1980

Abandonment of Notice Requirement in Third-Party Claims for Contribution under the Civil Damage Act: Hammerschmidt v. Moore

Minn. L. Rev. Editorial Board

Abandonment of Notice Requirement in Third-Party Claims for Contribution Under the Civil Damage Act: *Hammerschmidt v. Moore*

Joseph Hammerschmidt and Dwaine Beyer were the drivers of two cars that collided during the early morning hours of March 2, 1974.[1] Hammerschmidt died as a result of injuries received in the crash.[2] On May 24, Beyer's automobile insurance carrier, anticipating potential liability to the Hammerschmidt family, sent a notice of claim for contribution[3] to Michael and Myra Moore, proprietors of a licensed liquor establishment,[4] pursuant to provisions of the Minnesota Civil Damage Act requiring that notice of damage actions be given within 120 days of the accident.[5] Beyer had allegedly patronized the Moores' li-

1. Hammerschmidt v. Moore, 274 N.W.2d 79, 80 (Minn. 1978).
2. *Id.*
3. *See* notes 18-24 *infra* and accompanying text.
4. The Moores were proprietors of Coates Station Bar. *See* Brief for Appellants at 2, Hammerschmidt v. Moore, 274 N.W.2d 79 (Minn. 1978).
5. Act of June 4, 1969, ch. 952, § 1, 1969 Minn. Laws 1855 (current version at MINN. STAT. § 340.951 (1978)). The Act provided:

> From and after [July 1, 1969], every person who claims damages from any municipal liquor store or from the licensee of any licensed liquor establishment for or on account of any injury within the scope of Minnesota Statutes, Section 340.95, shall give a written notice to the governing body of the municipality or the licensee of the liquor establishment, as the case may be, stating:
>
> (1) The time and date when, and person to whom such liquor was sold, bartered, or given;
>
> (2) The name and address of the person or persons who were injured or whose property was damaged;
>
> (3) The approximate time and date and the place where any injury to person or property occurred.
>
> No error or omission in the notice shall void the effect of the notice, if otherwise valid, unless such error or omission is of a substantially material nature.
>
> This notice shall be served within 120 days after the injury occurs, and no action therefore shall be maintained unless such notice has been given, and unless it is commenced within three years after such injury. The time for giving the notice shall not include any period of time next succeeding the occurrence of the injury during which the person injured is incapacitated from giving such notice by reason of the injury sustained.
>
> Actual notice of sufficient facts to reasonably put the governing body of the municipality or the licensee of the liquor establishment, as the case may be, or its insurer, on notice of a possible claim, shall be construed to comply with the notice requirements herein.
>
> Any cause of action for injury heretofore caused by an intoxicated person as a result of an illegal sale, barter, or gift of liquor and not

quor establishment the night of the fatal collision.[6] Beyer's insurance carrier never filed a claim for contribution, because on March 10, 1976, the Hammerschmidt family released its claim against Beyer[7] and commenced a direct action against the Moores under the Civil Damage Act,[8] alleging that the Moores had illegally sold liquor to Beyer on the night of the collision and that Beyer's intoxicated condition caused the fatal accident.[9]

On September 29, 1976, over two and one half years after the accident and without any prior notice of claim, the Moores, defendants in the direct action, served a third-party complaint on the proprietors of two other licensed liquor establishments.[10] The complaint alleged that the third-party defendants

---

barred by the existing statute of limitations may be brought within three years after the cause of action accrued or within six months after [July 1, 1969], whichever is later, if notice thereof is given within 120 days of [July 1, 1969].

Id.

6. Brief for Appellants at 2, Hammerschmidt v. Moore, 274 N.W. 2d 79 (Minn. 1978).

7. Such a release is called a Pierringer release, named after a release used in a Wisconsin Supreme Court decision, Pierringer v. Hoger, 21 Wis. 2d 182, 124 N.W.2d 106 (1968). In states that permit the apportionment of liability among several joint tortfeasors, a plaintiff may use a Pierringer release to release some joint tortfeasors from an action while reserving his right to sue the remaining tortfeasors. *See generally* Simonett, *Release of Joint Tortfeasors: Use of the Pierringer Release in Minnesota*, 3 WM. MITCHELL L. REV. 1 (1977).

8. The Minnesota Civil Damage Act 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 by the intoxication of any person, shall have a right of action, in his or her own name, against any person, who shall by illegally selling, bartering, or giving intoxicating liquors, have caused the intoxication of such person, for all damages sustained; and all damages recovered by a minor under this act shall be paid either to such minor or to his or her parent, guardian, or next friend, as the court shall direct; and all suits for damages under this act shall be by civil action in any of the courts of this state having jurisdiction thereof.

Act of Apr. 18, 1911, ch. 175, 1 § 1, 1911 Minn. Laws 221 (current version at MINN. STAT. § 340.95 (1978)).

The Civil Damage Act does not define an "illegal" transfer, nor does it specify the particular statute that describes an illegal transfer for the purposes of the Act. Two Minnesota statutes proscribe the transfer of intoxicants to certain individuals. One statute provides that it shall be unlawful for any person other than a pharmacist to furnish liquor to any minor or to any intoxicated person. MINN. STAT. § 340.73(1) (1978). The second statute provides that "[n]o intoxicating liquor shall be sold, furnished, or delivered for any purpose to any minor or to any person obviously intoxicated or to any of the persons to whom sale is prohibited by statute." MINN. STAT. § 340.14(la) (1978).

9. *See* Hammerschmidt v. Moore, 274 N.W.2d 79, 80 (Minn. 1978).

10. The third-party defendants were Dennis Treml and Wallace Woldengen, proprietors of the Round-Up Bar, and Gary Kummer and Joseph C.

had illegally sold intoxicating liquor to Hammerschmidt and that the Moores were therefore entitled to contribution from the third-party defendants for any recovery awarded to the Hammerschmidt family in the direct action.[11] The third-party defendants moved for summary judgment in the contribution action on the ground that the Moores had not complied with the 120-day notice requirement of the Civil Damage Act.[12] The trial court granted the motion and entered a judgment dismissing the third-party complaint. The Moores appealed from this judgment and the Minnesota Supreme Court reversed, *holding* that the notice-of-claim provision of the Civil Damage Act is not a condition precedent to third-party civil damage actions for contribution. *Hammerschmidt v. Moore*, 274 N.W.2d 79 (Minn. 1978).

At common law, a person who is injured by the act of an intoxicated person has no remedy against the seller of the liquor.[13] The rationale for this rule is that the proximate cause of the injury is the act of drinking the liquor, not the act of selling it.[14] Several states, however, have altered this general rule by enacting dram shop legislation.[15] In Minnesota, the Civil Damage Act[16] gives persons injured as a result of illegal liquor sales a cause of action against the liquor establishment. The

---

Kummer, proprietors of W-K Black Stallion Supper Club. *See* Brief for Appellants at 2-3, Hammerschmidt v. Moore, 274 N.W.2d 79 (Minn. 1978).

11. Third-Party Complaint, Appellant's Brief at A-10, Hammerschmidt v. Moore, 274 N.W.2d 79 (Minn. 1978).

12. Act of June 4, 1969, ch. 952, § 1, 1969 Minn. Laws 1855 (current version at MINN. STAT. § 340.951 (1978)). *See* note 5 *supra*. The statute requires that persons demanding damages from liquor vendors give notice of their claims within 120 days from the date of the injury involved.

13. *See* Beck v. Groe, 245 Minn. 28, 34, 70 N.W.2d 886, 891 (1955); Demge v. Feierstein, 222 Wis. 199, 203, 268 N.W. 210, 212 (1936). *See generally* Note, *New Common Law Dramshop Rule*, 9 CLEV. - MAR. L. REV. 302 (1960); Comment, *Common Law Liability of Liquor Vendors*, 12 BAYLOR L. REV. 388 (1960).

14. *See* Beck v. Groe, 245 Minn. 28, 34, 70 N.W.2d 886, 891 (1955). *See generally* Note, *supra* note 13; Comment, *supra* note 13.

15. Dram shop laws, enacted as a result of the temperance movement in the late nineteenth century, generally imposed civil liability upon the seller of intoxicating liquor for all injury resulting from his sale. Seventeen states currently have such laws. *See* ALA. CODE tit. 6, § 6-5-71 (1975); COLO. REV. STAT. ANN. § 13-21-103 (1973); CONN. GEN. STAT. ANN. § 30-102 (West 1975); GA. CODE ANN. § 105-1205 (1968); Liquor Control Act, ILL. ANN. STAT. ch. 43, § 135 (Smith-Hurd 1978); IOWA CODE ANN. § 123.92 (West 1978); ME. REV. STAT. ANN. tit. 17, § 2002 (West 1964); MICH. COMP. LAWS ANN. § 436.22 (1978); MINN. STAT. § 340.95 (1978); N.Y. GEN. OBLIG. LAW § 11-101 (McKinney 1978); N.D. CENT. CODE § 5-01-06 (1975); OHIO REV. CODE ANN. § 4399.01 (Page 1973); OR. REV. STAT. § 30.730 (1977); R.I. GEN. LAWS § 3-11-1 (1976) VT. STAT. ANN. tit. 7, § 501 (1972); WIS. STAT. § 176.35 (1976); WYO. STAT. § 12-5-502 (1977).

16. Act of June 4, 1969, ch. 952, § 1, 1969 Minn. Laws 1855 (current version at MINN. STAT. § 340.95 (1978)).

Act requires that every person claiming damages for such injury must give notice to the liquor establishment within 120 days of the injury.[17] The cause of action in *Hammerschmidt*, however, was not a direct claim under the Act; rather, it was a claim for contribution against a cotortfeasor.

A person who has discharged a tort claim for which he and another person were liable may be entitled to indemnity or contribution from the other.[18] At common law, courts have traditionally applied the rule enunciated in *Merryweather v. Nixan*[19] that no right of contribution exists among joint tortfeasors.[20] Implicit in the opinions of these courts is an un-

17. Act of June 4, 1969, ch. 952, § 1, 1969 Minn. Laws 1855 (current version at MINN. STAT. § 340.951 (1978)).

18. *See* American Auto. Ins. Co. v. Molling, 239 Minn. 74, 77-84, 57 N.W.2d 847, 850-53 (1953). *See generally* Gregory, *Contribution Among Tortfeasors: A Uniform Practice*, 1938 WIS. L. REV. 365, 369 ("[Contribution] is an equitable device to redistribute the common burden rateably and in a fashion different from that employed by the person to whom each one of the group is usually answerable severally for the entire amount."); Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130 (1932).

As is usually done, the appellants (the Moores) in *Hammerschmidt* originally brought a claim for contribution or indemnification from respondents (D. Treml, W. Woldengen, G. Kummer, and J. Kummer). *See* 274 N.W.2d at 80. Although the purpose of both contribution and indemnity is to achieve an equitable allocation of the plaintiff's damages, contribution ordinarily results in an equal sharing of that burden while indemnity allows one who is secondarily liable and has discharged a common obligation to recover the entire amount he has paid from the party who is primarily liable. *See generally* Leflar, *supra*; *see also* Skaja v. Andrews Hotel Co., 281 Minn. 417, 419 n.2, 161 N.W.2d 657, 658 n.2 (1968). The court treated appellants' claim as one for contribution, and it is similarly treated in this Comment.

19. 101 Eng. Rep. 1337 (K.B. 1799). The joint tortfeasors in *Merryweather* were intentional wrongdoers, and the case was decided at a time when all torts were intentional. The case, however, is generally credited with originating the rule that no right of contribution exists among joint tortfeasors. *But see* Reath, *Contribution Between Persons Jointly Charged for Negligence*--Merryweather v. Nixan, 12 HARV. L. REV. 176, 177-79 (1898). "[B]y the great weight of modern common law authority, contribution is denied also as between joint tortfeasors whose liability is based on negligence merely, as distinguished from intentional wrongdoing." Leflar, *supra* note 18, at 130. *See, e.g.*, Union Stock Yards Co. v. Chicago, B. & Q. R.R., 196 U.S. 217, 228 (1905); Andromidas v. Theisen Bros., 94 F. Supp. 150, 156 (D. Neb. 1950); Adams v. White Bus Line, 184 Cal. 710, 712, 195 P. 389, 389 (1921); Village of Portland v. Citizens' Tel. Co., 206 Mich. 632, 644, 173 N.W. 382, 386 (1919); Public Serv. Ry. v. Matteucci, 105 N.J.L. 114, 116, 143 A. 221, 221-22 (1928); Royal Indem. Co. v. Becker, 122 Ohio St. 582, 587, 173 N.E. 194, 195 (1930). *See generally* Note, *Contribution and Indemnity Among Tortfeasors in Minnesota*, 37 MINN. L. REV. 470 (1953).

20. The term "joint tortfeasors" was defined in Paddock-Hawley Iron Co. v. Rice, 179 Mo. 480, 78 S.W. 634 (1904). The court held that the term, as used in a Missouri statute allowing contribution between joint tortfeasors, referred only to persons between whom there was intentional unity or concert of action, and did not refer to persons between whom there was merely an unintended concurrence of activities producing the result. *Id.* at 494-95, 78 S.W. at 638. This

willingness to aid persons whose conduct does not conform to legal standards, particularly when such persons, in order to recover contribution, must first establish their own culpability.[21] Statutes in a number of states[22] have modified this common law rule to allow contribution under certain circumstances,[23] and several jurisdictions, including Minnesota, have judicially created a right to contribution by making exceptions to the general rule.[24]

In cases in which several liquor vendors were jointly liable for an injury because each had illegally sold liquor to a person who subsequently caused that injury, the Minnesota Supreme Court has allowed the injured plaintiff to join all of the liquor vendors as defendants in a single action under the Civil Damage Act[25] or to select one vendor as the sole defendant.[26] Al-

---

definition was expanded in Kinloch Tel. Co. v. City of St. Louis, 268 Mo. 485, 496, 188 S.W. 182, 184 (1916), to refer to those tortfeasors involved in "a case of negligent omission of duty on the part of several tortfeasors which concurred in causing the injury, though there was no unity or concert of action on their part." The term "joint tortfeasors," under its currently accepted definition, includes those tortfeasors in "all cases where there is joint liability for a tort, whether the acts of those jointly liable were concerted, merely concurrent, or even successive in point of time." Tolbert v. Gerber Indus., Inc., 255 N.W.2d 362, 366 n.1 (Minn. 1977) (quoting Leflar, *supra* note 18, at 131 n.9).

21. "[T]he rule refusing contribution between joint tortfeasors is rooted in [the] unwillingness of courts to aid persons whose conduct has not measured up to legal standards." Leflar, *supra* note 18, at 132. *See generally* Reath, *supra* note 19, at 176.

22. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 50, at 307 (4th ed. 1971); Hewes, *The Evolution of Contribution Among Joint Tortfeasors in Maine*, 44 B.U. L. REV. 79, 83 & n.18 (1964); Note, *Adjusting Losses Among Joint Tortfeasors in Vehicular Collision Cases*, 68 YALE L.J. 964, 981-982 & app. I (1959); Comment, *Joint Tortfeasors: Contribution--No Intentional Wrongdoing Inference from Strict Liability Statute*, 53 MINN. L. REV. 1089, 1090-91 (1969).

23. Courts interpreting various statutes have denied contribution in cases in which there was no unity or concert of action, *see, e.g.*, Leflar, *supra* note 18, at 131 n.9; in which the tortfeasor who paid the judgment is primarily liable, *see, e.g.*, Hays-Fendler Constr. Co. v. Traroloc Inv. Co., 521 S.W.2d 171 (Mo. 1975); Hut v. Antonio, 95 N.J. Super. 62, 70, 229 A.2d 823, 828 (1967); and in which one party has contracted to assume the liability of both through indemnification, *see e.g.*, Maxwell Bros. Inc. v. Deupree Co., 129 Ga. App. 254, 257, 199 S.E.2d 403, 405-06 (1973).

24. *See* Skaja v. Andrews Hotel Co., 281 Minn. 417, 421, 161 N.W.2d 657, 660 (1968); Underwriters at Lloyds v. Smith, 166 Minn. 388, 389-90, 208 N.W. 13, 14 (1926); Ankeny v. Moffett, 37 Minn. 109, 110-11, 33 N.W. 320, 320-21 (1887). In both *Ankeny* and *Underwriters*, the court held that contribution is available only to defendants who are guilty of no intentional wrongdoing or could not be presumed to have known that they were doing illegal acts. The only statutory mention of contribution in Minnesota is section 548.19, which allows a joint debtor to continue the judgment in force in order to compel contribution from his nonpaying joint debtors.

25. *See, e.g.*, Hartwig v. Loyal Order of Moose, Brainerd Lodge No. 1246, 253 Minn. 347, 350, 91 N.W.2d 794, 798 (1958).

though the Act itself does not explicitly provide the sole defendant with a cause of action against other vendors also liable for the tort, the court has allowed that defendant, in a civil damage action, to seek contribution from other liquor vendors who contributed to the injury through illegal sales of alcohol.[27]

Hammerschmidt was the first case that required the Minnesota Supreme Court to consider the notice-of-claim provision of the Civil Damage Act in the context of a third-party action for contribution.[28] The court, however, had considered the parallel notice-of-claim provision of the Minnesota Tort Liability Act[29] in third-party actions for contribution involving tort claims against municipalities. Under that Act, the court had consistently held that a municipality must receive notice of a claim within the statutory period in order to be held liable for contribution.[30]

---

26. Joint tortfeasors are severally liable. *E.g.*, Reader v. Ottis, 147 Minn. 335, 339, 180 N.W. 117, 118 (1920); McClellan v. St. Paul, M. & M. Ry., 58 Minn. 104, 107, 59 N.W. 978, 979 (1894). Civil damage actions arising under section 340.95 sound in tort. Hammerschmidt v. Moore, 274 N.W.2d 79, 82 n.4 (Minn. 1978) (citing Dahl v. Northwestern Nat'l Bank, 265 Minn. 216, 221, 121 N.W.2d 321, 324 (1963)).

27. *See* Skaja v. Andrews Hotel Co., 281 Minn. 417, 423, 161 N.W.2d 657, 660 (1968). In *Skaja*, the court held that the violation of a strict liability statute does not raise a reasonable inference of intentional wrongdoing and that conscious intent to violate a statute or commit a wrongful act must be shown before contribution will be denied. *Id.* *See* notes 18-24 *supra* and accompanying text.

28. Connecticut is another state which requires that notice of claim be given by the plaintiff to the principal defendant within a certain period after injury (60 days). *See* CONN. GEN. STAT. ANN. § 30-102 (West 1975). Connecticut, however, has not had occasion to consider the notice of claim requirement in the context of a third-party action for contribution.

29. Act of May 22, 1963, ch. 798, § 5, 1963 Minn. Laws 1398 (current version at MINN. STAT. § 466.05(1) (1978). This statute provided:

> Every person who claims damages from any municipality for or on account of any loss or injury within the scope of section 2 shall cause to be presented to the governing body of the municipality within 30 days after the alleged loss or injury a written notice stating the time, place and circumstances thereof, and the amount of compensation or other relief demanded. Failure to state the amount of compensation or other relief demanded does not invalidate the notice; but in such case, the claimant shall furnish full information regarding the nature and extent of the injuries and damages within 15 days after demand by the municipality. No action therefor shall be maintained unless such notice has been given and unless the action is commenced within one year after such notice. The time for giving such notice does not include the time, not exceeding 90 days, during which the person injured is incapacitated by the injury from giving the notice.

30. *See, e.g.*, Hansen v. D.M. & I.R. Ry., 292 Minn. 503, 504, 195 N.W.2d 814, 815 (1972); McGuire v. Hennessy, 292 Minn. 429, 430-31, 193 N.W.2d 313, 314 (1971); Jensen v. Downtown Auto Park, Inc., 289 Minn. 436, 438-39, 184 N.W.2d 777, 778 (1971); American Auto Ins. Co. v. City of Minneapolis, 259 Minn. 294, 297-98, 107 N.W.2d 320, 322-23 (1961) (dismissing an indemnity action because

In *Hammerschmidt*, the Minnesota Supreme Court recognized the continued viability of "those decisions describing the statutory notice requirement in tort actions against municipalities as 'the foundation necessary to maintain an action for contribution or indemnity,' "[31] but the court refused to reach such a result under the Civil Damage Act. The court reasoned that "it would be patently inequitable to allow an injured plaintiff to select arbitrarily, whether intentionally or inadvertently, which of several tortfeasors should be burdened with the entire obligation for a wrongful act by delaying notice until there is little, if any, time to seek out joint tortfeasors."[32] In order to avoid that possibility, the *Hammerschmidt* court held "that the notice-of-claim provision is not a condition precedent to third-party civil damage actions for contribution."[33] The court supported this result by arguing that the notice requirement is merely procedural and thus should not bar contribution. The court also emphasized the nature of the role that the equitable doctrine of contribution should play in civil damage actions: first, allowing contribution without notice would discourage illegal liquor sales by eliminating the possibility of eventual escape from payment of damages and, second, allowing contribution without notice would spread the burden of paying damages to those injured because of illegal liquor sales more equitably in the liquor industry.[34] The court concluded that a

---

claimants failed to provide timely notice of claim). *See also* White v. Johnson, 272 Minn. 363, 368-69, 137 N.W.2d 674, 680 (1965) (a defendant may maintain an action for contribution against a municipality absent notice by the injured plaintiff to the third-party defendant).

Nearly all other states, however, permit the third-party plaintiff (the principal defendant in the original suit) to join the municipality for contribution or indemnification purposes despite improper notice or lack of notice. *See, e.g.*, Olsen v. Jones, 209 N.W.2d 64, 67 (Iowa 1973); Cotham v. Board of County Comm'rs, 260 Md. 556, 565-67, 273 A.2d 115, 120-21 (1971); Geiger v. Calumet County, 18 Wis. 2d 151, 155-57, 118 N.W.2d 197, 199-200 (1962); Note, *Notice of Claim Under the Municipal Tort Claims Act--The Watchdog with Plenty of Teeth*, 23 DRAKE L. REV. 670, 672 (1974).

31. 274 N.W.2d at 82 (quoting White v. Johnson, 272 Minn. 363, 372, 137 N.W.2d 674, 680 (1965)). In Hansen v. D.M. & I.R. Ry., 292 Minn. 503, 504, 195 N.W.2d 814, 815 (1972), and American Auto Ins. Co. v. City of Minneapolis, 259 Minn. 294, 298, 107 N.W.2d 320, 323 (1961), the Minnesota court dismissed actions for contribution and indemnity respectively because the claimants failed to provide timely notice of claim.

32. 274 N.W.2d at 83.

33. *Id.* at 82.

34. The *Hammerschmidt* court set out these policy considerations in a lengthy quotation from Skaja v. Andrews Hotel Co., 281 Minn. 417, 423, 161 N.W.2d 657, 661 (1968). *See* 274 N.W.2d at 83. It should be noted that these arguments about the ultimate frustration of the remedial and regulatory purposes of the Civil Damage Act, drawn from *Skaja*, are more persuasive in the context

rule making notice an absolute prerequisite for civil damage contribution actions would diminish the importance of the role of contribution in civil damage actions, thereby frustrating the objectives of the Civil Damage Act.[35]

The first of the *Hammerschmidt* court's three arguments[36] is that an essentially procedural limitation on liability, such as the notice-of-claim requirement, should not allow a joint tortfeasor to avoid payment of damages for a pre-existing common liability. The Minnesota Supreme Court had developed its concept of pre-existing common liability in *White v. Johnson*[37] and *Spitzack v. Schumacher*.[38] In *White*, the court held that a defendant could preserve a third-party claim against a municipality for either contribution or indemnity by personally giving the statutory notice of claim, despite any failure of the plaintiff to give the municipality such notice.[39] In reaching that result, the court noted that the city's alleged common liability arose at the time the injury occurred, but that notice from someone was a "practical" condition precedent to bringing suit.[40] In *Spitzack*, the defendant had attempted to implead alleged joint tortfeasors who had earlier been adjudged not liable in a suit by the plaintiff.[41] The court affirmed a dismissal of the im-

---

of that case. In *Skaja*, the defendants in the third-party contribution action attempted to escape liability for contribution because they had settled with the injured plaintiffs and secured a covenant not to sue from them. A contrary result in that case would have allowed the plaintiff in the original suit and a joint tortfeasor to abrogate ex parte the principal defendant's right to contribution from that joint tortfeasor.

35. 274 N.W.2d at 83.

36. In addition to the three arguments treated individually in this Comment, the court was concerned that if it insisted on notice in contribution actions, delayed notification of a principal defendant by the direct-action plaintiff might forestall the defendant's opportunity to bring a third-party action for contribution against other joint tortfeasors. *See* text accompanying note 32 *supra*. The court, however, could have required notice in contribution actions and still avoided that danger by allowing the principal defendant 120 days following his receipt of notice from the plaintiff in which to notify any potential third-party contribution defendants. *See* text accompanying notes 62-63 *infra*.

37. 272 Minn. 363, 137 N.W.2d 674 (1965).

38. 308 Minn. 143, 241 N.W.2d 641 (1976).

39. 272 Minn. at 371, 137 N.W.2d at 680. The court considered the giving of notice under the notice provision of the Minnesota Tort Liability Act, ch. 798, § 5, 1963 Minn. Laws 1398 (current version at MINN. STAT. § 466.05(1) (1978)) to be "a condition precedent to bringing suit for the practical purpose of quickly informing a municipality of injuries for which it might be liable." 272 Minn. at 370, 137 N.W.2d at 679. According to the court, "this purpose is served as well by notice from a joint wrongdoer as from an injured party." *Id.* at 372, 137 N.W.2d at 680.

40. *Id.* at 370-71, 137 N.W.2d at 679-80.

41. Spitzack v. Schmacher, 308 Minn. 143, 144-45, 241 N.W.2d 641, 642-43 (1976).

pleader action against the third-party defendants because of the lack of common liability.[42] In affirming the dismissal, the *Spitzack* court distinguished several other cases in language that was later quoted in *Hammerschmidt*:

> [I]n all of these cases the defenses were procedural in nature and did not go to the merits of the case. The defenses of release, [and] statute of limitations . . . do not deny liability, but rather avoid liability. Thus, the underlying common liability was never extinguished and a joint tortfeasor's right to contribution was allowed.[43]

The *Hammerschmidt* court concluded that, in light of the concept of pre-existing common liability drawn from *White*, "the notice-of-claim provision [of the Civil Damage Act], for purposes of contribution, is no different than the running of a statute of limitations against one cotortfeasor but not another."[44] The court did not further explain this reasoning except by the quotation from *Spitzack* stating that defenses such as the statute of limitations are procedural rather than substantive.[45] If the *Hammerschmidt* court had concluded that timely notice of claim were a prerequisite to a suit for contribution, it could have been argued that the court was setting a deadline beyond which suit could not be brought, much like the deadline set by the statute of limitations. It seems clear, however, that while statutes of limitations are intended to offer potential defendants repose by prescribing time periods within which rights of action must be enforced,[46] 120-day notice requirements are designed to give defendants a fair opportunity to

---

42. *Id.* at 149, 241 N.W.2d at 645.

43. *Id.* at 145-46, 241 N.W.2d at 643, quoted in Hammerschmidt v. Moore, 274 N.W.2d 79, 82 (Minn. 1978).

44. 274 N.W.2d at 82.

45. *Id. See* note 43 *supra* and accompanying text. Analogies should not be drawn to Gustafson v. Johnson, 235 Minn. 358, 51 N.W.2d 108 (1952), the case the *Spitzack* and *Hammerschmidt* courts cited as originally establishing the rule that " 'an injured party's failure to bring an action . . . within the statute of limitations [does not relieve] *a tortfeasor of his liability to a joint tortfeasor for contribution.*' " 274 N.W.2d at 81-82 (emphasis in original) (quoting Spitzack v. Schumacher, 308 Minn. 143, 145, 241 N.W.2d 641, 643 (1976)). *Gustafson* did not address that issue at all; rather, it was concerned with whether third-party defendants could be impleaded into the original suit before the cause of action for contribution had "matured" through payment by the named defendant of more than his share of the joint obligation. *See* 235 Minn. at 364, 51 N.W.2d at 112. The discussion in text assumes that the court would act consistently with the *Spitzack* and *Hammerschmidt* characterization of the *Gustafson* holding if an appropriate fact situation were presented to it.

46. *See Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1185-86 (1950), *cited with approval in* Dalton v. Dow Chem. Co., 280 Minn. 147, 153 n.2, 158 N.W.2d 580, 584 n.2 (1968); Bachertz v. Hayes-Lucas Lumber Co., 201 Minn. 171, 176, 275 N.W. 694, 697 (1937). *See also* note 47 *infra* and accompanying text.

prepare for trial.[47] Thus, the court's identical treatment of the two does not address their significant functional differences.[48] This judicial disregard of notice requirements is more difficult to justify because the legislature probably enacted such requirements in response to a perceived need for relatively quick notification.

The *Hammerschmidt* court also relied on equitable principles to justify its result, reasoning that not making notice a prerequisite to a suit for contribution would strengthen liquor vendors' incentive to avoid illegal sales.[49] The court believed that a contrary result would reduce this incentive because some vendors might escape payment for a common liability arising from their illegal sales if the injured plaintiff elected not to sue all liable vendors and gave notice to a single vendor so near the statutory time limit that the defendant vendor could not give timely notice of a contribution action to other vendors.[50] This sequence of events, however, probably would rarely occur, and would therefore only rarely encourage the carelessness on the part of liquor establishments that was feared by the court. Moreover, because the court's decision allows a vendor to more easily acquire contribution, his fear of liability is likely to be reduced since he need not be concerned that the injured plaintiff will fortuitously choose him as the sole defendant. In any event, it seems improbable that liquor vendors, such as the third-party defendants in *Hammerschmidt*, consider whether a patron has visited or will visit other liquor establishments at the time they decide whether to

47. A defendant will have an inadequate opportunity to prepare for trial if he learns of his possible liability too late to investigate the plaintiff's claim or to prove his lack of culpability. Chief Justice Sheran noted in his dissenting opinion in *Hammerschmidt* that the "purpose of the statutory requirement [of the Minnesota Civil Damage Act] that notice of claim be served 'within 120 days after the injury occurs' is to permit the alleged supplier of liquor to investigate the claim before witnesses disappear and memories fail—practical consideration uniquely pertinent in situations of this kind." 274 N.W.2d at 83 (Sheran, C.J., dissenting) (quoting MINN. STAT. § 340.951 (1978)). *See also* Donahue v. West Duluth Lodge No. 1478 of the Loyal Order of Moose, 308 Minn. 284, 286-87, 241 N.W.2d 812, 814 (1976); Hirth v. Village of Long Prairie, 274 Minn. 76, 79, 143 N.W.2d 205, 207-08 (1966).

Although it could be argued that statutes of limitation also promote the objective of avoiding stale claims that are difficult to investigate, statutes of limitation allow far more than 120 days to elapse and thus only slightly promote such a goal. In addition, statutes of limitation apply to a broader group of direct claims, giving one more reason to believe that the parties will be aware of potential lawsuits without either notice or service of process.

48. *See* notes 45-47 *supra* and accompanying text.

49. *See* note 34 *supra* and accompanying text.

50. 274 N.W.2d at 83. *See* note 36 *supra* and accompanying text.

sell liquor to him. If vendors do not contemplate possible tort liability when they serve liquor it is unrealistic to assume that the availability of contribution actions will alter vendors' behavior.[51]

The court also argued that not imposing a notice requirement for contribution actions under the Civil Damage Act would distribute the burden of economic loss more equitably throughout the liquor industry.[52] Forcing parties who have not received notice to share economic loss hardly seems more equitable. Although a notice requirement occasionally allows guilty parties to avoid liability, the reason for requiring notice is to allow sufficient time for liquor establishments to gather the evidence needed to avoid excessive liability.[53] The court dealt summarily with this purpose, stating: "Our holding does not frustrate the general purpose of the notice requirement since third-party defendants would have access to the pleadings and discovery processes in the original litigation and would be able to complete such discovery as would be necessary to aid their investigation."[54] Access to discovery by another party, however, does not adequately replace the opportunity for independent investigation that notice affords. Moreover, the

51. The availability of liquor vendor liability insurance also tends to weaken any deterrence argument. In addition, adopting the proposal to simply allow principal (direct-action) defendants 120 days in which to notify contribution (third-party) defendants, as described in the text accompanying notes 62-63 *infra*, would counter the deterrence argument in this case.

52. 274 N.W.2d at 83. *See* note 34 *supra* and accompanying text.

53. *See* note 47 *supra*. The justification for notice requirements seems even stronger under the Civil Damage Act than under the Minnesota Tort Liability Act (MTLA), despite the court's stronger support for the municipal notice provision. *See* notes 29-30 *supra* and accompanying text. Liquor sales are often made to individuals whom the liquor vendor does not know personally, so he will often have no way of knowing about his possible liability in a particular case until he receives notice of a claim. To rebut a claim against him, a defendant needs to determine whether he sold liquor to the already intoxicated person, how much that person had drunk before coming to defendant's establishment, whether that person drank elsewhere after leaving the defendant's premises, and whether that person's intoxication caused the plaintiff's injury. Without prompt investigation, the evidence needed to prove these matters may be difficult to obtain.

Giving a defendant notice of the claim against him has been recognized in other contexts. For instance, Justice Frankfurter commented:

> No better instrument has been devised for arriving at the truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.

Joint Anti-Fascist Refuge Comm. v. McGrath, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring).

54. 274 N.W.2d at 83 n.6.

crucial issue in a contribution action is likely to be what actually occurred on the premises of the third-party defendant. Since this issue would have been peripheral to the direct action, it is unlikely that the two original parties would have made the extensive investigation necessary for a third-party defendant.

The result in *Hammerschmidt*, as Chief Justice Sheran recognized in his dissent,[55] is clearly inconsistent with analogous cases interpreting the nearly identical notice requirement of the Minnesota Tort Liability Act (MTLA) dealing with the tort liability of municipalities.[56] To maintain a contribution action under the MTLA, a third-party plaintiff must provide notice to the third-party defendant within the statutory period; after *Hammerschmidt*, a third-party plaintiff in a Civil Damage Act contribution action need not give notice. There appears to be no reason to distinguish between municipal third-party defendants and third-party defendants under the Civil Damage Act. If anything, because of the high volume and relative anonymity associated with liquor sales, liquor vendors must investigate claims quickly and are thus in greater need of speedy notice than municipalities.[57]

In several cases, the Minnesota Supreme Court has had serious doubts about the constitutionality of the legislation requiring plaintiffs to give notice of claims to municipalities but not to other tort defendants.[58] In *Hammerschmidt*, the court it-

55. "The majority opinion . . . ignores the clear legislative purpose of the notice requirement in [the Minnesota Civil Damage Act] and, in effect, overrules our own recent precedents." *Id.* at 84 (Sheran, C.J., dissenting).

56. *See* notes 29-30 *supra* and accompanying text.

57. *See* note 53 *supra*.

58. In Frasch v. City of New Ulm, 130 Minn. 41, 153 N.W. 121 (1915), the court addressed the question of whether distinctions between private and municipal defendants were constitutional. The court held: "[T]he legislature is not, because of similarity of liability, precluded from making distinctions between municipalities and private corporations in respect to conditions precedent to suit." *Id.* at 43, 153 N.W. at 122. However, in the more recent case of Olander v. Sperry & Hutchison Co., 293 Minn. 162, 197 N.W.2d 438 (1972), the court stated: "Although plaintiff raises the question of whether § 466.05 transgresses constitutional limits, we need not discuss that issue as we dispose of the appeal on other grounds. It should be noted, however, that judicial patience should not be confused with judicial impotence, especially where constitutional rights may be concerned." *Id.* at 164-65, 197 N.W.2d 446. Three years later, concurring justices argued that the 30-day municipal notice-of-claim requirement was unconstitutional. Jenkins v. Board of Educ., 303 Minn. 437, 442, 228 N.W.2d 265, 269 (1975) (Todd, J., concurring, joined by Kelly & Scott, J.J.). *See* Kelly v. City of Rochester, 304 Minn. 328, 330, 231 N.W.2d 275, 276 (1975); Altendorfer v. Jandric, Inc., 294 Minn. 475, 481, 199 N.W.2d 812, 816-17 (1972);

self[59] drew a similar distinction between contribution defendants under the MTLA and the Civil Damage Act. Moreover, because the court lacks the broad authority of the legislature to draw public policy distinctions,[60] the legitimacy of its own ac-

---

Note, *Notice of Claim Requirement Under the Minnesota Municipal Tort Liability Act*, 4 WM. MITCHELL L. REV. 93, 105-06 & n.109 (1978).

In a recent case, Kossak v. Stalling, 277 N.W.2d 30 (Minn. 1979), the court held unconstitutional the requirement of section 466.05(1), *see* note 29 *supra*, that suit be commenced within one year of notice. *Id.* at 35. In support of its result, the court cited portions of the opinions in *Olander*, *Jenkins*, *Kelly*, and *Altendorfer* that questioned the constitutionality of the municipal notice provision of section 466.05(1). *Id.* at 33-35. In *Kossak*, however, the court did not reach the constitutionality of the notice requirement itself—thus, its constitutional status remains uncertain.

59. In Hirth v. Village of Long Prairie, 274 Minn. 76, 143 N.W.2d 205 (1966), the court vigorously defended the notice requirement of the Minnesota Tort Liability Act. There, the plaintiff suffered personal injury as a result of the negligence of municipal employees who fraudulently concealed their negligence until after the statutory notice period. The court refused to allow the action because of the lack of statutory notice, reasoning:

> To find in the case before us that the municipality is estopped from asserting the defense of failure to notify would be to undermine the purposes of the statute and invade the legislative prerogative. Were we to adopt plaintiff's arguments, we would, in effect, be amending the statute contrary to legislative intent clearly revealed by the statute's legislative history. The legislature had had before it . . . cases where hardship was the result of strict enforcement of the statute. Yet, the only response was an amendment in 1959 granting to those who are physically or mentally incapacitated as a result of the injury for which they claim relief an extension of time "not in excess of 90 days" to file notice. It is apparent, therefore, that the legislature is adamant in adhering to the strict requirements of the statute as applied in Johnson and similar cases, regardless of hardship.

Id. at 79, 143 N.W.2d at 207-08 (footnote omitted).

60. *See, e.g.*, Ferguson v. Skrupa, 372 U. S. 726, 729-30 (1963) ("'[T]he proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the constitution of the United States or of the State . . . .' [w]e have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.") (quoting Tyson & Brother v. Banton, 273 U.S. 418, 446 (1927) (Holmes, J., dissenting)); Williamson v. Lee Optical Co., 348 U.S. 483, 488 (1955). In contrast to the views of Justices Black and Holmes, Justice Harlan interpreted more broadly the power of the courts to invalidate legislation on constitutional grounds. *See* Poe v. Ullman, 367 U.S. 497 (1961) (Harlan, J., dissenting). He made it clear, however, that "it is the Constitution alone which warrants judicial interference in sovereign operations of the State." *Id.* at 539-40. It thus appears that when interpreting statutes, courts must ground their decisions either in their power to ascertain the intent of the legislature or in their power to determine the constitutionality of statutes.

The court's action in *Hammerschmidt* has created a distinction among claims against municipalities that was not made by the legislature. When the legislature added the notice requirement to the Civil Damage Act in 1969, it provided that notice be given to municipalities operating a municipal liquor store as well as liquor licensees. *See* note 5 *supra*. That provision was consistent with the general MTLA notice requirement. *See* Act of May 22, 1963, ch.

tion is questionable.[61]

Whatever constitutional problems might be created by the result in *Hammerschmidt*, the central shortcoming of the decision is the court's lack of concern for the purposes of the statutory notice provision. The court was understandably concerned with the possibility that an injured plaintiff's last-minute notice might prevent the defendant's suit for contribution,[62] but it should have reached a result consonant with the legislative requirement of notice. It could have achieved such a result by allowing the initial defendant to bring a third-party action for contribution if he gave notice within 120 days of his own receipt of notice from the plaintiff. Such a rule would be a more moderate solution to the problem the court perceived and would be consistent with the legislative decision to allow the initial plaintiff 120 days to give notice. In any event, it seems clear that any deference to the purposes of the statutory notice requirement would have required a different outcome in *Hammerschmidt* since the appellants waited a full twenty-eight months after their own receipt of notice before notifying the respondents.[63]

The *Hammerschmidt* court's purpose was to ensure that liquor vendors who make illegal liquor sales do not entirely escape liability for resulting injury.[64] The ease with which the court departed from the reasoning of the municipal notice cases may indicate that it considered liquor vendors to be less deserving of notice than municipalities. *Hammerschmidt* obviously makes contribution more readily available to liquor dealers by not imposing the requirement of timely notice upon third-party plaintiffs. This Comment, however, has already noted that greater access to contribution may have no deter-

798, § 5, 1963 Minn. Laws 1398 (current version at MINN. STAT. § 466.05 (1978)). The decision in *Hammerschmidt*, by abolishing the requirement of notice to liquor vendors in contribution actions, creates a new distinction between municipalities that are third-party defendants in dram shop tort actions and those that are third-party defendants in other tort actions.

61. Although the MTLA and Civil Damage Act contain similar requirements of notice from "every person who claims damages," *see* notes 5 and 29 *supra*, neither statute specifically mentions contribution actions. The court could, therefore, legitimately maintain that neither statute was intended to extend to contribution actions if it could discover a significant distinction between the importance of giving notice in contribution actions and the importance of giving notice in direct actions. The Minnesota Supreme Court, however, did not articulate any such distinction in *Hammerschmidt*. In fact, the court reached contradictory results under the MTLA and Civil Damage Acts without offering either a constitutional or interpretative justification.

62. 274 N.W.2d at 83. *See* note 50 *supra* and accompanying text.

63. 274 N.W.2d at 80.

64. *Id.* at 83. See notes 34-35 *supra* and accompanying text.

rent effect on tortious liquor sales.[65] If the Minnesota Legislature remains committed to the purposes of a notice requirement, it should explicitly extend the civil damage notice requirement to contribution actions.

65. *See* notes 50-51 *supra* and accompanying text.