The Common Law Liability for Minnesota Liquor Vendors for Injuries Arising from Negligent Sales

Minn. L. Rev. Editorial Board

Follow this and additional works at: https://scholarship.law.umn.edu/mlr

Part of the Law Commons

Recommended Citation
https://scholarship.law.umn.edu/mlr/2845

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.
The Common Law Liability of Minnesota Liquor Vendors for Injuries Arising From Negligent Sales

Liquor vendors have traditionally been held not liable at common law for injuries perpetrated by their patrons after consuming the purchased liquor. A recent series of cases has imposed liability, however, for injuries incurred by a third party as a result of an illegal sale. The author of this Note examines the likelihood that such a remedy may be recognized in Minnesota and the desirability of making it available. He concludes that both theoretical and practical considerations justify according an innocent third party a common law cause of action for injuries proximately resulting from certain kinds of illegal sales.

INTRODUCTION

We are fully mindful that policy considerations and the balancing of the conflicting interests are the truly vital factors in the molding and application of the common law principles of negligence and proximate causation. But we are convinced that recognition of the plaintiff's claim will afford a fairer measure of justice to innocent third parties whose injuries are brought about by the unlawful and negligent sale of alcoholic beverages to minors and intoxicated persons, will strengthen and give greater force to the enlightened statutory and regulatory precautions against such sales and their frightening consequences, and will not place any unjustifiable burdens upon defendants who can always discharge their civic responsibilities by the exercise of due care.¹

Minnesota liquor vendors have long been held liable under liquor licensing² and bonding³ statutes and the Civil Damage

2. An early statute provided that a liquor licensee was liable for all damages caused by persons intoxicated by liquors obtained from him after his license had been voided by a judgment forfeiting his bond posted in compliance with the liquor license laws. Minn. Sess. Laws 1858, ch. 74, § 5. This provision remained in effect until 1905.
3. Minn. Sess. Laws 1895, ch. 246, § 1, provided that the bond posted in compliance with the liquor licensing statutes be used to cover damages to a party injured as a result of a violation of the liquor laws by the licensee. Although amended, this section exists today substantially as enacted. MINN. STAT. ANN. § 340.12 (Supp. 1964).
("dramshop") Act [hereinafter CDA] for damages resulting from unlawful sales of liquor. In recent years a number of courts have imposed non-statutory liability by permitting the maintenance of a common law negligence action against the vendor by a third party who suffers injury at the hands of a vendee as a proximate result of illegal sales. Most of these decisions have reasoned that the violation of statutes prohibiting sales or transfers of liquor to minors or intoxicated persons constitutes negligence per se. One has held that the vendor is liable only if he knew or could reasonably be expected to have known that the sale was illegal. The availability of a common law negligence action in Minnesota is not altogether clear. The purpose of this Note is to discuss both the degree to which it may be available and its desirability.

I. AVAILABILITY OF THE COMMON LAW ACTION

A. THE TREND TOWARD RECOGNITION

Numerous cases hold that at common law persons injured by an intoxicate have no remedy against the vendor of the liquor, consumption of which caused the intoxication. When an explana-

---

4. The Minnesota Civil Damage Act (hereinafter cited as CDA), enacted in 1911, provides that those injured by an intoxicated person may recover from the vendor who, by illegally transferring liquor to such person, caused his intoxication. MNN. STAT. § 340.95 (1961). An excellent general discussion of the Minnesota Civil Damage Act may be found in Note, 46 MNNN. L. Rev. 169 (1961).


6. The absence of a "dramshop" act or its inapplicability to extraterritorial injuries may provide some explanation for the results of these cases. See Waynick v. Chicago's Last Dep't Store, supra note 5 (Illinois "dramshop" act had repeatedly been held to have no extraterritorial effect; sale occurred in Illinois but injuries inflicted in Michigan upon Michigan residents); Schelin v. Goldberg, 188 Pa. Super. 341, 146 A.2d 648 (1968) (Pennsylvania "dramshop" act repealed shortly before case arose).


nation is given it is either one of two rationales. The one infrequently advanced is that a sale of liquor to a "competent" person does not constitute negligence.\(^6\) The more common rationale, known as the "common law rule," is that the voluntary consumption of the liquor by the vendee, and not its transfer by the vendor, is the proximate cause of the plaintiff's injury.\(^*\) Also Annot., 130 A.L.R. 352, 357-62 (1941).

A great number of cases contain statements to the same effect which are dicta, or at least severely weakened, because made in the context of a civil damage act suit, e.g., James v. Wicker, 309 Ill. App. 397, 33 N.E.2d 169 (1941); Campbell v. Harmon, 96 Me. 87, 51 Atl. 501 (1901); and Kraus v. Schroeder, 105 Neb. 809, 182 N.W. 364 (1921), or a suit based on some other common law theory. Cherbonnier v. Rafalovich, 88 F. Supp. 800 (D. Alaska 1950), or a suit brought by an intoxicated person suing for injuries to himself, Hitson v. Dwyer, 51 Cal. App. 2d 803, 149 P.2d 992 (Dist. Ct. App. 1945), or a suit by a plaintiff whose claim was dependent upon the rights of another whose claim was barred because he was the intoxicated person, Barbosa v. Decas, 311 Mass. 10, 40 N.E.2d 10 (1942).\(^9\)

9. Manthei v. Heimerdinger, 382 Ill. App. 335, 338, 76 N.E.2d 132, 140 (1947); Buntin v. Hutton, 206 Ill. App. 194, 197 (1917). This rationale scarcely deserves comment when applied to certain kinds of illegal sales since such transfers would appear to involve clear cases of negligence per se. Waynick v. Chicago's Last Dep't Store, 269 F.2d 322 (7th Cir. 1959), cert. denied, 362 U.S. 908 (1960); Smith v. Clark, 411 Pa. 142, 190 A.2d 441 (1963). See the excellent analysis of negligence in Rappaport v. Nichols, 51 N.J. 158, 166 A.2d 1 (1959), quoted in text accompanying note 16 infra. These cases reason that liquor statutes prohibiting sales to intoxicated persons or minors are intended to protect the general public as well as vendees. As stated by Justice Musmanno, "An intoxicated person amid a group of people is a constant source of danger and hurt to those about him. He is the proverbial bull in a china shop . . . ." Corcoran v. McNeal, 400 Pa. 14, 19, 161 A.2d 97, 370 (1960). It is a general principal of tort law that if plaintiff is among the group a statute was intended to protect and suffers injury from the harm the statute was designed to avoid, the violation of the statute constitutes at least "evidence" of negligence and in most states is negligence per se. Lowndes, Civil Liability Created by Criminal Legislation, 16 Minn. L. Rev. 361 (1932); Morris, The Relation of Criminal Statutes to Tort Liability, 46 Harv. L. Rev. 463 (1933); Restatement, Torts §§ 286-87 (1934). See note 23 infra and accompanying text for analysis of the argument that a sale may be negligent even though legal.

10. See, e.g., Cowman v. Hansen, 250 Iowa 358, 92 N.W.2d 682 (1953); State ex rel. Joyce v. Hatfield, 197 Md. 249, 78 A.2d 754 (1951). Such reasoning would appear to reflect little more than a policy decision not to make a vendor liable to those injured by persons to whom he makes negligent sales of liquor. As Dean Prosser has pointed out, proximate cause involves a factual determination only when the issue is causation in fact. See Prosser, The Minnesota Court on Proximate Cause, 21 Minn. L. Rev. 19 (1936). Since the negligent sale clearly bears some factual relationship to the injury in the present context, the ultimate issue becomes one of social policy—to what extent the vendor should be held responsible for the consequences of his sale.
These apparently deep-rooted common law doctrines have been rejected in a recent series of cases recognizing the existence of a common law negligence action by an injured third party against the vendor. This development began in Pennsylvania with *Schelin v. Goldberg,* which held that violation of a statute prohibiting sales to obviously intoxicated persons was negligence per se. A subsequent Pennsylvania case, *Jardine v. Upper Darby Lodge No. 1978,* expressly rejected the common law proximate cause rule. The court assumed that the sale in issue constituted negligence. It then reasoned that since the sale of firearms to incompetents is regarded as a proximate cause of injuries subsequently inflicted upon third persons as a result of the negligent

The proximate cause rationale also appears to encompass the negligence rationale. To say that the vendee was competent is to imply that the consumption was voluntary, and that the intoxicate was responsible for his acts and was the sole proximate cause of the injury. Support for this analysis can be found in the two recognized exceptions to the common law rule of proximate cause. The first involved sales to slaves. See *Skinner v. Hughes,* 15 Mo. 440 (1850); *Harrison v. Berkley,* 38 S.C.L. (1 Strobh.) 525 (1847). The second involves a wife's suit for loss of consortium against a liquor vendor who, despite requests from the wife that he refrain from selling to her husband and knowledge of the husband's intemperate habits, continues to sell liquor to the alcoholic husband. See *Pratt v. Daly,* 55 Ariz. 535, 104 P.2d 147 (1940); *Swanson v. Ball,* 67 S.D. 161, 200 N.W. 482 (1940); *Riden v. Grimm Bros.,* 97 Tenn. 920, 36 S.W. 1097 (1896); Annot., 120 AL.R. 362-65 (1941). But see *Cole v. Rush,* 45 Cal. 2d 445, 296 P.2d 450 (1955). Both exceptions are premised on the view that the vendee is incompetent and that his consumption therefore cannot be regarded as the proximate cause of the injury. But it would also seem that a sale to an incompetent is negligent. Therefore, the rationale based upon an absence of negligence seems in fact to be another way of stating that the “voluntary” act of consumption by a competent vendee broke the chain of causation.

11. See cases cited note 5 supra.

12. 188 Pa. Super. 341, 146 A.2d 648 (1958). In this case an intoxicated plaintiff was illegally served liquor by the defendant and subsequently struck by another patron. The court held that the statute prohibiting sales to intoxicated persons was designed to protect vendees, and that violation of the statute was negligence per se. Although the court did not discuss the common law rule of causation, the affirmance of a judgment for plaintiff points to its rejection. The court apparently reasoned that the sale to the plaintiff rendered him incapable of protecting himself.

Subsequent cases have held that similar statutes were also intended to protect the general public from intoxicated persons. *Waynick v. Chicago's Last Dept Store,* 269 F.2d 522 (7th Cir. 1959), cert. denied, 362 U.S. 903 (1960); *Rappaport v. Nichols,* 31 N.J. 188, 156 A.2d 1 (1959); *Smith v. Clark,* 411 Pa. 142, 190 A.2d 441 (1963).

13. 418 Pa. 626, 196 A.2d 550 (1964). In *Jardine* the defendant served an intoxicated person, who then negligently drove his automobile and struck the plaintiff, a pedestrian.
use of the firearms, liquor vendors ought likewise be treated as proximately causing damages inflicted upon third persons by intoxicated vendees. In *Rappaport v. Nichols*, perhaps the leading case in this area, plaintiff was injured in an automobile collision. The other driver had been served liquor illegally by the defendant while a minor and intoxicated. After an exhaustive, well-reasoned analysis of both the negligence and proximate cause issues, the New Jersey Supreme Court held that a sale of liquor in violation of statute which could have been avoided through the exercise of reasonable care renders the vendor liable to a third person subsequently injured by the vendee. As to negligence the court reasoned that:

... Where a tavern keeper sells alcoholic beverages to a person who is visibly intoxicated or to a person he knows or should know from the circumstances to be a minor, he ought to recognize and foresee the unreasonable risk of harm to others through action of the intoxicated person or the minor. The Legislature has in explicit terms prohibited sales to minors as a class because it recognizes their very special susceptibilities and the intensification of the otherwise inherent dangers when persons lacking in maturity and responsibility partake of alcoholic beverages; insofar as minors are concerned the sale of the first drink which does "its share of the work"... and which generally leads to the others is unequivocally forbidden. In furtherance of the legislative policy, ... [an administrative agency has by regulation] provided that no licensee shall permit any minor to be served or consume any alcoholic beverages; and the same regulation contains a provision against service to or consumption by any person "actually or apparently intoxicated." It seems clear to us that these broadly expressed restrictions were not narrowly intended to benefit the minors and intoxicated persons alone but were wisely intended for the protection of members of the general public as well. ... 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 know that the patron is a minor or is intoxicated, his service to him may also constitute common law negligence. In view of the standard of conduct prescribed by the statute and the regulations, a tavern keeper's sale of alcoholic beverages when he knows or should know that the patron is a minor or intoxicated may readily be found by the jury to be imprudent conduct.

14. *Id.* at 631-82, 198 A.2d at 583. The rule which holds liable one who puts firearms in the hands of an incompetent is ancient. See *Anderson v. Settergren*, 100 Minn. 294, 111 N.W. 279 (1907), and authorities cited therein.
15. 31 N.J. 188, 156 A.2d 1 (1959).
16. *Id.* at 201-02, 156 A.2d at 8-9. See note 18 *infra* for a discussion of the defense that the vendor's violation could not have been avoided by the exercise of reasonable care.
In rejecting the common law rule of proximate causation, the court said that:

... [A] tortfeasor is generally held answerable for the injuries which result in the ordinary course of events from his negligence and it is generally sufficient if his negligent conduct was a substantial factor in bringing about the injuries. ... The fact that there were also intervening causes which were foreseeable or were normal incidents of the risk created would not relieve the tortfeasor of liability. ... If ... the defendant tavern keepers unlawfully and negligently sold alcoholic beverages to Nichols 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 course 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 reasonably find that ... [the vendee's activities in injuring plaintiff were] 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. ...17

B. MINNESOTA LAW

1. Negligence Per Se

Overwhelming Minnesota authority holds that the violation of a statute enacted for the protection of the class of people to which the injured party belongs, and designed to avoid the harm which he has suffered, is negligence per se.18 Moreover, the court

17. Id. at 203-04, 156 A.2d at 9.

The court drew analogies to liability for the sale of firearms, see note 14 supra, and to the liability of car owners who leave their keys in the ignition in violation of statute for injuries to third persons when the car is driven by a thief. Such responsibility has been recognized in several jurisdictions. See Ross v. Hartman, 189 F.2d 14 (D.C. Cir. 1949), cert. denied, 341 U.S. 789 (1944); Ney v. Yellow Cab Co., 3 Ill. 2d 74, 117 N.E.2d 74 (1954); Kinaley v. Von Atzingen, 20 N.J. Super. 378, 90 A.2d 97 (1952). But see Anderson v. Theisen, 231 Minn. 390, 43 N.W.2d 279 (1950).

18. See, e.g., Anderson v. Settergren, 100 Minn. 294, 111 N.W. 279 (1907); Bott v. Pratt, 33 Minn. 323, 28 N.W. 287 (1883). See also authorities cited in note 9 supra.

In this respect Minnesota law differs from that of New Jersey, which holds that such a violation is merely evidence of negligence, rebuttable by defendant's proof that he acted reasonably. Thus in the leading case of Evers v. Davis, 86 N.J.L. 196, 205, 90 Atl. 677, 681 (Ct. Err. & App. 1914), the court said that "a defendant, although he cannot be heard to say that it was not his duty to obey the statute, may show what he did in his effort to obey it, leaving it to the jury to say whether such effort was what a reasonably prudent person would have done in view of the statute." The New Jersey Supreme Court applied this rationale to illegal sales of liquor in Rappaport v.
would appear to have recognized the applicability of negligence per se theory to hold vendors liable for injuries arising from their unlawful sales of liquor. In *Windorski v. Doyle*, plaintiff's decedent was assaulted in defendant's tavern by a drunken patron. Plaintiff alleged in the alternative that defendant had negligently sold liquor to the assailant while the latter was "obviously intoxicated" in violation of a city ordinance, and that defendant negligently sold liquor to one known to become belligerent when drinking. On appeal from a verdict directed in defendant's favor, the court ordered a new trial and held that the question whether the assailant was "obviously intoxicated" presented an issue of fact for jury determination. Thus, in the only reported Minnesota case where the question whether an unlawful sale constitutes negligence per se has arisen, the court tacitly agreed with plaintiff that it did. Moreover, it would not seem that the fact that the injured person in *Windorski* was another patron of defendant's bar and was injured while in the bar serves to mark the outer limits of the class to whom the ordinance was designed to afford protection. In *Anderson v. Settergren*, defendant sold cartridges and loaned a rifle to a minor in violation of a statute. Plaintiff was injured when the minor negligently discharged the rifle, and the court held that plaintiff, as a member of the general public, was within the class of people intended to be protected. Numerous cases and the language of the CDA indicate that while statutory restrictions on the sale of liquor were undoubtedly intended partially to protect consumers unable to care for themselves, they were also

---

19. 219 Minn. 402, 18 N.W.2d 142 (1945).

20. The *Windorski* opinion is not explicit on this point. It is possible that the language regarding violations of statutes and ordinances referred to a suit to collect on the licensee's bond. However, the bond was not mentioned in the complaint, and the court's opinion fails to refer to it. Furthermore, the court's holding that the question of obvious intoxication was an issue for the jury was set forth in the context of a discussion of plaintiff's claim that the evidence of negligence presented a question of fact for jury determination. The briefs also regard the question of an illegal sale as going to the presence of negligence. Brief for Appellant, p. 18; Brief for Respondent, p. 7.

21. 100 Minn. 294, 111 N.W. 279 (1907).
NOTE 1161

1965] designed to protect the general public from such persons.22 The statutes reflect a legislative judgment that minors and intoxicates to whom liquor is served are troublesome and a menace to everyone with whom they come into contact.23

There are some illegal sales, however, which probably should not be held to constitute negligence per se. For example, a sale of liquor to a parolee of a state penal institution is illegal,24 but

22. See Waynick v. Chicago's Last Dep't Store, 269 F.2d 322, 325-26 (7th Cir. 1959), cert. denied, 363 U.S. 903 (1960); Connolly v. The Nicollet Hotel, 254 Minn. 373, 382-83, 95 N.W.2d 657, 665 (1959); Reppaport v. Nichols, 31 N.J. 186, 201-02, 155 A.2d 1, 8 (1959). A brief discussion of early criminal statutes relating to drunkenness appears in Hall, Drunkenness as a Criminal Offense, 32 J. CRIM. L. & C. 297-99 (1941). The author concludes that these statutes are designed to protect the public. See also the CDA, MINN. STAT. § 340.85 (1961), granting “every person . . . injured . . . by any intoxicated person” a cause of action against the vendor.


The preceding textual discussion of the common law liability of liquor vendors has been predicated on the occurrence of an illegal sale. A sale by a licensed vendor within the permitted hours of sale, see MINN. STAT. ANN. § 340.14 (Supp. 1964), is legal unless made to a minor, habitual drunkard, uncivilized Indian, public prostitute, spendthrift, parolee, or an improprietous opinion intoxicated person, see MINN. STAT. §§ 340.14, 76, 78, 82, 83 (1961). It is arguable, however, that a lawful sale should be regarded as negligent under certain circumstances. Examples might be the sale of a few drinks to a patron who the bartender knows or has reason to know will be operating an automobile shortly thereafter, or to a patron who the bartender knows becomes violent after consuming relatively small quantities of liquor. For a case where the Minnesota court apparently held a vendor liable to a patron injured in a barroom brawl under circumstances similar to the second example, see Windorski v. Doyle, 219 Minn. 402, 407, 18 N.W.2d 142, 145 (1945). A line of cases holding that a tavern keeper is bound to exclude from his premises persons likely to produce discord and brawls may also lend collateral support to the imposition of a duty to refrain from sales which foreseeably will produce injury. See Klingbeil v. Truesdell, supra; Prieve v. Bartz, 249 Minn. 486, 492-93, 89 N.W.2d 116, 120 (1953); Windorski v. Doyle, supra; Mastad v. Swedish Brethren, 83 Minn. 40, 45, 85 N.W. 913, 914 (1901).

These cases, however, require the exercise of care for patrons, and the court may well be reluctant to hold that such a duty is owed to the general public. To hold the vendor liable to the general public for injuries arising from lawful sales which produce some foreseeable risk of injury would, as a practical matter, make the vendor absolutely responsible for the conduct of his patrons. Moreover, the legislature has manifested in the CDA and license bond provisions an intent that liquor dealers be liable only for injuries arising from illegal sales. As a matter of public policy, the court is thus likely to regard the duty owed the public as being satisfied by obedience of the liquor laws.

it is difficult to believe that its prohibition was intended to protect the general public from injuries caused by a parolee. Rather, the intent would seem to be to assist in the rehabilitation of the parolee. Moreover, the sale of a drink at 7:30 on a weekday morning is also illegal, but it is hard to perceive a link between the illegal nature of the sale and the risk of injury which it creates. Therefore, the only illegal sales that should constitute negligence per se are those which are prohibited because they increase the risk of the injury which has in fact occurred and upon which suit is brought.

2. Causation

The crux of the common law denial of liability was the refusal, as a matter of social policy, to recognize the liquor vendor's sale as a proximate cause of the plaintiff's injury. A somewhat question-begging statement of the proximate cause requirement in Minnesota is that "the harm following the negligence [must] be in an unbroken sequence without an intervening efficient cause . . . ." As a general rule, however, an actor is held responsible for the results, whether or not foreseeable, of his negligent conduct in combination with reasonably foreseeable intervening causes, including the negligence of others. While intervening criminal acts or intentional torts are frequently held to break the chain of causation and consequently to avoid liability even when foreseeable, the opposite result has been reached in cases arising

26. See note 10 supra and accompanying text.
27. See Kalberg v. Anderson Bros. Motor Co., 251 Minn. 458, 460, 88 N.W.2d 197, 199 (1953), and authorities cited therein.
29. See, e.g., Crawford v. Woodrich Const. Co., 239 Minn. 12, 57 N.W.2d 648 (1953); Eichten v. Central Minn. Co-op Power Ass'n, 224 Minn. 180, 29 N.W.2d 862 (1948); Vills v. City of Cloquet, 119 Minn. 277, 138 N.W. 23 (1912); Neidhardt v. City of Minneapolis, 112 Minn. 149, 127 N.W. 484 (1910).
30. See, e.g., Ferraro v. Taylor, 197 Minn. 5, 265 N.W. 829 (1932); Anderson v. Settergren, 100 Minn. 294, 111 N.W. 279 (1907).
from a failure to protect patrons from intoxicated persons.82 On the other hand, the intervention of an unforeseeable cause bars the imposition of liability upon the original actor, but only for unforeseeable results.83 Thus liability may be imposed upon the original actor notwithstanding the intervention of another cause if either an additional cause or the particular result for which it is sought to hold him responsible was reasonably foreseeable when he acted.

Intervening causes and/or results have been held foreseeable in four Minnesota cases. In one, Vills v. City of Cloquet,84 a child was injured while playing with dynamite negligently left by the defendant in an unprotected place. By analogy to the “turntable cases,”85 the court held that the child’s presence and play and the resulting injury were foreseeable. In Ferraro v. Taylor,86 the defendant lessor leased an automobile which the lessee drove despite his knowledge that it was defective. As a result of its condition the automobile collided with plaintiff’s automobile. In holding the defendant liable despite the intervening negligence of the lessee, the court held that both the intervening negligence and the resulting accident were foreseeable. The court also found liability in Anderson v. Settergren,87 where the defendant negli-

82. See case cited in note 45 infra and accompanying text.
83. Dean Prosser has pointed out that if no injury could have been foreseen, the actor is simply not negligent. Prosser, supra note 10, at 47. However, if the injury could have been foreseen, but the intervening cause could not, the question whether to assign responsibility becomes essentially one of social policy. The Minnesota court has held the original actor liable in such cases. See id. at 53–57.
84. 119 Minn. 277, 138 N.W. 38 (1912).
85. These cases held that children who were injured while playing on unsafe railroad turntables were entitled to recover from the railroads. The doctrine originated in Railroad Co. v. Stout, 84 U.S. (17 Wall.) 657 (1873), but was first explained in Kelle v. Milwaukee & St. P. Ry., 21 Minn. 207 (1875). It has since become known as the attractive nuisance doctrine and has been broadened to apply to other situations in which a dangerous condition attractive to children is maintained by the defendant on his land. The theory underlying such liability is that the defendant is negligent in maintaining the condition because he ought to have foreseen that children would trespass and be injured. See, e.g., Mattson v. Minnesota & N.W. Wis. Ry., 95 Minn. 477, 104 N.W. 448 (1905).
86. 197 Minn. 5, 265 N.W. 829 (1936).
87. 100 Minn. 294, 111 N.W. 279 (1907).
gently sold cartridges and loaned a rifle to a minor. It impliedly held that both the minor's negligent discharge of the rifle and the resulting injury were foreseeable. In *Wedel v. Johnson*, the rule imposing liability for foreseeable results notwithstanding the intervention of an unforeseeable cause was applied to a bizarre sequence of events. Defendant negligently permitted his horse to run free in violation of a statute. The horse was subsequently struck and killed by the automobile of a third party. Plaintiff was injured when his automobile struck the carcass.

*Swinfin v. Lowry* is the only case in which the Minnesota court has *held* that one who makes an illegal transfer of liquor is not liable under the common law for injuries sustained as a result of its consumption. In that case the defendants, friends of a minor, furnished him liquor. After consuming it and becoming intoxicated, the minor assaulted the plaintiff. The court denied recovery, apparently on the ground that the attack and resulting injury were unforeseeable to the defendants when they

---

38. The court's reasoning is not explicit on this point. However, it quoted with approval Lord Ellenborough's statement that, "Every man must be taken to contemplate the probable consequences of the act he does." *Townsend v. Wathen*, 9 East 977, 280, 103 Eng. Rep. 579, 580–81 (K.B. 1808).

39. 196 Minn. 170, 264 N.W. 689 (1936).

40. 37 Minn. 345, 34 N.W. 22 (1887).

41. There are numerous other Minnesota cases which state the common law rule. See, *e.g.*, *Randall v. Village of Excelsior*, 258 Minn. 81, 83, 103 N.W.2d 151, 153 (1960); *Strand v. Village of Watson*, 245 Minn. 414, 419, 72 N.W.2d 609, 614 (1956); *Beck v. Groe*, 245 Minn. 38, 38–34, 70 N.W.2d 895, 917 (1955); *Hahn v. City of Ortonville*, 238 Minn. 428, 433, 67 N.W.2d 254, 259 (1954); *Stabs v. City of Tower*, 229 Minn. 535, 537, 40 N.W.2d 382, 371 (1945); *Sworski v. Coleman*, 204 Minn. 474, 477, 283 N.W. 778, 790 (1939).

It is doubtful that recovery could have been had in several of these cases even had the court rejected the common law rule, since suit was brought by the transferee or one standing in his position, so that the defense of contributory negligence might have been invoked. See *Randall v. City of Excelsior*, *supra*; *Stabs v. City of Tower*, *supra*; *Sworski v. Coleman*, *supra*. Moreover, the statement was dictum in all the cases, since the only claim asserted was that provided by the CDA. Finally, *Beck v. Groe*, *supra*, apparently the leading Minnesota case, relies on questionable authority. It cites *Hahn v. City of Ortonville*, *supra*, where the statement is also dictum, and a Wisconsin case, *Demge v. Feierstein*, 282 Wis. 199, 268 N.W. 218 (1936), where the statement was supported by citation of five cases, three of which are supportive only in dicta, *Coy v. Cutting*, 158 Kan. 109, 23 P.2d 458 (1933); *Kraus v. Schreuder*, 105 Neb. 809, 102 N.W. 304 (1921); *Healey v. Cady*, 104 Vt. 463, 161 Atl. 151 (1932), one of which is irrelevant to the issue, *State v. Johnson*, 28 S.D. 298, 121 N.W. 785 (1909), and the last of which is weakened by the presence of a potential contributory negligence claim, *Buntin v. Hutton*, 206 Ill. App. 194 (1917).
furnished the liquor.42 Whatever its rationale Swinfin can no longer be considered controlling on the question of causation. Since the case was decided a well-established line of Minnesota authority has imposed upon liquor vendors a common law duty to exercise reasonable care to protect patrons from drunken assaults.42 In these cases the Minnesota court has had little difficulty holding intentional assaults such as that in Swinfin to be foreseeable,44 characterizing the behavior of inebriates as “unpredictable” and a “well-recognized source of danger to others.”45

Existing Minnesota law and public policy seem to have rather clearly rejected the common law proximate cause rule, whether it is stated as holding (1) that the inebriate’s consumption rather than the sale is the proximate cause of injury,46 or (2) that the

42. The court’s terse opinion is not entirely clear. It speaks of the “voluntary” nature of the intoxicated person’s act and the “remoteness” of the plaintiff’s injury from the defendants’ act. As used by the court, “voluntary” would appear to imply that the intoxicated’s act was unforeseeable to the defendants when they furnished him liquor. The “remote” characterization of the injuries likewise appears to be a loose expression for unforeseeability, since such injuries clearly were factually connected to and not remote in time or space from the transfer of the liquor. It is of course possible that the issue of proximate cause was not considered on the basis of “foreseeability,” but that in concluding that plaintiff’s damages were “too remote” the court merely articulated a visceral reaction that as a matter of policy defendants’ liability ought not extend this far. See note 10 supra.

43. See, e.g., Klingbeil v. Truesdell, 256 Minn. 360, 98 N.W.2d 134 (1959); Priewe v. Bartz, 249 Minn. 488, 83 N.W.2d 116 (1957); Windorski v. Doyle, 219 Minn. 402, 18 N.W.2d 142 (1945); Mastad v. Swedish Brethren, 83 Minn. 40, 85 N.W. 913 (1901); cf. Sylvester v. Northwestern Hosp., 236 Minn. 384, 388, 53 N.W.2d 17 (1952).

44. Swinfin may also be distinguished from the typical case on the basis of duty. The defendants in that case were not commercial liquor vendors, but friends of the intoxicated person who drank with him. The Swinfin court may have been reluctant to impose upon such persons the same duty as that of commercial vendors. Such a distinction was made in Mastad v. Swedish Brethren, 83 Minn. 40, 44, 85 N.W. 913, 915 (1901), where the court noted that the Swinfin trial disclosed no duty on the part of the defendants to protect persons from the assault.


46. See, e.g., Collier v. Stamatis, 63 Ariz. 283, 290, 162 P.2d 195, 127–28 (1945). The opinion speaks of the act of the intoxicated person as being the proximate cause of the injury and of voluntary consumption as being the cause
inebriate's subsequent assault or negligent operation of an automobile is an unforeseeable intervening cause,\textsuperscript{47} or (3) that the sale is too remote from the injuries.\textsuperscript{48} Treating the consumption of liquor subsequent to its sale as the sole proximate cause—equivalent under the Minnesota causation rule to saying that it is unforeseeable to the vendor\textsuperscript{49}—seems ridiculous. A subsequent voluntary act was held not to break the causal connection in \textit{Settergren}, where the minor's use of the cartridges was a voluntary act, or \textit{Ferraro}, where the lessee's use of the automobile was also voluntary. The line of cases holding a tavern keeper liable for failure to exercise reasonable care to protect patrons one from another further diminishes the significance of intervening voluntary acts in determining liability.\textsuperscript{50} It seems no less foreseeable that an intoxicated person will negligently operate an automobile than that a minor will negligently discharge a rifle, or that a lessee of a defective automobile will negligently continue to operate it, or that an intoxicated person will assault another patron. In each case the intervening cause is foreseeable and defendant's negligence puts the chain of events into motion. In fact the original actor's responsibility for the ultimate injury appears to be ever greater in the case of the liquor vendor, since the liquor not only puts the events into motion, but disables the inebriate from either exercising caution or otherwise controlling his behavior. Finally the injury involved in \textit{Wedel v. Johnson}\textsuperscript{51} seems no less remote or more foreseeable than those occurring several miles or hours from a negligent transfer of liquor. Nor does the line of cases which holds that intoxicated persons are responsible for their acts compel the conclusion that the vendor is not also liable; to hold him liable is in no sense to excuse the intoxicated person.\textsuperscript{52} The situation is no different from the \textit{CDA} or protection of patrons cases, where the plaintiff of the intoxication. Presumably this means that the consumption is the sole proximate cause of the injury.

\textsuperscript{47} See, \textit{e.g.}, Cowman v. Hansen, 250 Iowa 355, 368-73, 92 N.W.2d 682, 686-90 (1958).

\textsuperscript{48} See, \textit{e.g.}, State, Use of Joye v. Hatfield, 197 Md. 249, 255, 78 A.2d 754, 756 (1951); Scibel v. Leach, 233 Wis. 66, 68, 288 N.W. 774, 775 (1939).

\textsuperscript{49} See text accompanying notes 26-33 supra.

\textsuperscript{50} See text accompanying notes 43-45 supra.

\textsuperscript{51} 196 Minn. 170, 264 N.W. 689 (1936); see text accompanying note 45 supra.

\textsuperscript{52} State v. Weltz, 155 Minn. 145, 193 N.W. 42 (1923); State v. Corrivau, 98 Minn. 38, 100 N.W. 688 (1904); State v. Herdina, 25 Minn. 161 (1876); State v. Welch, 21 Minn. 22 (1874).
can proceed against either the vendor or the intoxicated person or both. 53

3. Legislative Preemption

The strongest argument against recognizing a common law negligence action against liquor vendors is that the legislature has preempted the field. Briefly stated the argument is that the legislature, in providing for liability under the CDA and license bonding provisions, intended that these statutory remedies be exclusive. 54 Support for this argument can be drawn from the sheer quantity of liquor statutes. 55 Moreover, an appealing argument can be made that commercial liquor interests can better regulate their activities if they are subject to a uniform statutory scheme.

Although the preemption argument is strong, it is nevertheless partially vulnerable. The statutory provisions are extensive but they do not constitute the comprehensive scheme from which it might be inferred that the legislature envisaged an exclusive occupation of the field. It is particularly significant in this regard that the legislature failed to provide a remedy for injuries arising out of the improper or unlawful sale of 3.2 beer. It is difficult to believe that this legislative silence was intended to indicate to the courts that negligent sales of such beer should give rise

53. See Village of Brooten v. Cudahy Packing Co., 291 F.2d 284 (8th Cir. 1961) (injured recovered from intoxicated’s insurer; insurer sought CDA recovery from vendor); Beck v. Groe, 245 Minn. 28, 70 N.W.2d 886 (1955) (plaintiff sued intoxicated person and dram shop operator under CDA). In Priewe v. Bartz, 249 Minn. 488, 83 N.W.2d 116 (1957), plaintiff sued both the intoxicated person and the tavern keeper, seeking recovery from the latter for violation of the common law duty to protect patrons. The court affirmed verdicts against both defendants.


55. The strongest statement by the Minnesota court on this point appears in Beck v. Groe, 245 Minn. 28, 70 N.W.2d 886, 893 (1955), where it was said that the sale of liquors has been regulated by statute and “the courts cannot adopt rules . . . which the legislature did not when it considered the matter.” However, this statement was made in the context of determining whether 3.2 beer is an “intoxicating liquor” within the meaning of the CDA, rather than whether a cause of action against liquor dealers exists outside the CDA.

56. The liquor statutes are codified in Minn. Stat. ch. 340 (1961), containing 140 sections. Of course this does not include the special legislation which is in effect but uncodified.
Moreover, the court has allowed recovery in cases whose facts would have brought them within the CDA provisions if intoxicating liquor rather than 3.2 beer had been involved. Although the rationale of these cases is based upon the common law duty to protect patrons, it appears that the absence of a statutory remedy was not regarded as precluding common law liability.

Neither has the court considered the statutory remedy exclusive in cases involving intoxicating liquor. To the contrary, the court in Windorski v. Doyle tacitly sanctioned the predication of liability upon both negligence per se arising from the violation of an ordinance and violation of a non-statutory duty. Although the factual situation was clearly within the scope of the CDA, there was no mention of the preemption. Aside from these considerations, deciding whether preemption has occurred requires a determination of legislative intent from a sparse legislative history. In the absence of a clear manifestation of legislative intent to the contrary, it would seem desirable to afford injured plaintiffs a remedy against liquor vendors for injuries arising from the failure of the latter to observe statutory requirements.

II. THE DESIRABILITY OF AFFORDING A COMMON LAW ACTION

A. COMMON LAW ACTION WOULD FILL THE 3.2 BEER "VOID"

The statutory scheme of liability for sale of alcoholic beverages, while arguably complete as to sales of intoxicating liquors, contains no remedies for injuries arising from sales of 3.2 beer.

57. See Note, Liability Under the Minnesota Civil Damage Act, 46 MUN. L. REV. 169, 188 (1961), where the 3.2 beer void has been termed "unwarranted," and amendment of the CDA urged.

58. See, e.g., Klingbeil v. Truesdell, 256 Minn. 360, 98 N.W.2d 134 (1959); Priewe v. Bartz, 249 Minn. 488, 83 N.W.2d 116 (1957). In each case the plaintiff was assaulted by a drunken fellow-patron who had been served 3.2 beer by the defendant.

59. 219 Minn. 402, 18 N.W.2d 142 (1945).

60. Repeal of a dramshop act did not prevent Pennsylvania from recognizing the common law action. See Schelin v. Goldberg, 168 Pa. Super. 341, 146 A.2d 646 (1958). Yet, if the dramshop act had been deemed an exclusive remedy by virtue of legislative preemption, arguably its repeal while other liquor statutes were retained should have been ground for concluding that the legislature intended that there be no remedy. See also Waynick v. Chicago's Last Dcp't Store, 269 F.2d 322, 324 (7th Cir. 1959), cert. denied, 363 U.S. 903 (1960), where the sale occurred in Illinois, but the plaintiffs, Michigan...
No penalty bond is required of 3.2 licensees and the CDA has been held inapplicable to sales of 3.2 beer. This “void” is illogical from the viewpoint of social policy. The alcoholic content of most strong beers, defined by Minnesota law as intoxicating liquor, is only about one percentage point greater than that of 3.2 beer. It seems unreasonable that the vendor’s liability should hinge upon such a distinction. The legislature has traditionally regulated the sale of 3.2 beer closely. Since it has provided no remedy for injuries arising from illegal sales, recognition of a common law negligence action would afford otherwise unobtainable relief and encourage adherence to 3.2 beer laws and yet only impose a responsibility upon vendors which could be met by simple compliance with the law.

B. COMMON LAW ACTION WOULD SURVIVE THE VENDOR’S DEATH

The survival of actions is controlled by statute in Minnesota since no claims survived the death of either party at common law. The Minnesota statute provides that a cause of action for personal injuries dies with the person against whom it exists unless grounded upon an allegation that the decedent was negligent. It further provides that a cause of action arising out of personal injuries dies with the injured party except to the extent that it survives in favor of his surviving spouse and next of kin residents, were injured by the intoxicated person in Michigan. The Illinois dramshop act had been held to have no extraterritorial effect. The court rejected the defendant’s argument that the legislature had preempted the field, holding that it had merely “avoided” treatment of the factual situation under consideration.

64. See 4 Encyclopedia Americana 454 (1960); 3 Encyclopedia Britannica 315 (1949). These figures are limited to the common American beers. Other types of beer, such as ale, contain greater percentages of alcohol.
66. Notwithstanding passage of the less restrictive 3.2 Beer Act in 1933, some of the earlier and more rigorous provisions applicable to such beer remain unrepealed. See Minn. Stat. §§ 340.02--3 (1961).
69. See Minn. Stat. § 573.01 (1961).
under the wrongful death act. The CDA provides for recovery not only by the injured person, but also by certain of his relatives, his employer, and "other persons" injured in "property, or means of support."

As a result of this statutory scheme the result of an action under the CDA by the surviving relatives of a decedent would not differ greatly from that of a similar action predicated on negligence. In either case the survivors could recover for certain of their losses from one who is regarded as having caused the death by an improper transfer of liquor. On the other hand, if the defendant-vendor dies, the CDA action dies with him, because it is not based upon negligence. Since a common law action would be founded upon negligence, it would survive. Therefore, if the existence of a common law remedy were recognized, the fortuity that the vendor lives or is incorporated would no longer be essential to recovery by the injured party.

C. Common Law Action Would Give the Plaintiff Certain Advantages in Event of the Defendant's Bankruptcy

Where the sale of liquor and opportunity for institution of a suit for damages have occurred before the filing of a bankruptcy petition by the vendor, the Bankruptcy Act provides certain advantages to plaintiffs with claims based upon negligence. The right to recover damages in a pending negligence action is "provable" under section 63(a)(7). It may be asserted to partake

70. See Minn. Stat. § 573.01 (1961). The wrongful death act, Minn. Stat. § 573.02 (1961), provides that the personal representative of the decedent may maintain an action against the person whose wrongful act or omission caused the death of the decedent, if the decedent could have maintained an action for his injuries had he lived.


72. Although the actions under the CDA and the wrongful death action are similar, there are certain important differences. For example, the damages recoverable under the wrongful death act are limited to $25,000.00, but no limitation exists under the CDA. See Minn. Stat. §§ 578.02, 340.95 (1961). Moreover, the defense of contributory negligence is available in a wrongful death action, see, e.g., Jenson v. Glemaker, 195 Minn. 556, 263 N.W. 624 (1935), although there is a rebuttable presumption that the decedent was in the exercise of due care at the time of the occurrence giving rise to the action, Minn. Stat. § 602.04 (1961). This defense is not available in CDA action.


in the bankrupt’s estate for whatever partial payment it may yield in return for discharge. Since CDA actions have been held not to involve negligence, however, a claim reflected in a pending CDA action would probably not be “provable,” and consequently the CDA claimant would not partake of the bankrupt’s estate and his claim would not be discharged. Thus the negligence claimant possesses an option lacked by his CDA counterpart. He can file suit, assert his provable claim, and receive partial compensation, or withhold the filing of the suit until after the bankruptcy petition has been filed and seek satisfaction of his claim if and when the bankrupt becomes solvent. Although this choice may involve an extremely difficult problem of predicting the bankrupt’s future success, the option is more desirable than the mere hope for later satisfaction.

D. Common Law Action May Allow Plaintiff to Obtain Redress from Defendant’s Public Liability Insurer

Public liability insurance policies issued to vendors of intoxicating liquor customarily exclude coverage for liability imposed

1171

75. Only provable claims are allowed to partake of the bankrupt’s estate. See 52 Stat. 873 (1938), 11 U.S.C. § 108(a) (1958); 3 Collier, Bankruptcy § 63.02, at 1761 (14th ed. 1964). However, the fact that a claim is provable under § 63 of the act does not necessarily mean that it will be allowed to partake in the bankrupt’s estate. See generally 3 Collier, op. cit. supra § 63.05, at 1776-78. With some exceptions, unimportant for present purposes, § 17 of the act provides for discharge only from provable debts. 52 Stat. 851 (1938), as amended, 11 U.S.C. § 35(a) (1958).

76. Dahl v. Northwestern Nat’l Bank, 265 Minn. 216, 220, 121 N.W.2d 321, 324 (1963) (for purpose of determining whether a CDA claim survives the death of the defendant under the Minnesota survival statute); Hahn v. City of Ortonville, 238 Minn. 428, 433, 57 N.W.2d 254, 258 (1953) (for purpose of determining whether to apply the common law doctrine of governmental tort immunity to CDA suits against municipal liquor stores).

77. See note 75 supra.

78. If the action upon the claim were not instituted prior to the filing of the bankruptcy petition, the claim would not be provable, and consequently would not be discharged. See note 75 supra. However the statute of limitations will limit the time during which the plaintiff can bring suit. If the vendor is not under pressure from other creditors he may delay filing a bankruptcy petition. Plaintiff may then be forced to institute his action or forego recovery altogether. Thus he will have been deprived of his option not to participate in any subsequent bankruptcy proceedings. See MacLachlan, Bankruptcy 128-29 (1956).

79. It may also produce jockeying between the defendant and plaintiff to determine whether the former can force the latter to institute the liability suit before the bankruptcy petition is filed.

80. The preceding text has discussed only two of ten possible sequences
under dramshop acts. Usually, they provide that the insurer will pay, up to the limits of coverage, all amounts for which the insured becomes liable for bodily injuries arising out of the ownership, maintenance, and use of the premises. This language would seem to encompass common law claims arising from injuries proximately caused by an illegal or negligent sale of liquor.

of events of a liability suit and bankruptcy proceedings. In summary form these ten are:

<table>
<thead>
<tr>
<th>Sequence</th>
<th>Illegal Sale</th>
<th>Filing of Liability Suit</th>
<th>Judgment on Liability Suit</th>
<th>Bankruptcy Petition Filed</th>
<th>Discharge</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sequence 1</td>
<td>Sale (sale)</td>
<td>Filing of (suit)</td>
<td>Judgment on liability suit (judgment)</td>
<td>Bankruptcy petition filed (filing)</td>
<td>Discharge (discharge)</td>
</tr>
<tr>
<td>Sequence 2</td>
<td>sale</td>
<td>suit</td>
<td>filing</td>
<td>judgment</td>
<td>discharge</td>
</tr>
<tr>
<td>Sequence 3</td>
<td>sale</td>
<td>suit</td>
<td>filing</td>
<td>discharge</td>
<td>judgment</td>
</tr>
<tr>
<td>Sequence 4</td>
<td>sale</td>
<td>filing</td>
<td>suit</td>
<td>judgment</td>
<td>discharge</td>
</tr>
<tr>
<td>Sequence 5</td>
<td>sale</td>
<td>filing</td>
<td>suit</td>
<td>discharge</td>
<td>judgment</td>
</tr>
<tr>
<td>Sequence 6</td>
<td>sale</td>
<td>filing</td>
<td>discharge</td>
<td>suit</td>
<td>judgment</td>
</tr>
<tr>
<td>Sequence 7</td>
<td>filing</td>
<td>sale</td>
<td>suit</td>
<td>discharge</td>
<td>judgment</td>
</tr>
<tr>
<td>Sequence 8</td>
<td>filing</td>
<td>sale</td>
<td>discharge</td>
<td>suit</td>
<td>judgment</td>
</tr>
<tr>
<td>Sequence 9</td>
<td>filing</td>
<td>sale</td>
<td>discharge</td>
<td>suit</td>
<td>judgment</td>
</tr>
<tr>
<td>Sequence 10</td>
<td>filing</td>
<td>discharge</td>
<td>sale</td>
<td>suit</td>
<td>judgment</td>
</tr>
</tbody>
</table>

In sequence 1, the judgment on either a CDA or negligence claim would clearly be a provable debt. See Chandler Act § 68(a)(1), 52 Stat. 873 (1938), 11 U.S.C. § 103(a) (1958).

Sequences 2 and 3 are discussed in the text.

Sequences 4, 5, and 6 would cause neither a CDA nor a negligence claim to be provable since it would be neither pending at the time the bankruptcy petition was filed (negligence) nor evidenced by a judgment at that time (CDA). See § 68(a). Moreover, § 68(a)(8) of the act, making "contingent debts" provable, 52 Stat. 873 (1938), 11 U.S.C. § 103(a)(8) (1958) has been interpreted by commentators to refer to claims that were otherwise provable under § 68(a). See COLLIER, BANKRUPTCY § 63.30, at 1912-13 (14th ed. 1984); NADLER, BANKRUPTCY § 239 (1948). However, one writer has expressed doubt as to the validity of this construction. COWANS, BANKRUPTCY LAW AND PRACTICE § 367, at 202-03 (1983).

Sequences 7, 8, and 9 will generally not arise. Since the bankrupt has already failed in his operation of the business, the court will be reluctant to grant the trustee power to continue it after the bankruptcy petition has been filed. For a brief discussion of the power of bankruptcy trustees to operate a business, see MACLACHLAN, BANKRUPTCY 76-77 (1958).

Sequence 10 presents no problems; since the sale occurred after the discharge, the claimant would have no interest in the bankruptcy proceedings.


83. The opposite conclusion was reached in the only discovered case directly on point. In Ranochia v. Reliance Ins. Co., Civil No. 2224, Pa. Ct. C.P., Lackawanna County, Nov. 16, 1962, a vendor settled a common law
However, since this risk may have been uncontemplated by both liquor vendors and insurers, serious questions of coverage may stem from negligence claim based upon an illegal sale of liquor and sought reimbursement from his insurer. The policy covered hazards arising from the ownership and operation of the premises, but excluded “liability imposed upon the insured . . . as a person engaged in the business of . . . selling . . . alcoholic beverages . . . by reason of any statute or ordinance pertaining to the sale, gift, distribution or use of any alcoholic beverage . . . .” Id. at 2. The court reasoned that the common law civil liability of a liquor vendor depended upon his violation of the criminal liquor laws, and that “liability imposed by statute” includes common law liability for breach of a duty imposed by a criminal statute. This argument seems clearly erroneous. The criminal statute creates a duty, breach of which is negligence, but it does not of itself “impose liability.”

Arguably, since Pennsylvania has no dramshop act, the court could look only to the criminal liquor statutes. Otherwise, the exclusion for liability imposed by statute would have been meaningless. It seems clear, however, that the clause was part of a standard form used in many states, some of which do have dramshop acts, so that the insurer never intended the clause to refer to the criminal statutes. Regardless of the construction given the clause in a state without a dramshop act, it is easily distinguishable from the interpretation which ought to be placed upon it in a state such as Minnesota, where the clause arguably refers only to the CDA.

Three cases, although not directly in point, would appear opposite to the Ranochia decision. In London & Lancashire Indem. Co. v. Duryea, 143 Conn. 55, 119 A.2d 325 (1955), it was held that the policy did not cover liability under the Connecticut dramshop act, which imposes liability for sale to an obviously intoxicated person whose intoxication causes the plaintiff’s injury. Since the existence of a state of intoxication necessarily precedes the defendant’s sale, little if any causal relationship need exist between the sale and the injury. Id. at 57, 119 A.2d at 327-28. The policy language, “arising out of,” was construed to mean “caused by,” and the policy was held to cover only those situations where there was a more direct causal relationship than was required by the dramshop act. Id. at 59, 119 A.2d at 328. It seems clear, however, that in a common law action, where the sale must be the proximate cause of the accident, even this interpretation of “arising out of” would be satisfied. In Gannon v. Cosmopolitan Mut. Ins. Co., 34 Misc. 2d 365, 227 N.Y.S.2d 961 (Sup. Ct. 1962), plaintiff obtained judgment against vendor on the common law theory of negligent failure to protect his patrons and sought recovery from the vendor’s liability insurer. The court held that the policy covered such liability notwithstanding the insurer’s argument that the express exclusion of dramshop act liability included all liability arising from the sale of liquor. Finally, Lessak v. Metropolitan Cas. Ins. Co., 149 Ohio St. 123, 161 N.E.2d 789 (1958), held that the policy covered the alleged liability of a hardware dealer who, in violation of statute, sold B-Bs to a minor who injured plaintiff with his B-B gun. It held that such liability was clearly within the insured hazard of “ownership, maintenance and use” of the insured’s business. Liability imposed at common law for injury arising from the sale of B-Bs would appear to be no different than liability for the sale of liquor.
arise and require attention in the event a common law remedy is expressly recognized.\textsuperscript{84}

CONCLUSION

Notwithstanding numerous holdings and dicta to the contrary, New Jersey, Pennsylvania, the Seventh Circuit, and perhaps Minnesota have recognized a common law liability of liquor vendors for injuries arising from their negligent transfer of intoxicants. Usually, breach of this duty is premised upon violation of a statute or ordinance, and it is held that such violation is either negligence per se or evidence of negligence. These holdings represent a reversal of the traditional rules that a transfer of liquor to a “competent” person never constitutes negligence, or that the injury is not proximately caused by the sale because it was unforeseeable or remote. However, the development of Minnesota law in collateral fields indicates that no reason exists why an illegal sale should not be regarded as negligent, particularly where the vendor is put on notice of its illegality and the statute violated was enacted to protect plaintiff from the injury suffered. Nor is there any policy reason why the vendor should not be expected to foresee the natural consequences of his act, including likely intervening causes.

A barrier to recognition of the common law action is legislative preemption. Although the arguments in favor of preemption are cogent, they do not seem persuasive in the absence of a clear manifestation of legislative intent. On the other hand, recognition of the action would provide compensation for injuries arising from sales of 3.2 beer and facilitate recovery from unincorporated vendors whose death might otherwise cause the claim to die. The common law action would also provide limited advantages in the event of the vendor’s bankruptcy, but could be expected to raise serious coverage questions under vendors’ public liability insurance policies.

Although express recognition of the action may appear revolutionary, it should be remembered that it would be subject to the usual common law negligence limitations. The intoxicated person, for example, would probably be held contributorily negligent if

\textsuperscript{84} Existing rates may not reflect this risk exposure. This problem, however, can undoubtedly be solved by a rewording of the coverage provisions. For example, the policy could be worded so as to restrict coverage to injuries occurring on the insured’s premises, see 7A Appleman, Insurance Law and Practice § 4498.2 (1962), or to exclude coverage of injuries arising out of automobile accidents, see id. § 4500, at 66–68.
he were suing for his own injuries. Likewise, a passenger who knowingly rode with an intoxicated person no doubt would be held to have assumed the risk of an accident. Furthermore, it appears that the proximate cause requirements of the common law action would be more stringent than those of the CDA. These limitations would serve to keep the action well within the purpose of the liquor statutes.

87. Compare Smith v. Clark, 411 Pa. 142, 190 A.2d 441 (1963) (the illegal sale must be the proximate cause of the accident), with MINN. STAT. 340.95 (1961) (the CDA) ("injured . . . by any intoxicated person") and Sworski v. Coleman, 208 Minn. 43, 50, 293 N.W. 297, 300 (1940) ("it is not necessary that the intoxication be the proximate cause of the injury" under the CDA).