as stated in *Mjos v. Village of Howard Lake*, 287 Minn. 427, 178 N.W.2d 862 (Minn. 1970).

³⁵ See *id.*

³⁶ See *id.*

be available for the date and time of the alleged illegal sale. Video footage of an obviously intoxicated AIP being served at the bar is direct evidence that an illegal sale occurred and proof that the server failed to exercise his or her reasonable powers of observation to avoid making an illegal sale. To the extent the dram shop's insurer has not already done so, counsel defending the dram shop should immediately secure and preserve any surveillance tapes for the date of the alleged service as soon as he or she is retained to defend the dram shop. If the surveillance footage is damaging to the commercial liquor vendor, defense counsel can try to settle the case early and, thereby, attempt to minimize damage exposure and litigation expenses for the dram shop.

b. Indirect evidence of obvious intoxication: toxicology evidence

Obvious intoxication can also be proven indirectly. The Minnesota Supreme Court has held that proof of obvious intoxication does not have to "be positive by eyewitnesses."³⁷ Accordingly, blood or urinalysis test results may be admissible to help the trier of fact determine whether the AIP had reached such a state of intoxication that the seller should have observed the signs of intoxication.³⁸ In other words, blood or urinalysis test results may help prove the existence of an illegal sale where there is additional evidence from which it could be reasonably inferred that the AIP was *obviously* intoxicated.³⁹

The use of toxicology evidence in civil damage actions merits caution. There are many cases in which a dram shop's liability is remote or nonexistent, even though the allegedly intoxicated person ("AIP") may have an extremely high blood alcohol reading. It is an established fact that persons who are regular, heavy drinkers are able to hide many of the most common signs of intoxication to a much better degree than less experienced drinkers with equally high blood alcohol concentrations. Quite often the AIP is a very experienced drinker. Accordingly, it is not uncommon for the AIP to have a high blood alcohol reading while all available witnesses, including disinterested persons, testify that the AIP did not appear obviously intoxicated.⁴⁰ This situation is particularly common in situations where the AIP moves from bar to bar and is not at any bar for a very long period of time.⁴¹

Toxicologists have recognized this point scientifically. One study, for example, examined 110 consecutive alcoholics who voluntarily entered a detoxification center in order to evaluate the

³⁷ See *Strand*, 245 Minn. at 423, 72 N.W.2d at 616.

³⁸ See *Seeley*, 281 N.W.2d at 371.

³⁹ *Gutwein*, 419 N.W.2d at 812; *Hollerman v. River Roost, Inc., Riverside Coliseum, and Kevin Kraemer*, 1999 WL 639278 (Minn.App. Aug. 24, 1999) (unpublished).

⁴⁰ See e.g., Summary Judgment Order and Memorandum in *Lorilei Cole v. Scott Zoerb et al.*, Court File No.: C7-04-750 (Anoka Dist. Ct. July 9, 2004) (granting summary judgment in favor of defendant dram shop where plaintiff failed to present evidence that AIP with blood alcohol concentration of 0.27 appeared intoxicated while at the defendant dram shop).

⁴¹ See *Hollerman*, 1999 WL 639278.

subjects' ability to perform certain designated functions both at the time of admission and four days later after detoxification.⁴² Results from that study showed:

- Out of the 87 with positive blood alcohol, 35 % were normal in every respect of the criteria used (vision, verbal comprehension, gait, speech, coordination, pupils, ability to undress).⁴³
- Out of the 54 subjects with blood alcohol concentrations of 0.2% or higher, 13 (24%) showed no signs of intoxication.⁴⁴
- The following numbers of subjects exhibited normal reactions in the areas indicated: 31 (57%)—speech, 22 (40.7%)—gait, 31 (57%)—vision, 24 (44.4%)—verbal comprehension, 41 (75.9%)—ability to undress, 27 (50%)—pupils, and 20 (35.1%)—coordination.⁴⁵
- Although none of the subject who achieved a blood alcohol concentration of 0.3% exhibited sobriety in all fields of performance, 26 of the subjects with blood alcohol concentrations of 0.3% or higher were normal in the areas of: speech (11 subjects); verbal comprehension (8 subjects); gait (6 subjects); pupils and vision (11 subjects); and coordination (2 subjects).⁴⁶

From these amazing results, Dr. Perper and his colleagues concluded: “From a medico-legal point of view, the interpretation of a high blood alcohol concentration as an indicator of incapacitation, manifest drunkenness, or as an exclusive cause of death is unreliable. Therefore, for example, a bartender who serves a “chemically intoxicated person, (that is, having ipso facto a high BAC) should not be accused of serving alcohol to an obviously “clinically intoxicated” individual.”⁴⁷

Other studies support this conclusion. One study conducted during the 1980s showed there was little correlation between a person's plasma alcohol concentration and the person's visible signs of intoxication.⁴⁸ Another study determined that “behavioral tolerance to alcohol can be

⁴² See Joshua A. Perper, M.D., LL.B., M.Sc.; Abraham Twerski, M.D.; and Jerry W. Wienand, J.D., *Tolerance at High Blood Alcohol Concentrations: A Study of 110 Cases and Review of the Literature*, JOURNAL OF FORENSIC SCIENCES, IFCA, Vol. 31, No. 1 (Jan. 1986).

⁴³ See *id.* at 213

⁴⁴ See *id.*

⁴⁵ See *id.* at 213, 215.

⁴⁶ See *id.* at 215.

⁴⁷ Perper, et al., *Tolerance at High Blood Alcohol Concentrations: A Study of 110 Cases and Review of the Literature*, JOURNAL OF FORENSIC SCIENCES, IFCA, at 217.

⁴⁸ See John B. Sullivan, Jr., M.D.; Monica Hauptman, M.D.; and Alvin C. Bronstein, M.D., *Lack of Observable Intoxication in Humans with High Plasma Alcohol Concentrations*, JOURNAL OF FORENSIC SCIENCES, JFSCA, Vol. 32, No. 6 (Nov. 1987).

demonstrated in young men who drink regularly but only occasionally to excess.”⁴⁹ All of these studies tend to show that toxicology evidence, standing alone, is of limited value in determining whether someone is obviously intoxicated, particularly in the case of the experienced drinker.

Minnesota courts have recognized the use of toxicology evidence in civil damage cases for more than 50 years. In *Strand*,⁵⁰ the Minnesota Supreme Court determined that circumstantial evidence presented a fact question as to whether the purchaser was obviously intoxicated, where he demonstrated a blood alcohol concentration of 0.27, was involved in an accident within 45 minutes of leaving the bar, and a witness claimed he could tell the purchaser had been drinking. In *Hamilton v. Killian*,⁵¹ the Minnesota Supreme Court affirmed the Mille Lacs County District Court’s determination that circumstantial evidence presented a fact question as to whether an illegal sale occurred where the evidence showed that the patron drank continuously at a bar until shortly before the accident. In *Jaros v. Warroad Municipal liquor Store*,⁵² the court held that circumstantial evidence was sufficient to create a fact issue as to whether a sale to an obviously intoxicated person occurred, where the purchaser was a heavy drinker, spent at least five and one-half hours in the bar, was disoriented shortly before he left, and a fellow-patron recalled that the purchaser was not feeling too well when he left the bar. In *Larson v. Carchedi*,⁵³ the Minnesota Court of Appeals reached a similar conclusion where the patron consumed between five and 10 whiskey-cokes, each containing four or five shots of whiskey, smoked marijuana cigarettes, and consumed an unknown quantity of amphetamines before entering the various dram shops and consuming more alcohol. In *Gutwein v. Edwards*,⁵⁴ the Minnesota Court of Appeals determined that a fact issue existed as to whether an illegal sale occurred where the purchaser spent a considerable amount of time at the bar on the day of the accident, and was observed driving erratically after leaving. Finally, in *Jewitt v. Deutsch*,⁵⁵ the court of appeals held that a jury finding of obvious intoxication was supported by the evidence, where the patron’s blood alcohol concentration was 0.27 one hour after his arrest, approximately ten to fifteen beers were consumed within one and one-half hours, and there was evidence that the patron was disoriented.

Yet, in all of those cases, there was at least *some* evidence that the AIP showed obvious signs of intoxication independent of a alcohol concentration reading accompanied by a toxicologist’s report. Minnesota’s appellate courts have recognized this point in a number of cases. In *Strand*, the Minnesota Supreme Court stated:

In the former case it may well be that the results of a blood test or urinalysis alone may be sufficient to establish a violation of the law. In the latter case, while a

⁴⁹ Donald W. Goodwin, M.D., Barbara Powell, Ph.D., and John Stern, Ph.D., *Behavioral Tolerance to Alcohol in Moderate Drinkers*, AMER.J.PSYCHIAT. 127:12 (June 1971) at 1653.

⁵⁰ See 245 Minn. at 416, 72 N.W.2d at 612.

⁵¹ See 296 Minn. 256, 257, 207 N.W.2d 703, 704 (1973).

⁵² See 303 Minn. 289, 297, 227 N.W.2d 376, 381-382 (1975).

⁵³ See 419 N.W.2d 132, 133-134 (Minn.App. 1988).

⁵⁴ See 419 N.W.2d 809, 810-811 (Minn.App. 1988).

⁵⁵ 427 N.W.2d 717, 720 (Minn.App. 1989).

blood test or urinalysis may in a proper case be admitted to assist the trier of fact in determining whether the buyer had reached such a state of intoxication that the seller should have known that he was intoxicated, it does not, standing alone, have the probative force or value which it has in a case involving a violation of traffic laws.⁵⁶

Similarly, in *Jaros v. Warroad Municipal Liquor Store*, the court expressly stated: “We do not hold that a blood test establishes intoxication as a matter of law in a given case.”⁵⁷ Likewise, in *Harden v. Seventh Rib, Inc.*, the court stated: “On these facts, we are not prepared to hold that a 0.18 percent blood alcohol content is sufficient in and of itself to establish a prima facie case of obvious intoxication.”⁵⁸ Instead, there must be additional evidence from which it could reasonably be inferred that an individual was obviously intoxicated.⁵⁹ Thus, where there is no evidence of obvious intoxication independent of a blood test and a toxicologist’s opinion, counsel defending the dram shop should consider moving for summary judgment.⁶⁰

c. Ascertaining obvious intoxication

Between 1967 and 1971, the Liquor Act imposed a duty upon commercial liquor vendors by prohibiting the sale of alcohol to *intoxicated* persons, as opposed to *obviously* intoxicated persons.⁶¹ During that four year period, a commercial liquor vendor had a “duty to be aware of the natural and inevitable consequences which necessarily followed from the amount of intoxicating liquor the patron had consumed on its premises.”⁶² The seller could not continue serving the AIP drinks and later argue that the patron appeared fine. The seller was obligated to engage the AIP in conversation in order to ascertain whether the AIP was fit for alcohol consumption.

In 1971 the Minnesota Legislature amended the Liquor Act to prohibit sales to *obviously* intoxicated persons.⁶³ In 1974, the Minnesota Supreme Court interpreted this amendment as eliminating the commercial liquor vendor’s affirmative duty to engage a patron in conversation

⁵⁶ *Strand*, 245 Minn. at 422, 72 N.W.2d at 615. *Accord Seeley v. Sobczak*, 281 N.W.2d 368, 370-71 (Minn. 1979) and *Larson v. Carchdi*, 419 N.W.2d 132, 134 (Minn.App. 1988) (noting that an individual cannot be found obviously intoxicated merely by showing that the person is “under the influence” for purposes of traffic laws).

⁵⁷ 303 Minn. 289, 296, 227 N.W.2d 376, 381 (1975).

⁵⁸ 311 Minn. 27, 33, 247 N.W.2d 42, 46 (1976).

⁵⁹ *See Gutwein*, 419 N.W.2d at 812; *Hollerman.*, 1999 WL 639278 at *2.

⁶⁰ *See e.g.*, Order and Memorandum at 6-7 in *Charles W. Kraft v. Marie M. Lindahl, et al.*, Court File No.: C7-98-489 (Hubbard Co. Dist. Ct. Sept. 13, 1999) (granting summary judgment in favor of dram shop where the plaintiff’s only evidence supporting finding of obvious intoxication was AIP’s blood alcohol concentration level) *Kraft* is an interesting case, because the AIP was involved in a motor vehicle accident with the plaintiff on her way home from the dram shop and had a alcohol level was 0.22. The court’s decision to grant summary judgment turned on the fact that the bartender and four other witnesses, some of whom saw the AIP as she left the bar, testified that she exhibited no signs of obvious intoxication.

⁶¹ *See Hamilton*, 296 Minn. at 257, 207 N.W.2d at 704.

⁶² *Cameron v. City of Fridley*, 293 Minn. 110, 116, 197 N.W.2d 233, 237 (1972).

⁶³ *See Minn. Stat. 340.14, subd. 1* (1971) (now codified as Minn. Stat. § 340A.502).

in order to determine whether that person was intoxicated at the time of service.⁶⁴ Since 1971, the seller must simply exercise reasonable powers of human observation in order to avoid serving alcohol to patrons showing signs of obvious intoxication. Minnesota law no longer imposes a heightened duty on sellers to engage patrons in conversation prior to service.⁶⁵

Consequently, plaintiff's counsel will likely be unsuccessful at establishing obvious intoxication by dwelling on the fact that a bartender failed to engage the AIP in conversation prior to serving the AIP with alcohol. A better strategy is to marshal testimony by the AIP's companions or other witnesses that the AIP was showing signs of obvious intoxication prior to entering, or at, the defendant dram shop. Such testimony allows the plaintiff's counsel to argue persuasively that the AIP's state of intoxication was so obvious that any bartender exercising the ordinary powers of human observation should have noticed the AIP was obviously intoxicated and declined to serve the AIP.

2. Sales to minors

Any sale or furnishing of alcohol to a minor is prohibited by the Liquor Act.⁶⁶ Such a sale subjects a commercial liquor vendor to dram shop liability under the Civil Damage Act.⁶⁷ Not surprisingly, proof of a patron's age is a common issue in cases where a sale to a minor is alleged.

Good faith reliance on a statutorily accepted proof of age is a valid defense to dram shop claims premised on the sale of alcohol to a minor.⁶⁸ The practice of "carding" individuals is a means for a liquor establishment to later successfully defend a dram shop claim as long as their reliance on the false identification was reasonable and in good faith.⁶⁹ The defense may be based upon:

1. A valid driver's license or identification card issued by Minnesota, another state, or a province of Canada, and including the photograph and date of birth of the licensed person;
2. A valid military identification card issued by the United States Department of Defense;
3. A valid passport issued by the United States; or
4. In the case of a foreign national, by a valid passport.⁷⁰

⁶⁴ See *Knudsen v. Peickert*, 301 Minn. 287, 290-291, 221 N.W.2d 785, 787 (1974).

⁶⁵ See Order and Memorandum at 7 n.1-2 in *Cole*, Court File No.: C7-04-750 (Anoka Co. Dist. Ct. July 9, 2004) (expressly stating that appellate cases arising within the 1967 to 1971 era and imposing a heightened duty on sellers are inapplicable to the analysis of whether an AIP appeared obviously intoxicated under current law).

⁶⁶ See Minn. Stat. § 340A.503.

⁶⁷ See *id.* § 340A.801, subd. 1.

⁶⁸ See *id.* § 340A.801, subd. 3a; *cf.* Minn. Stat. § 340A.503, subd. 6a.

⁶⁹ *Wagner v. Schwegmann=s South Town Liquor Inc.*, 485 N.W.2d 730 (Minn Ct. App. 1992).

⁷⁰ Minn. Stat. § 340A.503, subd. 6(a) (2004).

The dram shop must establish by a preponderance of the evidence reasonable and good faith reliance upon any of these methods of proving age.⁷¹ If the dram shop satisfies its burden of proof, it is relieved of liability for a sale which is otherwise illegal.

Once again, the impact of video surveillance footage should not be underestimated by plaintiff or defense counsel. Consider, for example, a case in which the dram shop purports to have a policy of carding all patrons who appear to be minors. When all of the servers are deposed, they testify that they *always* card people who appear to be minors and that they carded and refused to serve alcohol to the minor in question. Surveillance footage showing one of the servers furnishing alcohol to that minor would completely undermine the dram shop's defense of good faith reliance on a statutorily accepted proof of age.

In cases involving minors, the plaintiff does not have to prove that the minor was intoxicated when the sale was made, because the sale is illegal by virtue of the consumer's minor status. Most of the time, the consumer's minor status is not disputed, and the only remaining issues of liability are whether the illegal sale caused the minor's subsequent intoxication and whether the intoxication caused the accident out of which the suit stems. These matters are often readily established, since proof of intoxication and causation requires significantly less evidence than a showing of obvious intoxication.

There normally is no causation defense in cases involving an alleged sale to an obviously intoxicated person. In cases involving an alleged sale to a minor, the lack of causation defense is the main defense. In other words, if the plaintiff establishes that the AIP was obviously intoxicated, the fact that the AIP's intoxication caused or contributed to the accident is normally self-evident. By contrast, where the case involves an alleged sale to a minor, the primary issues are whether the minor became intoxicated and whether that intoxication caused the accident.⁷² However, it should be noted that juries are frequently not impressed by defenses based on the lack of causation when an illegal sale is made. Such arguments, particularly in cases that involve a minor sale, tend to be overly technical and offend most jurors' sense of justice by asking them to help someone escape liability when that party has acted illegally.

In *Murphy v. Hennen*,⁷³ the Minnesota Supreme Court stated that, if a minor to whom a sale is made subsequently gives the alcohol to an adult, and the adult thereafter causes an accident, "[t]he illegality of the sale is neither affected or erased" regardless of whether the adult was sober or intoxicated." Moreover, the court added that, "[i]f the adult consuming the intoxicant is obviously intoxicated at the time, two illegal acts occur B the illegal sale to the minor and furnishing liquor to an intoxicated person."⁷⁴ In *Murphy*, the minor and adult bought rounds of drinks for each other throughout the evening. In that context, it is easy to understand how the bartender could be held responsible for furnishing intoxicants to an obviously intoxicated person, because that person was actually present at the bar. However, *Murphy's* language is certainly

⁷¹ Minn. Stat. § 340A.503, subd. 6(b) (2004).

⁷² See *Hahn v. City of Ortonville*, 238 Minn. 428, 57 N.W.2d 254 (1953).

⁷³ 264 Minn. 457, 462, 119 N.W.2d 489, 492 (1963).

⁷⁴ *Murphy*, 264 Minn. at 462, 119 N.W.2d at 492.

broader than that and, if literally applied, would extend to a situation in which the minor took an off-sale purchase and gave it to an adult outside the bar. If the adult was obviously intoxicated at the time, it is conceptually more difficult to understand how the bar would be responsible for selling alcohol to an obviously intoxicated person in addition to selling alcohol to a minor. Perhaps a distinction would be in order if this situation were presented to the court. The Minnesota Supreme Court has impliedly held that a sale to a minor followed by a gift by the minor to another person did not destroy the chain of causation.⁷⁵

A 1990 amendment to the Civil Damage Act expressly permits an action at common law against any person 21 years old or older who knowingly provides or furnishes alcoholic beverages to a person under the age of 21.⁷⁶ In other words, a person injured by such conduct may make a common law claim for negligence against an adult social host who furnished the alcohol to the minor. Such an act of supplying alcohol to minors is not likely a covered occurrence under the terms of a standard homeowner's policy, and the motor vehicle exclusion of that same policy will most likely apply as a further justification for denial of coverage. Thus, a successful common law claim against a social host for knowingly providing or furnishing alcohol to a minor may well result in a heavy financial penalty to the social host. Social host liability is discussed in greater detail in Chapter Five, which addresses common law and statutory and social host liability.

3. Sales after hours and on prohibited days

The Liquor Act prohibits the sale of intoxicating liquors on certain days and after certain hours, depending on whether the establishment is classified as "on sale" or "off sale."⁷⁷ "On sale" liquor establishments sell liquor by the drink for consumption on the premises. "Off sale" establishments, by contrast, sell liquor for purchase and consumption off the premises. Special rules also apply to the sale of 3.2 liquor.

a. "On sale" liquor establishments

"On sale" liquor establishments are generally forbidden to sell intoxicating liquor for consumption on the licensed premises (1) between 2:00 a.m. and 8:00 a.m. on Monday through Saturday and (2) after 2:00 a.m. on Sundays.⁷⁸ Certain exceptions exist with respect to Sunday sales. A restaurant, club, bowling center, or hotel with a seating capacity of at least 30 persons which holds an on sale liquor license may sell intoxicating liquor for consumption on the premises in conjunction with the sale of food between the hours of 12:00 p.m. on Sundays and

⁷⁵ See *Fitzer v. Bloom*, 253 N.W.2d 395, 403 (Minn. 1977); see also *Trail v. Village of Elk River*, 286 Minn. 380, 175 N.W.2d 916 (1970) (A common-law negligence action lies against a commercial vendor who illegally furnishes 3.2 beer to persons whose subsequent tortious acts caused injury to an innocent third party); and *Fette v. Peterson*, 404 N.W.2d 862 (Minn. App. 1987) (holding the sale of an intoxicating beverage need not be to the obviously intoxicated person directly).

⁷⁶ See Minn. Stat. § 340A.801, subd. 6.

⁷⁷ See Minn. Stat. § 340A.504, subs. 2, 3, and 4.

⁷⁸ See *id.*, § 340A.504, subd. 2.

2:00 a.m. on Mondays.⁷⁹ Following one public hearing, a municipality’s governing body may by ordinance permit a restaurant, hotel, bowling center, or club to sell alcoholic beverages for consumption on the premises in conjunction with the sale of food between the hours of 10:00 a.m. on Sundays and 2:00 a.m. on Mondays, provided that the licensee conforms to the Minnesota Clean Air Act.⁸⁰ Cities and counties are empowered to issue Sunday intoxicating liquor licenses if authorized to do so by the voters.⁸¹ Voter approval, however, is not required for licenses issued by the Metropolitan Airports Commission or common carrier licenses issued by the Commissioner of Public Safety.⁸² Common carriers have to obtain a Sunday license from the commissioner at an annual fee of \$50, plus \$20 for each duplicate.⁸³ These rules do not apply to a hotel that places intoxicating liquor in cabinets located in hotel rooms and charge guests for withdrawals from the cabinet.⁸⁴ Such dispensing of alcohol does not constitute a “sale” subject to “on sale” regulation.

“On sale” liquor establishments violate the Liquor Act when they sell alcohol in an open container without safeguarding against off-premises consumption.⁸⁵ Yet this statement “is not to say that an on-sale liquor vendor is liable every time a customer evades the vendor’s safeguards and smuggles liquor off-premises.”⁸⁶ As the United States District Court for the District of Minnesota recently observed, “a vendor will only be liable if it is established that the vendor did not ‘operate as a reasonable vendor, acting in good faith to sell liquor to be consumed only on the licensed premises.’”⁸⁷

b. “Off sale” liquor establishments

“Off sale” establishments cannot sell intoxicating liquor at all on Sundays or before 8:00 a.m. on Monday through Saturday.⁸⁸ They also cannot sell intoxicating liquor after 10:00 p.m. on Monday through Saturday at an establishment located in a city having less than 100,000 inhabitants or within a city located within 15 miles of such a city in the same county.⁸⁹ If the “off sale” establishment is located in a city having 100,000 or more inhabitants or within 15 miles of such a city in the same county, it generally cannot sell intoxicating liquor after 8:00 p.m. on Monday through Thursday and after 10:00 p.m. on Friday and Saturday.⁹⁰ It is allowed,

⁷⁹ See *id.*, § 340A.504, subd. 3(a).

⁸⁰ See *id.*, § 340A.504, subd. 3(b).

⁸¹ See *id.*, § 340A.504, subd. 3(c).

⁸² See *id.*, § 340A.504, subd. 3(d).

⁸³ See Minn. Stat. § 340A.504, subd. 3(f).

⁸⁴ See *id.*, § 340A.504, subd. 2a.

⁸⁵ See *Englund v. MN CA Partners/MN Joint Ventures*, 555 N.W.2d 328, 331-332 (Minn.App. 1996).

⁸⁶ *Englund*, 555 N.W.2d at 332.

⁸⁷ *Bicknell v. Dakota GM, Inc.*, 2009 WL _____ at * (D.Minn. 2009) (quoting *Englund*, 555 N.W.2d at 332).

⁸⁸ See Minn. Stat. § 340A.504, subd. 4(1)-(2).

⁸⁹ See *id.*, § 340A.504, subd. 4(3); *cf.*, Minn. Stat. § 410.01 (defining cities of various classes).

⁹⁰ See *id.*, § 340A.504, subd. 4(4); *cf.*, Minn. Stat. § 410.01.

however, to sell intoxicating liquor until 10:00 p.m. on December 31, July 3, and on the day before Thanksgiving Day, so long as those days do not fall on a Sunday.⁹¹ “Off sale” establishments are absolutely prohibited from selling intoxicating liquor on Thanksgiving Day, December 25, and after 8:00 p.m. on December 24.⁹²

c. 3.2 liquor

Certain rules also apply to the sale of 3.2 percent malt liquor. No sale of 3.2 percent malt liquor can be made between the hours of 2:00 a.m. and 8:00 a.m. on Monday through Saturday, nor between the hours of 2:00 a.m. and 12:00 noon on Sunday.⁹³ An exception exists for establishments connected with sporting and other events held in sports arenas. An establishment located on land owned by the Metropolitan Sports Commission, or a sports arena for which one or more licenses have been issued, may sell 3.2 percent malt liquor between the hours of 10:00 a.m. and 12:00 noon on a Sunday on which a sports or other event is scheduled to begin at that location on or before 1:00 p.m. that day.⁹⁴

d. Effect of an illegal sale

It has been argued that laws proscribing sales of alcohol after certain hours were not illegal sales for purposes of the Civil Damage Act, but were merely intended to regulate the hours of sale as part of the Liquor Act’s over-all regulatory scheme. The Minnesota Supreme Court rejected that argument in *Hollerich v. City of Good Thunder*.⁹⁵ The *Hollerich* court explained:

The concern of the Civil Damages Act is intoxication which results in injury to the intoxicated person’s dependents or others. The prohibition of after-hour sales tends to reduce liquor consumption late at night or in early morning hours, at times when the likelihood of overindulgence and the resultant hazards with which the Act is concerned is enhanced. In other words, we believe the prohibition against after-hour sales is sufficiently related to the purpose of the Dramshop Act so that such sales by a vendor constitute “illegally selling” within the meaning of the Act.⁹⁶

The *Hollerich* court, nevertheless, cautioned that more than an illegal sale is necessary to perfect a civil damage claim. The plaintiff must still prove that the illegal sale contributed to the intoxication, and that the intoxication contributed to cause injury.⁹⁷

⁹¹ See *id.*, § 340A.504, subd. 4(4).

⁹² See *id.*, § 340A.504, subd. 4(5)-(7).

⁹³ See *id.*, § 340A.504, subd. 1.

⁹⁴ See Minn. Stat. § 340A.504, subd. 1.

⁹⁵ 340 N.W.2d 665 (Minn. 1983).

⁹⁶ *Hollerich*, 340 N.W.2d at 668.

⁹⁷ See *id.*

Hollerich addressed the issue of whether an alcohol sale after 1:00 a.m. is illegal for purposes of the Civil Damage Act. Whether a packaged “off sale” after 10:00 p.m. is an illegal sale for the same purposes remains an open question. The *Hollerich* court determined that a sale made after 1:00 a.m. by an “on sale” establishment was sufficiently related to the purpose of the Civil Damage Act, because the sale occurred at night “when the likelihood of overindulgence is enhanced.”⁹⁸ However, restricting sales after 10:00 p.m. by “off sale” establishments does not so readily appear to further the Civil Damage Act’s purposes. “Off sale” restrictions, on their face, appear designed to regulate the liquor industry itself. It can be argued that, if the legislature wanted to address the problem of damages caused by illegal sales of off sale establishments, it would have also proscribed “on sale” establishments from selling alcohol to customers after 10:00 p.m. For example, it is illegal for an on sale establishment to sell a six-pack of beer to a customer at 10:01 p.m.⁹⁹ Yet the same customer could legally purchase and consume six or more beers at an “on sale” establishment between 10:00 p.m. and 1:00 a.m. Why a cause of action should exist for the sale of the six-pack, but not the sale of six or more bears at a tavern, is paradoxical.

Dicta in *Hollerich* suggests that this paradox is not so serious, because an after-hour sale by an “off sale” establishment still requires proof that the sale contributed to the patron’s intoxication, and that the intoxication caused injury.¹⁰⁰ However, those elements are not difficult to satisfy in most cases. Consider, for example, the facts in *K.R. v. Sanford*,¹⁰¹ in which a patron illegally purchased a bottle of Absolut Kurrant Vodka at approximately 5:00 a.m., became intoxicated with the liquor purchased, and then sexually assaulted the plaintiff. That illegal sale certainly contributed to the patron’s intoxication, and the patron’s intoxication certainly caused or contributed to the plaintiff’s harm. *K.R.*, however, addressed the issue of whether the plaintiff’s complicity in the illegal sale barred her ability to recover under the Civil Damage Act.¹⁰² It did not address the issue of whether the prohibition against after-hour sales is substantially related to the Civil Damage Act’s purpose. While the dicta in *Hollerich* may still be subject to challenge, *K.R.* may make such a challenge difficult.

Moreover, the Minnesota Supreme Court permitted a civil damage cause of action based on a Sunday sale to stand in *Fest v. Olson*.¹⁰³ Arguably, a cause of action based on a Sunday sale is analogous to an after-hour sale by an “off sale” establishment, because the prohibition against Sunday sales does not govern sales that occur “in early morning hours at times when the likelihood of overindulgence and the resultant hazards with which the Act is concerned is enhanced.”¹⁰⁴ *Fest*, of course, is an old case, having been decided in the years before prohibition. Public attitudes have certainly changed since the time *Fest* was decided.

⁹⁸ *Hollerich*, 340 N.W.2d at 668.

⁹⁹ See Minn. Stat. § 340A.504, subd. 4(3).

¹⁰⁰ See *Hollerich*, 340 N.W.2d at 668.

¹⁰¹ See 605 N.W.2d 387, 390 (Minn. 2000).

¹⁰² See *id.*

¹⁰³ 138 Minn. 31, 163 N.W. 798 (1917).

¹⁰⁴ *Hollerich*, 340 N.W.2d at 668.

Nevertheless, *Fest* may be used to further complicate efforts to challenge the *Hollerich* court's dicta in after-hour "off sale" cases.

Fest is the only known reported decision to discuss a civil damage claim involving a sale on a prohibited day. In *Fest*, the plaintiff's husband purchased intoxicants on Sunday from a bar and, as a result of his intoxication, drowned when his boat overturned as a result of his intoxication on the way home.¹⁰⁵ The widow's recovery was affirmed on appeal.¹⁰⁶

4. Sales at prohibited locations

The Liquor Act proscribes sales of alcoholic beverages in certain locations by prohibiting the issuance of liquor licenses in those areas. No license to sell intoxicating liquor may be issued in:

1. Places restricted against commercial use through zoning ordinances and other proceedings or legal processes regularly used for that purpose.¹⁰⁷
2. Restaurants in areas restricted against commercial use, except those in areas restricted against commercial uses after the restaurant was established;¹⁰⁸
3. Any place within the Capitol or on the Capitol grounds, subject to limited exceptions;¹⁰⁹
4. Any place on the State Fairgrounds or at any place in a city having 100,000 inhabitants or more within one-half mile of the fairgrounds, except as otherwise provided by charter;¹¹⁰
5. Any place on the campus of the College of Agriculture for the University of Minnesota, or at any place in a city having 100,000 inhabitants within one-half mile of the campus.¹¹¹ The city may, however, issue one "on sale" wine license on the campus of the College of Agriculture of the University of Minnesota that is not within one-half mile of the fairgrounds, no liquor licenses may be issued for that campus, provided that the place is not on the State Fairgrounds or within one-half mile thereof;¹¹²
6. Any place within 1,000 feet of a state hospital, training school, reformatory, prison, or other institution that is, wholly or partially, supervised or controlled by the Commissioner of Corrections;¹¹³

¹⁰⁵ *Fest*, 138 Minn at 32, 163 N.W. at 798.

¹⁰⁶ *See id.* at 34, 163 N.W. at 799.

¹⁰⁷ *See* Minn. Stat. § 340A.412, subd. 4(a)(1).

¹⁰⁸ *See id.*

¹⁰⁹ *See* Minn. Stat. § 340A.412, subd. 4(a)(2).

¹¹⁰ *See id.*, § 340A.412, subd. 4(a)(3); *cf.*, Minn. Stat. § 410.01 (defining cities of various classes).

¹¹¹ *See id.*, § 340A.412, subd. 4(a)(4); *cf.*, Minn. Stat. § 410.01 (defining cities of various classes).

¹¹² *See id.*

¹¹³ *See id.*, § 340A.412, subd. 4(a)(5).

7. A town or municipality in which a majority of votes cast in the last local option election did not favor the issuance of a license.¹¹⁴ A licensee also cannot be issued for any place that is within one-half mile of such a town or municipality, except that intoxicating liquor manufactured within that radius may be sold and consumed outside of that area;¹¹⁵
8. Any place on the east side of the Mississippi River within one-tenth mile of the main building of the University of Minnesota only if the licensed establishment is on property owned or operated by a nonprofit corporation organized before January 1, 1940 for and by former University students, or the licensed premises is Northrop Auditorium;¹¹⁶
9. Any place within 1,500 feet of a state university, subject to certain exceptions;¹¹⁷ and
10. Any place within 1,500 feet of any public school that is not within a city.¹¹⁸

None of these restrictions apply to a manufacturer or wholesaler of intoxicating liquor or to a drugstore or person who had a license originally issued lawfully before July 1, 1967.¹¹⁹

There are no known civil damage cases premised on violations of these provisions. Applying the logic of *Hollerich*, one would have to consider whether the prohibition against sales in certain geographical locations “is sufficiently related to the purposes of the Dram Shop Act so that such sales by a vendor constitute ‘illegally selling’ within the meaning of the Act.”¹²⁰ Although sales at prohibited locations do not seem likely to contribute to the problems that the Civil Damage Act was intended to address, the decision of the Minnesota Court of Appeals in *Clark v. Peterson*¹²¹ may suggest otherwise.

Clark involved a sale of alcohol in violation of Minn. Stat. § 340A.410, subd. 7 (2006), which provides that “[a] licensing authority may issue a retail alcoholic license only for a space that is compact and contiguous.”¹²² A retail alcoholic beverage license is only effective for the licensed premises specified in the approved license application.¹²³ Gordon Wheeler operated two establishments, one known as Camp Ripley Store/Bar/Café, an adult-entertainment establishment for which Wheeler had a liquor license.¹²⁴ The other establishment, Krazy Rabbit, did not have a

¹¹⁴ See *id.*, § 340A.412, subd. 4(a)(6).

¹¹⁵ See *id.*

¹¹⁶ See Minn. Stat. § 340A.412, subd. 4(a)(7).

¹¹⁷ See *id.*, § 340A.412, subd. 4(a)(8).

¹¹⁸ See *id.*, § 340A.412, subd. 4(a)(9).

¹¹⁹ See *id.*, § 340A.412, subd. 4(b).

¹²⁰ *Hollerich*, 340 N.W.2d at 668.

¹²¹ 741 N.W.2d 136 (Minn.App. 2007).

¹²² See *Clark*, 741 N.W.2d at 139 (quoting Minn. Stat. § 340A.410, subd. 7 (2006)).

¹²³ Minn. Stat. § 340A.410, subd. 7 (2006).

¹²⁴ See *Clark*, 741 N.W.2d at 138.

liquor license.¹²⁵ In July of 1999, Wheeler obtained a zoning permit to construct a 40-by 100-foot building adjacent to the Camp Ripley Bar which described the building as a “storage building.”¹²⁶ Later, Wheeler began operating the Krazy Rabbit out of that building, connected to the Camp Ripley Bar by a walkway not accessible to the public.¹²⁷ A liquor-control investigator and the local sheriff advised Wheeler that the walkway would satisfy the compact-and-contiguous requirement of Minn. Stat. § 340A.410.¹²⁸

On April 6, 2002, Roy Peterson was involved in an automobile accident that killed his passenger after the Krazy Rabbit served him alcohol.¹²⁹ The plaintiffs commenced a civil damage action against Wheeler, alleging damages caused by the Krazy Rabbit’s illegal sale of alcohol to Peterson.¹³⁰ The district court granted partial summary judgment to the plaintiffs, holding that the Krazy Rabbit’s sale of alcohol to Peterson constituted an illegal sale under Minn. Stat. ‘ 340A.410.¹³¹

The Minnesota Court of Appeals agreed.¹³² After recalling the Civil Damage Act’s purposes, the court observed that “[i]mposing liability on vendors acts as an incentive to the vendors to avoid illegal sales and also reflects the legislative judgment that the vendors can best bear the loss.”¹³³ The court further observed that the Civil Damage Act “reflects ‘a deep concern over alcohol abuse.’”¹³⁴ Rejecting Wheeler’s argument that Minn. Stat. ‘ 340A.401 merely governed the shape of his building, the court held that “Wheeler’s operation of two separate buildings circumvents statutory limits based on population on the number of liquor licenses that a municipality may issue, thereby increasing the potential for alcohol abuse and the injury of innocent persons.”¹³⁵

¹²⁵ *See id.*

¹²⁶ *See id.*

¹²⁷ *See id.*

¹²⁸ *See id.*

¹²⁹ *See id.*

¹³⁰ *See id.*

¹³¹ *See id.*

¹³² *See id.* at 140.

¹³³ *Clark*, 741 N.W.2d at 139 (citing *Conde v. City of Spring Lake Park*, 290 N.W.2d 164, 166 (Minn. 1980)).

¹³⁴ *Id.* at 139 (quoting *Rambaum v. Swisher*, 435 N.W.2d 19, 22 (Minn. 1989)).

¹³⁵ *Id.* at 140.

5. Sales to non-members of clubs

The Liquor Act allows some municipalities to issue “on sale” licenses to bona fide clubs and veterans organizations.¹³⁶ The license, however, permits sales to “members and bona fide guests only.”¹³⁷ In *Rambaum v. Swisher*,¹³⁸ the Minnesota Supreme Court held that a sale to a non-member of a club is an illegal sale for purposes of the Civil Damage Act. In so holding, the court determined that a sale to a non-member of a club is substantially related to the purposes that the Act is designed to achieve.

The most commonly litigated issue in relation to club sales is what constitutes a “bona fide guest.” In *Rogers v. Ponti-Peterson Post #1720 Veterans of Foreign Wars of the United States of Am., Inc.*,¹³⁹ the court of appeals defined a bona fide guest as a “persons specifically welcomed to a club by its members.”¹⁴⁰ The court went on to state that this does not include everyone. “It is inconsistent with the common usage of that phrase and the purpose of the restricted license statute to interpret the phrase to include everyone.”¹⁴¹

B. The Illegal Sale Caused or Contributed to the AIP’s Intoxication

In addition to proving the existence of an illegal sale, the plaintiff must also prove that the illegal sale caused or contributed to the AIP’s intoxication.¹⁴² This element of proof, however, does not require the plaintiff to establish that the intoxicants consumed were the sole cause of the AIP’s intoxication. It is sufficient if the intoxicants illegally served combine with other intoxicants, legally or illegally sold, and thereby *contribute* to the intoxication of the AIP.¹⁴³

There are two primary defenses to this element of proof. One is a lapse of time between the alleged illegal sale and the accident. Consider the following facts from an actual case as an example. The AIP enters a bar at around 7:00 p.m. and consumes one or two pitchers of beer over the course of three hours. After consuming and paying for his beer, the AIP arrives at home between 10:00 and 11:00 p.m., where he falls asleep. At approximately 2:00 a.m., the AIP awakes, has one or two beers, and falls back asleep. At 5:00 a.m., the AIP awakes and by 7:00 a.m. has consumed an unknown quantity of beer and approximately one-half pint of root beer schnapps, followed by five or six more beers as he drives from one town to another. The AIP

¹³⁶ See Minn. Stat. § 340A.404, subd. 1(3).

¹³⁷ *Id.*

¹³⁸ 435 N.W.2d 19, 21 (Minn. 1989).

¹³⁹ 495 N.W.2d 897 (Minn. App. 1993).

¹⁴⁰ *Rogers*, 495 N.W.2d at 901.

¹⁴¹ *Id.*

¹⁴² See *Murphy*, 264 Minn. at 462, 119 N.W.2d at 492; *Hahn*, 238 Minn. at 438, 57 N.W.2d at 258-59.

¹⁴³ See *Trail*, 286 Minn. at 389, 175 N.W.2d at 921; *Murphy*, 264 Minn. at 462, 119 N.W.2d at 493; *Randall v. Village of Excelsior*, 258 Minn. 81, 84, 103 N.W.2d 131, 134 (1960); *Hartwig v. Loyal Order of Moose, Brainerd Lodge No. 1246*, 253 Minn. 347, 356 91 N.W.2d 794, 801 (1958).

severely injures the plaintiff when his truck collides with the plaintiff's automobile.¹⁴⁴ Under facts such as these, lapse of time may be a valid defense.

The second primary defense is the AIP's minimal amount of consumption. The gravamen of this defense is that the AIP consumed such a minimal amount of alcohol that those intoxicants could not possibly have caused or contributed to the AIP's intoxication. This argument may be made in those rare situations in which only one drink is sold or consumed either seconds or minutes before the incident (*e.g.*, an assault) or accident. In that situation, it may be argued that the alcohol could not have been absorbed into the blood stream by the time of the incident or accident so as to cause or contribute to the patron's intoxication. The defendant dram shop may require the services of a toxicologist to lay the foundation necessary for this defense, which is seldom successful.

Despite the existence of these defenses, it is generally not difficult for a plaintiff to establish that the illegal sale caused or contributed to the AIP's intoxication. This point is evident from the manner in which the Minnesota Supreme Court described the phrase "obvious intoxication" in *Strand*:

When any person from the use of intoxicating liquors has affected his reason or his faculties, *or* has rendered himself incoherent of speech, *or* has caused himself to lose control in *any* manner to *any* extent of the actions or motions of his person or body, such person in the contemplation of the law is intoxicated.¹⁴⁵

The court's use of the disjunctive conjunction "or" is noteworthy. Apparently, the plaintiff needs only to prove the existence of one element of the definition in order to establish "obvious intoxication." For example, the first element, requiring proof that the intoxicant has affected the AIP's reason or faculties, is a phenomenon likely to be present for many people relatively early in drinking episode. In fact, taking this definition literally, most jurors would probably understand "obvious intoxication" as requiring far less drinking than they otherwise might have. If a patron may become "obviously intoxicated" at a relatively early point during the course of drinking, it is not difficult for a jury to determine that even a minimal amount of alcohol contributed to the patron's intoxication.

C. The Intoxication Proximately Caused the Plaintiff's Injury

A plaintiff cannot establish a dram shop case merely by proving the existence of an illegal sale which caused or contributed to the AIP's intoxication and the mere existence of an injury. The plaintiff must prove that the AIP's intoxication *actually caused* the plaintiff's injury. In most cases, proof that intoxication caused the plaintiff's injury is not an issue. Occasionally, however, a plaintiff's injury may be caused by factors that are entirely unrelated to the AIP's intoxication. Consider, for example, *Hastings v. United Pacific Insurance Company*,¹⁴⁶ in which the plaintiff's

¹⁴⁴ See Order and Memorandum at 2-5 in *Cole*, C7-04-750 (Anoka Co. Dist. Ct. July 9, 2004).

¹⁴⁵ 245 Minn. at 421-422, 72 N.W.2d at 615 (emphasis added).

¹⁴⁶ *Hastings v. United Pacific Ins. Co.*, 396 N.W.2d 682 (Minn. Ct. App. 1986).

vehicle crossed the center line and collided head-on with the AIP's vehicle. In that situation, the Minnesota Court of Appeals held that the district court properly entered summary judgment, because the plaintiff presented no evidence that the AIP's *intoxication* caused the plaintiff's injury.¹⁴⁷

In order to establish a civil damage claim, the plaintiff must prove that the AIP's intoxication caused the plaintiff's injury.¹⁴⁸ Such proof requires a "direct causal relationship between the intoxication and the injury."¹⁴⁹ In most cases, the plaintiff's ability to satisfy this proof element is not an issue.

Occasionally, however, a plaintiff's injury may be caused by factors entirely unrelated to the AIP's intoxication. In *Crea v. Bly*,¹⁵⁰ for example, the jury determined that an illegal sale was made to the AIP who subsequently persuaded her boyfriend, who was not intoxicated, to assault the plaintiff. The Minnesota Supreme Court determined that no cause of action existed, because the boyfriend's conduct constituted an intervening cause of plaintiff's injury.¹⁵¹ In *Hastings v. United Pacific Insurance Company*,¹⁵² in which the plaintiff's vehicle crossed the center line and collided head-on with the AIP's vehicle. In that situation, the Minnesota Court of Appeals held that the district court properly entered summary judgment, because the plaintiff presented no evidence that the AIP's *intoxication* caused the plaintiff's injury.¹⁵³ Similarly, in *Kryzer v. Champlin American Legion No. 600*,¹⁵⁴ an intoxicated person injured her wrist while being removed from the bar by a bar employee. The Minnesota Supreme Court held that, although the patron's intoxication may have been the occasion for her ejection from the club, it did not cause her injury.¹⁵⁵

The same result does not follow, however, when there are genuine issues of material fact as to the cause of the injury. In *Osborne v. Twin Town Bowl, Inc.*,¹⁵⁶ a state trooper pulled a bar patron over for speeding. While the trooper walked back to his car to return breath-test equipment after informing the patron of his intent to place the patron under arrest for driving under the influence of alcohol, the patron said, "I'm outta here," and jumped from the bridge to his death in order to avoid arrest.¹⁵⁷ The Minnesota Court of Appeals held that the events occurring between the patron's intoxication at the bar and his drowning precluded the conclusion

¹⁴⁷ See *Hastings v. United Pacific Ins. Co.*, 396 N.W.2d 682, 684 (Minn. Ct. App. 1986).

¹⁴⁸ See *Hartwig v. Loyal Order of Moose, Brainerd Lodge No. 1246*, 253 Minn. 347, 363, 91 N.W.2d 794, 806 (1958).

¹⁴⁹ *Kryzer v. Champlin American Legion No. 600*, 494 N.W.2d 35, 36 (Minn. 1992).

¹⁵⁰ 298 N.W.2d 66 (Minn.1980)

¹⁵¹ *Id.*

¹⁵² *Hastings v. United Pacific Insurance Co.*, 396 N.W.2d 682 (Minn.App. 1986).

¹⁵³ See *Hastings*, 396 N.W.2d at 684.

¹⁵⁴ 494 N.W.2d 35 (Minn. 1992).

¹⁵⁵ See *Kryzer*, 494 N.W.2d at 37.

¹⁵⁶ 749 N.W.2d 367, 369 (Minn. 2008).

¹⁵⁷ *Id.*

that intoxication caused the patron's death.¹⁵⁸ No evidence indicated that intoxication caused the patron's speeding, which was the only reason the trooper stopped him.¹⁵⁹ The parties also did not dispute that the patron jumped from the bridge in order to escape arrest.¹⁶⁰

The Minnesota Supreme Court, however, reversed. The court reasoned that, although the trooper's decision not to handcuff the patron may have given the patron the occasion to make a decision about whether he should jump into the river to avoid arrest, it was the patron who chose to and ultimately did jump into the river.¹⁶¹ Said the court: "Much like an intoxicated driver who speeds up at a red light because his alcohol-impaired judgment leads him to believe he can make it through an intersection before an oncoming vehicle arrives, [the patron's] decision to jump off a bridge when faced with arrest could have been substantially and directly caused by his alcohol-impaired judgment."¹⁶²

Osborne simply reaffirms the longstanding principle that causation questions generally present fact questions. A dram shop defendant's ability to obtain summary judgment on causation apparently is confined to those situations in which the injury results from acts or choices of someone other than the AIP. Such cases, as noted above, are rare. Nevertheless, as the foregoing discussion shows, cases involving the issue of whether intoxication proximately caused the plaintiff's injury involve interesting facts even if they are rare.

D. Damages

Assuming a plaintiff can establish that an illegal sale occurred, that the sale caused or contributed to the AIP's intoxication, and that the AIP's intoxication caused the plaintiff's injury, the final element of proof is damages. The Civil Damage Act is designed to compensate a person "injured in person, property, or means of support, or who incurs other pecuniary loss."¹⁶³ Punitive damages are not recoverable.¹⁶⁴

1. Personal injury damages

Personal injury damages are, as the phrase implies, damages stemming from bodily injury proximately caused by an intoxicated person. It includes money paid to compensate the plaintiff for past and future medical expenses as well as past and future pain and suffering. The measure of damages in a dram shop action is identical to the measure of damages recoverable in a common law negligence action. Thus, in civil damage actions, most courts give the jury damage instructions that are identical to those used in the garden variety personal injury action based on negligence.

¹⁵⁸ See *Osborne v. Twin Town Bowl, Inc.*, 730 N.W.2d 307, 311 (Minn.App. 2007).

¹⁵⁹ See *id.*

¹⁶⁰ See *id.*

¹⁶¹ See *Osborne*, 749 N.W.2d at 374.

¹⁶² *Osborne*, 749 N.W.2d at 374 (citing *Kvanli v. Village of Watson*, 272 Minn. 481, 485, 139 N.W.2d 275, 278 (1965)).

¹⁶³ See Minn. Stat. § 340A.801.

¹⁶⁴ See *Coughlin v. Radosevich*, 372 N.W.2d 817, 820 (Minn. App. 1985).

2. Property damage

Property damage clearly compensates the plaintiff for damage to tangible property, such as an automobile. Property, however, can be intangible as well as tangible. The scope of intangibles recoverable as property damage in civil damage actions is currently limited to medical and funeral expenses, and loss of earnings and services of a minor.

In *Herbes v. Village of Holdingford*¹⁶⁵ and *Glaesemann v. Village of New Brighton*,¹⁶⁶ the Minnesota Supreme Court held that funeral expenses are recoverable as property damage under the Act. Although neither case specifically addressed the issue of whether medical expenses are recoverable, the logic behind *Herbes* and *Glaesemann* makes it reasonable to conclude that medical expenses are also compensable as property damage. Both cases also held that loss of earnings and services of a minor up to the time of majority also constitutes property damage.¹⁶⁷ The Eighth Circuit has held that a liability insurer was injured in “property” when it made payments on behalf of an intoxicated purchaser’s employer in the settlement of actions against both the intoxicated purchaser and his employer.¹⁶⁸ Two categories of intangibles held *not* to be property damage are the loss of investment in the life of a minor child,¹⁶⁹ and pecuniary losses such as aid, comfort, advice, and assistance of a minor.¹⁷⁰ Whether the typical liquor liability policy provides coverage for the kind of property damage contemplated by *Herbes* and *Glaesemann* remains to be seen and requires an examination of how the policy defines property damage.

3. Loss of means of support

The Minnesota Supreme Court has defined this item of damages as a “reduction of a plaintiff’s standard of living.”¹⁷¹ The plaintiff is entitled to recover any and all such damages, not merely those to which the plaintiff had a legal right.¹⁷² Dicta in *Paine v. Water Works*,¹⁷³ states that definition assigned to loss of means of support damages applies only where the decedent was not the breadwinner. However, Minn. Stat. § 340A.801, subd. 1, does not differentiate between breadwinners and non-breadwinners. Accordingly, there seems to be no good reason for that distinction.

¹⁶⁵ 267 Minn. 75, 85, 125 N.W.2d 426, 432 (1963).

¹⁶⁶ 268 Minn. 432, 435, 130 N.W.2d 43, 45 (1964).

¹⁶⁷ See *Herbes*, 267 Minn. at 85, 125 N.W.2d at 433; *Glaesemann*, 268 Minn. at 435, 130 N.W.2d at 45.

¹⁶⁸ See *Village of Brooten v. Cudahy Packing Co.*, 291 F.2d 284, 300 (8th Cir. 1961).

¹⁶⁹ See *Glaesemann*, 268 Minn. at 437, 130 N.W.2d at 46.

¹⁷⁰ See *Glaesemann*, 268 Minn. at 436, 130 N.W.2d at 45; see also *Clemans v. Northern States Enterprises, Inc.*, 361 N.W.2d 149, 151 (Minn.App. 1985), *pet. for rev. den’d.* (April 18, 1985) (holding that loss of companionship, vacation time, and increased yard work did not constitute property damage under the Civil Damage Act).

¹⁷¹ *Fitzer*, 253 N.W.2d at 404; *Bundy v. City of Fridley*, 265 Minn. 549, 552-53, 122 N.W.2d 585, 588 (1963).

¹⁷² See *Fitzer*, 253 N.W.2d at 404 (citing *Herbes*, 267 Minn. at 84, 125 N.W.2d at 423).

¹⁷³ 269 N.W.2d 725 (1978).

Loss of means of support damages are limited to actual loss of means of support, as opposed to a potential loss of support or legal duty to support. If, for example, a decedent was not making his or her support payments under a divorce decree, there may not be any actual loss of support, even though the court ordered the payments to be made. Divorce pleadings are admissible on the issue of actual loss of means of support.¹⁷⁴ Moreover, the Minnesota Court of Appeals has held that there can be no recovery for loss of means of support where the plaintiff had a twenty-five percent chance of dying from an infection due to the loss of his spleen.¹⁷⁵ The loss of support claim must be “presently established.”¹⁷⁶

Several cases note the limited nature of loss of means of support damages as opposed to the broader category of “other pecuniary loss,” discussed in the following section. Consider, for example, *Bundy v. City of Fridley*,¹⁷⁷ which involved claims made by the parents of a ten year-old boy killed by an automobile driven by the AIP. In affirming the trial court’s order that the parents could make no claim for loss of means of support, the Minnesota Supreme Court stated:

It appears from the record that Douglas Bundy at the time of his death was ten years of age. His father was a lawyer. He resided with his parents in a suburban Twin Cities area and had attended the third grade in school. He was the oldest of four children and assisted his parents in caring for his younger brothers and sister. He was apparently a well-adjusted, intelligent boy and also assisted his parents by rendering small yard and household services. He participated in family activities and contributed to the enjoyment of the family life. It is not contended that he had a monetary income or that he contributed financially in any way to the support of his family.

It is the plaintiff’s contention that it is not necessary for recovery under the Civil Damage Act that they establish loss of financial contributions, or that their standard of living has been affected by the child’s death. They claim, however, that they have sustained a pecuniary loss recognizable as a loss of means of support, even though they were not financially dependent upon their son for support. They base this contention on our recent decision of *Fussner v. Andert*, 261 Minn. 347, 113 N.W.2d 355 (1962), which extended the measure of damages under § 572.02, subd. 1, so as to cover not only the economic loss, but also non-economic incident of services involved in the society and companionship of the deceased child. In other words, we are asked to equate the term “means of support” as found in the Civil Damage Act with the term “pecuniary loss” as found in the death-by-wrongful-act statute. It is contended that the measure of damages comprehended by these terms is coextensive.

¹⁷⁴ See *Bakke v. Rainbow Club*, 306 Minn. 99, 103, 235 N.W.2d 375, 378 (1975).

¹⁷⁵ See *Clemas*, 361 N.W.2d at 152.

¹⁷⁶ *Id.*

¹⁷⁷ See 265 Minn. 549, 122 N.W.2d 585 (1963).

The distinctions between damages recoverable under the Civil Damage Act and the death-by-wrongful-act statute are discussed in *Beck v. Groe*, 245 Minn. 28, 34, 70 N.W.2d 886, 892, 52 A.L.R. 875, 883, where we pointed out:

By the wrongful act the surviving spouse and next-of-kin are given rights within the limits of the statute to recovery damages measured by the mandatory loss to those who come within its provisions The element of dependency is not involved in this statute; the element of pecuniary loss is. * * * The wrongful death act and the civil damage act are wholly unrelated both as to scope and purpose.

Although we have adopted a generally broad and liberal attitude toward the Civil Damage Act, we are nevertheless, in construing the term “means of support” limited to its natural and ordinary meaning consistent with common usage of the term. 17 Dunnell Dig. (3d Ed.) § 8968. That the Legislature did not intend to equate pecuniary injuries with injury to means of support is obvious from the fact that it expressly enumerated the distinct times of injuries for which recovery could be had, without employing the general phrase utilized in the death-by-wrongful-act statute. Had it seen fit to permit recovery for pecuniary loss, appropriate language was available for that purpose. The death-by-wrongful-act statute affords the surviving spouse and next-of-kin a remedy for single pecuniary loss. The Civil Damage Act provides a classification of actionable injuries for which damages may be had.¹⁷⁸

Thus, loss of means of support damages recoverable under the Civil Damage Act are strictly limited to damages that demonstrate a reduction in the plaintiff’s standard of living.

Another case dealing with this issue is *Millbank v. Village of Rose Creek*,¹⁷⁹ in which an automobile insurer settled a wrongful death action against its insured based on pecuniary losses by paying \$17,000 to the appointed trustee. Because the decedent was 21 years old, single, and not supporting anyone, the court held the dram shop was obligated to pay only half of the funeral and ambulance expenses, since the family sustained no loss of means of support.¹⁸⁰ Likewise, in *Fitzer*, the dram shop’s obligation was limited to contribution toward special damages of approximately \$5,000, because the decedent was an adult, unmarried male, whereas the AIP, who was sued under the wrongful death statute, was obligated to pay \$150,000 in damages to the decedent’s heirs.¹⁸¹

Recently, in *Britamco Underwriters, Inc.*,¹⁸² the Minnesota Court of Appeals affirmed a district court’s conclusion that a plaintiff is not entitled to recover both bodily injury damages and loss

¹⁷⁸ *Bundy*, 365 Minn. at 551-52, 122 N.W.2d at 587-588.

¹⁷⁹ 302 Minn. 282, 225 N.W.2d 6 (1974).

¹⁸⁰ *See Millbank*, 302 Minn. at 283, 225 N.W.2d at 8.

¹⁸¹ 253 N.W.2d at 398.

¹⁸² *See* 649 N.W.2d 867, 871 (Minn.App. 2002).

of means of support damages. The court noted that “Minn. Stat. § 340A.801, subd. 1, which is the only provision that confers a cause of action under the Civil Damage Act, does not include the injured person.”¹⁸³ The court determined that the phrase “means of support” “incorporates within it the requirement that a claimant be a dependent.”¹⁸⁴ Moreover, the court observed that “no reported Minnesota cases have ever granted ‘loss-of-mean-of-support’ damages to the injured ‘breadwinner.’ Rather, the loss-of-support cases have involved dependents.”¹⁸⁵

4. Other pecuniary loss damages

The Civil Damage Act also allows for recovery of “other pecuniary loss.”¹⁸⁶ The phrase “pecuniary loss” refers to damages for loss of advice, comfort, assistance, and protection.¹⁸⁷ The concept of pecuniary loss damages is generally attributed to Minnesota’s Wrongful Death Act,¹⁸⁸ making it reasonable for defendant dram shops to argue that an award of pecuniary loss damages is improper in cases involving personal injury, but not death. The Minnesota Court of Appeals has disagreed with that argument in two separate cases.¹⁸⁹ Personal injury cases that involve a claim for other pecuniary loss tend to involve severe personal injuries, such as brain injuries, that so debilitate the plaintiffs’ loved one that the plaintiffs are deprived of that person’s advice, comfort, assistance, and protection just as if that person had died.

5. Damages checklist

It is important for the plaintiff’s counsel to determine at the outset what damage items can be sought. To that end, the initial client interview should cover these issues relative to damages:

1. Has the plaintiff sustained personal injury damages such as past and future medical expenses, pain and suffering?
2. Has the plaintiff sustained property damage, including damage to tangible property, medical and funeral expenses, the loss of earnings, or the support of a minor?
3. Has the plaintiff sustained any loss of actual means of support that are presently established, showing a reduction in the plaintiff’s standard of living?
4. Has the plaintiff sustained any other pecuniary losses such as advice, comfort, assistance and protection as a result of the illegal sale?

¹⁸³ *Bitamco*, 649 N.W.2d at 872.

¹⁸⁴ *Id.* (citing *Jones v. Fisher*, 309 N.W.2d 726, 730 (Minn.1981), recognizing that “[d]amages under the dram shop act, in case of death, are limited to loss of ‘means of support’ to decedent’s dependents”).

¹⁸⁵ *Id.*

¹⁸⁶ See Minn. Stat. § 340A.801, subd. 1.

¹⁸⁷ See *Brault v. Acceptance Indemnity Insurance Company*, 538 N.W.2d 144, 148 (Minn.App. 1995).

¹⁸⁸ See Minn. Stat. § 573.02.

¹⁸⁹ See *Coolidge v. St. Paul Fire & Marine Ins. Co.*, 523 N.W.2d 5, 6 (Minn.App. 1994); *DiSanti v. Youngs*, 2003 WL 139393, *7 (Minn.App. Jan. 21, 2003) (unpublished).

For each question answered affirmatively, the plaintiff's counsel should set about gathering as much information and documentation from his or her clients to support each item of damage claimed.

Obtaining that information early is important for at least two reasons. First, the savvy defense counsel is likely to ask specific interrogatories designed to obtain that information through discovery. Second, prosecution of a civil damage case may not be worth the effort, depending on the extent of the plaintiff's damages, the degree of effort required to prove damages, and the commercial liquor vendor's relatively limited exposure in view of recent amendments to Minnesota's comparative fault statute.¹⁹⁰

E. Statutory Notice Requirements

A civil damage plaintiff must serve the licensee or municipality (in cases involving municipal liquor licenses) with written notice of the illegal sale and the plaintiff's resulting damage. A person who claims damages, and a person or insurer who claims contribution or indemnity because of an injury compensable under the Civil Damage Act, must give the licensee or the municipality written notice of the claim.¹⁹¹ The notice must state: (1) the time and date when the intoxicants were illegally sold or bartered, as well as the identity of the AIP; (2) the name and address of the person(s) injured or whose property was damaged as a result of the illegal sale; and (3) the approximate time, date, and place of the claimed personal injury or property damage occurred.¹⁹² Similarly, a licensee or municipality claiming contribution or indemnification from another licensee or municipality must also give a similar written notice to the other licensee or municipality.¹⁹³

An otherwise valid notice is not rendered invalid due to a substantially immaterial error or omission.¹⁹⁴ In *Olander v. Sperry & Hutchinson Co.*,¹⁹⁵ the Minnesota Supreme Court held that "substantial compliance with respect to the adequacy of a description of the time, place, and circumstances surrounding a loss or injury was sufficient under the statute." Presumably, substantial compliance will have to be determined on a case-by-case basis.¹⁹⁶ In any event, the "determination of the sufficiency of the notice is for the trial court as a jurisdictional matter to be disposed of before commencement of trial."¹⁹⁷

¹⁹⁰ See Chapter III, D. Comparative Fault in Dram Shop Actions at 49 and ff., *infra*.

¹⁹¹ In the case of municipal licensees, this notice supersedes the notice requirement of Minn. Stat. § 466.05, which governs tort claims made against political subdivisions. See *Hahn*, 238 Minn. at 438-39, 56 N.W.2d at 262.

¹⁹² See Minn. Stat. § 340A.802, subd. 1.

¹⁹³ For the specific rules regarding providing notice to a municipality, please see section F. Claims Against Municipalities, below.

¹⁹⁴ See *Young v. 2911 Corp.*, 529 N.W.2d 715, 717 (Minn.App. 1995).

¹⁹⁵ 293 Minn. 162, 163, 197 N.W.2d 438, 439 (1972) (overruled by *Jenkins v. Board of Ed. Of Minneapolis Special School District No. 1*, 228 N.W.2d 265 (Minn. 1975) stating that only the manner of service still allows for substantial compliance).

¹⁹⁶ See generally *Donahue v. West Duluth Lodge*, 308 Minn. 284, 241 N.W.2d 812 (1976).

¹⁹⁷ *Olander v. Sperry & Hutchinson Co.*, 293 Minn. 162, 171, 197 N.W.2d 438, 443 (1972).

It is extremely important for the dram shop claimant, be it a plaintiff claiming personal injuries or a party seeking contribution or indemnity, to give adequate and timely notice of the dram shop claim. Service of proper notice is a necessary condition to bringing a valid civil damage claim.¹⁹⁸ Failure to comply with the notice provision will result in dismissal of the claim.¹⁹⁹ Consequently, an attorney who represents the injured party in a personal injury case where drinking is involved must conduct a diligent investigation of the case's facts to ascertain the existence of any potential civil damage claims so that adequate and timely notice can be given. Failure to do so may result in a lost opportunity for compensation for the injured plaintiff.

Certain timing provisions apply to the notice requirement. A person claiming damages must serve the notice within 240 days of the date that person enters into an attorney-client relationship with regard to the claim.²⁰⁰ However, the retainer agreement between the plaintiff and the attorney need not specifically reference representation for a dram shop claim.²⁰¹ Written notice served beyond this time period is improper notice and subjects the claim to dismissal. Therefore, when defending a civil damage claim, it is important for defense counsel to obtain a copy of the retainer agreement between the plaintiff and his or her attorney in order to determine whether written notice was timely given.

Claims for contribution or indemnity have their own timing requirements. Notice of such a claim must be served within 120 days after the injury occurs or within 60 days after written notice of a claim for contribution or indemnity, whichever is given.²⁰² "Injury" in this context refers to the underlying accident giving rise to the contribution or indemnity claim, not the financial injury sustained by the party seeking contribution from a commercial liquor vendor.²⁰³ If requested to do so, a municipality or licensee receiving the notice shall promptly furnish to the claimant's attorney the names and addresses of other municipalities or licensees who sold or bartered liquor to the AIP, if known.²⁰⁴

Written notice must be given in good faith. Bad faith notice subjects a claimant to liability for actual damages, including reasonable out-of-pocket attorney fees incurred by the licensee who did not sell or barter liquor to the AIP.²⁰⁵ Although the phrase "bad faith" is not defined, it appears to include situations in which the claimant lacks any evidence to either confirm, or that would allow a reasonable inference to be drawn, that the AIP was present and served at the licensee's establishment. The good faith requirement is clearly designed to prevent a "shot gun" approach to serving notices without conducting an investigation or receiving information sufficient to warrant provision of written notice.

¹⁹⁸ See *May v. Strecker*, 453 N.W.2d 549, 553 (Minn.App. 1990).

¹⁹⁹ See *Olson v. Blaeser*, 448 N.W.2d 113 (Minn.App. 1990).

²⁰⁰ See Minn. Stat. § 340A.802, subd. 2.

²⁰¹ See *Prince v. Torgersons of Austin*, 1992 WL 231667 (Minn.App. Sept. 22, 1992) (unpublished).

²⁰² See Minn. Stat. § 340A.801, subd. 2.

²⁰³ See *Oslund v. Johnson*, 578 N.W.2d 353, 357 (Minn.App. 1994).

²⁰⁴ See Minn. Stat. § 340A.802, subd. 2.

²⁰⁵ See *id.*, § 340A.802, subd. 3.

Actual notice of facts reasonably sufficient to put the licensee or municipality on notice relieves the plaintiff from having to comply with the notice requirement.²⁰⁶ However, the licensee or municipality must have sufficient notice following an accident that the plaintiff intends to pursue a civil damage claim.²⁰⁷ It is not sufficient that the licensee or municipality have knowledge that the AIP was drinking at its establishment.²⁰⁸

The notice requirement has withstood constitutional attack. In *Olson v. Blaeser*,²⁰⁹ the plaintiff was injured in an automobile accident on October 20, 1985. He retained counsel in March of 1986, but failed to serve notice on the city until July 23, 1986.²¹⁰ The city, which had no actual notice of the claim, moved for summary judgment for lack of notice.²¹¹ The plaintiff challenged the notice requirement, claiming that it violated the equal protection clauses of both the Minnesota and United States Constitutions.²¹² The Minnesota Court of Appeals held that the notice requirement was constitutional, despite its harsh result.²¹³

Despite its constitutionality, the notice requirement can have inequitable results. For example, consider a situation in which the plaintiff sues Bar A and the AIP. Bar A is uninformed about the fact that Bar B may also have illegally sold alcohol to the plaintiff. Since no one ever gave Bar A notice of a claim for contribution or indemnity, the 60-day clause of the notice requirement applicable to those kind of claims is inoperative. Presumably, Bar A must give notice to Bar B of its contribution or indemnity claim within 120 days after the accident. Doing so may be impossible for Bar A, particularly if Bar A was notified of the plaintiff's dram shop claim on the 120th day, or perhaps even afterward if the plaintiff did not retain counsel for several weeks after the accident. This situation raises a possibility that Bar B could escape liability for the accident and leave Bar A to pay more than its fair share of liability. Minnesota courts have attempted to cure this inequity by holding the notice requirements unenforceable in contribution actions where compliance was impossible.²¹⁴

F. Claims Against Municipalities

Special notice provisions in the Minnesota Political Subdivisions Tort Claims Act apply to suits against a municipality.²¹⁵ This situation usually arises within the dram shop context when the dram shop defendant is a municipal liquor store. Any person, whether plaintiff, defendant or

²⁰⁶ See *id.*, § 340A.802, subd. 2.

²⁰⁷ See *Donahue v. West Duluth Lodge No. 1478*, 308 Minn. 284, 286-87, 241 N.W.2d 812, 814 (1976).

²⁰⁸ See *Schulte v. Corner Club Bar*, 544 N.W.2d 486, 489 (Minn. 1996).

²⁰⁹ See 458 N.W.2d 113 (Minn.App. 1990).

²¹⁰ See *Olson*, 458 N.W.2d at 115.

²¹¹ See *id.*

²¹² See *Olson*, 458 N.W.2d at 115.

²¹³ See *id.* at 120.

²¹⁴ See *Hammerschmidt v. Moore*, 274 N.W.2d 79, 82 (Minn. 1978).

²¹⁵ See Minn. Stat. ' 466.05, subd. 1 (2005).

third-party plaintiff or defendant, who claims damages as a result of an injury caused by a municipality must provide notice to the municipality's governing body within 180 days of the injury.²¹⁶ The notice must include the time, place and circumstances of the injury, the names of the municipal employees involved, and the amount of compensation or relief demanded.²¹⁷ The 180 day period does not include any time during which the claimant is incapacitated because of the injury.²¹⁸ Failure to state a demand amount will not invalidate the notice to the municipality.²¹⁹ However, if the claimant fails to state a demand amount in the notice, the claimant must provide the municipality with that information within 15 days after the municipality demands it.²²⁰

Notice must be given to a responsible municipal official who is likely to place the notice before the municipality's governing body at the next meeting.²²¹ The purpose of the notice requirement is to allow the municipality to initiate an investigation to determine the nature and validity of the claim.²²² If a claimant fails to give notice to the municipality, the claim is not automatically dismissed.²²³ Rather, in order to obtain a dismissal the municipality must show that the claimant's failure to give notice prejudiced the municipality.²²⁴ The Minnesota Supreme Court has held that the notice requirement is satisfied so long as the claimant substantially complies with Minn. Stat. § 466.05.²²⁵

The maximum liability of any municipality on a claim is \$300,000.00 for any one claimant and \$1,000,000.00 for any number of claimants in a single occurrence for claims arising after January 1, 2000.²²⁶ A municipality has the right to purchase liability insurance over and above the maximum liability stated in Minn. Stat. § 466.04.²²⁷ However, the municipality waives "its section 466.04 liability limits by purchasing insurance in excess of those limits."²²⁸ "The procurement of such insurance constitutes a waiver of the limits of governmental liability . . . only to the extent that valid and collectible insurance . . . exceeds those limits and covers the claim."²²⁹

²¹⁶ See Minn. Stat. § 466.05, subd. 1.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ Minn. Stat. § 466.05, subd. 1.

²²¹ See *Seifert v. City of Minneapolis*, 298 Minn. 35, 213 N.W.2d 605 (1973).

²²² See *Olander*, *supra*.

²²³ See *Nisbet v. Hennepin County*, 548 N.W.2d 314 (Minn. App. 1996).

²²⁴ *Id.*

²²⁵ See *Kossak v. Stalling*, 277 N.W.2d 30 (Minn. 1979).

²²⁶ See Minn. Stat. § 466.04, subd. 1(1) and (3) (2005).

²²⁷ See Minn. Stat. § 466.06 (2005).

²²⁸ See *Casper v. City of Stacy*, 473 N.W.2d 902, 905 (Minn. App. 1991)

²²⁹ Minn. Stat. § 466.06.

G. Statute of Limitations

Compliance with the applicable statute of limitation is a necessary prerequisite to any legal claim, including civil damage claims. A civil damage action must be commenced no later than two years after the injury occurs.²³⁰ The legislature did not specify what statute of limitations would apply to statutory or common law host claims.

²³⁰ See Minn. Stat. § 340A.802, subd. 2.

III. COMMON ISSUES INVOLVING THE CIVIL DAMAGE ACT

A variety of common issues may arise when prosecuting or defending a claim under the Civil Damage Act. They include what parties are entitled to make claims under the Civil Damage Act, and why naming the proper party plaintiff is critical to the success of a civil damage claim. Other common issues are the admissibility of blood alcohol concentration data, and the mechanics of comparative fault in civil damage cases. Here we also discuss subrogation and collateral source considerations, the right to recover damages from a commercial liquor vendor's bonding company, the extra-territorial application of the Act, minimum insurance requirements imposed upon commercial liquor vendors, and the effect of *Pierringer* releases when settling claims involving liquor.

A. Parties Entitled to Make Civil Damage Claims

The Civil Damage Act gives a right of action against a commercial liquor vendor to any "spouse, child, parent, guardian, employer or other person" injured by an intoxicated person.¹ If a mother and wife are injured by an intoxicated person, she is entitled to bring a direct action under the Civil Damage Act in the typical dram shop case. Her spouse and children also may have claims for loss of means of support and/or other pecuniary loss.

The inclusion of the phrase "other person" creates potential claims beyond those of the injured party and his or her family members. It refers to any other person injured by the intoxication of another, provided that person played no role in causing the intoxication.² The key determination is whether the "other person" can be considered an innocent third party. Such a person need not have a legal relationship to the injured party in order to have a cause of action. For example, a fiancée or ex-wife of the injured party may qualify as an "other person" and, thus, have a cause of action against the commercial liquor vendor despite the lack of any legal relationship to the injured party.³ A liability insurer of a business that settles a claim for damages against the business and its employee arising from the illegal sale of alcohol qualifies as an "other person," having a right of action in its own name against the offending commercial liquor vendor to recover sums it paid to settle the injured third party's personal injury claim against the business and its employee.⁴ Minnesota courts have yet to define how wide the class of "other persons" is. It is fair to assume that courts will interpret the phrase "other person" liberally to achieve the Civil Damage Act's purposes.

Despite the likely broad interpretation courts are likely to give the phrase "other person," the list of potential dram shop plaintiffs is not infinite. The Civil Damage Act does not create a cause of action favoring one injured by his own voluntary intoxication.⁵ This rule makes sense when one

¹ See Minn. Stat. § 340A.801, subd. 1.

² See *Lefto v. Hogsbreath Enterprises, Inc.*, 581 N.W.2d 855, 858 (Minn. 1998).

³ See *id.* at 859. (holding that decedent's fiancée had a right of action against commercial liquor vendor whose illegal sale caused the fiancée's death).

⁴ See *Village of Brooten v. Cudahy Packing Company*, 191 F.2d at 277, 300 (8th Cir. 1961).

⁵ See *Robinson v. Lamott*, 289 N.W.2d 60 (Minn. 1979); *Martinson v. Monticello Municipal Liquors*, 297 Minn. 48, 209 N.W.2d 902 (1973); *Empire Fire & Marine Insurance Co. v. Williams*, 265 Minn. 333, 121 N.W.2d 580 (1963);

considers that a proper party plaintiff for purposes of the Civil Damage Act is an innocent third party, *i.e.*, one who played no role in the intoxication.⁶ In *Robinson*, the Minnesota Supreme Court held that an alcoholic is prohibited from maintaining a dram shop claim, even though his consumption of alcohol may not be entirely voluntary.⁷ This holding also makes sense, when one considers that the Civil Damage Act was enacted, in part, to suppress the mischief resulting from the abuse of intoxicating liquor.⁸

The Civil Damage Act also does not give a minor a right of action against a commercial liquor vendor who furnishes the minor with intoxicating liquor.⁹ In *Cavin*, a minor plaintiff commenced an action against a bar that had allegedly sold him alcohol.¹⁰ The minor plaintiff claimed the illegal sale caused him to become intoxicated and rendered him unable to defend himself from an assault inflicted by a fellow patron.¹¹ The Minnesota Supreme Court held that a minor injured because of an illegal sale of alcohol has no cause of action against a commercial liquor vendor that made the sale.¹² Minnesota courts steadfastly adhere to this rule, despite imaginative efforts to circumvent it.¹³

Although a liability insurer can qualify as an “other person,” the Minnesota Supreme Court has specifically held that the insurer’s ability to recover payments made on behalf of its insured depends on its insured’s ability to successfully prosecute the action.¹⁴ If, for example, the insured is the AIP, then neither the AIP nor the AIP’s insurer can recover.¹⁵ Note, however, that the Civil Damage Act has prohibited subrogation claims against commercial liquor vendors by first party insurers since July 1, 1985.¹⁶

State Farm Mutual Automobile Insurance Co. v. Village of Isle, 265 Minn. 360, 122 N.W.2d 36 (1963); *Randall v. Village of Excelsior*, 258 Minn. 81, 103 N.W.2d 131 (1960); *Stabs v. City of Tower*, 229 Minn. 552, 40 N.W.2d . 362 (1949).

⁶ See *Herrly v. Muzik*, 374 N.W.2d 275, 758 (Minn. 1985).

⁷ See *Robinson*, 289 N.W.2d at 63.

⁸ *Ross*, 294 Minn. at 120, 200 N.W.2d at 155.

⁹ See *Cavin v. Smith*, 228 Minn. 322, 323, 37 N.W.2d 368, 369 (1949).

¹⁰ See *id.*

¹¹ See *id.*

¹² See *id.* at 324, 37 N.W.2d at 369.

¹³ See *Empire Fire & Marine Insurance Company v. Williams*, 265 Minn. 333, 337, 121 N.W.2d 580, 583 (1963); *Randall v. Village of Excelsior*, 258 Minn. 81, 83, 103 N.W.2d 131, 133 (1960); *Cavin v. Smith*, 228 Minn. 322, 323-324, 37 N.W.2d 368, 369 (1949); see also Order and Memorandum in *Jayne Inman v. TR Restaurants of Bloomington, Inc.*, Court File No.: 98-19030 (Hennepin Co. Dist. Ct. Dec. 1, 1999) (holding that intoxicated minor’s attempted civil damage claim failed to state a claim for which relief could be granted and denying the plaintiff’s motion to amend complaint to assert negligence per se claim based on the illegal sale).

¹⁴ See *Empire Fire & Marine Ins. Co.*, 265 Minn. at 337, 121 N.W.2d at 583.

¹⁵ See *Robinson*, 289 N.W.2d at 63; *Sworski v. Coleman*, 204 Minn. 474, 283 N.W. 778 (1939); *Nelson v. Larson*, 405 N.W.2d 455, 459 (Minn. App. 1987).

¹⁶ See Minn. Stat. § 340A.801, subd. 12.

While an insurer is barred from recovering damages under the Civil Damage Act if its insured is barred, the insurer nevertheless has a right of contribution against the commercial liquor vendor for its aliquot share of the recovery by the injured party.¹⁷ Furthermore, although the AIP cannot recover damages, because the AIP is not a proper party plaintiff, the AIP's spouse and other dependants can recover damages for loss of means of support, property damage and other pecuniary loss.¹⁸ Again, the intention behind these rules is to compensate innocent third parties who sustained damages as a result of an illegal sale but who played no role in the AIP's intoxication.

Interestingly, a party cannot be considered an "other person" simply because he or she played no role in causing the AIP's intoxication. The status of "other person" apparently requires a party to be without fault. In *Nelson v. Larsen*,¹⁹ a negligent driver struck and seriously injured an intoxicated pedestrian. The negligent driver commenced a civil damage action, contending that he was entitled to sue the commercial liquor vendor as an "other person."²⁰ The Minnesota Court of Appeals disagreed, stating that, although the negligent driver was innocent in that he did not contribute to the AIP's intoxication, he was still a tortfeasor and "not totally without fault."²¹ Thus, an innocent third party who played no role in the AIP's intoxication, but who did play a role in causing the AIP's injury, is apparently not an "other person" entitled to sue the commercial liquor vendor.

B. Naming the Proper Party Plaintiff

A civil damage action must be brought in the name of the injured party. It cannot be maintained, for example, by a representative of the decedent's estate.²² If the action is undertaken for the benefit of a minor, it should be maintained by the minor's surviving parent or guardian.

Civil damage actions involving death can create interesting procedural problems for both plaintiffs and defendants. Consider, for example, *Haugland v. Mapleview Lounge Bottleshop, Inc.*²³ Robert John Donovan, Sr., died on February 20, 1999 in an automobile accident and was survived by his son, Robert Donovan, Jr., and Haugland, his son's maternal aunt. On February 12, 2002, Haugland served a summons and complaint on Mapleview Lounge Bottleshop, Inc., a commercial liquor vendor, purporting to make a civil damage claim.²⁴ The complaint identified Haugland as "Debra K. Haugland, as trustee for the next of kin of Robert John Donovan, Sr."²⁵ The district court dismissed the complaint for failure to state a claim for which relief could be

¹⁷ See Contribution between Defendants, *infra*.

¹⁸ See *Jones v. Fisher*, 309 N.W.2d 726 (Minn. 1981); *Ascheman v. Village of Hancock*, 254 N.W.2d 382 (1976).

¹⁹ 405 N.W.2d 455 (Minn.App. 1987).

²⁰ See *Nelson*, 405 N.W.2d at 459.

²¹ *Nelson*, 405 N.W.2d at 459.

²² See *Beck*, 245 Minn. at 34-35, 70 N.W.2d at 892; *Sworski*, 204 Minn. at 477, 283 N.W. at 780.

²³ 643 N.W.2d 618, 622 (Minn. App. 2002).

²⁴ See *Haugland*, 643 N.W.2d at 620.

²⁵ See *id.*

granted, because “the action for injury to Donovan’s survivors could not be brought in the name of the next of kin”²⁶ The district court also refused to allow the complaint to be amended to name the real party in interest because the two-year statute of limitations had expired.²⁷ Haugland appealed.

The Minnesota Court of Appeals affirmed the district court’s decision, holding that a dram shop plaintiff must prove that he or she sustained damages and must make a civil damage claim in his or her own name.²⁸ In so holding, the court of appeals noted: “Haugland’s complaint . . . does not allege that Haugland suffered any loss, as trustee or in any other capacity Therefore she did not have a right of action under the Civil Damages Act.”²⁹ Haugland’s dram shop claim was a legal nullity, because she was not a proper party plaintiff. Under those circumstances, the proposed amended complaint, which did name a proper party plaintiff, could not fairly relate back to the original complaint.³⁰ The passage of the two-year statute of limitation precluded Robert Donovan, Jr., from commencing a civil damage claim in his own name.³¹

The Minnesota Supreme Court unanimously reversed both the court of appeals and the district court, holding that the complaint could be amended and that the amended complaint, although interposed after the statute of limitation had expired, would relate back to the original, timely complaint.³² In so ruling, the court observed that the original complaint provided the dram shop with ample notice of a civil damage claim by Robert Donovan, Jr., thereby avoiding any prejudice to the dram shop.³³ Moreover, the court reasoned that the proposed amended complaint related back to the original complaint pursuant to Minn.R.Civ.P. 15.03, because it arose from the same factual occurrence set forth in that pleading.³⁴ The court supported its reasoning by citing to its prior decision in *Richardson v. Kotek*, wherein the court held that the district court improperly refused to allow the plaintiff to correct a technical flaw in the caption of a complaint seeking to recover possession of real property.³⁵ Thus, the Minnesota Supreme Court has determined that Minn.R.Civ.P. 15.03 permits the amendment of a civil damage complaint to name the real party in interest after the statute of limitation has expired, provided that the original complaint puts the defendant on notice of the claim, the amendment arises out of the same conduct, transaction, or occurrence as the original complaint, and the defendant is not unduly prejudiced.³⁶

²⁶ *See id.*

²⁷ *See id.*

²⁸ *See id.* at 622 (citing *Beck v. Groe*, 245 Minn. 28, 45, 70 N.W.2d 886, 898 (1955)).

²⁹ *Haugland*, 643 N.W.2d at 622.

³⁰ *Id.* at 623.

³¹ *Id.*

³² *See Haugland v. Mapleview Lounge & Bottleshop, Inc.*, 666 N.W.2d 689, 695 (Minn. 2003).

³³ *See id.* at 694.

³⁴ *See id.* at 694-695.

³⁵ *See id.* at 695 (citing *Richardson v. Kotek*, 123 Minn. 360, 361-362, 143 N.W. 973, 974 (1916)).

³⁶ *Haugland*, 666 N.W.2d at 690 *syllabus*.

The court's reliance on *Richardson* is troublesome when one considers that *Richardson* did not involve a statutory claim for damages that specifically identified the universe of eligible plaintiffs. While a technical deficiency in a caption should not defeat an otherwise valid claim, it is difficult to understand how a party who is not a proper plaintiff for purposes of the Civil Damage Act should be entitled to amend the complaint after the statute of limitations expires because the Act's specific enumeration of eligible plaintiffs is a mere technicality. A civil damage claim is a creature of statute. If it is not commenced by someone who is statutorily authorized to make that claim, it is difficult to understand how the failure to properly caption and plead that claim amounts to a mere technicality. *Haugland* does not address that concern.

Moreover, *Haugland's* result is completely at odds with the manner in which the Minnesota Supreme Court has dealt with post statute of limitation efforts to cure pleading deficiencies in wrongful death cases. For example, in *Ortiz v. Gavenda*,³⁷ the plaintiff commenced a wrongful death claim against the defendant without having had herself named as the trustee for her husband's estate. She eventually had herself appointed as trustee for her husband's next of kin after the three-year statutory limitation period set forth in Minn. Stat. ' 573.02.³⁸ The Minnesota Supreme Court held that the district court properly denied the plaintiff's motion to amend her complaint and specifically stated that the amended pleading could not relate back to the initial, timely complaint because that pleading was a legal nullity.³⁹ The court reached a similar decision in *Regie de l'assurance Auto. du Quebec v. Jensen*.⁴⁰

The Minnesota Supreme Court distinguished *Haugland* from *Ortiz* and *Regie* by noting that timely appointment of a wrongful death trustee is a necessary prerequisite to bringing an actionable wrongful death claim, whereas the Civil Damage Act contains no similar requirement.⁴¹ That distinction, however, seems to be one of form over substance, particularly when one considers that the Civil Damage Act specifically enumerates the kinds of persons entitled to make civil damage claims. If a wrongful death claim commenced by a plaintiff who has not been appointed trustee for the decedent's next of kin is a legal nullity, it seems logical that a civil damage claim commenced by someone other than a spouse, parent, child, guardian, employer, or other person should also be a legal nullity. It seems incongruous that a plaintiff in a wrongful death case cannot cure such a pleading deficiency, while a plaintiff in a civil damage action is allowed to do so, particularly where both the Wrongful Death Act and the Civil Damage Act are creatures of statute and specify who is an eligible party plaintiff. For now, *Haugland* is the final word on this issue, and the incongruity it has created may, ultimately, need to be addressed through a legislative amendment to the Civil Damage Act.

³⁷ See 590 N.W.2d 119, 121.

³⁸ See *Ortiz*, 590 N.W.2d at 121.

³⁹ See *id.* at 123.

⁴⁰ See 399 N.W.2d 85 (Minn. 1987).

⁴¹ See *Haugland*, 666 N.W.2d at 695.

C. Admissibility of Blood Alcohol Concentration Data

With proper foundation, reports of laboratory analyses of an AIP's blood-alcohol content are ordinarily admitted to show the state of intoxication of the person whose test was taken.⁴² There are, however, two situations in which such reports are arguably not admissible.

1. Coroner reports

Minnesota statutes provide that coroner's reports and the information contained therein "may be used only for statistical purposes which do not reveal the identity of the deceased."⁴³ On the other hand, all written and supplemental reports required to be provided to the Department of Public Safety "shall be for the confidential use of the department" and "no such report shall be used as evidence in any trial, civil or criminal, arising out of an accident."⁴⁴ The same statute also provides, however, that "[n]othing herein shall be construed to prevent any person who has made a report pursuant to this chapter from, therefore, testifying in any trial, civil or criminal, arising out of an accident, as to facts within the person's knowledge."⁴⁵

Presumably, the coroner or other such person could be subpoenaed and required to testify about what he knows. The coroner could use the report as a recorded recollection. He could also undoubtedly refresh his recollection by reading the report before testifying so that the information would be elicited as though the report itself were admissible. Either way, the report itself need not be admitted and "used as evidence." Whether the act of refreshing his recollection prohibits his subsequent testimony is not decided, but such a result seems unlikely.

2. The implied consent rule

Another related issue concerns whether blood-alcohol tests taken under the implied consent statute are admissible in civil actions.⁴⁶ In *State v. Oevering*, a criminal negligence prosecution, the court sustained the admission of the blood-alcohol test, taken while the defendant was unconscious and therefore without his consent, because there was probable cause to believe the defendant was guilty of criminal negligence.⁴⁷ In *Alman v. Anderson*, a civil case, the blood-alcohol test was excluded upon a showing that the party in question was incapacitated from giving consent.⁴⁸ The person tested was the plaintiff. The case is especially interesting because the plaintiff testified she had only been drinking minimally and, the jury found plaintiff 40 percent at fault without the admission of the blood test.⁴⁹ The *Alman* case probably has limited

⁴² *Herbes v. Village of Holdingford*, 267 Minn. 75, 125 N.W.2d 426 (1963).

⁴³ Minn. Stat. § 169.09, subd. 11 (2004).

⁴⁴ *Id.*, § 169.09, subd. 13.

⁴⁵ *Id.*

⁴⁶ See *Alman v. Anderson*, 264 N.W.2d 651 (Minn. 1978); *State v. Oevering*, 268 N.W.2d 68 (Minn. 1978); and *Tucker v. Pahkala*, 268 N.W.2d 728 (Minn. 1978).

⁴⁷ *Oevering*, 268 N.W.2d at 73; see also *State v. Dewey*, 272 N.W.2d 355 (Minn. 1978).

⁴⁸ *Alman*, 264 N.W.2d at 652.

⁴⁹ *Id.* at 651.

significance, because defense counsel conceded that the blood test was admissible only if given voluntarily and the Supreme Court did not decide whether an involuntary blood test was admissible.

That issue was probably resolved in *Tucker v. Pahkala*.⁵⁰ There, the Supreme Court allowed receipt of the blood-alcohol analysis in a civil case even though the defendant was unconscious at the time the blood was drawn and, therefore, could not have consented to the test.⁵¹ The court held that the implied consent law⁵² is not applicable in civil cases and that test results for blood alcohol may be received in evidence even though obtained without the consent of the party.⁵³

3. Medical records discussing intoxication

The Business Records as Evidence Act⁵⁴ allows the admission of hospital and medical records as exception to the hearsay rule if there is evidence the entries were made “in the regular course of business.”⁵⁵ In *Wadena v. Bush*,⁵⁶ the court held that references to intoxication in hospital records is not within the Business Records exception and is not admissible absent a showing that such entries were “germane to medical history, treatment, or diagnosis.”⁵⁷ Accordingly, the court affirmed the trial court’s expungement a doctor’s diagnosis that the patient was “drunk” on the grounds that no such showing had been made.

An AIP’s medical records are inadmissible unless he has put his condition in controversy.⁵⁸ A mere denial that the AIP was intoxicated is insufficient to make them admissible.

D. Comparative Fault in Dram Shop Actions

In most cases, once a jury or other fact finder determines that there has been an illegal sale along with causation, the next step is an apportionment of fault between the parties. To that end the fact finder must compare the relative fault of the AIP and the liquor vendor along with any other at-fault party. Pursuant to the specific terms of the Civil Damage Act, all actions under the Act are governed by Minnesota’s Comparative Fault Statute, Minn. Stat. § 604.01, meaning that the fault of the plaintiff will serve to reduce or deny the plaintiff’s claim.⁵⁹ However, in actions brought by dependent family members of an AIP, the fault of the AIP cannot be used against the

⁵⁰ *Supra*.

⁵¹ *Tucker*, 268 N.W.2d at 729.

⁵² Minn. Stat. § 169.123.

⁵³ *Tucker*, 268 N.W.2d at 730.

⁵⁴ Minn. Stat. § 600.02 (2004); Minn. R. Evid. 803(b).

⁵⁵ *Lindstrom v. Yellow Taxi Co. of Minneapolis*, 298 Minn. 224, 214 N.W.2d 672 (1974).

⁵⁶ 305 Minn. 134, 232 N.W.2d 753 (1975).

⁵⁷ *Wadena*, 305 Minn. at 139, 232 N.W.2d at 753.

⁵⁸ *Knudsen v. Pieckert*, 301 Minn. 287, 221 N.W.2d 785 (1974).

⁵⁹ *K.R. v. Sanford*, 605 N.W.2d 387 (Minn. 2000).

family members making the claim.⁶⁰ In *Skelly v. Mount*⁶¹ the Court of Appeals extended the term “other people” to include an AIP’s ex-wife. It should be noted that Ms. Skelly was allowed to recover under the Civil Damage Act. Had her ex-husband died as a result of the automobile accident without a dram shop component she would not have had a claim as the wrongful death statute specifically limits recovery to the deceased’s “next of kin.”⁶² Therefore, damages sustained by anyone to whom a duty of support exists will not be reduced by the fault of the AIP.

1. Complicity

Another factor to be considered under the comparative fault statute as it relates to dram shop claims is complicity. Complicity is the active participation by the plaintiff in the intoxication of the AIP. For example, the plaintiff and the AIP go to the bar for an evening of fun. Throughout the evening, the plaintiff and the AIP buy one another drinks, become obviously intoxicated, and continue purchasing drinks for one another. The plaintiff is injured as a passenger in the AIP’s automobile in an accident caused by the AIP’s intoxication. In that situation, the dram shop may argue that the plaintiff is guilty of complicity. Prior to 1990 complicity stood as an absolute bar to recovery.⁶³ In actions arising after May 4, 1990 complicity is merely a factor of the comparative fault analysis but does not bar the claim.⁶⁴

2. Joint and several liability

Joint and several liability principals apply to dram shop actions. Since the AIP involved in an automobile accident is commonly uninsured or underinsured, joint and several liability exposure is an important component to evaluating a claim. Of particular interest is the amendment made to Minnesota’s joint and several liability statute in 2003.⁶⁵

Prior to that amendment, if a judgment was not collectible against a responsible party, the remaining liable parties would be held jointly and severally liable for the judgment. However, any tortfeasor whose fault was 15 percent or less could be liable for a percentage of the total award no greater than four times that tortfeasor’s percent of fault.

For claims arising on or after August 1, 2003,⁶⁶ collectible defendants as severally liable for the judgment in proportion to their percentage of fault. Any tortfeasor whose fault is greater than 50 percent will be held jointly *and* severally liable for the judgment.⁶⁷

⁶⁰ *Paulson v. Lapa, Inc.*, 450 N.W.2d 374 (Minn. App. 1990).

⁶¹ 620 N.W.2d 566 (Minn. App. 2000).

⁶² *Skelly*, 620 N.W.2d at 569.

⁶³ *K.R.*, 605 N.W.2d at 394.

⁶⁴ *Id.* at 389.

⁶⁵ Minn. Stat. § 604.02 (2004).

⁶⁶ Minn. Stat. § 604.02, subd. 1.

⁶⁷ *Id.*, § 604.02, subd 1(1).

While it is still too early to say exactly how the 2003 amendment to Minnesota's joint and several liability statute will affect dram shop claims in Minnesota, some observations are in order. In cases where the plaintiff has sustained severe injuries due to the AIP's intoxication, the AIP's liability insurance limits are often insufficient to adequately compensate the plaintiff. Prior to the 2003 amendment, it made sense for the plaintiff to sue the dram shop as well as the AIP under a comparative fault system in which the dram shop is jointly and severally liable with the AIP, not only because the dram shop represents another potential source of insurance coverage, but also because the dram shop's insurance coverage limits are often higher than the limits held by the AIP. A dram shop's percentage of fault is often determined to be less than 50 percent. With the 2003 amendment to joint and several liability, a plaintiff may be less inclined to incur large expenses prosecuting a dram shop claim under a comparative fault system in which the dram shop does not become *jointly* liable with the AIP until the dram shop's fault exceeds 50 percent. Nevertheless, it does not follow that the 2003 amendment to Minnesota's joint and several liability statute will bring an end to dram shop claims. In severe injury cases where the AIP's liability insurance limits do not provide the plaintiff with adequate compensation, the plaintiff may still be willing to sue the dram shop simply because it represents an additional source of insurance coverage.

The 2003 amendment to Minnesota's joint and several liability statute will likely make it easier for dram shop insurers to settle claims on terms more favorable than they did previously. Dram shop claims rarely result in a finding that a commercial liquor vendor is more than 50 percent at fault. The plaintiff's strategy will focus on determining what the bar's true exposure might be, and the plaintiff will likely make efforts to settle for that amount. Under the right circumstances, the amendment may also make dram shop insurers more willing to risk the outcome of a trial if efforts to achieve a favorable settlement are not successful.

In 2007, bills were introduced in both the Minnesota House of Representatives and the Minnesota Senate purporting to make persons who violate the Liquor Act *jointly and severally* liable for their violation, regardless of their fault percentage. *See* S.F. No. 1091, 85th Leg., Reg. Sess. (Minn. 2007); H.F. No. 561, 85th Leg., Reg. Sess. (Minn. 2007). Both bills have been referred to committees. Clearly, if either bill passes the legislature and is signed into law by the governor, the 2003 amendment to Minnesota's joint and several liability statute will be of no benefit to dram shops, and the comparative fault landscape in liquor liability actions will change yet again.

E. Subrogation and Collateral Source Considerations

The Civil Damage Act prohibits subrogation actions against commercial liquor vendors by insurance companies for payments made in the form of no-fault economic loss benefits, collision coverage payments, or uninsured and underinsured motorist benefits.⁶⁸ Commercial liquor vendors are also entitled to a collateral source off-set for amounts paid to the injured plaintiff by no-fault, uninsured or underinsured motorist insurance carriers.⁶⁸ The prohibition against first party subrogation claims perhaps reflects the desire that commercial liquor vendors should not be

⁶⁸ *See* Minn. Stat. § 340A.801, subd. 4.

⁶⁸ *See Imlay v. City of Lake Crystal*, 453 N.W.2d 326 (Minn. 1990).

punished excessively for the illegal sale of alcohol, because the Civil Damage Act is sufficiently penal in its own right. Granting commercial liquor vendors the collateral source off-set for no-fault, uninsured, and underinsured motorist payments is likely motivated by the equitable consideration that an injured plaintiff is not entitled to make a double recovery for his or her injuries.

The Minnesota Supreme Court has determined that an employer-insurer is entitled to deduct from workers' compensation dependency benefits payable to a surviving spouse the amount she received from a third-party settlement of a dram shop claim.⁶⁹ A tort reform provision, effective August 1, 1986, provides that a third-party settlement of a civil damage action must be reduced by the amount of workers' compensation benefits received by the plaintiff for which no subrogation right has been asserted, less any payments made by the plaintiff for the two-year period immediately preceding the action to secure the right to receive workers' compensation benefits.⁷⁰

F. Recovery on the Bond

Although the AIP is not a proper party plaintiff for purposes of the Civil Damage Act, the Minnesota Supreme Court has held that the AIP may seek recovery from the commercial liquor vendor's liability bonding company under Minn. Stat. § 340A.301, a separate provision of the Liquor Act.⁷¹ The court has also recognized that a claimant entitled to recover damages under the Civil Damage Act is precluded from recovering additional sums against the commercial liquor vendor's liquor liability bonding company, assuming full compensation is received from the commercial liquor vendor's liability insurer.⁷² This holding modifies previous decisions to the extent they stood for the proposition that a plaintiff could make a double recovery.⁷³ The right to sue the commercial liquor vendor's bonding company has been recognized as recently as 1991, when the Minnesota Court of Appeals acknowledged that right of action in dicta contained in an unpublished opinion.⁷⁴

As a practical matter, recovery on the bond is something that seldom, if ever occurs. The injured party has little or no incentive to attempt recovery on the bond, because the commercial liquor vendor general has plenty of insurance coverage to compensate the injured party. The AIP is not inclined to make such a claim, particularly in automobile cases, because doing so amounts to a virtual admission that the AIP was operating a motor vehicle while legally intoxicated, which

⁶⁹ See *Paine v. Water Works Supply Co.*, 269 N.W.2d 725 (Minn. 1978).

⁷⁰ See Minn. Stat. § 584.36.

⁷¹ See *Turk v. Long Branch Saloon, Inc.*, 280 Minn. 438, 159 N.W.2d 903 (1968); *Mayes v. Byers*, 214 Minn. 54, 7 N.W.2d 403 (1943).

⁷² See *Johnson v. Helary, Inc.*, 342 N.W.2d 146, 148 (Minn. 1984).

⁷³ See *Best v. Fedo*, 163 F.Supp. 79 (D.Minn. 1957); *Phillips v. Aretz*, 215 Minn. 325, 10 N.W.2d 226 (1943); *Miles v. National Surety Co.*, 149 Minn. 187, 182 N.W. See *O'Neill v. Pofahl*, 1991 WL 144832 at * 5 n.1 (Minn.App. Aug. 6, 1991) (unpublished) 2d 996 (1921).

⁷⁴ See *O'Neill v. Pofahl*, 1991 WL 144832 at * 5 n.1 (Minn.App. Aug. 6, 1991) (unpublished).

can expose the AIP to a claim for punitive damages in a common law negligence action.⁷⁵ Accordingly, joinder of the liquor liability bonding company as a party defendant is improper and unnecessary in all cases where liquor liability insurance coverage is available and adequate.

G. Extra-Territorial Application of the Civil Damage Act

A Minnesota resident can sue a Minnesota commercial liquor vendor for damages stemming from an illegal sale in Minnesota and causing injuries in Wisconsin.⁷⁶ A Minnesota resident can also make a civil damage claim against a commercial liquor vendor outside of Minnesota, provided the commercial liquor vendor has sufficient contacts with the State of Minnesota to authorize that State's exercise of personal jurisdiction over the commercial liquor vendor.⁷⁷ In *West American Insurance Company v. Westin, Inc.*,⁷⁸ the Minnesota Supreme Court refused to exercise jurisdiction over a Wisconsin bar where the sole contact between the tavern and Minnesota was a hearsay allegation that Minnesota Highway Patrol officers, if called as witnesses, would testify that seventy-five percent of young people who drink and have traffic violations in the vicinity of the accident drank at that Wisconsin tavern. The *Westin* court overruled two earlier cases which conferred jurisdiction over out-of-state liquor vendors, *Blamey v. Brown*⁷⁹ and *Anderson v Luitjens*.⁸⁰ In both of those cases, the Minnesota courts exercised personal jurisdiction over border state liquor vendors for three reasons: (1) the consequence of the sale of liquor was foreseeable by the defendant; (2) Minnesota's strong interest in providing a forum for injured Minnesota plaintiffs; and (3) the short distance involved vitiated any inconvenience to the defendants. The *Westin* court rejected this rationale because the United States Supreme Court, in *World Wide Volkswagen v. Woodson*,⁸¹ expressly rejected the foreseeability considerations upon which *Blamey* and *Anderson* relied in order to exercise jurisdiction.

In *Janssen v. Johnson*,⁸² the Minnesota Supreme Court again held that an out-of-state liquor vendor did not have minimum contacts with Minnesota necessary for a constitutional exercise of personal jurisdiction. The only contacts the bar in *Janssen* had with Minnesota were the purchasing of some bar supplies and equipment from a St. Paul supplier and the hiring of a Minnesota attorney.⁸³ The *Janssen* court's decision indicates that a decisive factor was that the tavern never advertised in Minnesota newspapers and did not actively solicit Minnesota patrons.⁸⁴ Not surprisingly, the Minnesota Court of Appeals subsequently held that a

⁷⁵ See Minn. Stat. 169A.76.

⁷⁶ *Schmidt v. Driscoll Hotel*, 249 Minn. 376, 82 N.W.2d 365 (1957).

⁷⁷ *West American Ins. Co. v. Westin, Inc.*, 337 N.W.2d 676 (Minn. 1983).

⁷⁸ *West American Ins. Co.*, 337 N.W.2d at 678.

⁷⁹ 270 N.W.2d 884 (Minn. 1978).

⁸⁰ 311 Minn. 203, 247 N.W.2d 913 (1976).

⁸¹ 444 U.S. 286 (1980).

⁸² 358 N.W.2d 117 (Minn. App. 1984).

⁸³ *Id.* at 120.

⁸⁴ *Id.*

commercial liquor vendor located in a Wisconsin border city that advertised on a Minnesota radio station had sufficient minimum contacts with Minnesota to allow Minnesota courts to exercise personal jurisdiction over it.⁸⁵

Finally, in *Lawson v. Darrington*, the defendant Iowa bar argued that the court should analyze the personal jurisdiction issue by determining whether its Minnesota advertising directly caused the AIP's trip to the Iowa tavern.⁸⁶ Instead, the court found the tavern's contacts with Minnesota, primarily its solicitation of Minnesota customers by advertising in the state, sufficient to permit the exercise of personal jurisdiction.⁸⁷

H. Minimum Insurance Requirements

The Liquor Act requires commercial liquor vendors to demonstrate proof of financial responsibility with regard to liability imposed by the Civil Damage Act.⁸⁸ The authority responsible for issuing the commercial vendor's liquor license must submit the applicant's proof of financial responsibility to the commissioner of public safety.⁸⁹ Local political subdivisions may require higher insurance or bond coverages, or larger deposits of cash or securities than those minimum amounts required by the Liquor Act.⁹⁰

Generally speaking, a commercial liquor vendor must provide proof of financial responsibility by filing:

1. a certificate of insurance with limits of at least \$50,000 for bodily injury to any one person in any one occurrence, \$100,000 for bodily injury to two or more persons in any one occurrence, \$10,000 for injury or destruction of property in any one occurrence, \$50,000 for loss of means of support of any one person in any one occurrence, and \$100,000 for loss of means of support of two or more persons in any one occurrence;⁹¹
2. a bond of a surety company with minimum coverages as provided above;⁹² or
3. a certificate of the commissioner of finance that the licensee has deposited with the commissioner \$100,000 in cash or securities which may be legally purchased by savings banks or for trust funds having a market value of \$10,000.⁹³

⁸⁵ *BLC Ins. Co. v. Westin, Inc.*, 359 N.W.2d 752 (Minn. App. 1985).

⁸⁶ 416 N.W.2d 841, 844 (Minn.App. 1987).

⁸⁷ *Id.* at 845.

⁸⁸ See Minn. Stat. § 340A.409, subd. 1.

⁸⁹ See *id.*

⁹⁰ See *id.*

⁹¹ See *id.*, § 340A.409, subd. 1(1).

⁹² See *id.*, § 340A.409, subd. 1(2).

⁹³ See Minn. Stat. § 340A.409, subd. 1(3).

An annual aggregate policy limit for dram shop insurance of not less than \$300,000 per policy year may be included in the policy provisions.⁹⁴ A Licensee is entitled to exemption if it establishes by affidavit that: (1) it is an “on sale” 3.2 percent malt liquor licensee with sales of less than \$25,000 of 3.2 percent malt liquor for the preceding year; (2) it is an “off sale” 3.2 percent malt liquor licensee with sales of less than \$50,000 of 3.2 percent malt liquor for the preceding year; (3) it holds an “on sale” wine license with sales of less than \$25,000 for wine in the preceding year; or (4) it holds a temporary wine license issued under law.⁹⁵

Interestingly, there is technically no requirement that liquor liability vendors obtain, or that insurance carriers provide, coverage for other pecuniary loss. The use of generic liquor liability policies has spawned litigation and has left insureds at risk of their annual aggregate limits. “Other pecuniary loss” is usually addressed in the policy definition for “bodily injury.” However, if “other pecuniary loss” has not been addressed somewhere in the policy, courts have found that recovery of such damages may occur from the policy’s aggregate limit.⁹⁶

In 2010, the Minnesota Supreme Court addressed the issue of insurance coverage limits in *Brua v. Minnesota Joint Underwriting Association*.⁶⁹ This decision holds that Minn. Stat. § 340A.490, subd. 1 requires dram shop policies to offer separate minimum coverage limits in the amounts it specifies for bodily injury, property damage, and loss of means of support.⁷⁰ It does not require dram shop policies to provide coverage for pecuniary loss.⁷¹ It also holds that the coverage offered must be cumulative and cannot be blended with other damage categories.⁷² Additionally, a policy cannot dilute the minimum limit available for bodily injury damages by defining “bodily injury” to include “other pecuniary loss.”⁷³ Policies that attempt to do so are subject to reformation to make them consistent with the minimum insurance requirements imposed under Minn. Stat. § 340A.490, subd. 1.⁷⁴

I. The Effect of *Pierringer* Releases when Settling Claims Involving Liquor

The use of *Pierringer* releases to settle civil damage claims has become common, especially since the use of these releases has been judicially recognized in Minnesota.⁹⁷ A *Pierringer* release allows one tortfeasor to settle with the plaintiff while precluding claims against the released party by a joint tortfeasor. The joint tortfeasor is then entitled to eliminate that settled

⁹⁴ See *id.*, § 340A.409, subd. 1.

⁹⁵ See *id.*, § 340A.409, subd. 4.

⁹⁶ See *Brault v. Acceptance Indemnity Insurance Company*, 538 N.W.2d 144, 149 (Minn.App. 1995), *rev. den’d.* (Minn. Nov. 21, 1995).

⁶⁹ See 778 N.W.2d 294 (Minn. 2010).

⁷⁰ See *Brua*, 778 N.W.2d at 300.

⁷¹ See *id.*

⁷² See *id.* at 304.

⁷³ See *id.*

⁷⁴ See *id.* at 305-306.

⁹⁷ See *Frey v. Snelgrove*, 269 N.W.2d 918 (Minn. 1978).

percentage of the entire claim, which precludes the possibility that a co-defendant will pay more than the percentage of fault attributed to that co-defendant. Parties wishing to utilize *Pierringer* releases to settle lawsuits involving both civil damage and wrongful death claims can, however, encounter some serious potential problems.

As applied to a death case under the Wrongful Death and Civil Damage Acts, these principles are somewhat unclear for at least two reasons. First, the only proper party plaintiff in a wrongful death case is the trustee for the heirs and next of kin of the decedent. In civil damage actions, however, only a spouse, parent, child, guardian, or other person can be a proper party plaintiff. A release signed by the plaintiff in the wrongful death case is probably not binding on the plaintiff in the dram shop case. Second, the fault of a deceased AIP is attributed to the surviving heirs in the wrongful death action, while the AIP's fault is not attributed to the plaintiffs in a civil damage action.⁹⁸

A hypothetical fact pattern illustrates how the effect of a *Pierringer* settlement differs for commercial liquor vendors and other defendants. Suppose the plaintiffs, who are heirs of the AIP, settle a civil damage claim against Bar A for \$20,000 in exchange for a standard *Pierringer* release. The wrongful death case proceeds to trial against Driver B. The jury awards a total of \$100,000 in damages and apportions 80 percent of the fault to the AIP and 20 percent of the fault to Driver B. The plaintiffs recover nothing from Driver B, because the AIP's fault is imputed to them the AIP's fault is greater than Bar A or Driver B. The plaintiffs' total recovery is therefore only \$20,000. Suppose, instead, that the plaintiffs execute a *Pierringer* release with Driver B for \$20,000, and the civil damage action is tried. The jury apportions 80 percent of the fault to the AIP and 20 percent of the fault to Bar A. Bar A is responsible for paying the plaintiffs its share or \$20,000, because the AIP's fault is not imputed to plaintiffs. The plaintiffs' total recovery is \$40,000.

J. Financial Responsibility Requirements And Exceptions

Section 340A.409 of the Minnesota Liquor Act requires commercial liquor vendors to demonstrate proof of financial responsibility with regard to the liability imposed by the Civil Damage Act.⁷⁵ Proof of financial responsibility must be submitted to the Commissioner of Public Safety and may be given in one of three ways.⁷⁶ One way of demonstrating financial responsibility is to file a certificate which states that the commercial liquor vendor has insurance providing at least \$50,000 of coverage because of bodily injury to any one person in any one occurrence, \$100,000 because of bodily injury to two or more persons in any one occurrence, \$10,000 because of injury or destruction of property of others in any one occurrence, \$50,000 for loss of means of support of any one person in any occurrence, and \$100,000 for loss of means of support of two or more persons in any one occurrence.⁷⁷ The second way of demonstrating financial responsibility is to file a surety company's bond which has the foregoing minimum

⁹⁸ See *Bushland v. Corner Pocket Billiard Lounge of Moorhead, Inc.*, 262 N.W.2d 615 (Minn.App. 1990).

⁷⁵ See Minn. Stat. § 340A.409, subd. 1 (2011).

⁷⁶ See *id.*

⁷⁷ See Minn. Stat. § 340A.409, subd. 1(1).

coverage limits.⁷⁸ The third way of demonstrating financial responsibility is to file a certificate of the Commissioner of Management and Budget stating that the licensee has deposited with that commissioner \$100,000 in cash or securities which may legally be purchased by savings banks or for trust funds having a market value of \$100,000.⁷⁹ An insurer can provide the required coverage in combination with other kinds of insurance coverage.⁸⁰ The policy provisions may include an annual aggregate policy limit for dram shop insurance of not less than \$300,000 per policy year.⁸¹

The Liquor Act's financial responsibility provision does not require a commercial liquor vendor to carry coverage for "pecuniary loss" damages.⁸² Consequently, "the insurance coverage required to demonstrate financial responsibility under Minn. Stat. § 340A.409, subd. 1, is not coextensive with liability under Minn. Stat. § 340A.801."⁸³ If an insurance policy provides coverage for "pecuniary loss" damages, that coverage may not be blended with other forms of coverage.⁸⁴ Nor is an insurer free to define "bodily injury" to include "pecuniary loss," as case law illustrates that pecuniary loss is not compensable as a personal injury.⁸⁵ If an insurance policy impermissibly blends coverage, courts will reform the policy, but only to the extent necessary to satisfy the statutory financial responsibility requirements.⁸⁶ Thus, if a policy provides \$50,000/\$100,000 limits for bodily injury inclusive of pecuniary loss damage, courts will interpret the policy as providing separate coverage for pecuniary loss damage with equal limits.⁸⁷

An insurer who provides coverage for damages under the Civil Damage Act must, upon request, inform the insured concerning the status of any claim made under the policy.⁸⁸ The information must include the insured's employees and the nature of their involvement, any amount the insurer is holding in reserve for payment of a claim or has paid in the disposition of a claim, and any amount paid in the defense of the claim.⁸⁹ This requirement does not obligate the insurer to disclose to an adverse party in litigation information that is otherwise not discoverable.⁹⁰

⁷⁸ See *id.*, § 340A.409, subd. 1(2).

⁷⁹ See *id.*, § 340A.409, subd. 1(3).

⁸⁰ See Minn. Stat. § 340A.409, subd. 1.

⁸¹ See *id.*

⁸² See *Brua v. The Minnesota Joint Underwriting Association*, 778 N.W.2d 294, 300 (Minn. 2010).

⁸³ *Brua*, 778 N.W.2d at 301.

⁸⁴ See *Brua*, at 304 (citing *Johnson v. Consol. Freightways, Inc.*, 420 N.W.2d 608, 613 (Minn. 1988); *Beck v. Groe*, 245 Minn. 28, 45, 70 N.W.2d 886, 897 (1955)).

⁸⁵ See *id.*

⁸⁶ See *id.* at 305-306.

⁸⁷ See *id.* at 306.

⁸⁸ See Minn. Stat. § 340A.409, subd. 3a.

⁸⁹ See *id.*, § 340A.409, subd. 3a(1)-(3).

⁹⁰ See *id.*, § 340A.409, subd. 3a.

Suppose that a commercial liquor vendor has trouble getting insurance coverage or has been rejected for coverage. The market assistance plan of the Minnesota Joint Underwriting Association must help licensees to obtain coverage.⁹¹ Coverage obtained through the market assistance plan must conform to the minimum requirements stated above.⁹² That coverage shall be denied or terminated if the vendor disregards safety standards, rules, or ordinances pertaining to the offer, sale, or other distribution of liquor.⁹³

A licensee does not need to have proof of financial responsibility in certain limited circumstances. The Liquor Act's financial responsibility requirements do not apply to a licensee who establishes by affidavit that: (1) they are on-sale 3.2 malt liquor licensees with sales of less than \$25,000 of 3.2 percent malt liquor for the preceding year; (2) they are off-sale 3.2 percent malt liquor licensees with sales of less than \$50,000 of 3.2 percent malt liquor for the preceding year; (3) they are holders of on-sale wine licenses with sales of less than \$25,000 for wine for the preceding year; or (4) they are holders of temporary wine licenses issued under law.⁹⁴ These circumstances are likely to be uncommon, given the exception's limited scope.

⁹¹ See Minn. Stat. § 340A.409, subd. 2.

⁹² See *id.*, § 340A.409, subd. 3(a).

⁹³ See *id.*, § 340A.409, subd. 3(b).

⁹⁴ See *id.*, § 340A.409, subd. 4.

IV. COMMON LAW AND STATUTORY HOST LIABILITY

A “social host,” as the term implies, is someone who gives alcoholic beverages to others in a casual or social situation. By far the most typical kind of social host is a homeowner who furnishes alcoholic beverages to guests as part of a social event. At early common law, no cause of action existed against social hosts for damage stemming from their service of alcoholic beverages to guests. Social host liability in Minnesota has developed within the context of a duet between the Minnesota Legislature and the Minnesota Supreme Court, wherein the court noted a legislative omission or oversight, and the legislature responded by amending the statute.¹

A. Early Legislation

In 1911, the Minnesota Legislature adopted the initial version of the Civil Damage Act.² That version of the Civil Damage Act imposed liability upon any person who illegally gave or sold liquor to another person causing intoxication which resulted in damage to the plaintiff. Because the original Civil Damage Act did not define the term “person” as it related to dispensers of alcoholic beverages, the Minnesota Supreme Court held that the Civil Damage Act applied to a social host who provided alcohol to a minor brother who became intoxicated and was subsequently killed in a traffic accident.³ Hence, it can be said that the Civil Damage Act created social host liability where none existed previously.

In 1977, the Minnesota Legislature amended the Civil Damage Act to preclude social host liability by deleting the word “giving” from the statute, limiting liability to “any person who, by illegally selling or bartering intoxicating liquors, causes . . . intoxication.”⁴ The Minnesota Supreme Court held that this amendment “preempted any action against social hosts who gave liquor to guests.”⁵ The court later expanded this holding four years later, making the Act inapplicable to all social hosts, regardless of the terms under which they provided their guests with liquor.⁶ Based on those decisions, the Minnesota Supreme Court in *Holmquist v. Miller* determined that the Civil Damage Act precluded any common law action against social hosts who negligently serve alcohol to a minor.⁷

B. 1990 Amendments

The Minnesota Legislature superceded *Holmquist* in 1990 by amending the Civil Damage Act via Minn. Stat. § 340A.801, subd. 6, which provides: “Nothing in this chapter precludes common law tort claims against any person 21-years-old or older who knowingly provides or

¹ See *Wollan v. Jahnz*, 656 N.W.2d 416, 418 (Minn. 2003) (citing *Koehnen v. Dufuor*, 590 N.W.2d 107, 109-12 (Minn.1999) (outlining evolution of Civil Damages Act)).

² See Chapter I, *supra*.

³ See *Ross v. Ross*, 294 Minn. 115, 200 N.W.2d 149, 151, 153 (1972).

⁴ Minn. Stat. § 340.95 (1972).

⁵ *Cole v. City of Spring Lake Park*, 314 N.W.2d 836, 837-838 (Minn. 1982).

⁶ *Cady v. Coleman*, 315 N.W.2d 593, 595 (Minn. 1985).

⁷ See 367 N.W.2d 468, 472 (Minn. 1985).

furnishes alcoholic beverages to a person under the age of 21 years.”⁸ This provision resurrected social host liability stemming from the giving of alcoholic beverages to minors. It did not, however, affect the Minnesota Supreme Court’s decisions in *Cole* or *Cady*, which held that the Civil Damage Act, Minn. Stat. § 340A.801, did not apply to social hosts.⁹ As noted above, that provision merely amounted to legislative recognition of social host claims.¹⁰ Consequently, the only social host liability that existed after the 1990 Amendment to the Civil Damage Act was the common law liability that arises when a social host knowingly provides or furnishes alcoholic beverages to a minor.

In *Koehnen v. Dufuor*,¹¹ the Minnesota Supreme Court confronted the issue of whether a social host, who charged guests a nominal fee for beer at a party, lost her status as a social host, making her subject to legal liability under the Civil Damage Act. In light of the Civil Damage Act’s legislative history, the court held that a social host does not become subject to statutory liability under the Civil Damage Act merely because a fee is charged for the alcohol served.¹² The court premised its holding on the fact that the legislature had amended the Civil Damage Act in 1985 and 1990 without extending statutory liability to social hosts.¹³

C. 2000 Amendments

In response to *Koehnen*, the Minnesota Legislature amended the Liquor Act in 2000 to create a statutory cause of action in favor of persons injured by, or as a result of, the intoxication of minor caused by a social host.¹⁴ That provision, the Social Host Liability Act, is almost identical to the Civil Damage Act in that it grants a cause of action to a “spouse, child, parent, guardian, employer, or other person” injured by an intoxicated person, or by the intoxication of another person, under 21 years of age.¹⁵ Presumably the group of potential plaintiffs under Minn. Stat. § 340A.90 is identical to the group of persons entitled to make civil damage claims. Claimants within this category of persons have a right of action in their own name against a person who is 21 years or older who:

1. had control over the premises and, being in a reasonable position to prevent the consumption of alcoholic beverages by the person under the age of 21, knowingly or recklessly permitted the consumption, resulting in the minor’s intoxication; or

⁸ Minn. Stat. § 340A.801, subd. 6 (1990)

⁹ *See id.*

¹⁰ *See Wollan v. Jahnz*, 656 N.W.2d 416, 419 (Minn.App. 2003).

¹¹ 590 N.W.2d 107 (Minn. 1999).

¹² *Koehnen*, 590 N.W.2d at 113.

¹³ *Id.* at 112.

¹⁴ *See* Minn. Stat. § 340A.90 (2000).

¹⁵ Minn. Stat. § 340A.90, subd. 1(a).

2. sold, bartered, furnished, or gave to, or purchased for the person under the age of 21 alcoholic beverages that caused the intoxication of that person.¹⁶

The intoxicated person under the age of 21 years who caused the injury has no right of action under Minn. Stat. § 340A.90.¹⁷ This provision is similar to the rule in civil damage actions that an intoxicated person or minor to whom alcohol was illegally served has no right of action against the commercial liquor vendor.

The damages recoverable under the Social Host Liability Act are identical to the damages recoverable under the Civil Damage Act.¹⁸ The injured party is entitled to recover personal injury damage, property damage, and damage for loss of means of support, or other pecuniary loss.¹⁹ Damage recovered by a minor must be paid either to the minor or to the minor's parent, guardian, or next friend as the court directs, just as in civil damage actions.²⁰ Subrogation claims for the recovery of first party insurance benefits are similarly precluded.²¹

D. Minor Child Host

Certain issues remain undefined with respect to the social host provision. It is unclear whether, and to what extent, a parent can be liable for damages where a minor child throws a party and serves alcohol to other minors who become intoxicated and cause damage. Arguably, a parent who is not at home would neither have control over the premises nor knowledge of the consumption of alcohol by minors. Minnesota's appellate courts have yet to address this issue.

Senate File 1733 and House file 2555, the bills which resulted in Minn. Stat. § 340A.90, were introduced in March and April of 1999 respectively by Senator Betzold and Representative Carruthers. On April 11, 2000, the full House discussed the bill, which later was enacted.²² Representative Carruthers, responding to questions from other House members, stated that the bill's intention was to stop parents from *affirmatively supplying* alcohol to their minor children and their minor friends.²³ The legislative drafters wanted the statute to penalize an adult who had control over the premises and either knowingly or recklessly supplied alcohol to minors.²⁴ Specifically, Representative Carruthers stated that the conference committee discussed the issue of minors throwing parties and serving alcohol without their parents' knowledge, and that the

¹⁶ *Id.*, § 340A.90, subd. 1(a) and (b).

¹⁷ *Id.*, subd. 1(c).

¹⁸ *See* Minn. Stat. § 340A.90, subd. 1(a); *cf.* Minn. Stat. § 340A.801, subd. 1.

¹⁹ *See id.*

²⁰ *See id.*, § 340A.90, subd. 1(b); *cf.* Minn. Stat. § 340A.801, subd. 1

²¹ *See id.*, § 340A.90, subd. 2; *cf.*; Minn. Stat. § 340A.801, subd. 4.

²² Video tape conference of House Session, dated April 11, 2000 located at http://www.house.leg.state.mn.us/hvt/programa.asp?ls_year=81&event_id=86, last visited August 18, 2005).

²³ *Id.* at 1 hour: 15 minutes: 00 seconds-1:16:05.

²⁴ *Id.* at 1:17:52-1:19:00.

committee did not want parents held responsible in those situations.²⁵ Parents who actually threw parties for their minor children and supplied the alcohol would be liable for any damage that an intoxicated minor may cause.

E. Homeowners Insurance

Statutory social host claims may not be covered by the social host's homeowners insurance policy. The Social Host Liability Act specifically provides that no homeowners coverage exists for losses arising on or before December 31, 2001, unless the loss was specifically covered by the policy, or the loss was covered by a rider attached to the policy.²⁶ That provision was likely intended to give homeowners insurers time to address coverage issues that could develop due to the enactment of that legislation and has since expired.²⁷ Nevertheless, the existence of that statutory provision underscores the need for social hosts to consider whether their homeowners insurance policy extends coverage to injuries arising from a minor's consumption of alcohol at a social event.

F. Statute of Limitations

Compliance with the applicable statute of limitation is a necessary prerequisite to any legal claim, including civil damage claims. A civil damage action must be commenced no later than two years after the injury occurs.²⁸ The legislature did not specify what statute of limitations would apply to statutory or common law host claims.

Although Minnesota's common law did not specifically provide for claims against social hosts who serve intoxicating liquor to minors,²⁹ the legislature's enactment of Minn. Stat. § 340A.801, subd. 6, permitted such claims.³⁰ That addition to the Civil Damage Act provides that "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."³¹ In *Wollan v. Jahnz*,³² the Minnesota Court of Appeals held that the six year statute of limitations set forth in Minn. Stat. § 541.05, subd. 1(5) applies to common law social host claims. The Wollan court reasoned that prior appellate court decisions analyzed social host claims in terms of negligence, which generally carries a six-year statute of limitation.³³ Thus, the legislature's

²⁵ Video tape conference of House Session dated April 11, 2000 at 1:19:18-23.

²⁶ See Minn. Stat. § 340A.90, subd. 3 (2000).

²⁷ See Minn. Stat. § 340A.90, subd. 3 (2005).

²⁸ See Minn. Stat. § 340A.802, subd. 2.

²⁹ See *Holmquist v. Miller*, 367 N.W.2d 468, 472 (Minn. 1985); accord *Meany v. Newell*, 367 N.W.2d 472, 474 (Minn. 1985).

³⁰ See *Wollan v. Jahnz*, 656 N.W.2d 416, 419 (Minn. Ct. App. 2003).

³¹ Minn. Stat. § 340A.801, subd. 6.

³² *Wollan v. Jahnz*, 656 N.W.2d 416, 420 (Minn. Ct. App. 2003).

³³ See *Wollan v. Jahnz*, 656 N.W.2d 416 at 419 (citations omitted).

recognition of common law social host claims, combined with prior jurisprudence analyzing such claims in terms of negligence, justified applying the six year statute of limitation to common law social host claims.

In *Christiansen v. University of Minnesota Board of Regents*,³⁴ a death case, the Minnesota Court of Appeals addressed this issue of what statute of limitations should apply to statutory social host claims made pursuant to Minn. Stat. § 340A.90. Because that provision is part of the same statutory scheme which imposes a two year statute of limitation on claims against commercial liquor vendors,³⁵ one would think that statutory social host claims should be subject to a two year statute of limitation. The *Christiansen* opinion does not indicate whether the appellant made that argument. The opinion does note that appellant argued that the three year statute of limitation applicable to wrongful death claims should apply.³⁶ The Minnesota Court of Appeals disagreed, holding, based on *Wollan*, that the six year statute of limitation applicable to negligence claims applied instead.³⁷ Thus, unless the Minnesota Court of Appeals revisits this issue, or the Minnesota Supreme Court overrules *Christiansen*, the six year statute of limitations will apply to statutory social host claims.

³⁴ *Christiansen v. University of Minnesota Bd. of Regents*, 733 N.W.2d 156 (Minn. Ct. App. 2007).

³⁵ See Minn. Stat. § 340A.802, subd. 2.

³⁶ See *Christiansen v. University of Minnesota Bd. of Regents*, 733 N.W.2d 156, 159 (Minn. Ct. App. 2007).

³⁷ See *Christiansen v. University of Minnesota Bd. of Regents*, 733 N.W.2d 156, 158–159 (Minn. Ct. App. 2007).

APPENDIX A
Sample Notice of Claim and Sample Complaint

SAMPLE NOTICE OF CLAIM AND SAMPLE COMPLAINT

To: Defendant, above-named, and its attorney of record,

_____.

PLEASE TAKE NOTICE that on April 1, 2005, at about 9:00 p.m. on said day, John Doe, who resides at 1234 Main Street, Anytown, Minnesota, was a patron of the premises of the liquor store owned and operated by Joe Anyone d/b/a ABC Bar and Grill in the County of Any, State of Minnesota.

On said date, at said time, and for a period of time thereafter, said Joe Anyone d/b/a ABC Bar, through its agents, servants and employees, served intoxicating liquor to said John Doe while said John Doe was in an intoxicated condition and as a direct result thereof, said John Doe, at or about 10:15 p.m., on said day, caused his motor vehicle to collide with a motor vehicle owned and driven by Ima Injured on Highway A in Any County, causing numerous and sever injuries to said Ima Injured, thereby causing her to be damaged by reason of past, present and future medical care; past, present and future loss of earnings; damage to property, and past, present and future mental and physical pain and anguish in a sum in excess of Two Hundred Fifty Thousand and no/100ths Dollars (\$250,000.00).

SMITH, SMITH, AND SMITH, P.A.

Dated: _____

Julia M. Smith

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

John Doe,
Plaintiff,

Court File No.: _____
Case Type: Dram Shop
Judge: _____

v.

Joe Anyone, d/b/a ABC Bar and Grill,
Defendants.

COMPLAINT

As and for Plaintiff's cause of action herein, he states and alleges:

1. At all times material herein Plaintiff was a resident of Hennepin County, Minnesota, and defendant owned and operated an on-sale liquor establishment known as ABC Bar and Grill, also in Any County.
2. On April 1, 2005, defendant illegally sold one Jack Anyman certain intoxicating beverages when he was in an obviously intoxicated condition in violation of Minn. Stat. § 340A.801.
3. As a direct result of said illegal sales, Jack Anyman became even more intoxicated and thereafter was caused to drive his automobile in a negligent and careless manner into an automobile driven by the Plaintiff on Highway A in Any County, Minnesota.
4. As a direct result of said illegal sales and resulting automobile accident, the Plaintiff sustained serious and permanent injuries to her head and neck, incurred hospital and medical expenses, lost wages and will in the future have an impaired earning capacity, and has and will in the future suffer great pain of body and mind.

WHEREFORE, Plaintiff prays for judgment against defendant in an amount in excess of \$50,000.00 plus costs and disbursements herein.

SMITH, SMITH, AND SMITH, P.A.

Dated: _____

Julia M. Smith

APPENDIX B
Sample Answer

SAMPLE ANSWER

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF DAKOTA

FIRST JUDICIAL DISTRICT

John Doe,

Court File No.: _____

Plaintiffs,

Case Type: Dram Shop

Judge: _____

vs.

ANSWER

Joe Anyone, d/b/a ABC Bar and Grill,

Defendant.

Defendant Joe Anyone, d/b/a ABC Bar and Grill, for its Answer to Plaintiffs' Complaint, states and alleges:

1. Denies each and every allegation, matter, and thing contained in Plaintiffs' Complaint except as hereafter admitted, qualified, or otherwise explained.
2. Denies that Joe Anyone, d/b/a ABC Bar and Grill, directly or indirectly sold, bartered, furnished, or gave intoxicants to AIP in violation of any statutes, laws, ordinances, or any other legal rules having the force an effect of law. Therefore, Joe Anyone, d/b/a ABC Bar and Grill, denies the express or implied allegations to that effect contained in Plaintiffs' Complaint and puts Plaintiff to his strictest proof thereof.
3. Lacks sufficient knowledge or information allowing Joe Anyone, d/b/a ABC Bar and Grill, to admit or deny whether liquor intoxication caused or contributed to the accident alleged in Plaintiff's Complaint and, therefore, denies the same, and puts Plaintiff to his strictest proof thereof.

4. Lacks sufficient knowledge or information concerning the allegations regarding Plaintiff's past and future damages and injuries, if any, and, therefore, denies the same, and puts Plaintiff to his strictest proof thereof.

5. Specifically alleges that any and all damages and/or injuries Plaintiff may have sustained as a result of the alleged accident are due to the carelessness, fault, illegal, or wrongful conduct of AIP or others over whom Joe Anyone, d/b/a ABC Bar and Grill, has no control and for whose actions Joe Anyone, d/b/a ABC Bar and Grill, is not legally responsible.

AFFIRMATIVE DEFENSES

6. Affirmatively alleges, but without relieving Plaintiff of his burden of proof in any respect, that the claims asserted are or may be barred by any and all of the affirmative defenses contemplated by Rule 8.03 of the Minnesota Rules of Civil Procedure. The extent to which the Plaintiffs' claims are or may be barred by one or more of said affirmative defenses, not specifically set forth above, cannot be determined until there has been further discovery. Joe Anyone, d/b/a ABC Bar and Grill, therefore, incorporates all such affirmative defenses set forth in Rule 8.03.

7. Affirmatively alleges that this action is or may be barred by the applicable statute of limitations set forth in Minn. Stat. § 340A.802, subd. 2.

8. Affirmatively alleges that this action may fail due to Plaintiff's failure to provide Joe Anyone, d/b/a ABC Bar and Grill, with timely and adequate notice pursuant to Minn. Stat. § 340A.802, subd. 1.

9. Affirmatively alleges that this action may fail for insufficiency of process and insufficiency of service of process.

10. Affirmatively alleges that this action in whole or in part fails to state a claim for which relief can be granted.

WHEREFORE, Defendant Joe Anyone, d/b/a ABC Bar and Grill, prays that this Court dismiss Plaintiffs' Complaint with prejudice, enter judgment in favor of Defendant Joe Anyone, d/b/a ABC Bar and Grill, award Defendant Joe Anyone, d/b/a ABC Bar and Grill, the reasonable costs and attorney's fees and award Defendant Joe Anyone, d/b/a ABC Bar and Grill, such other and further relief as may be deemed equitable and just.

ANDERSON AND ANDERSON, PLLP.

Dated: _____

Madeline J. Anderson

APPENDIX C
Sample Discovery Served by Plaintiff and Defendant

SAMPLE DISCOVERY SERVED BY PLAINTIFF AND DEFENDANT

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF DAKOTA

FIRST JUDICIAL DISTRICT

John Doe,

Court File No.: _____

Plaintiffs,

Case Type: Dram Shop

Judge: _____

vs.

**PLAINTIFF'S INTERROGATORIES
TO DEFENDANT (SET ONE)**

Joe Anyone, d/b/a ABC Bar and Grill,

Defendant.

TO: Joe Anyone, d/b/a ABC Bar and Grill, and its attorney, Madeline J. Anderson, 6789 Oak Street, St. Paul, Minnesota 55555.

PLEASE TAKE NOTICE that Plaintiff John Doe demands Answers to the within Interrogatories, under oath, within the time prescribed, pursuant to the provisions of the Minnesota Rules of Civil Procedure. These Interrogatories are deemed to be continuing and should the answers thereto be modified, amended or changed or additional witnesses obtained, it is demanded that you so advise defendants and defendants= undersigned attorneys.

1. State the names and addresses of your employees.
2. State the names and addresses of all employees working the evening of the accident mentioned in Plaintiffs= Complaint and twelve (12) hours previous thereto.
3. State the names and addresses of all known patrons or anyone else who was in your business establishment the evening of the accident mentioned in Plaintiffs= Complaint.
4. State the identity (name and current address) of all eyewitnesses to the accident referred to in our Complaint.

5. State the identity (name and current address) of any witnesses, including expert witnesses, who have information concerning this cause of action who were not eyewitnesses.
6. From which of the witnesses listed above have you taken statements which were written, signed, recorded or reported?
7. State the substance of any admissions relative to the issue of this lawsuit made by any of the parties for whom these interrogatories are served and indicate by whom, to whom, when and where each such admission was made.
8. State whether you or your attorneys have any knowledge of any photographs taken by any persons other than those listed above. If so, please describe the subject of each, when, where and by whom taken.
9. If you have any insurance coverage which would indemnify you against the cause of action alleged in Plaintiffs= Complaint, state the name and address of each such insurance company, the policy numbers of each such insurance policy, the types of coverage afforded under said insurance policy, and the limits of coverage afforded under said insurance policy.
10. With respect to the time during which Jack Anyman was present at ABC Bar and Grill on the date of the subject incident, state a description of the beverages consumed by Jack Anyman, including the type and quantity of the beverage consumed, the name and address of Mr. Anyman=s server, the food consumed by Mr. Anyman, and the time Mr. Anyman spent at John=s Place Bar, including arrival and departure time.
11. State the name, home address, home telephone number and relationship to Defendant Joe Anyone, d/b/a ABC Bar and Grill, if any, of all persons known to you, your attorney, agent or representative, who observed the alleged intoxicated person drinking any intoxicating beverages on the date in issue.
12. State the name, home address, home telephone number, and job of any and all persons who served the alleged intoxicated person any intoxicating beverages on the date in issue, including the time of service, amounts served and the identity of the server(s).
13. State the names, present addresses, and places of employment of any persons having knowledge or information of this incident or any facts related thereto which are known to you, your counsel, associates, investigators, employees or agents, whether obtained in the course of investigation, preparation for trial or otherwise. This includes any customers of Joe Anyone, d/b/a ABC Bar and Grill, on April 1, 2005.

14. Between the hours of 8:00 p.m. and 12:00 p.m. on April 1, 2005, identify the maximum number of customers at ABC Bar and Grill during that time and the minimum number of customers during that time period.
15. Identify the names, present addresses, and places of employment of any persons having knowledge or information concerning Jack Anyman=s presence at ABC Bar and Grill on April 1, 2005, or any facts related thereto which are known to you, yours counsel, associates, investigators, employees or agents, whether obtained in the course of investigation, preparation for trial or otherwise.
16. Identify the names, present addresses, and places of employment of any persons known to you, your counsel, associates, investigators, employees or agents who have knowledge or information regarding Jack Anyman=s physical condition and/or activities which would reflect thereon on April 1, 2005.
17. If you, your counsel or your insurer=s agents or representatives have interviewed and/or taken any statements, signed or unsigned, recorded, verbatim recorded, or court reporter statements from individuals having knowledge of the facts surrounding this accident, then provide the name of person interviewed and/or giving statement(s), the name of the person conducting the interview(s) and/or taking statement(s), the date of interview and/or statement was taken, the name of the custodian of original statement/recording, and attach a copy to your answers.

STATE OF MINNESOTA
COUNTY OF DAKOTA

DISTRICT COURT
FIRST JUDICIAL DISTRICT

John Doe,

Plaintiffs,

Court File No.: _____
Case Type: Dram Shop
Judge: _____

vs.

Joe Anyone, d/b/a ABC Bar and Grill,

Defendant.

**DEFENDANT'S INTERROGATORIES
TO PLAINTIFF (SET ONE)**

TO: John Doe, Plaintiff, above-named, and his attorney, Julia M. Smith, 5678 Maple Avenue, Anywhere, MN 55555.

PLEASE TAKE NOTICE that Defendant Joe Anyone, d/b/a ABC Bar and Grill, demands Answers to the within Interrogatories, under oath, within the time prescribed, pursuant to the provisions of the Minnesota Rules of Civil Procedure. These Interrogatories are deemed to be continuing and should the answers thereto be modified, amended or changed or additional witnesses obtained, it is demanded that you so advise defendants and defendants= undersigned attorneys.

1. Please state your full name, present age and address, all other names by which the plaintiff has been known, other than the name set forth in division (a) above.
2. Please state the plaintiff=s marital status, the name of plaintiff=s spouse, the date and place of marriage, and a description of the employment of said spouse.
3. Please state the names, ages and addresses of all of the plaintiff=s children.
4. Please state the names and addresses of schools Plaintiff has attended, the dates of attendance and degree or diploma received and date of same, if any, and plaintiff=s Social Security number.
5. State each of your residential addresses during the past 10 years.

6. If you have ever served in the military service, then set forth the branch of service, dates of service, occupational specialty, highest rank received, and date and type of discharge.
7. With respect to the employment of the plaintiffs for the past 10 years, please state the name, address and telephone number of each employer, the dates of beginning and termination of employment, the reason for termination of employment, the wage rate for each employment, a description of the type of work performed for each employment, and the name and address of supervisor.
8. Set forth the dates and times you missed employment as a result of the injuries claimed herein and the loss of income claimed.
9. If you have ever been convicted of or pled guilty to a criminal offense, then state the city, county and state in which the offense occurred, the court in which the plea or conviction was entered, the nature and type of offense to which you pled guilty or were convicted, the date(s) of such pleas or convictions, and the sentence received in connection with such plea or conviction.
10. If you have ever been a party to a claim, lawsuit, workers' compensation proceeding, or any proceeding of any kind in which you sought recovery of money damages for injuries sustained, then state the dates of such claim, lawsuit or proceeding, the name and address of the entity or person against whom you brought such claim, lawsuit or proceeding, the name or caption of such claim, lawsuit or proceeding, the location and/or court, venue and trial number of such claim, lawsuit or proceeding, the nature of the injuries for which you made claim, and the date of the resolution of such claim, lawsuit or proceeding and the outcome of such claim, lawsuit or proceeding.
11. State the name and address of each and every medical doctor, physician, chiropractor, psychiatrist, psychologist, mental health counselor, social worker, hospital, clinic or other person or entity who has rendered care to you, both prior to and subsequent to the incident described in your Complaint.
12. With respect to each provider identified in your Answer to Interrogatory No. 11, state the injury or condition for which you sought treatment, the approximate dates of treatment, and the nature of the treatment received.
13. List all other accidents or incidents in which you sustained any injuries, both prior to and subsequent to the accident/ incident described in your Complaint, setting forth the date, place and nature of such accident/incident, the scope and extent of injuries received in each accident/ incident, and the name and address of each and every person or entity against whom indemnity or claim for compensation has been made as a result of such accident/incident.
14. Set forth in detail all special damages that you are claiming as a result of the incident described in your Complaint and if you have bills, receipts or other documentation supporting a claim for such special damages, attach copies of same to your Answers to these Interrogatories.

15. If you obtained medical treatment as a result of the injuries sustained, please state the name and address of physicians who have treated you since the accident and the dates of such treatment and all medical expenses incurred as a result of such treatment and attach a copy of statements of such billings.
16. Set forth in detail all injuries you claim to have sustained in the accident/incident alleged in your Complaint.
17. If you were hospitalized as a result of your injuries, please state the name and address of hospital(s), the date or dates of confinement, the amount of all bills for treatment received, and attach copies of all medical bills.
18. If you were confined in your home as a result of the injuries alleged in your Complaint, please state the dates of confinement.
19. Please state the date on which you recovered from the injuries claimed in your Complaint, otherwise set forth in detail all of your present complaints.
20. If you claim permanent injuries, set forth in detail which injuries you claim to be permanent and the extent thereof. Attach copies of all medical reports in your possession or in the possession of your counsel or representatives.
21. If you are still under treatment or observation by any physician as a result of the injuries sustained by you, state the date of your last treatment, by whom, and the date of your next treatment.
22. If you suffered from any physical disability or disease prior to the accident/incident described in your Complaint, describe the nature thereof.
23. If you claim aggravation of any pre-existing physical condition or disease, describe the condition or disease and the manner in which it was aggravated.
24. If you filed for unemployment compensation subsequent to the incident alleged in your Complaint, please state when you filed for unemployment compensation, where you filed for unemployment compensation, and the length of time you received such benefits.
25. Describe in detail the manner and circumstances involved in how the accident/incident referred to in your Complaint occurred.
26. State the name and address of each and every law enforcement officer who investigated the accident/incident.
27. Set forth the names and addresses of all eyewitnesses to the accident/incident described in your Complaint, stating for each such witness whether or not such person has been interviewed by you or on your behalf, whether a statement has been taken from such person, the date and time when such statement was taken, and whether or not the statement was signed by the person from whom it was taken.

28. Set forth the names and addresses of all other persons claimed to have any information about the accident/incident, the scene of the accident/incident, or conduct of the parties hereto or employees of the parties hereto, stating for each person identified whether or not such person has been interviewed by you or on your behalf, whether a statement has been taken from such person, the date and time when such statement was taken, and whether or not the statement was signed by the person from whom it was taken.
29. If you claim that these Defendants, their employees, agents or representatives made any statements or admissions regarding the incident described in your Complaint, then state the date, time and place at which such statement or admission was made, the identity of person making such statement or admission, the exact substance of such statement or admission including what was said by each participant in such statement or admission, and the names and addresses of any witnesses to such statement or admission.
30. For each expert you expect to call to testify as a witness at trial, state the name and address of each expert, whether such expert has provided a report to you or your attorneys, and if so, attach a copy of same to your Answers to these Interrogatories, the qualifications of such expert or experts, the subject matter on which such expert is expected to testify, the substance of the facts and opinions to which such expert or experts are expected to testify.
31. State the name and address of each and every lay witness you propose to call in the trial of the above-captioned action and state the subject matter to which each said witness will testify.
32. State the names and addresses of all persons you claim or contend will support your contentions of an illegal sale of intoxicating liquor against these Defendants contained in your Complaint, stating for each person identified whether such person has been interviewed by you or on your behalf, whether a statement has been taken from such person, the date and time when such statement was taken, and whether or not the statement was signed by the person from whom it was taken.
33. State the names and addresses of any persons known or believed to have knowledge as to any sale of intoxicating liquor to the alleged intoxicated person (AIP) by these Defendants for the period of 12 hours immediately preceding the accident/incident.
34. For each alleged sale of intoxicating liquor to the AIP by these Defendants for the 12 hours preceding the accident/ incident, state the type and amount of intoxicating liquor consumed, the date and approximate hour of each such consumption, who served intoxicating liquor for each sale, and who purchased intoxicating liquor for each sale.
35. State the names and addresses of any persons known or believed to have observed the AIP in an intoxicated condition at the time of any alleged sale of intoxicating liquor by these Defendants to such person.
36. As to any other establishment in which you allege or have knowledge that the AIP was sold intoxicating liquor during the 24-hour period immediately preceding the accident,

state the name and address of any such establishment, when the AIP entered each such establishment, how much liquor was consumed by the AIP at each such establishment, indicating the nature and quantity of any such liquor consumed, the names and addresses of persons present with the AIP, the names and addresses of persons you allege were witnesses to any drinking by the AIP in each such establishment, and when the AIP left each such establishment.

37. If a blood alcohol test or any other tests devised to determine the state of intoxication was made of the AIP subsequent to the accident/incident, state the type of test or tests administered, where said test or tests were administered, the approximate time said test or tests were administered, the names and addresses of all persons involved in the making of such test, and the result of said test or tests.
38. Set forth a detailed and itemized list of all payments related to the injury or disability in question made to the plaintiffs, or on the plaintiffs behalf, by or pursuant to:
 - a. A federal, state or local income disability or Workers' Compensation Act; or other public program providing medical expenses, disability payments, or similar benefits;
 - b. Health, accident and sickness, or automobile accident insurance or liability insurance that provides health benefits or income disability coverage;
 - c. A contract or agreement of a group, organization, partnership, or a corporation to provide, pay for or reimburse the costs of hospital, medical, dental or other health care services; or
 - d. A contractual or voluntary wage continuation plan provided by employers or any other system intended to provide wages during a period of disability except benefits received from a private disability insurance policy where the premiums were wholly paid for by the plaintiffs.
39. With regard to the payments referred to in your Answer to Interrogatory No. 38 above, set forth a list of all such payments for which a subrogation right has been asserted.
40. With regard to the payments described in your Answer to Interrogatory No. 35 above, set forth a specific and detailed list of all amounts that have been paid, contributed, or forfeited by, or on behalf of, the plaintiffs or members of the plaintiffs' immediate family for the two-year period immediately before the date of the accident to secure the right to any such benefits that the plaintiffs are receiving as a result of losses caused by the accident in question.
41. Please identify all drugs, medications, alcohol or other mood altering substances you consumed or took in the 24 hour period prior to the incident, stating for each drug, medication, alcohol product or mood altering substance the time and amount that was taken, and who witnessed your consumption.

APPENDIX D
Checklist for Taking Statements

CHECKLIST FOR TAKING STATEMENTS

A. Liquor Establishment Personnel

1. Identify all personnel working on the date and at the approximate time the AIP was allegedly in the tavern. Time cards are a good source.
2. Identify bartenders or waitpersons who served the AIP. Check for credit card receipts, checks or table and or server identification on sales slips and/or cash register receipts.
3. Attempt to verify the amount of liquor served directly to the AIP.
4. Attempt to verify if there were others in the AIP=s party ordering drinks.
5. Attempt to verify when the AIP arrived and left.
6. Identify any personnel that had any conversation with the AIP.
7. Identify any personnel that observed the AIP walking, talking, counting money, dancing, etc.
8. Learn if AIP was a regular customer who was familiar to tavern personnel.
9. Attempt to identify potential witnesses who interacted with the AIP.
10. Learn if there was video surveillance of the bar and attempt to obtain a copy of the video tape.

B. AIP

1. Age
2. Height / Weight
3. Gender
4. Drinking History
5. Other mental or physical contributing factors
6. Activities during the day
7. Sleep during the day and the previous night

8. Food Consumed During the Day
 - a. When
 - b. What
9. Medications / Drugs Consumed
10. Consumption of alcoholic beverages
 - a. What
 - b. How Many
 - c. Size / Concentration
 - d. When
 - e. Where Served
 - f. Who Served
 - g. Where Consumed
 - h. Who Observed
 - i. Effect Felt
11. Opinion as to Whether Acting Different than Usual
12. Ability to Walk, Make Change
13. Opinion as to Whether Exhibiting Signs of Intoxication
 - a. What signs the AIP knows (s)he exhibits when intoxicated
14. Activities After Leaving Establishment up to Time of Accident/ Incident
15. Identification of Witnesses
 - a. Before going to tavern
 - b. While at tavern
 - c. Tavern personnel
 - d. After leaving tavern
 - e. At accident site
16. Details of the Accident
 - a. Time
 - b. Place
 - c. Route
 - d. Activity just before accident up to time of accident-narrative
 - e. Statements at the Scene
 - f. Narrative of what happened after accident
 - g. Law enforcement
 - h. Witnesses
 - i. Weather
 - j. Other contributing factors
17. Contact with Law Enforcement

18. Any Substance Ingested Prior to Breath / Blood Test
19. How Blood Tested
 - a. Type of sample (serum or whole blood); urine, breath
 - b. Site
 - c. When
 - d. Where
 - e. Any sterilization of site where blood was drawn
 - f. Person collecting Sample

A. Witnesses

1. When and how long contact with AIP
2. Identification of other witnesses
3. Whether AIP consumed food
4. When, how many, and what intoxicating beverages did AIP consume
 - a. Witnesses to consumption
5. Did AIP exhibit any signs of intoxication such as:
 - a. Slurred Speech
 - b. Staggering
 - c. Louder than usual voice
 - d. Inability to count money
 - e. Spilled drinks
 - f. Bloodshot eyes
 - g. Other
6. Who purchased drinks
7. Who served drinks
8. Did AIP have any intoxicating liquor before arriving at tavern or after leaving tavern
9. Other taverns AIP visited before or after our tavern
10. Drinking history of AIP
11. Relationship to AIP
12. Routes taken after leaving tavern
13. Description of the accident
14. Contact with law enforcement or others after the accident