UIC Law Review

Volume 5 | Issue 2 Article 6

Spring 1972

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Recommended Citation

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THE ILLINOIS DRAM SHOP ACT AND THE COMMON LAW: A CONTINUING DRAMA

Since its enactment in 1874,[1] the Illinois Dram Shop Act[2] has been a popular subject for both legislative change and appellate review. It is the purpose of this article to comment on areas of recovery available to those injured by the acts or omissions of intoxicated parties against those who furnished the liquor which caused the intoxication. Particular attention will be paid to those recently developing avenues of recovery which are ancillary to statutorily created causes of action, their possible application in Illinois courts, and how they may be affected by recent legislative changes in the Dram Shop Act.[3]

The driving force behind the enactment of the original Act is generally held to be the stong temperance movement of the

[1] ILL. REV. STAT. ch. 43 (Hurd 1874). The 1874 Act was preceded by the "Temperance Bill" of 1872 — (Laws of 1871-72 at 552-56).

[2] ILL. REV. STAT. ch. 43 (1971).

[3] Section 135 in its entirety reads as follows:

Every person who is injured in person or property by any intoxicated person, has a right of action in his own name, severally or jointly, against any person who by selling or giving alcohlic liquor causes the intoxication of such person. Any person owning, renting, leasing or permitting the occupation of any building or premises with knowledge that alcoholic liquors are to be sold therein, or who having leased the same for other purposes, shall knowingly permit therein the sale of any alcoholic liquors that have caused the intoxication of any person, shall be liable, severally or jointly, with the person selling or giving the liquors. However, if such building or premises belong to a minor or other person under guardianship or conservatorship the guardian or conservator of such person shall be held liable instead of the ward. A married woman has the same right to bring suit and to control it and the amount recovered as a feme sole. All damages recovered by a minor under this Act shall be paid either to the minor, or to his parent, guardian or next friend as the court shall direct. The unlawful sale or gift of alcoholic liquor works a forfeiture of all rights of the lessee or tenant under any lease or contract of rent upon the premises where the unlawful sale or gift takes place. All suits for damages under this Act may be by any appropriate action in any of the courts of this State having competent jurisdiction. An action shall lie for injuries to means of support caused by an intoxicated person or in consequence of the intoxication, habitual or otherwise, of any person resulting as aforesaid. The action, if the person from whom support was furnished is living, shall be brought by any person injured in means of support in his name for his benefit and the benefit of all other persons injured in means of support. However, any person claiming to be injured in means of support and not included in any suit brought hereunder may join by motion made within the times herein provided for bringing such action or the personal representative of the deceased person from whom such support was furnished may so join. In every such action the jury shall determine the amount of damages to be recovered without regard to and with no special instructions as to the dollar limits on recovery imposed by this Section. The amount recovered in every such action is for the exclusive benefit of the person injured in loss of support and be distributed to such persons in the proportions determined by the judgment or verdict rendered in the action. If the right of action is settled by agreement with the personal representative of a deceased person from whom support was furnished,

late 19th century.[4] The nuisance that the marching ladies sought to be to saloon keepers of their day is continued vicariously today in Illinois primarily by the Dram Shop Act.

The general subject of the liquor trade in Illinois is covered by Chapter 43 of the Illinois Revised Statutes under the title of the Liquor Control Act. However, when the term "Dram Shop Act" is used, the speaker is generally referring only to Section 135 of Chapter 43.[5] That section places strict liability on those who sell liquor on the retail market for damage which results from intoxication caused by liquor they have sold or given. This is the section with which this article will be mainly concerned.

The stated purpose of the Liquor Control Act,[6] reflecting the nature of its history is:

> [t]his Act shall be liberally construed, to the end that the health, safety and welfare of the People of the State of Illinois shall be protected and temperance in the consumption of alcoholic liquors shall be fostered and promoted by sound and careful control and regulation of the manufacture, sale and distribution of alcoholic liquors.[7]

Section 135 aids this purpose by providing civil remedies against those vendors of liquor for those injured when vendees (consumers) have become intoxicated. It is important to note, however, that the defendant must be engaged in the liquor trade for profit[8] before he can be held to liability under section 135. It has been held that it is not the purpose of the Act to regulate social drinking conducted as between host and guest in the home.[9] The requirement of the section which provides that there be a "sale or gift" of liquor is strictly applied, and is held to exclude those who are not regularly in the business of selling liquor.

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the court having jurisdiction of the estate of the deceased person shall distribute the amount of the settlement to the person injured in loss of support in the proportion, as determined by the Court, that the percentage of dependency of each such person upon the deceased person bears to the sum of the percentages of dependency of all such persons upon the deceased person. In no event shall the judgment or recovery under this Act for injury to the person or to the property of any person as aforesaid exceed $15,000, and recovery under this Act for loss of means of support resulting from the death or injury of any person, as aforesaid, shall not exceed $15,000 for each person so injured where such injury occurred prior to July 1, 1956, and not exceeding $20,000 for each person so injured after July 1, 1956. Every action hereunder shall be barred unless commenced within one year next after the cause of action accrued.

[4] Ogilvie, *History and Appraisal of the Illinois Dram Shop Act*, U. ILL. L.F. Vol. 1958, 175.

[5] See Note 3 *supra*.

[6] ILL. REV. STAT. ch. 43 (1971).

[7] ILL. REV. STAT. ch. 43, §94 (1971).

[8] Cruse v. Aden, 127 Ill. 231, 20 N.E. 73 (1889).

[9] Miller v. Owens Illinois Glass Co., 48 Ill. App. 2d 419, 199 N.E.2d 70 (1964).

The single case on this point in Illinois, *Cruse v. Aden*,[10] concerned a gentleman who became intoxicated while drinking with a friend at the home of the latter. While the gentleman was returning home he was unable, because of his inebriated condition, to control his horse and was killed when the horse threw him. In reversing the trial court's judgment for the deceased's wife against his host, the appellate court established, once and for all, that the Dram Shop Act was only intended to operate against those who are in the liquor trade for profit.[11]

That the furnishing of alcoholic beverages may be prompted by a profit motive not directly connected with the beverage is obvious, but so long as a profit does not return for the liquor itself there is no danger of liability under section 135. Liability under the Act has been extended so far as to include not-for-profit organizations, when such organizations run licensed dram shops for their members, the proceeds of which are placed in the general fund of the organization.[12] There are also several older cases which establish that a valid liquor license is not a condition precedent to liability under the Act, with again the test being whether or not the defendant is in the business of selling liquor at a profit.[13]

At common law, the old rule was that there was no civil liability for the sale of liquor to an "able bodied" man.[14] The theory behind this statement was that if intoxication and subsequent damage did ensue, the negligence was to be founded in the consumption of the liquor, not in the furnishing of it, and is thus the proximate[15] cause of any resulting damage. In the few older cases where the common law has recognized a remedy for damage caused by a person's intoxication against the provider of the liquor independent of statutory remedies, the one to whom the liquor was furnished was incapable through drunkenness, infancy or mental debilitation of resisting either the consumption or the effect of the beverage.[16] For example, those who induced a person whose faculties had been weakened by an al-

[10] 127 Ill. 231, 20 N.E. 73 (1889).

[11] In reaching its decision in *Cruse v. Aden*, the court reasoned that by the title of the act it is not intended to operate but against "dram shop" owners and operators.

[12] *E.g.*, Klopp v. Benevolent Protective Order of Elks, 309 Ill. App. 145, 33 N.E.2d 161 (1941).

[13] McCormick v. Decker, 204 Ill. App. 554 (1917); Parsons v. Smith, 164 Ill. App. 509 (1911); Woods v. Dailey, 211 Ill. 495, 71 N.E. 1068 (1901).

[14] Manthei v. Heimerdinger, 332 Ill. App. 335, 75 N.E.2d 132 (1947).

[15] Pratt v. Daly, 55 Ariz. 535, 104 P.2d 147 (1940).

[16] Pratt v. Daly, 55 Ariz. 535, 104 P.2d 147 (1940); Ibach v. Jackson, 148 Ore. 92, 35 P.2d 672 (1934); McCue v. Klein, 60 Tex. 168, 48 Am. R. 260 (1883); Swanson v. Ball, 67 S.D. 161, 290 N.W. 482 (1940), Ridden v. Gremm, 97 Tenn. 220, 36 S.W. 1097 (1896).

coholic condition of which they were aware, to drink three pints of whiskey in rapid succession were held liable to his dependents under a common law negligence theory for his resulting death.[17] These cases have never been followed in Illinois, either prior or subsequent to the enactment of the Dram Shop Act. The cases considering the question of common law liability for the sale of liquor have consistently held that the Dram Shop Act is the exclusive remedy against the sellers of liquor in Illinois for those injured by their intoxicated patrons.[18] This result has been reached on the theory that the Dram Shop Act is purely of statutory origin and does not depend on a theory of common law liability for its existence. The legislature, having chosen to create a remedy where none existed at common law, that remedy is intended to be exclusive.[19]

It is the main contention of this comment, that under appropriate circumstances[20] and based on common law concepts, the Illinois courts should entertain actions against dram shop operators for damage done by their intoxicated patrons, irrespective of the remedies available under the Dram Shop Act. In determining what are appropriate circumstances for such relief and the burden of proof which a plaintiff must face in order to maintain such an action, this comment will begin by noting the theories unsuccessfully attempted in Illinois,[21] and then turn its attention to the growing judicial trend toward recognizing common law remedies against dram shop operators[22] in other jurisdictions.

Because the Dram Shop Act does not depend on any theory of common law liability for its existence,[23] it would seem that under the appropriate fact situation separate counts for the statutory and the common law liability could be entertained. Illinois prohibits and makes it unlawful to "[s]ell, give or deliver alcoholic liquor to any person under the age of 21 years, or to any person known by him [the dram shop operator or his

[17] McCue v. Klein note 16 *supra*.

[18] Hyba v. C. A. Horneman Inc., 302 Ill. App. 143, 23 N.E.2d 564 (1939); James v. Wicker, 309 Ill. App. 397, 33 N.E.2d 169 (1941); Howlett v. Doglio, 402 Ill. 311, 83 N.E.2d, 708 (1949); Fourt v. DeLazzer, 348 Ill. App. 191; 108 N.E.2d 599 (1952); Thompson v. Capasso, 21 Ill. App. 2d 1, 157 N.E.2d 75 (1959); Konsler v. United States 288 F. Supp. 895 (N.D. Ill. E.D. 1968); Anderson v. Dale, 90 Ill. App. 2d 332, 232 N.E.2d 767 (1967); Graham v. General U.S. Grant Post No. 2665, V.F.W., 43 Ill. 2d 1, 248 N.E.2d 657 (1969); Schulte v. Schleeper, 210 Ill. 357, 71 N.E. 325 (1904); Thompson v. Wogan, 309 Ill. App. 413, 33 N.E.2d 151 (1941); Kreps v. D'Agostine, 329 Ill. App. 190, 67 N.E.2d 416 (1946); Freese v. Tripp, 70 Ill. 496 (1873); Knierim v. Izzo, 22 Ill. 2d 73; 174 N.E.2d 157 (1961).

[19] *Id.*

[20] See notes 35-38 and 63-73 *infra* and accompanying text.

[21] *Id.*

[22] See note 74 *et seq. infra* and accompanying text.

[23] See note 18 *supra*.

agent] to be an habitual drunkard, a spendthrift, insane, mentally ill, mentally deficient, or in need of treatment."[24] This section, by its language, is limited to dram shops.[25] Penalty for its violation by a dram shop operator is by fine and/or imprisonment upon finding of guilt.[26] There is no reference to civil damages in the section.[27] Because the language of this section so closely parallels that of the older cases where civil liability was found for the sale of liquor to a "non-able bodied" man,[28] it was argued that violation of this section by a dram shop operator sounded in common law negligence and would provide a right of action not limited by the maximum money damages allowed by section 135.[29]

The flaw in this theory was first explained in *Rogers v. Dwight.*[30] The District Court for the Eastern District of Wisconsin, applying the Illinois Liquor Control Act stated:

> It is the decision of this Court that since the Illinois Legislature granted a new cause of action which had not previously existed at common law, [section 135], the remedy provided therein is an exclusive remedy and excludes any action for civil damages under section 131.[31]

When the question of civil liability under section 131 first came before an Illinois appellate court several years after the *Rogers* opinion, the Illinois court was quick to adopt the analysis of the *Rogers* court. In *Busser v. Noble,*[32] the court declared section 135 to be the exclusive remedy in Illinois for actions against dram shop operators, to the exclusion of actions based on violation of section 131. Thus, the *Rogers* and *Busser* decisions collectively maintain that there is no recognition in Illinois of a common law action against a dram shop operator for damages caused by his intoxicated patrons, whether "able bodied" or not.

Two years after *Busser,* the question of common law liability came before the Illinois Supreme Court in *Cunningham v. Brown.*[33] In *Cunningham,* suit was brought by a widow, individually and as administratrix of her husband's estate, against several dram shop operators who had furnished her deceased husband liquor which had caused his intoxication on the night he took his own life in a fit of despondency. In addition to damages

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[24] ILL. REV. STAT. ch. 43, §131 (1969).
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] See note 16 *supra* and accompanying text.
[29] Section 135 limits recovery for injury to person or property to $15,000, and for injury to means of support to $20,000. Note 3 *supra.*
[30] 145 F. Supp. 537 (E.D. Wisc. 1956).
[31] *Id* at 540.
[32] 22 Ill. App. 2d 433, 161 N.E.2d 150 (1959).
[33] 22 Ill. 2d 23, 174 N.E.2d 153 (1961).

under the Dram Shop Act, the widow included a common law count for violation of section 131, and a count for common law liability irrespective of section 131. A direct appeal was pursued from the trial court's striking of the two common law counts.

Consistent with precedent, the court affirmed but left the door open to common law actions. In dictum, the court stated that the plaintiff's claim that the defendants had breached a common law duty by furnishing liquor to one known to be a habitual drunkard would have some merit had there been no statutory remedy available.[34]

Because the Illinois courts have refused to apply the Dram Shop Act extraterritorially,[35] it seemed possible that if an injury was suffered outside of Illinois, caused by one who became intoxicated while in the state, the Dram Shop Act would not apply and the courts would not be restricted by the reasoning in *Cunningham.*

The case which arose under those circumstances was *Colligan v. Cousar.*[36] The plaintiff was injured in Indiana when struck by a car, the occupants of which were returning in an intoxicated condition from a drinking spree in Illinois. The Illinois Dram Shop Act was held not to have extraterritorial operation and hence would not apply since the accident occurred in Indiana. The law which the court found to apply was the Illinois common law.[37] The task which the court placed upon itself was to determine what the common law of Illinois would be if there had been no Dram Shop Act, and to apply that law to the instant case.

After an enlightening review of the authorities, the court concluded that:

> [T]he acts of the defendant in furnishing the intoxicating liquors to the tort-feasors were acts which, had there been no Dram Shop Act in existence in the State of Illinois, would give rise to a common law cause of action in this State on behalf of the plaintiff allegedly subsequently injured by the acts of the said tort-feasors as a result of their intoxicated condition.[38]

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[34] It was reasoning such as this which prompted a federal appellate court in Waynick v. Chicago's Last Department Store, 269 F.2d 322 7th Cir. (1959), to opine that rather than preempting the field of common law negligence, that the Illinois Dram Shop Act had avoided it. *Id.* at 324.

[35] Eldridge v. Don Beachcomber Inc., 342 Ill. App. 151, 95 N.E.2d 512 (1950); Butler v. Wittland, 18 Ill. App. 2d 578, 153 N.E.2d 106 (1958); Colligan v. Cousar, 38 Ill. App. 2d 392, 153 N.E.2d 106 (1963); Graham v. General U.S. Grant Post No. 2665, V.F.W., 43 Ill. 2d 1, 248 N.E.2d 657 (1969).

[36] 38 Ill. App. 2d 392, 187 N.E.2d 292 (1963).

[37] *Id.* at 403, 187 N.E.2d at 297.

[38] *Id.* at 414, 187 N.E.2d at 302.

The plaintiff's theory in *Colligan* was that the defendant had continued to sell intoxicants to the men who caused the accident after the men had become intoxicated and that "[s]aid latter sales or gifts were made carelessly and negligently or wilfully and wantonly, contrary to and in violation of a certain statute of the State of Illinois then and there in full force and effect, known as Section 131 of Chapter 43 Illinois Revised Statutes . . . "[39]

In support of its conclusion that the defendant had breached a common law duty in continuing to supply liquor to the tort-feasors after they became intoxicated, the *Colligan* court relied heavily on two decisions of similar fact situations.

In the first, *Waynick v. Chicago's Last Department Store,*[40] a Seventh Circuit diversity suit was brought seeking recovery of damages arising from an automobile accident alleged to have been a proximate result of the defendant's sale of liquor to an intoxicated person — the driver of the car which injured the plaintiff in Michigan. The court held that neither the Dram Shop Acts of Michigan[41] nor of Illinois applied to the case because the intoxication had occurred in one state and the accident in another. Rather, the court held that the common law of Michigan applied. The court further found that the sale of liquor to the tort-feasor in Illinois was unlawful because it violated Section 131 of Chapter 43 of the Illinois Revised Statutes and stated:

> The Illinois Act making unlawful the sale of alcoholic liquor to any intoxicated person is for the protection of any member of the public who might be injured or damaged as a result of the drunkenness to which the particular sale of alcoholic liquor contributes. Obviously the plaintiff in the case at bar is entitled to the protection given by Section 131 of the Illinois Act. . . . We hold that, under the facts appearing in the complaint, the tavern keepers are liable in tort for the damages and injuries sustained by plaintiff, as a proximate result of the unlawful acts of the former.[42]

The second case relied on by the court is a New Jersey opinion. In *Rappaport v. Nichols,*[43] suit was brought on the theory of common law negligence for the defendant's furnishing a minor intoxicating liquor in violation of a New Jersey statute.[44] The statute prohibited sales of liquor to any minor or any person "actually or apparently intoxicated" which causes his intoxication and a resulting accident in which a person is killed.

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[39] *Id.* at 395, 187 N.E.2d at 293.
[40] 269 F.2d 322 (7th Cir. 1959).
[41] MICH. COMP. LAWS §436.22 (1948).
[42] 269 F.2d at 325-26.
[43] 31 N.J. 188, 156 A.2d 1 (1959).
[44] R.S. 33.1-77, N.J.S.A. (1940).

The Supreme Court of New Jersey found all the elements of actionable negligence under common law concepts present in the complaint and reversed the decision of the trial court that there was no proximate cause because the plaintiff's injuries were not reasonably foreseeable, stating:

> When alcoholic beverages are sold by a tavern keeper to a minor or to an intoxicated person, the unreasonable risk of harm not only to the minor or the intoxicated person but also to members of the traveling public may readily be recognized and foreseen; this is particularly evident in current times when traveling by car to and from the tavern is so commonplace and accidents resulting from drinking are so frequent. . . . If the patron is a minor or is intoxicated when served, the tavern keeper's sale to him is unlawful; and if the circumstances are such that the tavern keeper knows or should have known that the patron is a minor or is intoxicated, his service to him may also constitute common law negligence.[45]

In discussing the question of proximate cause, the court first looked to the defendant's violation of the statute in serving the minor.[46] The court concluded that the statute was not merely intended to protect the minor from the effects of alcohol,[47] but was generally intended to provide broad protection to the members of the general public from the acts of intoxicated minors.[48] Having established that the conduct of the defendant was unlawful and negligent in selling liquor to the minor, the court then faced the question of whether the sale was the proximate cause of the injuries suffered, stating:

> If . . . the defendant tavern keepers unlawfully and negligently sold alcoholic beverages to [the minor] causing his intoxication, which in turn caused or contributed to his negligent operation of the motor vehicle at the time of the fatal accident, then a jury could reasonably find that the plaintiff's injuries resulted in the ordinary cause of events from the defendant's negligence and that such negligence was, in fact, a substantial factor in bringing them about. And a jury could also reasonably find that [the minor's] negligent operation of his motor vehicle after leaving the defendant's tavern was a normal incident of the risk they created, or an event which they could reasonably have foreseen, and that consequently there was no effective breach in the chain of causation.[49]

Two years after the *Colligan* decision, the Illinois appellate court entertained a case of decidedly similar facts, *Graham v. General U.S. Grant Post No. 2665, V.F.W.*[50] In this case, a

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[45] 31 N.J. 202, 156 A.2d 9.
[46] *Id.* at 201-02, 156 A.2d at 8.
[47] *Id.*
[48] *Id.*
[49] *Id.* at 204, 156 A.2d at 9.
[50] 97 Ill. App. 2d 139, 239 N.E.2d 856 (1968); *rev'd in part, aff'd in part*, 43 Ill. 2d 1, 248 N.E.2d 657 (1969).

patron became intoxicated in the defendant's establishment in Illinois and was involved in an accident in Wisconsin which caused the plaintiff's injuries. Both the plaintiff and the intoxicated party were Illinois residents. An action was brought in Illinois in two counts. Count one alleged a cause of action under the Dram Shop Act, and count two alleged a common-law action.[51] The trial court held that neither count stated a cause of action and the plaintiff appealed. The appellate court reversed the trial court as to the Dram Shop count, but affirmed as to the common-law count.[52] In reversing the first count, the court held that extraterritorial effect would be given to the Dram Shop Act where the liquor was served in Illinois, both parties lived in Illinois, the intoxicated person lived in Illinois, and the only contact with Wisconsin, the fact of the accident, was "wholly fortuitous."[53]

In affirming the common-law negligence count, the court relied on *Cunningham v. Brown*[54] and reiterated its holding that the Dram Shop Act was the exclusive remedy against dram shop operators for injuries inflicted by an intoxicated patron[55] in Illinois. Looking also to Wisconsin law, the court found further support for their holding in the fact that Wisconsin, which has no dram shop act, recognizes no common law action of the type the plaintiff was asserting.[56] Cross appeals were taken to the Illinois Supreme Court,[57] which reversed as to the extraterritorial effect of the Dram Shop Act, but affirmed as to the common law negligence count. The court's opinion as to the common law negligence count is brief and succinct:

> The plaintiff contends that the Appellate Court erred in upholding the dismissal of count II of the complaint: this count alleges that the defendants were guilty of common law negligence in selling alcoholic beverages to an intoxicated person. This contention is without merit. The precise issue was definitely decided by us in *Cunningham v. Brown,* [citation]. We there held that the Dram Shop Act provides the only remedy against tavern operators and owners of tavern premises for injuries to persons, property or means of support by an intoxicated person or in consequence of intoxication.[58]

The court further found that Wisconsin did not recognize

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[51] 97 Ill. App. 2d 139, 141, 239 N.E.2d 856, 857 (1968).
[52] *Id.* at 155, 239 N.E.2d at 864.
[53] *Id.* at 154, 239 N.E.2d at 863.
[54] See note 32 *supra.*
[55] 97 Ill. App. 2d 139, 155-56, 239 N.E.2d 856, 864 (1968).
[56] *Id. See* Rubitsky v. Russo's Derby Inc., 70 Ill. App. 2d 482, 216 N.E.2d 680 (1966).
[57] 43 Ill. 2d 1, 248 N.E.2d 657 (1969).
[58] *Id.* at 8, 248 N.E.2d at 661.

a common law liability[59] and affirmed the appellate court.

It does not appear that the common-law negligence count in *Graham* was founded on violation of section 131.[60] This may have some bearing on why *Colligan v. Cousar*[61] was not cited for authority in support of the plaintiff's contention as to the common law negligence count, thus leaving unanswered the question of whether Illinois would recognize a count based on violation of section 131[62] and sounding in common law negligence when the Dram Shop Act would not apply.

Another situation where a person has been injured by an intoxicated person, but the Dram Shop Act has been held not to be an available remedy against the dram shop operator, is when the dram shop operator is the Federal Government. In *Konsler v. United States*,[63] the plaintiff was injured in Illinois by a person who became intoxicated at the Fort Sheridan Non-Commissioned Officers' Club, located on the Fort Sheridan Military Base in Illinois. A damage suit was brought under the Federal Tort Claims Act[64] for violation of the Illinois Dram Shop Act. The plaintiff's complaint was dismissed on the grounds that the Federal Tort Claims Act[65] requires a "negligent or wrongful" act. The court ruled that since liability under the Dram Shop Act imposes liability without fault and does not require a showing of negligence,[66] "a cause of action premised upon the Dram Shop Act seeks to recover on a theory of absolute liability, and must fail when asserted against the United States."[67] In addition, the plaintiff argued (apparently without so pleading) that a common law action would therefore lie, citing *Cunningham v. Brown*,[68] and *Colligan v. Cousar*.[69] The court dismissed this contention for two reasons: (1) Because the legislature has created a statutory cause of action, "the common law action never evolved";[70] and (2) there was no allegation that the defendant

[59] Farmer's Mutual Automobile Insurance Co. v. Cast, 17 Wis. 2d 344, 117 N.W.2d 347 (1962).

[60] ILL. REV. STAT. ch. 43, §131 (1971).

[61] See note 36 *supra*.

[62] See note 24 *supra*.

[63] 288 F. Supp. 895 (N.D. Ill. E.D. 1968).

[64] 28 U.S.C. §1346 (1967).

[65] 288 F. Supp. at 896.

[66] Citing Osinger v. Christian, 43 Ill. App. 2d 480, 193 N.E.2d 872 (1963); Lichter v. Sher, 11 Ill. App. 2d 441, 138 N.E.2d 66 (1956); Robertson v. White, 11 Ill. App. 2d 177, 136 N.E.2d 550 (1956); Danlof v. Osborn, 11 Ill. 77, 142 N.E.2d 20 (1957).

[67] See note 63 *supra*. *See also* Garfield v. United States, No. 64C 1155 (N.D. Ill. Oct. 29, 1965).

[68] See note 33 *supra*.

[69] See note 36 *supra*.

[70] See note 63 *supra*, at 897. See also note 34 supra and accompanying text.

made a sale of liquor to an intoxicated person,[71] as was the case in both *Colligan*[72] and *Cunningham.*[73]

There is a growing judicial trend in other jurisdictions to re-evaluate the traditional common law rule of non-liability. A growing number of those jurisdictions which have reconsidered the question have held that where the allegations of a complaint allege the necessary elements of negligence in a charge against a dram shop, the dram shop may be liable for damages done to a third person[74] by an intoxicated patron.

The latest jurisdiction to reconsider the common law rule is California. In *Vesely v. Sager*[75] the Supreme Court of California unanimously held that a dram shop keeper or other liquor vendor who illegally sells liquor to one who is visibly intoxicated may be civilly liable to third persons injured as a result of the intoxicated person's actions. In effect, the California court overruled clear precedent to the contrary.[76] Almost all prior analogous cases had consistently refused to recognize a common law right of action against dram shop operators for two reasons: that since the California legislature had not seen it necessary to enact dram shop legislation, the courts would not step in to change the common law rule; and that the proximate cause of injury resulting from intoxication is not the furnishing of alcohol, even though it may be furnished in violation of statute, but the consuming of the alcohol by the one to whom it is furnished.[77]

The facts in *Vesely* lend themselves well to the result. The intoxicated patron had spent over seven hours in the defendant's establishment, including over three hours after the regular 2:00 A.M. closing time during which the defendant continued to serve him liquor; the dram shop was located near the top of a moun-

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[71] See note 63 *supra* at 897.

[72] See note 36 *supra.*

[73] See note 33 *supra.*

[74] Deeds v. United States, 306 F. Supp. 348 (D. Ct. Mont. 1969); Prevatt v. McClennan, 201 So. 2d 780 (Fla. Dist. Ct. App. 1967); Elder v. Fischer, 247 Ind. 598, 217 N.E.2d 847 (1966); Pike v. George 434 S.W.2d 626 (Ky. 1968); Adamian v. Three Sons, Inc., 353 Mass. 498, 233 N.E.2d 18 (1968); Berkeley v. Park, 47 Misc. 2d 381, 262 N.Y.S.2d 290 (Sup. Ct. 1965); Jardine v. Upper Darby Lodge No. 1973, Inc. 413 Pa. 626, 198 A.2d 550 (1964); Mitchell v. Ketner, 54 Tenn. App. 656, 393 S.W.2d 755 (1965); Ramsey v. Anctil, 106 N.H. 375, 211 A.2d 900 (1965); Rappaport v. Nichols, note 43 *supra;* Waynick v. Chicago's Last Department Store, note 40 *supra;* Colligan v. Cousar note 36, *supra;* Wilkins v. Weresiuk, 64 Misc. 2d 736, 316 N.Y.S.2d 260 (1970).

[75] 95 Cal. Rptr. 623, 5 Cal. 3d 153, 486 P.2d 151 (1971).

[76] Lammers v. Pacific Elec. Ry. Co., 186 Cal. 379, 199 P. 523 (1921); Hitson v. Dwyer, 61 Cal. App. 2d 803, 143 P.2d 952 (1943); Fleckner v. Dionne, 94 Cal. App. 2d 246, 210 P.2d 530 (1949); Cole v. Rush, 45 Cal. 2d 345, 289 P.2d 450 (1955). *Cf.* note 3 *supra* and accompanying text.

[77] See note 76 *supra.*

tain, and the only route leading from the dram shop was a steep, narrow, winding mountain road which the defendant knew the patron would be driving.[78] It was while traveling this road after leaving the defendant's establishment that the patron's car struck the plaintiff, causing the injuries complained of.

After reviewing the prior California cases denying recovery and the trend in other jurisdictions toward allowing recovery, the court abandoned the concept of proximate cause[79] upon which the old rule of non-liability was partly based, stating:[80]

> Insofar as proximate cause is concerned, we find no basis for a distinction founded solely on the fact that the consumption of an alcoholic beverage is the voluntary act of the consumer and is a link in the chain of causation from the furnishing of the beverage to the injury resulting from intoxication . . . [I]t is clear that the furnishing of an alcoholic beverage to an intoxicated person may be a proximate cause of injuries inflicted by that individual upon a third person. If such furnishing is a proximate cause, it is so because the consumption, resulting intoxication, and injury producing conduct are foreseeable intervening causes, or at least the injury producing conduct is one of the hazards which makes such furnishing negligent.
>
> The central question in this case, therefore, is not one of proximate cause, but rather one of duty: Did defendant owe a duty of care to plaintiff or to a class of persons of which he is a member?[81]

In looking to the duty which the defendant owed, and to the standard of conduct to which he would be held, the court found the duty of care to be one which was imposed on him by statute.[82] The controlling statute makes it a misdemeanor to "sell, furnish, [give], or [cause] to be sold furnished or given away, any alcoholic beverage to any habitual or common drunkard or to any obviously intoxicated person."[83] Under California law, negligence is presumed when a person violates a statute,[84] and when the violation results in injury to one of a class of persons for whose protection the statute was adopted.[85] Since the court found that the statute which the defendant violated was "adopted for the purpose of protecting members of the general public from injuries and damage to property resulting from the excessive use of intoxicating liquor,"[86] it followed,

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[78] 95 Cal. Rptr. at 626, 5 Cal. 3d at 157, 486 P.2d at 154.
[79] *Id.* at 630, 5 Cal. 3d at 163, 486 P.2d at 158.
[80] See note 15 *supra* and accompanying text.
[81] 95 Cal. Rptr. at 631, 5 Cal. 3d at 164, 486 P.2d at 159.
[82] CAL. BUSINESS AND PROFESSIONS CODE S. 25602; Stats. 1935, ch. 330, S 62, at 1151.
[83] *Id.*
[84] CALIFORNIA EVIDENCE CODE §669. (West 1966).
[85] *Id.*
[86] 95 Cal. Rptr. at 631, 5 Cal. 3d at 165, 486 P.2d at 159.

that (upon sufficient proof on remand) if these elements were proven, the defendant would be liable for the damage caused by their intoxicated patron.

As to prior decisions holding that if a change in the common law non-liability rule is to come, it must only come from the legislature,[87] the *Vesely* court refused to extend them on two grounds. First, the older cases had denied liability "because of the judically created rule that the furnishing of alcoholic beverages is not the proximate cause of injuries resulting from intoxication. . . . [T]his rule is patently unsound and totally inconsistent with the principles of proximate cause . . . [A]nd there is no reason for retaining the common law rule . . ."[88] Secondly, by the adoption of the statute which the defendant violated in making a sale of liquor to an intoxicated person,[89] together with the adoption of the statute which presumes negligence upon a violation of statute with a resulting injury to a person of the class intended to be protected by the statute,[90] the legislature has expressed its intention in this area to promote the safety of the people of California by permitting actions against dram shop operators under such circumstances as the instant case.[91]

CONCLUSION

That the regulation of the liquor trade in the State of Illinois is a job best left to the legislature is not to be denied. The legislature has recognized its responsibility in this area by enacting the Dram Shop Act. The desirable social consequences of this Act have never been seriously questioned. Nor can it be denied that the Dram Shop Act has been anything less than a heavy burden on those who are in the retail liquor trade in Illinois. Application of the Act is, as this comment has tried to point out, intrastate in scope. The person injured across the Illinois State line, or by a person who had been drinking on a military base suffers no less than the person otherwise injured by an intoxicated person, yet they may find themselves without a remedy against the dram shop operator. These results illustrate an undesirable social consequence.

In addition, the most recent legislative change in the Dram Shop Act[92] has further limited the application of the Act. Prior

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[87] See note 76 *supra*.
[88] 95 Cal. Rptr. at 632, 5 Cal. 3d at 166, 486 P.2d at 160.
[89] See note 82 *supra*.
[90] See note 84 *supra*.
[91] 95 Cal. Rptr. at 632, 5 Cal. 3d at 166, 486 P.2d at 160. *Accord*, Carlisle v. Kanaywer, 24 Cal. 3d 587 (1972).
[92] P. A. 77-1186, H. B. 63 (1971).

to the 1971 amendment, liability under the Act extended to every dram shop which caused or *contributed to* the intoxication of the patron.[93] The Act now applies only to those dram shops which "cause" the intoxication that results in injury.[94] It remains, that the effect of this change on actions under the Act must be thoroughly scrutinized. It is not questioned, however, that this effect will be restrictive.

The recent opinions in other jurisdictions which have extended the common law liability of dram shop operators represent an enlightened approach to a serious national problem. Illinois should follow these jurisdictions and permit common law dram shop actions in those instances when the Dram Shop Act is not an available remedy.

The Illinois Supreme Court has not been unmindful of the unsoundness of certain judicially created immunities,[95] and has not hesitated in overruling them when it was necessary for the proper allocation of compensation for injured parties and deterrence of future injuries. Such considerations should now demand a change in the Illinois non-liability rule at common law.

James McParland

[93] ILL. REV. STAT. ch. 43, §135 (1969).
[94] See note 3 *supra*.
[95] *See e.g.*, Molitor v. Kaneland Community Unit District No. 302, 18 Ill. 2d 11, 163 N.E.2d 89 (1959).