Torts—Complicity as a Comparative Fault in Minnesota: The Essence of a Doctrine is Lost

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TORTS—COMPLICITY AS A COMPARATIVE FAULT IN MINNESOTA: THE ESSENCE OF A DOCTRINE IS LOST

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

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I. INTRODUCTION

It is well known that alcohol related injuries and accidents are prevalent in the United States. Alcohol consumption is associated with a wide range of accidents and injuries resulting from the im-
paired performance of complex mental and motor functions.\textsuperscript{1} Studies show that at least forty percent of all traffic fatalities are alcohol related.\textsuperscript{2} Alcohol also increases the risk of accidental injuries from other causes. In one study of emergency room patients who were admitted by injuries, forty-seven percent tested positive for alcohol and thirty-five percent were intoxicated.\textsuperscript{3} In addition to causing themselves injury, these intoxicated individuals often cause harm to others.

To help deal with the high costs in life and money caused by this epidemic, state legislatures across the United States have enacted Dram Shop laws.\textsuperscript{4} Dram Shop laws create a statutory cause of action, on behalf of an injured third party, against the seller of the alcohol that "caused" the accident.\textsuperscript{5} Minnesota has had a dram shop statute on the books in some form since 1911.\textsuperscript{6}

The "complicity doctrine," sometimes called the "innocent party doctrine," is a judicially created defense to the statute that denies certain parties standing to sue.\textsuperscript{7} The complicity doctrine disallows a person to sue under the dram shop act if he had an active role in producing the intoxication that harmed him.\textsuperscript{8} For over

\begin{itemize}
  \item 4. This occurred largely as a result of the temperance movement of the mid-1800's. Daphne D. Sipes, \textit{The Emergence of Civil Liability for Dispensing Alcohol: A Comparative Study}, 8 REV. LITIG. 1, 3-4 (1988).
  \item 5. \textit{Infra} note 19 and accompanying text.
  \item 6. MINN. STAT. § 340A.801 (1998) (providing historical notes). Minnesota's Dram Shop act is called the Civil Damages Act (CDA). The terms "dram shop act" or "dram shop statute" and "Civil Damages Act" (CDA) will be used interchangeably.
  \item 7. Turk v. Long Branch Saloon, Inc., 280 Minn. 438, 442, 159 N.W.2d 903, 906 (1968) (holding that one who participated in the intoxication of another has no standing to sue under MINN. STAT § 340.95). \textit{See also} 45 AM. JUR. 2d Intoxicating Liquors § 538 (1999).
  \item 8. 45 AM. JUR. 2d, \textit{supra} note 7 at § 538.
\end{itemize}
K.R. v. Sanford

In K.R. v. Sanford, the Minnesota Supreme Court was tasked with interpreting an amendment to Minnesota's Comparative Fault Act (CFA). The amendment seemingly overruled a long line of cases and made the complicity doctrine a fault to be compared, as opposed to a complete bar to the action. The court held that complicity is no longer a bar to a cause of action under Minnesota law. The court's analysis weighed heavily on legislative intent. Faced with overwhelming documentation of the legislative process in amending the CFA, the court made the correct ruling on the question of interpretation. However, the legislature seemed to misconstrue the purpose behind the creation of the dram shop acts, and, in doing so, created a situation which will serve only to undermine judicial efficiency and pervert a fundamental principle of law.

This case note will review the pertinent history of the Minnesota's Civil Damages Act, and its adoption and adherence to the complicity doctrine. Next will be a brief overview of the Minnesota Supreme Court case, K.R. v. Sanford. In section IV, this case note will discuss the underlying legal theories and purposes behind the creation of dram shop acts, and how these underlying principles can only be realized by continued adherence to the complicity doctrine in Minnesota. Finally, Section V explores the impact of K.R. v. Sanford on future cases by analyzing it, in part, as applied to the facts presented in this case.

II. HISTORY

A. Minnesota's Dram Shop Act

Under common law, there existed no cause of action against a
vendor for an injury resulting from the illegal sale of liquor. In cases where injury to a third person resulted from the intoxication of another, courts held that drinking liquor, not selling it, was the proximate cause of the injury. In the mid-1800s, many states enacted dram shop statutes that generally imposed strict liability upon a seller of liquor for injuries caused by an intoxicated customer. Wisconsin, Minnesota's neighbor to the east, was the first such state, adopting its statute in 1849.

In 1911, Minnesota adopted the CDA and created a cause of action against the seller of alcohol for injuries to third persons. Minnesota's CDA creates a cause of action for "[a] spouse, child, parent, guardian, employer, or other person injured in person."

B. Minnesota's Adaptation Of The Complicity Doctrine

In 1968, Minnesota's Supreme Court, in Turk v. Long Branch Saloon, Inc., introduced the complicity doctrine as a defense to the statute. Because the court found the language of the statute

15. Common law liability did not exist with respect to injuries occurring off the vendor's premises. E.g., Cowman v. Hansen, 92 N.W.2d 682, 690 (Iowa 1958); Swinfin v. Lowry, 37 Minn. 345, 346-47, 34 N.W. 22, 22 (1887); Demge v. Feierstein, 268 N.W. 210, 212 (Wis. 1936).


17. Id. at 1156.

18. Id. Wisconsin's dram shop statute required tavern owners to post a bond to pay the expenses of all prosecutions, civil or criminal, arising from the selling of alcoholic beverages. Id.

19. MINN. STAT § 340A.801. In 1985, Minnesota's first Civil Damages Act was repealed and replaced by a new Civil Damages Act, Minnesota Statute § 340A.801 (1986). See also Strand v. Vill. of Watson, 245 Minn. 414, 419, 72 N.W.2d 609, 614 (1955) (stating that cause of action for damages caused by an intoxicated person or by intoxication of any person against one who by illegally selling intoxicating liquor caused the intoxication of such person existed only by virtue of Civil Damages Act, and there was no such cause of action at common law).

20. MINN. STAT. § 340A.801, subd. 1(1998). The entire relevant subdivision reads as follows:

Subdivision 1. A spouse, child, parent, guardian, employer, or other person injured in person...by an intoxicated person or by the intoxication of another person, has a right of action in the person's own name for all damages sustained against a person who caused the intoxication of that person by illegally selling alcoholic beverages.

Id.

21. Turk v. Long Branch Saloon, Inc., 280 Minn. 438, 442, 159 N.W.2d 903, 906 (1968). Although the court in Turk did not call this defense by its common name, the "complicity doctrine," they recognized it as such in Herrly v. Muzik, 17 years later. Herrly v. Muzik, 374 N.W.2d 275, 277 (Minn. 1985). Although it was
somewhat unclear, it turned to the legislative intent for help in the interpretation. The court concluded that the protection of the public created by the statute was not intended by the legislature to be extended to persons who participate in the illegal sale of liquor. Accordingly, the court held that a person who is injured because of the intoxication of another is not afforded a right under the CDA if he himself participated in the illegal procurement of the liquor.

Later, in 1973, the Martinson court linked the complicity doctrine specifically with the language of the CDA. There, the court expanded its construction of legislative intent by explaining that the purpose of the CDA is both penal and remedial in nature, and that barring recovery by a wrongdoer advances the dual purposes.

at this point that the Minnesota Supreme Court officially introduced the complicity doctrine as a defense to the dram shop act, it was, at the time, "the conventional judicial position." *Myers, supra* note 16, at 1158. Illinois first recognized the complicity defense in 1890.

22. *Turk*, 280 Minn. at 440-41, 159 N.W.2d at 905. The term "other person" was not defined and was sufficiently vague as to require a judicial interpretation. *Id.* "The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature." *Minn. Stat.* § 645.16 (1998).

23. *Turk*, 280 Minn. at 442, 159 N.W.2d at 906. When applying statutes, it is common judicial practice to analyze (1) the particular type of harm the statute was intended to protect the public from, and (2) the classes of persons the statute was intended to protect. *Restatement (Second) of Torts* §§ 286, 288 (1965).

24. *Turk*, 280 Minn. at 442, 159 N.W.2d at 906 (concluding that an "innocent third party" is one who has had nothing to do with illegal furnishing of liquor to intoxicated wrongdoer).

25. *Martinson v. Monticello Mun. Liquors*, 297 Minn. 48, 53, 209 N.W.2d 902, 905 (1973). The court explains that although there is no statutory language defining the effect of "complicity," the court has limited the benefits of the CDA to innocent third persons. A person who himself is a wrongdoer does not fall within the class of those to whom the statute gives a cause of action. Therefore, the *Martinson* court created a clear link between the concept of complicity and the right to bring an action. *Id.*

26. *Id.* at 906. For more Minnesota cases forwarding this purpose behind the dram shop act, *e.g.*, *Hollerich v. City of Good Thunder*, 340 N.W.2d 665 (Minn. 1983) (holding that the purpose of the dram shop act was to suppress mischief of social ills which resulted from intoxication by providing an incentive for liquor vendors to do everything in their power to avoid making illegal sales and by compensating members of public who were injured as the result of illegal sales); *Englund v. MN CA Partners/MN Joint Ventures*, 555 N.W.2d 328 (Minn. Ct. App. 1996) (stating that the purposes of the civil damages act are to protect health, safety and welfare of the public through careful regulation of liquor distribution, to penalize dram shops for illegal sale of liquor, and to provide a remedy for innocent third persons injured as a result of another's intoxication), *aff'd*, 565 N.W.2d 433. *But see* *Sworski v. Colman*, et al., 204 Minn. 474, 283 N.W. 778 (1939) (stating that the dram shop act did not manifest a legislative intent to protect the benefici-
Collectively, the cases defined “other person” as expressed in the statute, to mean that only “innocent third parties” have standing to sue under the CDA.

C. The 1977 Amendment To The Civil Damages Act

In 1977, the Minnesota Legislature amended the CDA by providing that actions for damages based upon liability imposed by the statute shall be governed by the Minnesota CFA. The Minnesota Supreme Court did not have occasion to discuss the impact of the amendment until 1985, in *Herrly v. Muzik*. The *Herrly* court again deferred to the legislative intent in deciding whether the amendment overruled their prior decisions and made the complicity doctrine a fault to be compared, rather than a complete bar to the action. Here, the court concluded that the legislature had not intended to overrule cases such as *Turk* and *Martinson*. Had they meant to do so, they would have used more specific language to

aries of the statute from their own failures or to impose a penal liability).

27. *Infra* note 28 and accompanying text; *Turk*, 280 Minn. at 440-443, 159 N.W.2d at 905-906; see also *Herrly v. Muzik*, 374 N.W.2d 275, 277 (Minn. 1985) (stating that the defendant is liable only if the plaintiff has standing to commence an action under the CDA). For a definition of “innocent third party,” *supra*, note 24 and accompanying text. In a more recent case decided after the amendment to the CFA, the Minnesota Supreme Court in *Lefto v. Hoggsbreath* gave a definition of “other person.” *Lefto v. Hoggsbreath Enters.*, Inc., 581 N.W.2d 855, 857 (Minn. 1998). The court said that “the term ‘other person’ refers to any other person injured by the intoxication of another who played no role in causing the intoxication.” *Id.* (emphasis added). The Committee argued that this definition should apply, and therefore, bar plaintiff’s claim. *K.R. v. Sanford*, 605 N.W.2d 387, 393 (Minn. 2000). However, the court dismissed the definition as dicta, since the complicity doctrine was not at issue, nor was it even mentioned, in *Lefto*. *Id.* The Minnesota Supreme Court considers dicta anything that goes beyond the issues presented in the instant case. State ex rel. Foster v. Naftalin, 74 N.W.2d 249, 266 (Minn. 1956) (defining dicta and the reasons for not giving weight of precedent).


29. *See generally Herrly*, 374 N.W.2d 275 (becoming the first case since the amendment to challenge the complicity doctrine in front of the Minnesota Supreme Court).

30. *Id.* at 278. In dicta, the court theorized that their previous rulings on this issue could not have escaped legislative attention. Therefore, if the legislature had intended to overrule those cases, it would not have been difficult to specifically do so. *Id.*

31. *Id.*
make that intent clear. Therefore, notwithstanding the 1977 amendment to the CDA, complicity continued to be a complete bar to recovery under the statute.

D. The 1990 Amendment To The Comparative Fault Act

In 1990, the Minnesota Legislature amended the CFA. Upon recommendation by a commission, the legislature added the defense of complicity to the list of faults to be compared. Not until K.R. v. Sanford has a Minnesota appellate court had the opportunity to consider the effect of the 1990 amendment on the issue of whether a complicit party can sue under the CDA.

III. K.R. v. Sanford

A. The Facts

K.R. was an employee at a downtown Minneapolis nightclub known as First Avenue. On December 21, 1996, at around midnight, Sergio Vargas ("Vargas"), an acquaintance, asked K.R. to buy a bottle of vodka for him. Vargas gave K.R. twenty dollars for the

32. Id. In Koehnen v. Dufuor, 590 N.W.2d 107, the Minnesota Supreme Court speaks eloquently about the cause and effect relationship between judicial interpretation and legislative amendment.

The import of this long history of legislative action/court interpretation "duet" is this: liability for injuries caused by illegal sale of liquor was unknown to the common law and is a part of our jurisprudence solely as a creature of the legislature. Where the legislature has perceived this court's holdings to have strayed from its intent, it has reacted by amending the Act accordingly.

33. Herrly, 374 N.W.2d at 276.

34. Minn. Stat. § 604.01, subd. 1(a) (1998) (providing historical notes). See also infra note 54 and accompanying text.

35. Minn. Stat. § 604.01, subd. 1(a) (2000). In its present state, the act reads: "'Fault' includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others...The term also includes...the defense of complicity under section 340A.801." Id. "Section 340A.801" refers specifically to the Civil Damages Act. Id.

36. K.R. v. Sanford, 588 N.W.2d 545, 548 (Minn. Ct. App. 1999), cert. granted, No. C2-98-1377 (Minn. 2000). In 1998, the Minnesota Supreme Court decided Lefto v. Hogsbreath Enterprises, Inc., 581 N.W.2d 855 (Minn. 1998). Although the main crux of the case was to examine the meaning of "other person" under the CDA, the case did not specifically deal with the amendment, or the complicity doctrine. Id.


38. Id.
purchase and promised to drive K.R. home from work.  

When her shift was over, K.R. illegally purchased the bottle of vodka for Vargas from her manager. At about 5:00 a.m., Vargas arrived at the club to collect his vodka and drive K.R. home. Vargas arrived with two friends, Brandon Sanford ("Sanford") and Douglas Schneider ("Schneider").

After stopping at a party, the four went to Sanford's apartment to have a drink. Vargas, Schneider and K.R. each mixed a drink using the vodka K.R. had illegally purchased for Vargas earlier. Vargas and K.R. each inhaled a line of cocaine. Both Vargas and Schneider continued to drink. Because Vargas was too intoxicated to drive, they decided to sleep at the apartment. Vargas gave K.R. a drug called a "ruffle" to help her sleep. After taking the pill, K.R. started to go in and out of lucid consciousness. When K.R. regained consciousness, she found three men sexually assaulting her.

B. Procedural History And The Court's Analysis

K.R. brought suit in district court against The Committee under Minnesota's CDA. The district court granted The Committee's motion for summary judgment, ruling that K.R. did not have standing as an "other person" under the CDA because of her complicity. The court of appeals reversed the district court concluding that the 1990 amendment to the CFA made complicity an issue to be considered under comparative fault, and not a complete bar.

39. Id.
40. Id. This was a common practice at First Avenue. Id. This practice of selling closed bottles of alcohol after hours and for off-premises consumption violated Minnesota Statute section 340A.504, subd. 4(4). By violating the state statute, this act qualifies as an "illegal selling [of] alcoholic beverages," as defined in the CDA. MINN. STAT. § 340A.801 (1998). Myers, supra note 16 and accompanying text.
41. K.R., 605 N.W.2d at 390.
42. Id.
43. Id.
44. Id.
45. Id.
46. Id. The two men each mixed and consumed at least two more drinks. Id.
47. Id.
48. Id. "Ruffle" is the street name for the drug Rohypnol. Id.
49. Id.
50. Id.
51. Id. at 389. Named Defendant "The Committee" owns and operates the First Avenue nightclub where K.R. worked. Id. at 389 n.3.
52. Id.
to the action. Since this was the first time a Minnesota court had an opportunity to consider the effect of the 1990 amendment, the Minnesota Supreme Court granted review.

The Minnesota Supreme Court affirmed the court of appeals, holding that under the 1990 amendment to the CFA, complicity is now a comparative fault and not a bar to the suit. In ruling on this issue, the court returned once again to its scrutiny of the legislative intent.

The 1990 amendment was adopted by the legislature upon recommendation by the Minnesota Injury Compensation Study Commission. The Commission recommended that "fault," with regard to Minnesota's CFA, be redefined and should include the defense of complicity. Specifically, it recommended that the defense of complicity in actions brought under the CDA should be subject to apportionment, and should no longer be a complete bar to recovery. The Minnesota Supreme Court, faced with the obvious intent of the legislature to overrule their previous decisions with respect to the complicity doctrine, concluded that the complicity doctrine is no longer a bar to recovery and K.R. has standing to pursue a claim under the CFA.

54. See generally K.R., 605 N.W.2d at 387 (discussing the amendment to the CFA and its implications as applied to this case). In 1991, the Minnesota Court of Appeals decided O'Neil v. Pofahl, Nos. C5-91-40, C4-91-45, C8-91-405 and C8-91-467, 1991 WL 144832, at *2 (Minn. Ct. App. Aug. 6, 1991). The court affirmed the complicity doctrine and concluded that it "applies to any person who is not an innocent third party, regardless of that person's age." Id. at *2. The court does not discuss the 1990 amendment to the CFA at all, and review was denied on October 11, 1991. Id. However, it is important to note that the events surrounding this cause of action occurred in April 1998. Id.
55. K.R., 605 N.W.2d at 389.
56. Id. at 392.
57. Id. The recommendations were part of a massive tort reform recommended by the Commission. The Minnesota Injury Compensation Study Commission was established by the legislature in 1988 to evaluate the tort recovery system and make recommendations for changes. Michael K. Steenson, With the Legislature's Permission and the Supreme Court's Consent, Common Law Social Host Liability Returns to Minnesota, 21 WM. MITCHELL L. REV. 45, 46 (1995); see also Minnesota Injury Compensation Study Comm'n, Report to the Legislature of 1990 (1990) (hereinafter "Commission Report").
59. Id. In its report, the Commission specifically identified the complicity doctrine and explained why it thought the doctrine should not act as a complete bar to recovery. Id. at 33-34; See also K.R., 605 N.W.2d at 392.
60. K.R., 605 N.W.2d at 394.
IV. ANALYSIS

The tragedy in this case is not that the Minnesota Supreme Court misconstrued the legislative intent. Indeed, it did not. The tragedy is that the Minnesota Legislature's actions perverted the original intent behind enacting dram shop laws, and Minnesota's CDA.

A. The Purpose Of Dram Shop Acts

Dram Shop acts were created to give an innocent third party a cause of action against the illegal supplier of liquor, in the event that illegal act caused him injury. They were designed to place the economic consequences of intoxicated behavior primarily on the businesses that profited from the selling of liquor. As one court pointed out, dram shop statutes are designed to fulfill a need for discipline in the traffic of liquor and to provide a remedy for evils and dangers which flow from such traffic. The evil and danger we are concerned with here is that a person in an intoxicated condition might unintentionally, but as a result of his intoxication, injure some other party.

Besides providing a remedy for injured persons, this type of legislation was enacted to "protect the public, and the rights and interests of innocent persons who come within their scope and to discipline or restrain those who engage in the traffic of liquor." Although protecting the public from the "evils" of liquor is an underlying goal of dram shop statutes, it is also a general principle of law that one should not profit from his own wrongdoing. Ac-
cordingly, intoxicated persons themselves are denied recovery under the dram shop statutes.68

B. The Complicity Doctrine

“Protection of the innocent is central to [the] dram shop statute.”69 Therefore, the courts sought to carry out that purpose when they created the complicity doctrine.

Adhering to the complicity doctrine as a complete bar to an action might sound to some like reinstating common law contributory negligence.70 Although there is a certain relationship between the two, they are different.71 Contributory negligence is “conduct on the part of plaintiff contributing as a legal cause to the harm he has suffered, which falls below the standard to which he is required to conform for his own protection.”72 As one Illinois court put it, “[c]ontributory negligence relates to the plaintiff’s role in causing his own injury, while complicity concerns the plaintiff’s role in causing the inebriate’s intoxication.”73

Traditionally, garden-variety contributory negligence was not a defense to a dram shop act.74 Even in Minnesota, the Minnesota

and defendant have participated in the illegal activity which is the basis for the plaintiff’s action, the plaintiff’s claim is barred entirely). In Orzel, this doctrine was used to bar a plaintiff’s claim against a pharmacy where the plaintiff had obtained prescription drugs without a valid prescription. Id. Notwithstanding the presence of the dram shop act in the present case, the factual situations are similar. Here, K.R. knowingly participated with the defendant in the illegal selling-purchase of the vodka.

68. Slager, 435 N.W.2d at 356. This is also indicated by the statutory construction of most dram shop acts.
69. Id. at 351.
73. Walter v. Carriage House Hotels, Ltd., 646 N.E.2d 599, 604 (Ill. 1995); see also Baxter, 752 P.2d at 245 (providing definitions of both contributory negligence and complicity in the dissent).
74. See generally Zucker v. Vogt, 329 F.2d. 426 (2d Cir. 1964) (holding that contributory negligence of a taxi driver changing his tire in the road was not a defense to the dram shop act because the gravamen of a dram shop actions is not negligence, but a statutory violation); Overocker v. Retoff, 234 N.E.2d 820 (Ill. App. Ct. 1968) (finding that plaintiff's contributory negligence in attempting to break up a bar fight was not a factor, since the remedy under the dram shop act is statutory, and is not based in negligence); Williams v. Klemesrud, 197 N.W.2d 614 (Iowa 1972) (holding that plaintiff's contributory negligence in vehicle crash no defense when driver of other vehicle intoxicated by liquor given to him by defendant).
Supreme Court recognized that contributory negligence would not bar recovery. However, courts viewed complicity differently.

Being complicit is to be more than just negligent. It isn’t the same as, for example, being on a highway when struck by a drunk driver. Complicity, to the extent that will create an absolute bar to recovery in an action under a dram shop act, exists only where the injured party has encouraged or voluntarily participated, to a material and substantial extent, in the drinking of alcoholic beverages by the intoxicated person who caused the injuries.

A favorite scenario of opponents of the complicity doctrine is the situation in which friends are out together and take turns buying rounds of drinks. They subsequently might leave together and the driver, because of his intoxication, crashes the vehicle injuring both himself, and his passenger. The argument is that, under the complicity doctrine, the passenger will not be able to recover under the dram shop act because he purchased some of the

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75. Kvanli v. Watson, 272 Minn. 481, 139 N.W.2d 275 (1965) (holding that although there was nothing in the record to support a finding that negligence on the part of the plaintiff was the sole cause of the accident, concurring negligence, if any, would not bar recovery).

76. Martin v. Heddinger, 373 N.W.2d 486, 489-90 (Iowa 1985). In a dram shop action brought on behalf of an automobile passenger killed in a one-car collision, contributory negligence was not a defense, although both assumption of the risk and complicity were defenses. Id.

77. Wanna v. Miller, 136 N.W.2d 563, 571 (N.D. 1965). In Wanna, the plaintiff was standing at the rear of his automobile, trying to jack up the left rear wheel so that the tire could be changed. Id. He was struck by a vehicle driven by an intoxicated person and suffered severe injuries. Id. The plaintiff was allowed to recover money damages from the defendant tavern owner. Id.; see also Sanders v. Officers' Club of Conn., Inc., 397 A.2d 122, 123 (Conn. Super. Ct. 1978) (holding that plaintiff's deceased in preparing to tow disabled vehicle on highway was not defense to action against bar serving liquor to defendant driver prior to fatal accident).

78. 45 AM. JUR. 2d supra note 7, at § 538. This is quite similar to language used in Minnesota. Heveron v. Vill. of Belgrade, 181 N.W.2d 692, 695 (Minn. 1970) (stating that recovery was barred only to those who "voluntarily" participated to a material and substantial extent in the drinking which led to the intoxication). Other jurisdictions seem to agree. E.g., Martin, 373 N.W.2d at 490 (recognizing that 'participation' is a relative term and, in order to amount to complicity, it should be more than passive); Parsons v. Veterans of Foreign Wars Post 6372, 408 N.E.2d 68, 74 (Ill. App. Ct. 1980) (holding that complicity existed where the plaintiff voluntarily participated to a material an substantial extent in the drinking which led to the intoxication); Dahn v. Sheets, 305 N.W.2d 547, 550 (Mich. Ct. App. 1981) (stating that participation was not shown to be sufficiently active by evidence only tending to show that "plaintiff drank with" intoxicated driver).


80. Id.
alcohol that caused the intoxication. If this were the case, it might seem unfair to be barred recovery.

Fortunately, the complicity doctrine does not reach this far. While it is true that there have been disagreements in the courts regarding exactly what constitutes complicity and what does not, the most well-reasoned law indicates that it must be more than buying rounds of drinks. "A court should not place too much weight on any particular aspect of a plaintiff's conduct, such as buying an inebriate 'rounds' of drinks, for purposes of determining whether the affirmative defense of complicity applies."

"In order for participation to constitute complicity, it must be more than passive, and it is not enough to establish complicity that the individual is a mere drinking companion of the intoxicated person." There is a high threshold to overcome in order to be 

81. Id. “We think it would be an absurd result if alcoholic beverage dealers could avoid liability for illegal sales to intoxicated customer depending upon whether the customers paid for their own drinks or took turn paying for each others' drinks.” Id. at 156.

82. Turk v. Long Branch Saloon, Inc., 280 Minn. 438, 443, 159 N.W.2d 903, 904 (1968) (stating that one who knowingly and actively participates in events leading to the intoxication of a minor has no right of action under the dram shop statute); see also Martinson v Monticello Municipal Liquors, 297 Minn. 48, 55, 209 N.W.2d 902, 906 (1973) (holding the complicity defense applicable where plaintiff and intoxicated person, both adults, took turns buying rounds of drinks, and where plaintiff knew drinking partner was intoxicated; court found that he was in as good a position as bartender to stop buying companion drinks, and therefore, afforded no remedy under the statute); Hempstead v. Minneapolis Sheraton Corp., 283 Minn. 1, 9, 166 N.W.2d 95, 99 (1969) (stating there is no complicity as to bar recovery as long as the plaintiff has not procured or in other ways furnished liquor to intoxicant, but is simply a companion).

83. 45 AM. JUR. 2d, supra note 7, at § 538.

84. Id. For example, in an action against a bar owner and an intoxicated patron for injuries sustained when the patron attacked plaintiff, plaintiff’s actions did not rise to level of active contribution to, or procurement of, patron intoxication. Walter v. Carriage House Hotels, Ltd. 607 N.E.2d 662 (Ill. App. Ct. 1993). In this case, plaintiff bought patron one drink at dinner and accepted three or four beers from patron, but did not join patron in his consumption of 10 to 11 rounds of beer and whisky. Id. at 663-64. In addition, plaintiff did not serve any drinks to patron or encourage him to drink. Id. at 664.

85. 45 AM. JUR. 2d, supra note 7, at § 538. In some situations, buying rounds might constitute complicity. For example, in Turk the plaintiff, an adult, had been drinking with several companions, including one he knew to be a minor. Turk, 280 Minn. at 440, 159 N.W.2d at 905. Each paid for at least one round of drinks, but the court found that the plaintiff bought more than his share of rounds. Id. After six hours of drinking, the minor while driving, collided with a parked car, resulting in the plaintiff's injuries. Id. The court found that a person who buys drinks for an obviously intoxicated person, or one whom he knows to be a minor, is at least as much the cause of the resulting intoxication as the bartender
judged complicit, and courts must determine a plaintiff’s complicity on a case by case basis. 86

C. The Purpose Behind Dram Shop Acts Is Married With The Complicity Doctrine

In essence, the rationale supporting the adherence to the complicity doctrine coexists with the rationale in creating dram shop acts in the first place. 87 The goal of a dram shop act is to protect innocent parties, not those who have participated in an intoxicated person’s intoxication. 88

Under the dram shop acts, an intoxicated person who injures himself cannot recover any damages from the liquor serving establishment, even though the establishment might be partially responsible for his injuries. 89 In light of this principle, it is contrary to who served the customer illegally. Id.

86. Nelson v. Araiza, 372 N.E.2d 637, 641 (Ill. 1977) (observing that whether there is sufficient evidence to support the complicity doctrine will be for judicial determination, but in many cases, application of the doctrine will be an issue of fact under the given circumstances); Walter, 646 N.E.2d at 608 (refraining to assign general factors to be used in analysis of existence of complicity because “the existence of complicity will depend on the specific facts of each case”).

87. This is the same rationale that still supports courts’ decisions not to allow one who is voluntarily intoxicated to recover under the CDA. E.g., Kryzer v. Champlin Am. Legion No. 600, 494 N.W.2d 35 (Minn. 1992) (holding that an injury to the wrist of a patron who was forcibly removed from a bar by an employee was not entitled to sue under the CDA on a theory that the bar served her after she was obviously intoxicated); Hanna v. Jensen, 298 N.W.2d 52, 53 (Minn. 1980) (holding that although dram shop act imposed liability on the part of the bar owner, it did not protect intoxicated persons injured as a result of their own intoxication); Johnson v. St. Charles Mun. Liquor Store, 392 N.W.2d 909, 911 (Minn. Ct. App. 1986) (holding that the city, as proprietor of a liquor store, was not liable to an intoxicated person for alleged negligence of bartender in serving obviously intoxicated person after patron tripped, fell, and was injured).


In striking the balance between the rights of persons injured under dramshop-related facts and the extent of the tavern owner’s liability, the Legislature chose to omit intoxicated persons as a class protected by the act…. [W]e believe the Legislature’s failure to include the intoxicated party within the class of persons protected is indicative of its belief that the intoxicated party should not be afforded a remedy. To construe the statute otherwise would do violence to the Legislature’s intent and its continuing efforts to keep the act internally balanced. Id. (quoting Jackson v. PKM Corp., 422 N.W.2d 657, 663 (Mich. 1998)). Here, the Supreme Court of Michigan interpreted that state’s dram shop act which reads substantially the same as Minnesota’s Civil Damages Act: “A wife, husband, child, parent, guardian, or other person injured in person, property, means of support, property, and opportunity to marry.”
conclude that partial recovery is available to a plaintiff who actively participates in the intoxication of the person who thereafter injures her.

The very nature of the dram shop act lends credence to this interpretation. As mentioned, there was no recognized liability under common law for servers of alcohol, whose patrons, by virtue of their intoxication, subsequently injured third parties. The acts were created to "fill the void left by the common law's general rule of non-liability." They were intended to be "a complete and self-contained solution to a problem not adequately addresses at common law, and the exclusive remedy for any action arising under dramshop related facts."

The complicity doctrine, as a defense to this statutory cause of action, is garnered from the intent of the enacting legislature, and is not dependent upon the common-law doctrine of contributory negligence, nor, as here, comparative fault. The aim of the dram shop statutes is not a matter of securing "fairness" for people who drink. The "fairness" concept is defined in terms of proportional fault. Dram shop acts, instead, choose a class of people who otherwise..."


90. Craig, 439 N.W.2d at 900. The Michigan Supreme Court in this case declined to reevaluate this interpretation and exercise its authority to reshape the common law by replacing the complicity doctrine with the principles of comparative fault. Id.

91. Supra note 15 and accompanying text.

92. Id.

93. Craig, 439 N.W.2d at 902 (citing Millross v. Plum Hollow Golf Club, 413 N.W.2d 17, 20 (Mich. 1987)).

94. Craig, 439 N.W.2d at 905. See also Nelson v. Araiza, 372 N.E.2d 637, 638-39 (Ill. 1978) (stating recovery by a plaintiff guilty of complicity in the inebriate's intoxication would undermine the purpose of the dram shop act, distinguishing complicity from the common-law negligence concept of contributory negligence). This is because, as stated, "[t]he liability created by the Civil Damages Act has no relation to any common law liability, or any theory of tort. It was the intention of the legislatures to create liability in a class of cases where there was no liability under the common law." Iszler v. Jorda, 80 N.W.2d 665, 667-68 (N.D. 1957). Because liability is not imposed for negligent conduct, it makes no sense to base a defense on the "negligent" conduct of the plaintiff. Aanenson v. Bastien, 438 N.W.2d 151, 153 (N.D. 1989). Instead, the complicity doctrine is based on affirmative actions by the plaintiff, those which will remove him from the class of "other person." Id.


96. Id.
should receive protection under the act. The intent was to protect "other persons"—innocent third parties.

By studying their decisions in Turk and Herrly, it seems the Minnesota Supreme Court agreed with this interpretation. In Herrly, when faced with the 1977 amendment, the court concluded that the legislature did not intend to negate the complicity defense. The court also concluded that if the complicity defense were negated, the legislature would have created an anomaly by barring a claim by a voluntary intoxicated person, yet permitting a person who participated in that intoxication to recover. In doing so, the court echoed the intent of those creating the dram shop acts in the first place, to deter sales of alcohol to certain classes of person who are likely to injure innocent third persons, and to provide a cause of action if they do.

D. Minnesota’s Comparative Fault Doctrine Now Includes Complicity As A Comparative Fault

In 1978, the Minnesota legislature enacted the CFA, and changed the common law role of contributory negligence. Nevertheless, those actions which would traditionally constitute contributory negligence are the same as those that are compared under Minnesota’s CDA. Upon recommendation, the legislature added complicity to that list.

The Commission’s rationale for its recommendation suggests that the complicity doctrine is similar to other forms of comparative fault. However, what it failed to recognize was that the judicially created complicity doctrine was an interpretation of the stat-

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97. Id.
98. Craig, 439 N.W.2d at 902-03; Jackson v. PKM Corp., 422 N.W.2d 657, 660 (Mich. 1988); Iszler, 80 N.W.2d at 666.
100. Steenson, supra note 57, at 83.
102. Supra note 28 and accompanying text. This is when Minnesota first defined “fault.” It is under this definition that complicity now falls.
103. Id.
104. Id.
105. Herrly v. Muzik, 374 N.W.2d 275, 280 (Minn. 1985); Commission Report, supra note 57, at 33-34 (claiming that complicity is difficult to distinguish from other types of contributory negligence and, therefore, fits better into this grouping of defenses than as a complete bar).
The court, introducing the complicity doctrine, echoed traditional rationale when it concluded that the protection afforded the statute was not meant to extend to those who participate in the illegality of the sale or intoxication of the wrongdoer. In explaining its decision, the court said that "to hold otherwise would be to permit one who has been an intentional accessory to the illegality to shift the loss resulting from it to a person no more responsible for the damage than he himself had been."

The decision interpreted the term "other person" in the statute, to discern who had standing to sue under the statute, and not an actual question of defense.

The court distinguishes complicity from negligence, as if anticipating that one day the two would be grouped together under a definition of "fault." Complicity is different from the situation in which a party suffers loss at the hands of a person with whose intoxication he had no involvement. In such a case, Minnesota's policy against supplying liquor illegally is so strong that recovery will be allowed even though the injured person, in respects unrelated to the intoxication, may have failed to exercise reasonable care for his own safety. Here, the court is clearly distinguishing the complicity doctrine from such activities that would normally be considered under the comparative fault statute.

106. Turk v. Long Branch Saloon, Inc., 280 Minn. 438, 442, 159 N.W.2d 903, 906 (1968); see also Note, Minnesota's Dramshop Act: Is the Complicity Doctrine Obsolete?, 12 WM. MITCHELL L. REV. 705, 720 (1986) (explaining that complicity is a statutory restriction on the classes of plaintiffs who can maintain a dram shop action, not a defense).

107. Turk, 280 Minn. at 442, 159 N.W.2d at 906. Illinois was the first state to recognize the complicity doctrine in 1890. Hays v. Waite, 36 Ill. App. Ct. 397, 399 (1980). In this opinion, the court said that an injured party "must not be an active and willing agent with the saloonkeeper, assisting in causing such intoxication." Id. A few years later, the Michigan Supreme Court held that a wife who procured liquor for her husband was barred from recovery after his subsequent death. Rosencrants v. Shoemaker, 26 N.W. 794, 795 (Mich. 1886). From these judicial beginnings, the complicity defense became a widely accepted doctrine until the 1980s. Myers, supra note 16, at 1157.


109. Id.

110. Id.

111. Id.; see also supra note 73 and accompanying text. This explanation echoes the definition of "contributory negligence." Id.

112. Turk, 280 Minn. 442, 159 N.W.2d at 906. See generally MINN. STAT. § 604.01, subd. 1(a) (1988) (listing the acts to be considered a fault for comparison and apportionment.) The statute includes acts or omissions that are negligent or
Adhering to traditional concepts, several other jurisdictions which have comparative fault statutes treat complicity as a complete bar, and do not include it as a comparative fault. There are some jurisdictions, however, that disagree.

For instance, the Oregon Supreme Court was recently faced with the decision whether or not to recognize the complicity doctrine in the first case to ask the question. Oregon also operates under a comparative fault system. In Grady, the plaintiff was injured when his drinking companion veered off the highway, struck a power pole, and flipped over the car in which they were riding. Since the plaintiff purchased most, if not all, of the alcohol throughout the evening, the defendants argued that the complicity doctrine should bar his recovery. The Oregon Supreme Court held that, under these circumstances, the complicity doctrine would not be a bar.

Oregon’s situation, however, is quite different from Minnesota’s. One part of Oregon’s Dram Shop Act provides a remedy when the bartender, or social host, serves or otherwise provides alcohol recklessly, the type of negligence associated with defenses under a common law cause of action. Id.

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113. E.g., Cookingham v. Sullivan, 179 A.2d 840 (Conn. Super. Ct. 1963) (holding that the Dram Shop Act does not contemplate giving remedy to one who joins and participates in violation of the Act); Lewis v. Champaign County VFW Post 5520, 543 N.E.2d 233 (Ill. App. Ct. 1989) (holding that victim of alleged assault by intoxicated patron of two taverns could not recover in dramshop action when she was “guilty of complicity” in his intoxication); Oisinger v. Christian, 193 N.E.2d 572 (Ill. App. Ct. 1963) (holding that complicity is a defense to dram shop liability, contributory negligence is not); Hill v. Alexander, 53 N.E.2d 307 (Ill. App. Ct. 1944) (holding that complicity preclusion is not contributory negligence); Martin v. Hedinger, 373 N.W.2d 486 (Iowa 1985) (holding that the Dramshop Act is meant to protect only those who have not participated in the intoxication by their complicity). Compare Baxter v. Noce, 752 P.2d 240 (N.M. 1988) (replacing complicity defense with comparative negligence because the action under the statute “sounds in negligence”).

114. McLsaac v. Monte Carlo Club, Inc. 587 So. 2d 320 (Ala. 1991) (reasoning that objective of dram shop act would be defeated if liability shifted to patrons drinking with intoxicated person); Aanen v. Bastien, 438 N.W.2d 151 (N.D. 1989) (holding party’s complicity in drinking companions intoxication is no defense to dram shop action); Grady v. Cedar Side Inn, Inc. 97 P.2d 197 (Or. 2000) (holding in a case of first impression, that complicity is no defense to this limited fact pattern).

115. Grady, 997 P.2d at 197-98.


117. Grady, 997 P.2d at 198.

118. Id. at 199.

119. Id. at 198.
cohol to patrons or guests who are obviously intoxicated.\textsuperscript{120} The language of the statute creates liability for "damages incurred or caused by intoxicated patrons or guests."\textsuperscript{121} Within the original language of the statute itself, the Oregon legislature meant for the intoxicated persons to have standing to sue under the statute in this type of situation. Accordingly, the Oregon Supreme Court decided against recognizing the complicity doctrine, but only in the context of cases that involve providing alcohol to visibly intoxicated persons.\textsuperscript{122} The court did not expound on what the rule would be in other situations.\textsuperscript{123}

Notwithstanding some jurisdictions' distinct analysis, most jurisdictions recognize the complicity doctrine and consider it a

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120. \textit{Id.} at 200. The Act provides:

No licen, permitted or social host is liable for damages incurred or caused by intoxicated patrons or guests off the licen, permitted or social host's premises unless:

The licen, permittee or social host has served or provided...alcoholic beverages to the patron or guest while the patron or guest was visibly intoxicated; and

The plaintiff proves by clear and convincing evidence that the patron or guest was served alcoholic beverages whole visibly intoxicated.

\textit{Id.} (quoting OR. REV. STAT. § 30.950 (1993)). The Oregon Legislature amended section 30.950 in 1997. Those amendments apply only to claims arising on or after March 15, 1998, and were not relevant to the Oregon Supreme Court's decision in this case.) \textit{Grady, 997 P.2d at 200 n.1.}

121. \textit{Grady, 997 P.2d at 200} (emphasis added). This is markedly different than the language of Minnesota's Civil Damages Act. \textit{Supra} note 18 and accompanying text. States that have dram shop statutes that are similar to Minnesota include: Iowa (Iowa Code Ann. § 123.92 (1971)), Michigan (Mich. Comp. Laws § 436.22 (1961)), Illinois (Ill. Comp. Stat. § 135 (1999)), and North Dakota (N.D. Cent. Code § 5-0-06.1(1987)). Of these, only North Dakota refused to recognize the complicity doctrine as a bar to an action under the Dram Shop Act. \textit{See generally, Aanenson v. Bastien, 438 N.W.2d 151, 153 (N.D. 1989)} (refusing to apply the complicity doctrine in a case of first impression). However, in a concurring opinion, Justice Vande Walle cautioned against an overbroad interpretation of the precedent, saying:

I would leave for another day the issue of whether or not complicity can ever constitute a defense to a dram-shop action in North Dakota. Under different circumstances we might be hard pressed to hold, as a matter of law, that complicity can never constitute a defense. Indeed, public policy might dictate a different result under different circumstances.

\textit{Id.} at 162 (Vande Walle, J., concurring) (emphasis added).

122. \textit{Grady, 997 P.2d at 199}. Oregon's Dramshop Act is also not as broad as Minnesota's version. In Minnesota, any illegal act can trigger liability. \textit{Supra} note 23 and accompanying text. In \textit{K.R. v. Sanford}, it was the after-hours, off-sale of the vodka that brought the case under the Civil Damages Act. 605 N.W.2d 387, 389 (Minn. 2000).

123. \textit{Grady, 997 P.2d at 199}. 

\end{quote}
complete bar to recovery. They rightfully concluded that complicity is distinguishable, on a primary basis, from contributory negligence. It is a determination of who has standing to sue under the statute. In grouping the complicity doctrine together with forms of negligence, the Minnesota Legislature had distorted the essence of what is the doctrine, and forced it into a mold in which it was not meant to fit.

V. REPERCUSSIONS OF THE DECISION

A. Applied To K.R. v. Sanford

The case that creates this topic of discussion is an illustrative example of the legislature’s folly. First, however, it may be wise to say a few words about causation.

As in any tort case, regardless of the statutorily created cause of action, a plaintiff may not recover without showing that the deed done by the defendant was the proximate cause of the plaintiff’s injuries. Although at the time of this writing this case has not been

124. F.S. Tinio, Annotation, Third Person’s Participating in or Encouraging Drinking as Barring Him from Recovering Under Civil Damage or Similar Act, 26 A.L.R. 3d 1117 (1969).
125. Id.
126. Id. at 1118 (citing Cookinham v. Sullivan, 179 A.2d 840 (Conn. 1962) (reporting that “the issue was not whether plaintiff’s acts contributed to his injury in the sense of ‘contributory negligence,’ but whether he was of the group that the statute was intended to protect.”)
127. Although it has been described as a “defense,” the doctrine was meant to make clear who had standing to sue under the CDA. Martinson v. Monticello Mun. Liquors, 297 Minn. 48, 54, 209 N.W.2d 902, 906 (1973). “[I]t is not the purpose of the Civil Damages Act...to allow recovery to one who is himself a wrongdoer and that, accordingly, such a wrongdoer does not fall within the class of those to whom the statute gives a cause of action.” Id.
128. To establish liability under the Dram Shop Act, a plaintiff must establish: (1) that the sale of alcohol was in violation of the statute; (2) that the violation was substantially related to the purposes sought to be achieved by the Dram Shop Act; (3) that the illegal sale was the cause of the intoxication, and (4) that the intoxication was the cause of the plaintiff’s injuries. Kunza v. Pantze, 527 N.W.2d 846, 848 (Minn. Ct. App. 1995), rev’d on other grounds, 531 N.W.2d 839 (Minn. 1995). See also Kvanli v. Vill. of Watson, 272 Minn. 481, 139 N.W.2d 275 (1965) (holding that to establish liability under the CDA there had to “be a practical and substantial relationship between the circumstances making the sale of liquor illegal and the circumstances accounting for the consumption of it by the one whose intoxication caused damage.”); Weber v. Au, 512 N.W.2d 348, 351 (Minn. Ct. App. 1994) (holding that the claimant must show that the illegal sale of alcohol contributed to the intoxication of the individual and that the intoxication of the individual contributed to the cause of claimant’s injuries)
tried before a jury, it seems that the plaintiff may have difficulties proving that The Committee, as the bar owner, was the proximate cause of her injuries.

Setting aside, for a minute, her illegal participation in the procurement of the vodka, the plaintiff and her attackers (the other defendants) (1) partied at a “rave,” (2) snorted cocaine, and (3) took a Ruffle.\(^{129}\) Obviously, nothing the plaintiff said or did that night should have caused, or should justify her falling victim to a sexual attack. These facts are used only to illustrate that the vodka drunk by the plaintiff’s attackers played a comparatively small role in her injuries. In light of the many factors involved in this case, The Committee’s culpability, as compared with its fellow defendants, the attackers, seems trivial, at best.

The Committee’s actual role in K.R.’s injuries can be dissected further. Minnesota’s dram shop act is at issue in this case because the vodka drunk by K.R. and her attackers had been illegally procured.\(^{130}\) The vodka was purchased after hours and from an establishment without a license to sell liquor to be consumed off the premises.\(^{131}\)

The Committee sold the liquor. However, K.R. was both an employee involved in the illegal sale, and the purchaser of the vodka. As a bartender at the club, she would well have been aware of the illegality of her actions. A reasonable finder of fact may easily find her at least equally at fault as The Committee on this issue.

Under the CFA, the percentage of fault attributed to The Committee, for their part in the illegal sale of the liquor, and the injuries caused, will be compared with K.R.’s own fault on this issue, added to any fault attributed to her for any other aspects of the case.\(^{132}\) To this, the other defendants’ fault will also be compared.\(^{133}\) The CFA provides that a plaintiff will only recover if her contributory fault is not greater than the fault of the person against whom recovery is sought.\(^{134}\) Considering the small role the vodka allegedly played in the attack, it is possible, maybe even probable, that a reasonable finder of fact will find The Committee’s fault less than K.R.’s fault in this case.

\(^{129}\) Supra notes 43-50 and accompanying text.
\(^{130}\) Supra note 40 and accompanying text.
\(^{131}\) Id.
\(^{132}\) Minn. Stat. § 604.01, subd. 1 (1998).
\(^{133}\) Id.
\(^{134}\) Id.
The above scenario is merely speculation based on known facts of the case at hand. However, it serves to illustrate the precarious position of the plaintiff. Having been granted standing to sue under the CDA, instead of being barred because of her complicity, the outcome will likely be the same. The clear message is that a person in her position was simply not meant to benefit from a Dram Shop Act, or else this type of situation should not have fallen under the dram shop act in the first place. The extended journey to reach this probable conclusion, however, has already eaten up precious judicial recourses, and continues to do so.

B. Implications Generally

By expanding the class of persons protected by the statute, the already overloaded court system will now be open to all ranges of complicit individuals. Moreover, as illustrated by the present case, many of these new plaintiffs will not recover anyway. In many of these types of cases, a jury may likely find for the defendant when comparing fault. The CDA was simply not intended to create a cause of action for those who contributed to the intoxication which harms them. In light of the consequences that will surely follow this amendment, the legislature should revisit its decision.

C. Modest Proposal

The Minnesota legislature acted upon a recommendation in enacting the 1990 amendment to the CDA. In time, the repercussions will be felt both in the stretching of judicial recourses and the absurdity of future decisions. It is this author’s hope that the legislature remedies its mistake. The concerns that no doubt prompted the legislature to act as it did can be dealt with in at least two other ways.

First, the legislature should amend the CFA to delete the complicity doctrine as fault to be compared. If indeed the legislature is concerned about the situation in which one “buys a round” for another, and in doing so bars himself from any recovery, any concerns should be mollified by current case law which suggests that this is not to be considered complicity. However, if it is not, it might be beneficial for the legislature to define complicity in the State of Minnesota. No doubt there are situations that invite a

135. Supra notes 82-86 and accompanying text.
plaintiff to be barred from recovery. There are just as likely situations in which a person, by virtue of his companionship, should not be barred. "If [a] defendant is unable to present sufficient evidence to demonstrate that [a] plaintiff's conduct actively contributed to or procured the inebriate's intoxication, the complicity defense should not be submitted to the jury. The nonexistence of complicity is for judicial determination." This solution would allow the fundamental principles of the CDA to remain true by continuing to provide a remedy to innocent third persons. It is not the doctrine that is flawed; rather, the flaw lies in an imprecise definition of what constitutes an active role in the intoxication.

A second suggestion is to amend the CDA to reflect a change in what events will trigger liability under the statute. In Grady, liability is triggered specifically by serving alcohol to a visibly intoxicated person. This is probably the scenario in mind when the first legislatures enacted the dram shop acts. It plays off of a negligence theory that, if one is already intoxicated, it is foreseeable that providing him/her with more alcohol will cause injury. Likewise, knowingly selling alcohol to a minor might be asking for trouble. Likely "complicit" individuals in these cases are other intoxicated persons and minors. Both of these are persons who might not be in a position to make a self-preserving judgment, in which case the vendor may be in a better position to make it for the individual.

On the other hand, an establishment who illegally sells a sober adult a closed container of alcohol without an off-sale license might not be a legitimate defendant to a dram shop action. The same alcohol could likely have been purchased through legal means, and if it had been, it would produce no viable cause of action. In any case, the legislature should avoid creating a situation where plaintiffs sue liquor vendors simply because they can.

137. Id.
138. Id. at 604. In this case, the Supreme Court of Illinois acknowledges a similar problem and concluded that "the court's inconsistent application of the complicity doctrine may have arisen from the lack of a clear analytical basis for the complicity doctrine." Id.
139. Supra note 120 and accompanying text.
140. Aanenson v. Bastien, 438 N.W.2d 151, 153 (N.D. 1989) (stating that the objective of the legislature in enacting the Dramshop Act was to discourage bars from selling intoxicating liquors to visibly intoxicated persons and minors and to provide for recovery under certain circumstances by those that have been injured as a result of the sale of intoxicating liquor).
VI. CONCLUSION

The court’s job is to interpret legislation, not create it. Although the court has repeatedly denied recovery to those who are complicit, the legislature has spoken on this issue and the Minnesota Supreme Court must follow the legislature’s lead. The legal tragedy is that the legislature has chosen to overrule a sound legal principle that had been in place in Minnesota for more than thirty years. This new course of action will sacrifice judicial resources for a mirage of justice.