may be of such questionable rationales, they certainly prove inadequate to the homeowner as a means of recovery.

2. When a claim or encumbrance is asserted against the homeowner's title, the most appropriate method for resolution is for the homeowner to "vouch in" his grantor. In such a way the result of any litigation will, for most purposes, be binding upon the grantor.[79] Thus, if an adverse party should sue the homeowner due to, for example, a previously existing mortgage, then the homeowner can "vouch in" his grantor who will then be bound by the result of the litigation.

However, if the adverse claimant has not brought suit, it may not yet be appropriate to "vouch in" the grantor. The homeowner may resolve that it is simply more expedient to purchase the outstanding claim and then obtain recompense from his grantor.[80] However, should he so act "it is at his own risk; and in the suit with his covenantor, he must assume the burden of proof, and rely upon and make out the adverse title to which he has yielded."[81] In any proceeding against his grantor, the homeowner will also have to prove that the amount paid was reasonable.[82] It is thus entirely possible that the homeowner will be unable to prove the third parties' adverse claim or demonstrate the reasonableness of the amount paid to acquire it.[83]

IV. Conclusion

In light of the matters discussed in this article, the answer to the question initially presented, that is, how valuable, as a tool of recoupment, are covenants of title to the average Iowa homeowner, seems clear. The homeowner *may* effectively be able to recover upon his covenants of title, but he runs a serious risk of failure. No matter how infrequent such failure might be, to the homeowner who loses his life savings, or a substantial part thereof, it is of no consolation for his attorney to tell him: "But in the big picture a homeowner often can recover upon his covenants of title."

The person who enters an attorney's office seeking legal assistance in purchasing a home is entitled to something more than apologies. He is entitled to a legal *system* which offers him the assurance that he seeks, that is, that his investment in his new house will not be lost.[84]

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79. Kellar v. Lindley, 203 Iowa 57, 212 N.W. 360 (1927).

80. This expediency may present itself when the adverse claim is discovered just prior to the time when the homeowner is about to convey his title to another. That person may object to the marketability of the title. In order to quickly establish marketability the homeowner may pay what he then considers a reasonable price for purchasing the outstanding interest.

81. Brandt v. Foster, 5 Iowa 287, 298 (1857).

82. Guthrie v. Russell, 46 Iowa 269, 26 Am. Rep. 135 (1877).

83. *See* Ballou v. Clark, 187 Iowa 496, 171 N.W. 682 (1919); Myers v. Munson, 65 Iowa 423, 21 N.W. 759 (1884); Annot., 61 A.L.R. 10, 104-117 (1929).

84. The Iowa legislature has again denied the homeowner a method by which he might possibly acquire such assurance. On March 8, 1973, House Bill 376 was submitted. It would have repealed the prohibition on domestic companies' selling of title insurance in Iowa. *See* note 4, *supra*. The bill was sent to the Commerce Committee, where it died without any action being taken on it.

THE IOWA DRAM SHOP ACT—CAUSES OF ACTION AND DEFENSES

Frank G. Schubert†

I. INTRODUCTION

Iowa is one of nineteen states[1] that have enacted dram shop (civil liability) acts, which allow a statutory remedy in a civil action for money damages against the operator of a tavern who causes or contributes to the intoxication, in one manner or another, of someone who, because of his intoxication, causes injury to either himself or a third person. The original intent of the dram shop act was to overcome the common law requirement of proximate cause, although, to date, it is still a necessary element of proof in some cases. Were it not for the dram shop act, the Iowa supreme court has stated, the proximate cause between the sale of the beverage and the injury caused by the intoxicated person would be too remote.[2] The dram shop act is intended, then, to impose strict liability upon the tavern operator, without regard to his negligence.[3]

This article is directed to certain common situations that give rise to the classical dram shop type action and hopefully will aid in the recognition of such actions.

Dram shop acts, in general, are best exemplified by Illinois' statute[4] which allows recovery against a tavern licensee who causes the intoxication; by the Iowa statute[5] under which the tavern operator, or his agent, must give or sell an intoxicant to a person while he is intoxicated, or serve the person to a point where he becomes intoxicated; and the Minnesota[6] and New York[7] acts which impose liability for the illegal or unlawful selling which causes or contributes to the intoxication.

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1. ALA. CODE tit. 7, § 121 (1958); COLO. REV. STAT. ANN. § 41-2-3 (1963); CONN. GEN. STAT. ANN. § 30-102 (Supp. 1973); DEL. CODE ANN. tit. 4, § 716 (1953); GA. CODE ANN. § 105-1205 (1968); ILL. ANN. STAT. ch. 43, § 135 (Supp. 1973-74); IOWA CODE § 123.92 (1973); ME. REV. STAT. ANN. tit. 17, § 2002 (1964); MICH. STAT. ANN. § 436.22 (Supp. 1973-74); MINN. STAT. ANN. § 340.95 (1972); N.Y. GEN. OBLIGATIONS LAW § 11-101 (McKinney 1969); N.D. CENT. CODE § 5-01-06 (Supp. 1971); OHIO REV. CODE ANN. §§ 4399.01-.02 (1965); OREGON REV. STAT. § 30.730 (1971); R.I. GEN. LAWS ANN. § 3-11-1 (1956); VT. STAT. ANN. tit. 7, § 501 (1972); WASH. REV. CODE ANN. § 71.08.080 (1962) (repealed as of Jan. 1, 1974); WIS. STAT. ANN. § 176.35 (1957); WYO. STAT. ANN. § 12-34 (Supp. 1973).
2. Cowman v. Hansen, 250 Iowa 358, 368, 92 N.W.2d 682, 687 (1958).
3. Williams v. Klemesrud, 197 N.W.2d 614, 617 (Iowa 1972).
4. ILL. ANN. STAT. ch. 43, § 135 (Supp. 1973-74).
5. IOWA CODE § 123.92 (1973).
6. MINN. STAT. ANN. § 340.95 (1972).
7. N.Y. GEN. OBLIGATIONS LAW § 11-101 (McKinney 1969).

Iowa had the distinction, only recently alleviated, of having two separate dram shop acts in effect simultaneously.[8] These two statutes were substantially different in language and content, and the differences can basically be summarized in the following manner: (1) the earlier statute (section 129.2) was directed at individuals violating the Liquor Control Act (by illegal sales), whereas the new statute (section 123.95) was directed at liquor licensees and permittees; (2) the old law did not include beer in the category of intoxicants, while the new law specifically did; (3) under the earlier law, an injured party could recover actual damages, but in addition could also recover exemplary damages, whereas the new statute made no provision for exemplary damages; (4) the language describing the act for which compensation was allowed changed from "who shall . . . cause the intoxication of such person" to "who shall sell or give any beer or intoxicating liquor to any such person while he is intoxicated or serve any such person to a point where such person is intoxicated."[9]

As previously noted, the statute presently in effect is virtually identical to the now repealed section 123.95. It should be noted that a great deal of the dram shop litigation occurred under the older statute. However, except for the differences already noted (basically relating to establishing a prima facie case) the primary factors such as who may recover, what damages may be recovered for, and defenses to a dram shop action have not changed.

II. A Prima Facie Case

In order to recover damages under the dram shop act, the liability of the tavern operator must be proven. This may be done by establishing that the following elements of a prima facie case are present.

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8. Iowa Code § 129.2 (1971) (repealed as of Jan. 1, 1972) provided:
> Every wife, child, parent, guardian, employer, or other person who shall be injured in person or property or means of support by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her own name against any person who shall, by selling or giving to another contrary to the provisions of this title any intoxicating liquors, cause the intoxication of such person, for all damages actually sustained, as well as exemplary damages.

Iowa Code § 123.95 (1971) (repealed as of Jan. 1, 1972) provided:
> Every husband, wife, child, parent, guardian, employer or other person who shall be injured in person or property or means of support by any intoxicated person or resulting from the intoxication of any such person, shall have a right of action, severally or jointly against any licensee or permittee who shall sell or give any beer or intoxicating liquor to any such person while he is intoxicated, or serve any such person to a point where such person is intoxicated for all damages actually sustained.
>
> Every liquor control licensee shall furnish proof of financial responsibility either by the existence of a liability insurance policy or by posting bond in such amount as determined by the commission.

The current statute, Iowa Code § 123.92 (1973) is substantially identical to the previous § 123.95.

9. For a thorough discussion of the differences in the two statutes *see* Note, *Civil Remedies for Intoxication in Iowa*, 13 Drake L. Rev. 168 (1964).

be proven by the alleged intoxicated person's loud and boisterous behavior.[30] The Illinois Pattern Dram Shop Jury Instruction defines intoxication as follows: "A person is intoxicated when as a result of drinking alcoholic liquor there is an impairment of his mental or physical condition so as to diminish his ability to think and act with ordinary care."[31] Again, the point to be made is that although a blood test is probably the most certain way of proving an individual's level of intoxication, and is of course admissible in evidence to do so,[32] it is not necessary to procure this type of evidence in order to establish the intoxicated condition of a person. In Iowa it has been held that lay testimony to the effect that a certain person, at a certain time, was drunk and that he acted drunk, is admissible as against the objection that it is an opinion of the witness and not a statement of fact.[33] Most all cases leave the question of intoxication to the jury, with blood test evidence to be used by the jury in reaching their decision, but it is not considered to be conclusive proof.[34]

The safest trial strategy is to sue all of the taverns in which the intoxicated person consumed alcoholic liquor and let the jury decide which tavern or taverns are culpable. By this method, the last frequented taverns are precluded from arguing to the jury that others, who have not been joined in the suit, may also be liable. In non-suit situations, during negotiation stages, it permits the dram shop insurance companies to determine amongst themselves their respective liability, and possibly the proportionate amounts of their contribution toward settlement.

C. *Actionable Injury*

In order to recover damages, the plaintiff must show that the intoxicated individual caused an actionable injury to the plaintiff, either a direct bodily injury,[35] damage to property,[36] or a non-physical injury such as loss of means of support.[37] This area will be discussed in depth in a later section covering damages.

D. *Proximate Cause*

The intoxication of the individual must have some causal connection with the injury sustained by the plaintiff. In discussing proximate cause it should

30. Aleski v. Freilich, 7 Misc. 2d 631, 164 N.Y.S.2d 151 (Sup. Ct. 1957).
31. Illinois Pattern Jury Instructions 2d, No. 150.16.
32. *See, e.g.*, Brooks v. Engel, 207 N.W.2d 110 (Iowa 1973), where the plaintiff's husband had drowned as a result of trying to rescue a friend who had fallen out of a boat while "relieving himself" after both men had been drinking continuously all night and well into the day of the drowning. The blood test was, in fact, the only evidence of the plaintiff's husband's intoxication since a third party who was present at the time of the drowning testified that neither man was intoxicated.
33. *See* State v. Wheelock, 218 Iowa 178, 254 N.W. 313 (1934); McDermott v. Hawkeye Commercial Men's Ass'n, 158 Iowa 544, 139 N.W. 472 (1913); Kuhlman v. Weiben, 129 Iowa 188, 105 N.W. 445 (1905).
34. *See* State v. Fox, 248 Iowa 1394, 85 N.W.2d 608 (1957).
35. Kearney v. Fitzgerald, 43 Iowa 580 (1876).
36. Woolheather v. Risley, 38 Iowa 486 (1874).
37. Huff v. Aultman & Schuster, 69 Iowa 71, 28 N.W. 440 (1886).

be pointed out that the Iowa dram shop statute differentiates between injuries caused *by* the intoxicated person and injuries received *as a result of* (in consequence of) the intoxication.[38] An "in consequence action" would exist, where for example, the intoxicated person injures himself, commits suicide, or becomes the victim of habitual intoxication. A "by action," on the other hand is where an intoxicated person injures, by automobile, gun, assault, or otherwise, some third person.

In a situation involving an "in consequence action" Iowa requires the plaintiff to prove that the intoxication was *a* proximate cause of the incident and resulting injury and damage.[39]

However, in the case of a "by action" the authorities are not so clear. *Bistline v. Ney Bros.*[40] held that in a "by action" where the intoxicated person directly injures a third person, intoxication need not be shown to be the proximate cause of the injury. The statute indulges in a reasonable presumption that the action of an intoxicated person was the result of the intoxication.[41] In such a situation, the only defense to the dram shop action would be that the injurious act was wholly chargeable to some other cause.[42] In a more recent case, *Federated Mutual Implement & Hardware Ins. Co. v. Dunkelberger,*[43] the insurers of an intoxicated driver's car sought contribution and/or indemnity from the defendant tavern operator. The defendant contended that the plaintiff-insurers could not recover because defendant's sale of liquor could not have been the proximate cause of the collision and resulting death and personal injury. In that case, the Iowa court adopted section 431 of the *Restatement of Torts* which states: "The actor's negligent conduct is a legal cause of harm to another if (a) his conduct is a substantial factor in bringing about the harm . . . ."[44] The supreme court went on to state in dictum that "if the allegations of plaintiff's petition are taken as true the issue of whether defendant's sale of liquor . . . was a proximate cause of the injury . . . would be for the jury."[45]

In *Federated Mutual,* then, the Iowa supreme court hinted that it might be necessary to establish that the sale of the liquor was a proximate cause of the accident.

It cannot, however, be stated with certainty that such proof will be necessary for recovery under the dram shop act. In *Pose v. Roosevelt Hotel Co.*,[46] a dissenting opinion stated, "As noted by the majority, no issue is presented in this case as to whether a dram shop claimant must show the intoxication was a prox-

38. IOWA CODE § 123.92 (1973) provides in part: ". . . who shall be injured in person or property or means of support by any intoxicated person or resulting from the intoxication of any such person. . . ."
39. Bistline v. Ney Bros., 134 Iowa 172, 111 N.W. 422 (1907).
41. *Id.* at 179, 111 N.W. at 424.
42. *Id.* at 180, 111 N.W. at 424-25.
43. 172 N.W.2d 137 (Iowa 1969).
44. *Id.* at 144.
45. *Id.* at 143-44.
46. 208 N.W.2d 19 (Iowa 1973).

imate cause of the injury for which recovery is sought. That remains an open question under our statute."[47]

Another question of proximate cause that has not received much attention came to light in the *Pose* case. This is the question of the proximate cause of the intoxication, *i.e.*, must the plaintiff plead and prove that the liquor sold to the alleged intoxicated person by the defendant was a proximate cause of that person's intoxication at the time of the accident? The court stated that it had not previously considered this question[48] and concluded, in this case, by answering it in the affirmative:

> A proper construction of section 123.95 (now section 123.92, The Code, 1973) requires one seeking damages from a licensee or permittee under the provisions of this statute for injuries to person or property or means of support by any intoxicated person or resulting from the intoxication of any such person to plead and prove a causal connection between such person's intoxication at the time of the commission of the act causing such injuries and the sale or gift of beer or intoxicating liquor to him by the licensee or permittee against whom recovery is sought.[49]

The court seemed to stress that this is not to say that the plaintiff must prove a negative act, *i.e.*, that the alleged intoxicated person would not have been intoxicated at the time of the incident if it had not been for the alcohol served by the defendant. But rather it is to say that the alcohol sold by the defendant to the alleged intoxicated person was *a* proximate cause of the intoxication at the time of the accident; it need not have been the sole cause of the intoxication.[50]

It appears that a plaintiff's attorney would be advised to be prepared to prove that the liquor sold by the defendant was a proximate cause of the intoxication at the time the incident occurs, and also, although still an open question, that the intoxication was a proximate cause of the injury.

E. *Who May Sue?*

The relevant language of section 123.92 reads: "Every husband, wife, child, parent, guardian, employer or other person who shall be injured in person or property or means of support . . . shall have a right of action. . . ."[51] In order to maintain an action under the dram shop act the plaintiff must fall within this statutory scheme. With the persons specifically mentioned, there would seem to be no problem. However, difficulties have arisen concerning the scope of the term "other person."

1. *The Intoxicated Person*

One thing that is relatively certain under Iowa's dram shop statute is that

47. *Id.* at 34 (dissenting opinion).
48. Pose v. Roosevelt Hotel Co., 208 N.W.2d 19, 28 (Iowa 1973).
49. *Id.* at 30.
50. *Id.* See also the jury instructions given by the trial court at pp. 22-23.
51. IOWA CODE § 123.92 (1973).

the intoxicated person may not recover for injuries caused to himself by reason of his intoxication.[52] This, the court said, is because the law was passed for the benefit of innocent persons injured as a result of his intoxication—it was not intended to benefit one who voluntarily becomes intoxicated and injures himself.[53]

Since the court will not reward the intoxicated person, the state's rights are no better. In *Evans v. Kennedy*[54] the Iowa court specifically held that the term "other person" does not include the administrator of the deceased intoxicated person's estate stating:

> Of course, it is obvious under the Iowa Survivorship Statute that if the intoxicated person himself could not maintain a cause of action, his estate has no standing either. . . . In any event, we find no authority to support appellant's contention that the administrator of a deceased drunk falls within the description of the term "or other person" and must hold, in the absence of anything to indicate such was the intent of the legislature, that he is not so included.[55]

2. *The Intoxicated Person's Insurance Company*

The other area in which a question has arisen is where the intoxicated person's insurance company, acting as subrogee, seeks contribution and/or indemnity from the tavern owner for monies paid out by it as a result of the intoxicated person's actions. In *Federated Mutual Implement & Hardware Ins. Co. v. Dunkelberger*,[56] the Iowa supreme court was directly confronted with the question of whether or not the insurer was meant to be included within the scope of the term "other person" in the dram shop statute. The court held that the owner of the automobile which the intoxicated person was driving at the time of collision was included within "other person" and that his liability insurer, a subrogee, was entitled to indemnity under the dram shop act for amounts paid in settlement of actions where the owner's liability was vicarious only, and arose because of the negligence of the driver, by virtue of statute.[57] In addition, the court held that since the intoxicated driver was not included within the term "other person" his liability insurer, as subrogee, could not recover indemnity against the defendant tavern operator.[58] However, the intoxicated driver's insurer could recover contribution from the tavern operator.[59]

The *Federated Mutual* case was brought under the former section 123.95, and did present a confusing situation. Such a problem could not occur under the present statute, as it has been specifically provided for in section 123.94 which provides: "No right of action for contribution or indemnity shall accrue

52. Evans v. Kennedy, 162 N.W.2d 182 (Iowa 1968).
53. *Id.* at 185.
54. 162 N.W.2d 182 (Iowa 1968).
55. *Id.* at 187.
56. 172 N.W.2d 137 (Iowa 1969).
57. *Id.* at 141-42.
58. *Id.* at 142.
59. *Id.*

to any insurer, guarantor, or indemnitor of any intoxicated person for any act of such intoxicated person against any licensee or permitee as defined in this chapter."[60] This section would not seem to cut off the rights of the insurer of the owner of an automobile that was being driven by any intoxicated person (other than the owner). The owner would seemingly still fall within the scope of "other person." However, this section may be subject to attack by automobile insurers as special legislation for dram shop owners and their insurers.

While on the subject of insurance, keep in mind that it is mandatory under the dram shop act that a licensee or permittee secure a dram shop insurance policy with certain minimum limits of liability.[61] These are "minimum" limits and more often the actual limits of liability carried by a dram shop keeper are much higher. Iowa Rule of Civil Procedure 122 makes the exact limits of liability subject to discovery.

F. *Who May Be Sued?*

The Iowa supreme court, in *Cochran v. Lovelace*,[62] a very close decision,[63] recently ruled that section 123.92 of the *Iowa Code* specifically provides that an injured party may bring an action against a licensee or permittee who has committed an act which is wrongful under the statute. The court said that the language of the statute was clear and that actions were not to be maintained against the insurance company. Specifically, the court stated: "If the General Assembly, in enacting section 123.95, had meant that actions such as this be brought against licensees or permittees *and* their surety it could easily have so provided. This it did not do."[64]

In essence, the dissenting opinons' objection seemed to be that the dram shop act was not intended to provide indemnification to the permittees and licensees involved, but rather to protect persons injured by liquor traffic. Thus, there is no logical reason why the surety should not be sued in the same action.[65]

III. Damages

The dram shop act provides for recovery of three types of damages: (1) injury to the person; (2) injury to property; and (3) injury to means of support.

Injury to the person refers generally to physical injuries, and has been extended to include death.[66] Injury to property is generally construed to mean

60. Iowa Code § 123.94 (1973).
61. Iowa Departmental Rules (Iowa Beer and Liquor Control Dept.) § 8.1(3) (1973).
62. 209 N.W.2d 130 (1973).
63. Justices Uhlenhopp, Reynoldson, Harris, and McCormick dissented.
64. Cochran v. Lovelace, 209 N.W.2d 130, 132 (Iowa 1973).
65. *See* Justice Reynoldson's dissenting opinion. *Id.* at 136.
66. *See* Wendelin v. Russell, 259 Iowa 1152, 147 N.W.2d 188 (1966).

injury to tangible real or personal property.[67] Injury to means of support refers to a decrease in monetary support of an individual dependent upon someone who is injured or killed by or in consequence of intoxication, or resulting from the intoxication of anyone.[68]

A. *Injury to the Person*

It has been held that injury to the person is intended to mean bodily injuries.[69] This would include, then, the obvious types of injuries to the body such as broken limbs, internal injuries, etc. Thus, for example, a wife who has been attacked and beaten by an intoxicated husband would have a cause of action for which damages may be recovered under the dram shop statute.[70] Also, injuries to the person resulting from an intoxicated driver, a shooting by an intoxicated person, etc., are types of injuries for which damages will be awarded.

In discussing this area, it seems advantageous to point out injuries the court has found not to constitute injuries to the person. It is well established that mental anguish or hurt feelings arising from vulgar or threatening remarks made by an intoxicated person does not constitutte injury to the person.[71] Thus, a husband's remarks to his wife while he was intoxicated were found not to be actionable in *Calloway v. Laydon*[72] where the court stated that to give a right of action to every person to whom a vulgar or threatening remark was made would be a construction of the statute of which it was not susceptible.[73] In addition, because a wife has suffered, as a result of her husband's intoxication, a decline in her standing in society, she has been held not to have an injury to person, property, or means of support.[74]

The fact that damages are not recoverable because of mere mental anguish should be distinguished from a situation where a wife, for example, suffers actual physical injuries because of the mental anguish, instead of violent action. In *League v. Ehmke*[75] the Iowa supreme court upheld a jury instruction that the jury could consider, in determining the wife's damages, injuries to her health resulting from threats of bodily injury made to her by her intoxicated husband.[76]

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67. *See, e.g.*, Kearney v. Fitzgerald, 43 Iowa 580 (1876); Woolheather v. Risley, 38 Iowa 486 (1874).
68. *See, e.g.*, Huff v. Aultman & Schuster, 69 Iowa 71, 28 N.W. 440 (1886).
69. Calloway v. Laydon, 47 Iowa 456 (1877).
70. Kearney v. Fitzgerald, 43 Iowa 580 (1876).
71. Welch v. Jugenheimer, 56 Iowa 11, 8 N.W. 673 (1881); Jackson v. Noble, 54 Iowa 641, 7 N.W. 88 (1880); Calloway v. Laydon, 47 Iowa 456 (1877).
72. 47 Iowa 456 (1877).
73. *Id.* at 458.
74. Jackson v. Noble, 54 Iowa 641, 7 N.W. 88 (1880).
75. 120 Iowa 464, 94 N.W. 938 (1903).
76. *See also* Ward v. Thompson, 48 Iowa 588 (1878), where the court held it proper for the jury to consider physical injuries resulting from mental anguish, shame, or suffering where plaintiff's husband had repeatedly forced her to leave the house and stay out all night.

B. *Injuries to Property*

As stated previously, injury to property has been construed to mean injury to tangible real or personal property, so that injuries to furniture or household goods of a wife, as a result of the intoxication of her husband have been held to be recoverable.[77] Where a husband has become intoxicated and sold property belonging to his wife, and then squandered the proceeds, the wife may recover the actual amount of damages from the tavern operator.[78]

When all the cases concerning injury to property are construed together, it appears that there has not been much litigation in the area. A more recent case[79] indicates a less stringent definition of "injury to property." In *Federated Mutual* the Iowa court held that "injury in property" under the dram shop statute does not need to be a direct physical injury to be compensable.[80] The court went on to say that it is sufficient that the plaintiff show a lessening of his total assets due to the intoxication of another in order to state a cause of action against the tavern operator who caused the intoxication.[81] Under this holding, it would appear that monies paid out for hospital and doctor's bills could be recovered as an injury in property.

C. *Injury to Means of Support*

The "injury to means of support" cases produce a variety of recoveries under the dram shop statute. For example, there is no doubt that a wife is injured in her means of support when her husband dies as a result of intoxication—his own or someone else's.[82] This is illustrative of the reasoning allowing for recovery in this area, *i.e.*, that the dependents of one who dies, or becomes unable to provide support as the result of intoxication should be able to recover the support which they would have actually received had it not been for the intoxication.[83]

In dealing with a loss of support case, it will be necessary to have a working definition of "support." In *Thill v. Pohlman*,[84] the Iowa supreme court upheld a jury instruction defining reasonable support as follows:

> The law requires that a husband shall provide for his wife a reasonable support, according to her rank and station in society; and to this end she is entitled, with her husband and family, to share his property, and the proceeds of his labor. It is not to be understood that a husband is only obligated to furnish a bare subsistance to his

77. Kearney v. Fitzgerald, 43 Iowa 580 (1876); Woolheather v. Risley, 38 Iowa 486 (1874).
78. Woolheather v. Risley, 38 Iowa 486 (1874).
79. Federated Mut. Implement & Hardware Ins. Co. v. Dunkelberger, 172 N.W.2d 137 (Iowa 1969).
80. *Id.* at 141.
81. *Id.*
82. Bistline v. Ney Bros., 134 Iowa 172, 111 N.W. 422 (1907); Huff v. Aultman & Schuster, 69 Iowa 71, 28 N.W. 440 (1886); Rafferty v. Buckman, 46 Iowa 195 (1877).
83. *See, e.g.*, Mathre v. Devendorf, 130 Iowa 107, 106 N.W. 366 (1906); Bellison v. Apland & Co., 115 Iowa 599, 89 N.W. 22 (1902); Ennis v. Shiley, 47 Iowa 552 (1877).
84. 76 Iowa 638, 41 N.W. 385 (1889).

> wife,—that is, food and clothing,—but to the extent of his ability he is under obligation to provide his wife those comforts and surroundings reasonable and necessary for home enjoyment in the society in which she lives . . . .[85]

The Iowa cases would seem to indicate that in determining the amount of damages for support a person has been deprived of, the court will definitely consider the actual situation of the plaintiff, *i.e.*, was the person whom the plaintiff relied upon for support a good provider, industrious, etc.[86] As suggested above, the great majority of the cases have been commenced by plaintiffs whose husbands have, because of intoxication, ceased to provide support. This may have been due to some act of the intoxicated person which resulted in a disabling injury or death to such person or resulted in his death or it may be due to the fact that the person has become habitually intoxicated. As to exactly what evidence may be considered in awarding damages, the court has held admissible evidence of "circumstances and condition in life"[87] of the plaintiff prior to the intoxication which deprived her of support, evidence of social standing,[88] and very importantly, the amount of support actually provided prior to the intoxication,[89] since recovery was limited to that amount.[90]

It should be noted that each dependent seeking damages for loss of support is going to have to bring his or her own action. For example, where a wife brings an action for loss of means of support, it has been held that evidence of the number of children in the family and their ages is inadmissible since the wife is entitled to recover for only her own support.[91] However, if a child brings the action, evidence as to the number of other children in the family has been held to be admissible to prove the amount of actual damages suffered by that child.[92]

Before proceeding to some specific examples of instances where damages for loss of means of support have been allowed, it should be made clear that although, as pointed out above, the great majority of cases deal with loss of support actions brought by dependents of the intoxicated person, actions for loss of means of support can also be maintained by dependents of innocent third parties who have been injured or killed by an intoxicated person.[93]

A great variety of types of recovery exists in the "means of support" cases. As already mentioned, a wife can recover in a situation where her husband dies as a result of intoxication. But in addition, where a husband became habitually intoxicated, the court has also allowed the wife damages for loss of

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85. *Id.* at 639, 41 N.W. at 385.
86. *See generally* Rafferty v. Buckman, 46 Iowa 195 (1877); Dunlavey v. Watson, 38 Iowa 398 (1874).
87. Thill v. Pohlman, 76 Iowa 638, 640, 41 N.W. 385, 386 (1889).
88. *Id.*
89. *Id.*
90. *See, e.g.*, Mathre v. Devendorf, 130 Iowa 107, 106 N.W. 366 (1906).
91. Huggins v. Kavanagh, 52 Iowa 368, 3 N.W. 409 (1879).
92. Shull v. Arie, 113 Iowa 170, 84 N.W. 1031 (1901).
93. *See, e.g.*, Pose v. Roosevelt Hotel Co., 208 N.W.2d 19 (Iowa 1973).

support.[94] In fact, in *League v. Ehmke*,[95] the Iowa court held that where the plaintiff's husband had failed to support her, in the past, because of habitual intoxication and this condition had been caused to continue by sales of liquor made by the defendant tavern operator, the plaintiff was entitled to damages to her means of support resulting from the continuation of the habitual intoxication, to the extent that the defendant's acts contributed to the injury. The rationale behind this type of recovery seems to be that even though the husband has been a habitual drunk, there is always the chance that he may have reformed, were it not for the tavern operator selling him liquor.[96] Important also is that, in the case of habitual intoxication, recovery will be allowed only for the two preceeding years (this is the case even if the intoxication has continued for some twenty years).[97] Also, in such a situation, the defendant would not be able to defeat plaintiff's recovery for the prior two years by showing habitual intoxication for the past twenty years.[98] This situation should not, however, be confused with an action for future support. In such a case evidence of the intoxicated person's habits (*i.e.*, intoxication or industriousness) would be competent evidence in determining what future support the plaintiff would have received.[99] Also, in this area of future support, the Iowa supreme court has approved the use of life expectancy tables in determining the amount of support lost.[100] However, in doing so the court seemed to take note of the defendant's contention that life expectancy tables were not accurate since the intoxicated person's life expectancy would be changed by his habits. The court said that the jury could consider tables along with other evidence as to a person's habits and physical condition, and the vocation of the person whose probable length of life is to be estimated.[101]

A wife is also injured in her means of support if her husband, because of intoxication, loses his job, his business, etc., or finds that he is unable to secure a job because of his intoxication.[102] In *Fox v. Wunderlich*,[103] for example, the plaintiff's husband was shown to be a good mechanic, in constant demand when not intoxicated. The evidence showed that when he was intoxicated, he contributed no support at all. The Iowa court affirmed a judgment for the plaintiff.

A situation not yet encountered by the Iowa court is illustrated by the Illinois case of *Saint Clair v. Douvas*[104] where it was held that the incarceration

94. League v. Ehmke, 120 Iowa 464, 94 N.W. 938 (1903); Ennis v. Shiley, 47 Iowa 552 (1877).
95. 120 Iowa 464, 94 N.W. 938 (1903).
96. *See* Knott v. Peterson, 125 Iowa 404, 101 N.W. 173 (1904); Woolheather v. Risley, 38 Iowa 486 (1874).
97. *See* Huff v. Aultman & Schuster, 69 Iowa 71, 28 N.W. 440 (1886).
98. *Id.*
99. Lee v. Hederman, 158 Iowa 719, 138 N.W. 893 (1912).
100. Peterson v. Brackey, 143 Iowa 75, 119 N.W. 967 (1909).
101. *Id.* at 80, 119 N.W. at 968.
102. *See, e.g.*, Jewett v. Wanshura, 43 Iowa 574 (1876).
103. 64 Iowa 187, 20 N.W. 7 (1884).
104. 21 Ill. App. 2d 444, 158 N.E.2d 642 (1959).

of the provider due to some act committed because of his intoxication gives rise to a loss of means of support action by his dependants for the period of his confinement in jail. The Iowa attorney may want to keep this possible action in mind since the Iowa court has not ruled on it as of this time.

In the case of a minor suing for loss of support, the elements of proof are similar to those where the spouse is suing. The death of the father, as in the case of the wife, would constitute injury to the child's means of support.[105] If the plaintiff is a very young child, so that damages will mainly be for loss of future support, it is important to show the past habits of the father. In *Lee v. Hederman*,[106] this situation arose and the Iowa court stated that since the plaintiff was merely three years old, the amount of damages he could receive would depend upon the support that would have been provided by the father, as reflected by past habits.[107]

Clearly, an advantage afforded the attorney representing a child injured in means of support is that he is not faced with a two-year statute of limitations. The Iowa statute, unlike the Illinois act for example, does not provide a period within which suit must be filed. Therefore, the general statutes of limitation apply. Since this particular action is not too well known, it is conceivable that there are many loss of means of support actions still viable since the passage of the statute. However, it is important to note the requirement of section 123.93 that an injured person must give *written notice* to the licensee or permittee of his intention to sue within *six months* of the occurrence of the injury.[108] The section further provides that the six month period is to be extended if at the end of the period the injured person is incapacitated or if through due diligence he has been unable to find the name of the permittee, licensee or person causing the injury.[109] Presumably the notice requirement would not then be applicable to minors and incompetents, although it does not specifically exclude them.

Furthermore, since the actions are severable as to the widow and minor children, the trial tactic advantage should be obvious. The first action, filed by the spouse or widow, and not subject to any consolidation because the second action by the children has not yet been filed, compels the defendant tavern owner to expose his entire defense in the initial suit.

Thus it can be seen that a great many possibilities exist for bringing an action for means of support. Although, most clearly, the family members of the intoxicated individual may recover for loss of support, do not overlook the family members of an individual who has been injured or killed by an intoxicated person.

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105. Goulding v. Phillips, 124 Iowa 496, 100 N.W. 516 (1904) (involved an illegitimate child).
106. 158 Iowa 719, 138 N.W. 893 (1912).
107. *Id.* at 724-25, 138 N.W. at 895.
108. Iowa Code § 123.93 (1973).
109. *Id.*

IV. Defenses

As might be expected, since the intent of the dram shop act is to "place a hand of restraint upon those licensed or permitted by law to sell or supply intoxicants to others and protect the public,"[110] the court does not allow many defenses to a dram shop action. This section will explore those defenses which have been found to be valid by the Iowa supreme court and also those that would seem on their face to raise a valid defense, but which the court has ruled do not.

If the defendant can prove that the plaintiff actively contributed to the intoxication of an individual by purchasing liquor for him or consenting to the drinking, the plaintiff will not be allowed to recover.[111] It is not, as previously stated, the purpose of the dram shop act to reward one who voluntarily participates in the drinking. It is, then, a valid defense to a dram shop action if it can be shown that a wife has *voluntarily* consented to her husband's drinking.[112] However, where the wife has given her consent to the drinking, as a result of threats of violence or coercion, no defense is found to exist.[113] It is no defense that the wife had on other occasions bought and drank with her husband if she did not contribute to or sanction the specific intoxication for which she brings the action.[114] However, the particular drinking situation may make the question of complicity a fact determination to be made by the jury. For example, there is an Illinois case, *Dunkelberger v. Hopkins*,[115] where a twenty year old girl accompanied her host-driver on a visit to a number of taverns. The question of whether she was guilty of complicity in participating in the bringing about of the intoxication of her host-driver was, under the circumstances, a question of fact for the jury. Here, the court felt that the girl was more of a captive because she had to rely on the driver to take her home.

The fact that the person to whom the defendant-tavern operator sold liquor was in the habit of becoming intoxicated and the defendant did not know this fact does not constitute a defense.[116] In addition, it is no defense that the defendant's agent violated orders in selling the liquor to the intoxicated person.[117]

In the case of an action for loss of means of support, as mentioned in a prior section, it is no defense that the husband had failed to give previous support.[118]

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110. Wendelin v. Russell, 259 Iowa 1152, 1158, 147 N.W.2d 188, 192 (1966).
111 *See, e.g.*, Rafferty v. Buckman, 46 Iowa 195 (1877); Engleken v. Hilger, 43 Iowa 563 (1876).
112. Kearney v. Fitzgerald, 43 Iowa 580 (1876).
113. *See* Jewett v. Wanshura, 43 Iowa 574 (1876), where the plaintiff-wife had forbidden the defendant-tavern owner to sell liquor to her husband, but later retracted the order because of threats made by her husband.
114. Rafferty v. Buckman, 46 Iowa 195 (1877).
115. 51 Ill. 2d 205, 200 N.E.2d 905 (1964).
116. Bistline v. Ney Bros., 134 Iowa 172, 111 N.W. 422 (1907); Dudley v. Sautbine, 49 Iowa 650 (1878).
117. Dudley v. Sautbine, 49 Iowa 650 (1878).
118. Knott v. Peterson, 125 Iowa 404, 101 N.W. 173 (1904); League v. Ehmke, 120 Iowa 464, 94 N.W. 938 (1903).

The fact that the plaintiff has commenced other suits, or other suits are pending does not give rise to a defense.[119] That the plaintiff has recovered from one tavern operator, would not raise a defense for other tavern operators who may also be liable under the statute, unless the first action was a joint action involving that defendant and the same intoxication.[120]

A "new defense" to a dram shop action is established by the recent case of *Pose v. Roosevelt Hotel Co.*[121] In *Pose,* the court held for the first time that the plaintiff must prove that the liquor sold to the intoxicated person by the defendant was a proximate cause of the intoxication at the time of the incident causing the injury.[122] Thus the defendant, by denying such an allegation, will force the plaintiff to prove this fact—a task that may prove quite difficult.

V. Example

Since the purpose of this article is to give some assistance in recognizing a possible dram shop action, an example involving different types of injuries and an explanation as to whether or not each injury would be actionable under the dram shop act might be instructive.

X, the alleged intoxicated person, and his friend *Y*, had been drinking in a local tavern for several hours. An argument erupted which terminated with *X* breaking a beer bottle over *Y*'s head. A piece of the bottle struck *W*, the waitress who had been serving the two all evening. Another sliver struck *P*, a patron at the other end of the bar, who had been drinking for quite some time also, and who had become intoxicated. As a result of the disturbance, muscles and tendons in *X*'s hand were severely severed, *Y* received a fractured skull, *W* suffered a ragged facial cut, resulting in a disfiguring scar, and *P* lost the sight of his eye. Amongst the four persons, what dram shop actions arise?

As to *X*, the intoxicated person, no recovery would be allowed in Iowa.[123] Courts are not inclined to reward a drunk person for his own folly.[124] Although *X* would not be able to recover any damages, his family would have an action against the tavern operator for loss of means of support if *X* is unable to work because of the injuries he received.[125]

Although *Y* sustained a personal injury, he is not entitled to recover under the dram shop act because he voluntarily participated in the drinking with *X*.[126] Even though *Y* is not the intoxicated person performing the affirmative tortious

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119. Mathre v. Devendorf, 130 Iowa 107, 106 N.W. 366 (1906).
120. Jackson v. Noble, 54 Iowa 641, 7 N.W. 88 (1880).
121. 208 N.W.2d 19 (Iowa 1973).
122. *See* note 48, *supra*, with accompanying text.
123. In fact, a recent Alaska case seems to make that state the only one, even though it does not have a dram shop act, to allow the intoxicated person to recover. *See* Vance v. United States, 41 U.S.L.W. 2500 (D. Alas., Mar. 16, 1973).
124. Evans v. Kennedy, 162 N.W.2d 182 (Iowa 1968).
125. *See* cases cited notes 75-99 *supra.*
126. *See* cases cited note 101 *supra.*

act, few, if any, jurisdictions would permit him to recover for bodily injury. *Y*'s conduct is not generally referred to as contributory negligence, but rather as not being an innocent party, or being guilty of complicity, or being guilty of participation in procuring the intoxication of the intoxicated individual.[127] However, like *X*, if *Y*'s injury keeps him from working for some period, his wife and children would have a cause of action against the tavern operator based on loss of means of support. *Y*'s family should not be deprived of their support because of *Y*'s conduct.

Although *W* was neither a participant in the drinking nor the argument, she still would not be able to recover under the dram shop act since she was an active and willing agent in bringing about the intoxication.

P, although a patron and himself becoming intoxicated, would still be considered an innocent party. He would have an action against the tavern operator for injury to the person, and, if married, his wife and children would have an action for loss of means of support based on any earnings lost during the period of disability.

VI. Conclusion

Types of dram shop cases are infinite. In some cases the dram shop act is overlooked as a legitimate means of recovery. Consider for a moment situations you may have had presented to you in your own practice, such as intentional death occurrences where a member of your client's family was killed by a drunk in the commission of a felony, such as an armed robbery or rape. Although the defense argument may be that the crime was "premeditated" and drinking was in no way related, the plaintiff's argument should be that the liquor consumed relaxed the inhibitions, thereby giving the drunk sufficient courage to carry out his scheme. The latter thought should also apply in suicide cases.

Representative of the unintentional death situations are cases such as an intoxicated person who drowns, or becomes asphyxiated after falling asleep with his automobile running, or burning to death after falling asleep in bed with a lighted cigarette. Only after weighing the facts will you be able to decide whether or not to pursue an action under the dram shop act.

As a practical matter, regardless of the severity of your client's injury or the nature and extent of damages, do not think in terms of a F.E.L.A. recovery, or the value you would assess to the case were you suing the intoxicated person directly. Keep in mind that the operation of a tavern is a legal, licensed business, and as such, pays substantial license fees and taxes to the state and community. The majority of today's jurors drink alcoholic beverages, and therefore do not have an inherent prejudice against the dispenser. Also, remember that if the intoxicated person is injured and you are representing his wife and

127. Berge v. Harris, 170 N.W.2d 621 (Iowa 1969); Kearney v. Fitzgerald, 43 Iowa 580 (1876); Engleken v. Hilger, 43 Iowa 563 (1876).

family in a loss of means of support action, you do not have the same sympathetic factors in your favor as you do when representing the innocent person who is injured or his family.

A final suggestion: Avoid getting involved in multiple divisions or counts for injuries to person, property, means of support, etc., if you have a marginal or average case. You will not only get involved in headaches of pleading and proof, but you will stay awake nights preparing your instructions.

FINAL PAYMENT AND WARRANTIES ON PRESENTMENT UNDER THE UNIFORM COMMERCIAL CODE— SOME ASPECTS

Elwin J. Griffith†

I. INTRODUCTION

Most checks are processed and paid in the normal course of events by the payor bank[1] without fanfare. Frequently, though, there are competing claims for payment and it becomes important to determine whether there has been final payment.[2] The necessity of making that determination implies that not all payments are final. Whether a payment is indeed final, or whether it may be recovered despite its apparent finality may be determined by sections 3-417, 3-418 and 4-213 of the *Code*. Final payment must be considered in light of the two latter sections. Section 4-213 prescribes those events which constitute final payment by a payor bank, while section 3-418 sets out those conditions under which a payment may be recovered even though final under section 4-213. Thus, the concept of finality does not preclude recovery by the payor bank unless there has been final payment within the context of both sections 3-418 and 4-213. Such finality is really a product of balancing the equities between the parties, particularly in those cases where each party seems equally innocent.

II. ASPECTS OF FINAL PAYMENT

Under section 3-418,[3] payment may be final in favor of a holder in due course or a person who has in good faith changed his position in reliance on

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1. UNIFORM COMMERCIAL CODE, 1962 Official Text, Section 4-105(b). "'Payor bank' means a bank by which an item is payable as drawn or accepted;" (Further references to the CODE will be to the 1962 Official Text unless otherwise indicated).

2. U.C.C. § 4-213:

(1) An item is finally paid by a payor bank when the bank has done any of the following, whichever happens first:

(a) paid the item in cash; or

(b) settled for the item without reserving a right to revoke the settlement, and without having such right under statute, clearing house rule or agreement; or

(c) completed the process of posting the item to the indicated account of the drawer, maker or other person to be charged therewith; or

(d) made a provisional settlement for the item and failed to revoke the settlement in the time and manner permitted by statute, clearing house rule or agreement.

Upon a final payment under subparagraphs (b), (c) or (d) the payor bank shall be accountable for the amount of the item.

3. U.C.C. § 3-418: "Except for recovery of bank payments as provided in the Article on Bank Deposits and Collections (Article 4) and except for liability for breach of warranty on presentment under the preceding section, payment or acceptance of any instrument is final in favor of a holder in due course, or a person who has in good faith changed his position in reliance on the payment."