Minnesota's Dramshop Act: Is the Complicity Doctrine Obsolete? [Herrly v. Muzik, 374 N.W.2d 275 (Minn. 1985)]

Michael Koziol
MINNESOTA'S DRAMSHOP ACT: IS THE COMPILCITY
DOCTRINE OBSOLETE?

[Herrly v. Muzik, 374 N.W.2d 275 (Minn. 1985)].

INTRODUCTION

Who should bear the loss when a commercial vendor of alcoholic beverages illegally serves an individual who becomes intoxicated and subsequently injures a third party? In states that have "dram shop" or "civil damage" acts,1 the loss will likely be borne by the commercial vendor. Such statutes create a remedy for "innocent third parties" 2 who are injured by an individual who has been served "illegally."3 In these situations, Minnesota is one state that has placed the loss on the commercial vendor.

In Herrly v. Muzik,4 the Minnesota Supreme Court restricted the potential plaintiffs who are eligible for a remedy under Minnesota's Dram Shop Act. The statute as interpreted in Herrly does not provide a remedy for persons who bought or procured intoxicants for the injuring party.5 Such individuals are said to be "in complicity with" or to be "complicious with"6 the commercial liquor vendor, and therefore, must bear the liability of their own actions.

The complicity preclusion is not a new doctrine under Minnesota law.7 The Herrly decision is significant, however, in that the court, for the first time, held that complicity is unaffected by the compara-

1. These terms are used interchangeably to refer to the portion of the state's liquor control statute which imposes civil liability on commercial liquor vendors. For the text of Minnesota's Act, MINN. STAT. § 340A.801 (Supp. 1985), see infra note 38.

2. The requirement that the plaintiff be an "innocent third party" is a judicial creation. This requirement typically excludes both the intoxicated/injuring party and the complicious plaintiff from recovering under the Act. For further discussion, see infra notes 45-49 and accompanying text.

3. The requirement of an illegal sale is imposed by the express language of the statute. For further discussion, see infra notes 50-55 and accompanying text.

4. 374 N.W.2d 275 (Minn. 1985).

5. This bar is raised only when the plaintiff has played an active role in intoxicating the injuring party. This typically involves the purchase or procurement of intoxicants by the injured party for the injuring party. For further discussion of this topic, see infra notes 48-49 and accompanying text.

6. These terms are used synonymously throughout this Comment.

7. See, e.g., Martinson v. Monticello Municipal Liquors, 297 Minn. 48, 52-53, 209 N.W.2d 902, 905 (1973) (person who knowingly and actively participates in the events leading to the intoxication may not recover under the Minnesota Dram Shop Act).
tive fault provision of the statute. Reversing the decision of the Minnesota Court of Appeals, the Minnesota Supreme Court held that the complicity preclusion is unaffected by the express incorporation of comparative fault into the Dram Shop Act. As a result of this decision, most plaintiff misconduct will be compared against the defendant's fault and will merely reduce the plaintiff's recovery in proportion to his respective fault. The purchasing of intoxicants by the plaintiff for the injuring party, however, will be an absolute bar to recovery.

This Comment will first provide a brief overview of the history and public policy objectives underlying dram shop legislation. Second, an explanation of the Minnesota Dram Shop Act and the comparative fault statute will be given. Finally, the Comment will analyze the supreme court's rationale in Herrly. The Comment will suggest that a more appropriate decision would have placed complicity within the purview of the comparative fault formula provided for in the Act. Such a holding would have been more consistent with Minnesota's civil liquor liability reforms, and with the court's prior decisions interpreting the Dram Shop Act.

Regardless of the rectitude of the Herrly decision, the case is important to any practitioner who is attempting to understand this rapidly changing area of the law. With national concern over the

8. See infra notes 106-08 and accompanying text.
10. MINN. STAT. § 604.01 (1984). For the complete text of the statute, see infra note 37. The plaintiff argued that his admitted complicity should proportionately reduce, rather than preclude, his recovery. His position was accepted by the Minnesota Court of Appeals. See Herrly, 355 N.W.2d at 455.
12. It is important to distinguish complicity, which will not be compared under MINN. STAT. § 604.01, from other forms of plaintiff misconduct which will be compared. See, e.g., Pautz v. Cal-Ros, Inc., 340 N.W.2d 338, 341 (Minn. 1983) (liquor establishment entitled to contribution from injuring party where injuring party's negligence as well as defendant liquor establishment's illegal sale caused injuries to third parties). For a discussion of the comparison formula, see infra notes 93-95 and accompanying text.
13. See supra note 117-20 and accompanying text.
14. In 1985, the Minnesota Supreme Court decided two other cases which will have a substantial impact on civil liquor liability. The court in Meany v. Newell, 367 N.W.2d 472 (Minn. 1985); and Holmquist v. Miller, 367 N.W.2d 468 (Minn. 1985), made two clear pronouncements affecting dram shop litigation. First, Minnesota's Dram Shop Act preempts common law remedies with respect to liability for furnishing intoxicants. Second, Minnesota's Dram Shop Act does not impose liability on social hosts. Meany, 367 N.W.2d at 476 (employer sponsoring a Christmas party is social host and incurs no liability if intoxicated employee causes injury to another); Holmquist, 367 N.W.2d at 471 (no social host liability for serving minor). Denial of social host liability expressly rejects Ross v. Ross, 294 Minn. 115, 200 N.W.2d 149 (1972). Ross, however, had been earlier rendered ineffective when the legislature deleted the words "or giving" from the Dram Shop Act. The effect of this deletion
drunk driving phenomenon, dram shop legislation will undoubtedly receive continued attention as a mechanism for addressing this concern.15

I. COMMON LAW DEVELOPMENT

At common law, courts did not recognize a cause of action against commercial vendors when the vendor’s intoxicated patrons caused off-premises injuries to others.16 The rationale for the common law denial of liability was the refusal, as a matter of social policy, to recognize the liquor vendor’s sale as the proximate cause of the plaintiff’s injury.17 The consumption rather than the sale was seen as the proximate cause of a third party’s injuries.18 As the Minnesota Supreme Court stated in Swinfin v. Lowry in 1887, “[w]e think the damages claimed [are] too remote. The assault must be considered as the voluntary and wrongful act of [the injuring party], and was not so related to the fact that he drank intoxicating liquors with the defendants . . . as to be considered the natural and proximate result.”19

The rigid common law rule began to erode around the turn of the century. Pressure applied by the temperance movement20 resulted

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15. The impetus for recent liquor liability reform, which provided statutory causes of action, stems from the increasing percentage of traffic fatalities attributable to drunk driving. See generally Comment, Liability of Commercial Vendors, Employers and Social Hosts for Torts of the Intoxicated, 19 WAKE FOREST L. REV. 1013 (1983).

16. Common law liability did not exist with respect to injuries caused by intoxicated patrons when the injuries occurred off the vendor’s premises. See, e.g., Cowman v. Hansen, 250 Iowa 358, 92 N.W.2d 682 (1958); Swinfin v. Lowry, 37 Minn. 345, 34 N.W. 22 (1887); Demge v. Feierstein, 222 Wis. 199, 268 N.W. 210 (1936).

17. Common law liability existed with respect to foreseeable injuries occurring on the commercial vendor’s premises. See, e.g., Filas v. Daher, 300 Minn. 137, 218 N.W.2d 467 (1974); Swanson v. The Dugout, Inc., 256 Minn. 371, 98 N.W.2d 213 (1959); Klingbeil v. Truesdell, 256 Minn. 360, 98 N.W.2d 134 (1959); Priewe v. Bartz, 249 Minn. 488, 83 N.W.2d 116 (1957); Windorski v. Doyle, 219 Minn. 402, 18 N.W.2d 142 (1945).


19. Swinfin, 37 Minn. at 346, 34 N.W. at 22.

in experimentation with both statutory liability\(^{21}\) and common law liability.\(^{22}\) By the repeal of prohibition in 1933, thirty-seven states had enacted statutes imposing liability on commercial vendors.\(^{23}\) These statutes—dram shop acts—were intended to circumvent the common law denial of liability as articulated in Swinfin.\(^{24}\)

Minnesota's Dram Shop Act was enacted in 1911.\(^{25}\) The statute contained broad and sweeping language creating liability for the furnishing of intoxicants. The language of the statute has remained substantially unchanged in the intervening 75 years.\(^{26}\) Its general language has allowed the courts to make adjustments in the scope of the Act without major changes in its language.\(^{27}\)

In addition to the dram shop acts, a vendor's liability has been established by an alternative theory—negligence per se. Negligence per se was facilitated through liquor control statutes. While many states were reluctant to adopt express statutory civil liability for liquor vendors, almost all states had liquor control statutes.\(^{28}\) These statutes prohibited the sale of liquor to minors,\(^{29}\) to intoxicated per-

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21. These early statutes required the liquor vendor to post a bond as a condition of doing business and allowed injured parties to recover liquidated damages for violations of the statutory requirements. See Comment, Common Law Liability of Liquor Vendors, 12 BAYLOR L. REV. 388, 398 (1960).

22. This approach was based upon a negligence per se theory. See infra notes 28-35 and accompanying text.


24. See supra notes 18-19 and accompanying text.

25. The Act as originally set forth reads as follows:

Action for injuries caused by intoxicated person.
— Section 1. 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 one of the courts of this state having jurisdiction thereof.

Act of April 18, 1911, ch. 175, 1911 Minn. Laws 221.


27. See, e.g., Herly, 374 N.W.2d 275 (complicity doctrine unaffected by comparative fault); Holmquist, 367 N.W.2d 468 (denial of social host liability); Turk v. Long Branch Saloon, Inc., 280 Minn. 438, 159 N.W.2d 903 (1968) (only innocent third parties have dram shop remedies).

28. See infra note 98 and accompanying text.

29. E.g., GA. CODE ANN. § 3-3-23 (Supp. 1985); IND. CODE ANN. § 7.1-5-7-8 (West 1982). The Georgia statute provides, in pertinent part: "No person knowingly, directly or through another person shall furnish, cause to be furnished, or permit any person in such person's employ to furnish any alcoholic beverage to any person under 20 years of age . . . ." GA. CODE ANN. § 3-3-23.
sons, or to both. The courts began to interpret these laws as though they were designed to protect injured third parties. Through these liquor control statutes, vendors had an implied duty to their customers which, if breached, established negligence per se.

Minnesota recognized the negligence per se alternative in Windorski v. Doyle. The plaintiff prevailed under a negligence per se theory, citing the defendant’s violation of a St. Paul liquor ordinance. Recent pronouncements by the Minnesota Supreme Court, however, have cast doubt on the continued viability of negligence per se as a theory of recovery for injuries caused by the furnishing of intoxicants to an intoxicated individual.

II. The Statutory Framework

Understanding the issue in Herrly v. Muzik requires an under-
standing of Minnesota's comparative fault statute\textsuperscript{37} and the Dram Shop Act.\textsuperscript{38} The issue in \textit{Herrly} arose because the legislature incorporated comparative fault into the language of the Dram Shop Act.\textsuperscript{39}

\textit{A. Dram Shop Act}

A successful suit under Minnesota's Dram Shop Act requires the plaintiff to prove three statutory elements. The plaintiff must establish: (1) an illegal sale\textsuperscript{40} by a commercial vendor;\textsuperscript{41} (2) proper causa-

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\item [37.] Subdivision one of Minnesota Statutes section 604.01 provides:
  Scope of application. Contributory fault shall not bar recovery in an action by any person or his legal representative to recover damages for fault resulting in death or in injury to person or property, if the contributory fault was not greater than the fault of the person against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of fault attributable to the person recovering. The court may, and when requested by any party shall, direct the jury to find separate special verdicts determining the amount of damages and the percentage of fault attributable to each party; and the court shall then reduce the amount of damages in proportion to the amount of fault attributable to the person recovering.
  
  \textbf{MINN. STAT.} \textsect 604.01, subd. 1 (1984).

\item [38.] Minnesota Statutes section 340A.801 provides:
  \begin{itemize}
  \item \textbf{Subdivision 1. Right of action.} A spouse, child, parent, guardian, employer, or other person injured in person, property, or means of support 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. All damages recovered by a minor under this section must be paid either to the minor or to the minor's parent, guardian, or next friend as the court directs.
  \item \textbf{Subd. 2. Actions.} All suits for damages under this section must be by civil action in a court of this state having jurisdiction.
  \item \textbf{Subd. 3. Comparative negligence.} Actions under this section are governed by section 604.01.
  \item \textbf{Subd. 4. Subrogation claims denied.} There shall be no recovery by any insurance company against any liquor vendor under subrogation clauses of the uninsured, underinsured, collision, or other first party coverages of a motor vehicle insurance policy as a result of payments made by the company to persons who have claims that arise in whole or part under this section. The provisions of section 65B.53, subdivision 3, do not apply to actions under this section.
  \item \textbf{Subd. 5. Presumed damages in case of death.} In the case of an individual who is deceased and where a person is found liable under this section for a person's death, the individual or those claiming damages on the person's behalf, shall be conclusively presumed collectively to be damaged in a minimum amount of $30,000; provided, however, that nothing herein shall prevent a claimant from recovering a greater amount of damages to the extent allowable and proven under this section.
  
  \textbf{MINN. STAT.} \textsect 340A.801 (Supp. 1985) (emphasis added).
\end{itemize}

\item [39.] See id.

\item [40.] For the text of the statute, see supra note 37. For a complete discussion of illegal sales, see infra text accompanying notes 50-55.

\item [41.] Minnesota has recently denied social host liability. See supra note 14 and accompanying text.
\end{itemize}
tion; and (3) a recognized form of injury. In addition to these statutory elements, the plaintiff must also demonstrate that he is an "innocent third party." Since a complicious plaintiff is not an innocent third party, this consideration bears on the defense available to the defendant and, therefore, is not an element of the suit. Nevertheless, status as an innocent third party was central to the issue in Herrly and will be discussed as a fourth element to be proved.

Minnesota courts have ruled that dram shop actions are available only to "innocent third parties." This limitation has two effects. First, voluntarily intoxicated persons, who are themselves injured by their own actions, are denied a cause of action under the statute. In other words, only injuries which an intoxicated person causes to others will create a right of action. Second, persons who have "actively participated" in the process of intoxicating the injuring party are not innocent third parties and, therefore, do not have a cause of action under Minnesota's Act. The only conduct that courts have construed as active participation has been the purchasing or procurement of intoxicants for the injuring party. The distinction between passive participation and active participation is, however, nebulous. A person may have been substantially involved in causing the injuring party's intoxication but, as long as he has not furnished liquor, the involvement will be deemed passive and it will not raise the complicity preclusion. Only active participation raises the complicity preclusion.

In addition to establishing that he is an innocent third party, the plaintiff must establish an illegal sale. The statute defines illegal sales as sales to minors and sales to "obviously intoxicated per-

42. See infra notes 58-71 and accompanying text.
43. See infra notes 72-81 and accompanying text.
44. See infra notes 45-49 and accompanying text.
45. See, e.g., Turk, 280 Minn. at 442, 159 N.W.2d at 906 ("innocent third party" is one who has had nothing to do with illegal furnishing of liquor to intoxicated wrongdoer).
46. See, e.g., Martinson, 297 Minn. at 54, 209 N.W.2d at 906; Empire Fire & Marine Ins. Co. v. Williams, 265 Minn. 333, 337, 121 N.W.2d 580, 583 (1963). The fact that the voluntarily intoxicated person is a minor does not create an exception to denying the intoxicated person a remedy. See, e.g., Randall v. Village of Excelsior, 258 Minn. 81, 84, 103 N.W.2d 131, 134 (1960).
47. For a complete discussion of the injuries recognized by the Dram Shop Act, see infra text accompanying notes 72-81.
48. Active participation occurs when the injured party procures intoxicants for the injuring party. Active participation raises the complicity preclusion. See, e.g., Herrly, 374 N.W.2d at 278; Martinson, 297 Minn. at 53, 209 N.W.2d at 905. But cf. Hempstead v. Minneapolis Sheraton Corp., 283 Minn. 1, 9, 166 N.W.2d 95, 99 (1969) (merely accompanying the intoxicated person is not active participation and will not raise the complicity preclusion).
49. See infra text accompanying note 107.
Beyond the statutory definition of an illegal sale, the Minnesota Supreme Court has held that after hours sales are illegal sales for purposes of the Dram Shop Act.\(^{51}\)

Although Minnesota’s Dram Shop Act is a strict liability statute, not dependent upon the vendor’s negligence,\(^{52}\) the court has articulated a negligence-type standard for determining when someone is “obviously intoxicated.” Under \textit{Jaros v. Warroad Municipal Liquor Store},\(^{53}\) “a person is [obviously] intoxicated if his intoxication is or should be discoverable by a \textit{reasonably} active observation . . . .”\(^{54}\) Merely being under the influence will not necessarily qualify as “obviously intoxicated.”\(^{55}\)

In addition to the illegal sale, the plaintiff must establish that the sale was made by a commercial vendor. The Minnesota Supreme Court and the Minnesota Legislature have recently decided that the Dram Shop Act does not impose liability upon social hosts.\(^{56}\) Thus, by a process of elimination, only commercial vendors fall within the purview of the Act.\(^{57}\)

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\(^{50}\) Minnesota Statutes sections 340A.502 and 340A.503 provide:

\textbf{340A.502 SALES TO OBVIOUSLY INTOXICATED PERSONS.} 
No person may sell, give, furnish, or in any way procure for another alcoholic beverages for the use of an obviously intoxicated person. 

\textbf{340A.503 PERSONS UNDER 19; ILLEGAL ACTS.} 
Subdivision 1. Consumption. It is unlawful for any: 
(1) retail intoxicating liquor or nonintoxicating liquor licensee or bottle club permit holder under section 340A.414, to permit any person under the age of 19 years to consume alcoholic beverages on the licensed premises; 
Subd. 2. Purchasing. It is unlawful for any person: 
(1) to sell, barter, furnish, or give alcoholic beverages to a person under 19 years of age, except that a parent or guardian of a person under the age of 19 years may give or furnish alcoholic beverages to that person solely for consumption in the household of the parent or guardian; 

\(^{51}\) Hollerich v. City of Good Thunder, 340 N.W.2d 665 (Minn. 1983) (prohibition against after-hour sales sufficiently related to purposes of Dram Shop Act that such sales constitute “illegal sales” within meaning of statute).

\(^{52}\) See Dahl v. Northwestern Nat’l Bank of Minneapolis, 265 Minn. 216, 220, 121 N.W.2d 321, 324 (1963); Hahn v. City of Ortonville, 238 Minn. 428, 433, 57 N.W.2d 254, 259 (1953).

\(^{53}\) 303 Minn. 289, 227 N.W.2d 376 (1975).

\(^{54}\) \textit{Id.} at 295, 227 N.W.2d at 380-81 (emphasis added).

\(^{55}\) Strand v. Village of Watson, 245 Minn. 414, 422, 72 N.W.2d 609, 615 (1956).

\(^{56}\) See supra note 14.

\(^{57}\) In \textit{Meany}, 367 N.W.2d 472, the court confronted the question of whether an employer providing liquor at an office Christmas party was a commercial vendor. The plaintiff argued that the Christmas party was an employee benefit intended as an inducement to employment and, thus, the liquor was not “given” so as to preclude liability under the Dram Shop Act. In other words, the employer was not a social host immune from liability. The court ruled that the employer was indeed a social host. Further, the court suggested that the vendor must be in the business of selling liquor for a commercial sale to occur. \textit{Id.} at 474. See also supra note 14.
The plaintiff must also establish the causal connections between the defendant's acts and the plaintiff's injuries. Establishing the necessary causal connections requires a two-part showing: "[A] claimant must, first, establish that the illegal sale contributed to the intoxication, and, second, that the intoxication contributed to cause the injury." The Minnesota Supreme Court has articulated a causation standard for the first aspect of causation—the connection between the sale and the intoxication, but has not established a standard for the second—the connection between the intoxication and the injury. Although Minnesota courts frequently speak in terms of "proximate" causation, the term is somewhat misleading in the context of Minnesota's Dram Shop Act. Since the impetus behind dram shop legislation was the desire to circumvent the "common law rule," which held that furnishing liquor is not the proximate cause of injuries inflicted by the intoxicated person, the requisite standard had to be something more lenient than common law proximate causation.

The standard for the first causation component was articulated in *Hahn v. City of Ortonville*.

59. The *Hahn* court held that "the liquor sold need not be the sole cause of the intoxication but it is enough if it is a cooperating, concurring, or proximately contributing cause." Similarly, in *Murphy v. Hennen*, the Minnesota Supreme Court stated that the "claims asserted under the [Dram Shop Act] must be sustained if the evidence is sufficient to permit a finding that the defendant made one or more illegal sales of intoxicants . . . ." Under this standard, a single illegal sale could create liability. Thus, it is easy to conceive of a situation where an illegal sale would create dram shop liability, even though the same circumstances would not satisfy the common law "but for" test for causation in fact. In order to break this easily-demonstrated chain of causation between the sale and the intoxication, the defendant must show that the injuring party experienced a period of sobriety between the sale and the sub-

58. *Hollerich*, 340 N.W.2d at 668.
59. 238 Minn. 428, 57 N.W.2d 254 (1953).
60. *Id.* at 432, 57 N.W.2d at 258-59.
62. *Id.* at 460, 119 N.W.2d at 491.
63. For example, suppose an individual became intoxicated in his own home on intoxicants which were purchased at a time when he was sober. Assume further that, he later purchased a single drink from a commercial vendor at a time when he was obviously intoxicated. Finally, assume that the intoxicated person returned home and accidentally burned his home to the ground after he passed out with a lit cigarette. It is clearly false to say that "but for" the one drink sold by the commercial vendor the accident would not have happened. Yet, under the *Murphy and Hahn* standards, the third parties injured in the fire by proving the facts discussed above would satisfy the causation requirements necessary to maintain a dram shop action against the commercial vendor of the single drink.
sequent injuring act.\textsuperscript{64}

Less certainty exists regarding the standard for the second causation component—the connection between the intoxication and the injuring act. Originally, Minnesota's position on dram shop causation was that "[t]he causal connection between the use of intoxicating liquor and [the] resulting injury or death is always a fact question."\textsuperscript{65} In other words, the courts would not be determining, as a matter of law, that this causal connection is lacking. Thus, in \textit{Sworski v. Coleman},\textsuperscript{66} the causation question was left to the jury where the liquor vendor sold liquor to an individual who was later jailed for boisterous behavior, and then committed suicide while in jail. The \textit{Sworski} court felt that the connection between the intoxication and the suicide was not, as a matter of law, insufficient.

There has been a partial retreat from the position that the second causation aspect is always a fact question. In a recent case,\textsuperscript{67} the Minnesota Supreme Court decided that, as a matter of law, serving liquor is not the proximate cause of injuries inflicted by a third person who had been encouraged by the intoxicated person to inflict the injuries.\textsuperscript{68} This ruling demonstrates the reluctance of courts to rule, as a matter of law, that causation is lacking. Thus, the connection between the intoxication and the injuring act must be extremely tenuous for the court to rule that causation is lacking.

There may well be significant practical difficulties which the plaintiff may encounter in attempting to satisfy the causation requirements under Minnesota's Dram Shop Act.\textsuperscript{69} The legal hurdles, however, will be few. For the most part, the Minnesota Supreme Court has left the question of causation to the jury. Very few examples exist where the Minnesota court has held, as a matter of law, that the causal link between the defendant's actions and the plaintiff's injuries is insufficient. This position represents a radical departure from the common law rule expressed in \textit{Swinfin}, where the court decided, as a matter of law, that furnishing liquor is not the prox-

\textsuperscript{64} See, e.g., \textit{Trail}, 286 Minn. 380, 389, 175 N.W.2d 916, 921-22 (injuring parties attained sobriety between time of illegal sale and the subsequent injuries, therefore, causal connection lacking).

\textsuperscript{65} \textit{Sworski v. Coleman}, 208 Minn. 43, 46, 293 N.W. 297, 298 (1940).

\textsuperscript{66} 208 Minn. 43, 293 N.W. 297 (1940).

\textsuperscript{67} Crea v. Bly, 298 N.W.2d 66 (Minn. 1980).

\textsuperscript{68} \textit{Id.} at 66.

\textsuperscript{69} Plaintiff's showing on the causation question, as well as on the other statutory elements, typically would require testimony from other patrons of the liquor vendor. Testimony from other patrons would present inherent problems of witness credibility in the jurors' eyes. Especially in the context of "on sale" liquor vendors, plaintiff's witnesses' testimony may well be vulnerable to impeachment. For example, the injured party may have to rely on witnesses who themselves may be intoxicated.
mate cause of injuries inflicted by the intoxicated person.70 Given jurors' inability to distinguish between what they deem as causes of an occurrence, and what are in fact only necessary conditions to an occurrence,71 the causation element appears quite favorable to plaintiffs.

The final element of the statutory dram shop action to be proved is the injury. The statute provides for recovery for injuries "in person or property or means of support."72 The Minnesota Supreme Court has interpreted these terms liberally. The court purports to give these terms their common sense meaning,73 although arguably, the court has gone beyond what common sense would suggest. In any event, the court has indicated a willingness to apply the Dram Shop Act to a wide range of injuries.74

The liberal interpretation of the injury requirement is best illustrated by the court's decisions regarding injury to property. In Glaesemann v. Village of New Brighton,75 the Minnesota Supreme Court decided that injury to property included the loss of prospective earnings and services by the parents of a minor child.76 In Village of Brooten v. Cudahy Packing Co.,77 the Eighth Circuit Court of Appeals allowed an employer to maintain an injury to property claim because accidents caused by intoxicated employees required the employer to pay higher insurance premiums.78

Injury in means of support has also received a liberal construction by the courts. The test of whether a means of support injury has occurred is whether the plaintiff has been "deprived of the support

70. Swinfen, 37 Minn. 345, 346, N.W. 23.
71. For a scholarly treatment of the legal implications involved in the distinction between causes and necessary conditions, see HART, CAUSATION IN LAW (1985).
72. For the complete text of the statute, see supra note 38.
73. See Glaesemann v. Village of New Brighton, 268 Minn. 432, 130 N.W.2d 43 (1964) ("property" will be construed in its ordinary and generally accepted meaning); Bundy v. City of Fridley, 265 Minn. 549, 122 N.W.2d 585 (1963) (term "means of support" is to be given its natural and ordinary meaning consistent with common usage of term).
74. See infra notes 75-81 and accompanying text.
75. 268 Minn. 432, 130 N.W.2d 43 (1964).
76. Id. at 435, 130 N.W.2d at 45.
77. 291 F.2d 284 (8th Cir. 1961) (applying Minnesota law).
78. Id. at 300. In 1985, the Minnesota Legislature expressly denied subrogation claims under the Act by insurers against commercial vendors:

There shall be no recovery by any insurance company against any liquor vendor under subrogation clauses of the uninsured, underinsured, collision, or other first party coverages of a motor vehicle insurance policy as a result of payments made by the company to persons who have claims that arise in whole or part under this section. The provisions of section 65B.53, subdivision 3, do not apply to actions under this section.

which he had theretofore enjoyed."79 Under this test, even an adult
child can maintain an action for loss of support.80 An action will not
succeed, however, where the loss is only a slight diminution in
support.81

B. Comparative Fault

The other statute at issue in Herrly was Minnesota's comparative
fault statute.82 When the legislature incorporated comparative fault
into the Dram Shop Act, the complicity issue was not resolved.83
Although complicity and comparative fault have long been features
of Minnesota law,84 the express incorporation of comparative fault
into the Dram Shop Act suggests that the relationship between the
two statutes should be closely examined. There may be aspects of
comparative fault which suggest a particular resolution of the com-
plicity issue confronted in Herrly.85

Under the common law of negligence, if a plaintiff was causally
negligent in causing his own injuries, the plaintiff was precluded
from recovery by his contributory negligence.86 The harshness of
the contributory negligence rule was mitigated first by judicial doc-
trines,87 and later by comparative negligence statutes.88

79. Bundy, 265 Minn. 549, 552-53, 122 N.W.2d 585, 588-89 (1963) (parents of
ten-year-old boy could not bring loss of support action where child did not contrib-
ute financially to support of family).
80. See, e.g., Glaesemann, 268 Minn. at 435, 130 N.W.2d at 45 (parents of adult
child can bring loss of support claim).
81. Bundy, 265 Minn. 549, 122 N.W.2d 585.
82. MINN. STAT. § 604.01, subd. 1. See supra note 37.
83. See Act of June 2, 1977, ch. 390, § 1, 1977 Minn. Laws 887 (codified as
amended at MINN. STAT. § 304A.801 (Supp. 1985)).
84. Minnesota has a long standing commitment to the complicity doctrine. See
infra text accompanying note 97.
85. See infra notes 138-46.
87. The most commonly accepted modification of the rule of contributory negli-
gence is the doctrine of last clear chance. Id; see e.g., Gill v. Minneapolis, St. Paul,
Rochester & Dubuque Elec. Traction Co., 129 Minn. 142, 151 N.W. 896 (1915) (if
defendant had last clear opportunity to avoid the harm, plaintiff's negligence is not
the proximate cause of injury).
88. The former statute provided:
604.01 Comparative Negligence; Effect.
Subdivision 1. Scope of Application. Contributory negligence shall not bar
recovery in an action by any person or his legal representative to recover
damages for negligence resulting in death or in injury to person or property,
if such negligence was not as great as the negligence of the person
against whom recovery is sought, but any damages allowed shall be dimin-
ished in the proportion to the amount of negligence attributable to the per-
son recovering. The court may, and when requested by either party shall,
direct the jury to find separate special verdicts determining the amount of
damages and the percentage of negligence attributable to each party; and
tive negligence statutes reduce a plaintiff's recovery rather than preclude recovery altogether. Consequently, a plaintiff’s misconduct is compared to the misconduct of the other parties, and his recovery is reduced in proportion to whatever fault the factfinder assigns to the plaintiff.89

Minnesota's comparative negligence statute was adopted in 1969. In 1978, Minnesota's comparative negligence statute became a comparative fault statute.90 The effect of this amendment was to expand the theories of recovery and the defenses that were subject to comparison.91 For example, under comparative fault, the defendant may no longer assert as a defense an "unreasonable assumption of risk not constituting express consent."92 Rather, assumption of the risk becomes one factor to be considered in apportioning fault. Under Minnesota's comparison formula, the plaintiff's fault will not bar recovery as long as a plaintiff's fault is "not greater than the fault of the person93 against whom recovery is sought. . . ."94 Thus, Minnesota has adopted a modified form of comparative fault along with the individual comparison rule95 where multiple defendants are involved.

III. OTHER JURISDICTIONS

The precise issue in Herrly is whether complicity will continue as an the court shall then reduce the amount of such damages in proportion to the amount of negligence attributable to the person recovering. When there are two or more persons who are jointly liable, contribution to awards shall be in proportion to the percentage of negligence attributable to each, provided, however, that each shall remain jointly and severally liable for the whole award.

Act of May 23, 1969, ch. 624, § 1, 1969 Minn. Laws 1069, 1067 (formerly codified at MINN. STAT. § 604.01, subd. 1 (1971)).

89. See supra note 37.


92. Minnesota Statutes section 604.01, subdivision 1a states that '[f]ault' includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an express consent, misuse of a product and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

MINN. STAT. § 604.01, subd. 1a (emphasis added).

93. Under Minnesota's comparative fault statute, the plaintiff's fault is compared individually to each defendant's fault. The alternative formula compares plaintiff's fault with the aggregate fault of all defendants. See supra note 37.

94. MINN. STAT. § 604.01.

95. See Steenson, note 13, at 2-3.
absolute preclusion to dram shop recovery. The question is whether the express incorporation of comparative fault into the Dram Shop Act\(^{96}\) should be viewed as an indication of an intent to have the complicity "defense" compared along with other defenses. The precise issue has not been litigated elsewhere and, as a result, other jurisdictions offer little clear guidance.

Most jurisdictions have some form of comparative fault\(^{97}\) and all

96. See *supra* note 38.

97. There are four types of comparative fault:

- (1) the slight-gross form (recovery only if plaintiff's negligence was slight in comparison to defendant's),
- (2) the even-division form (dividing the damages evenly, or pro-rata, among the parties),
- (3) one of the two modified forms (plaintiff can recover reduced damages if his negligence was either (a) "not as great as" or (b) "not greater than" that of defendant), and
- (4) the "pure" form (diminished recovery allowed even though plaintiff's negligence is greater than that of defendant).


Thirty states and the Virgin Islands adhere to some variety of modified comparative negligence. Fifteen of those states have adopted the "not greater than" form of modified comparative fault. All 15 have adopted it legislatively. They are Connecticut, CONN. GEN. STAT. § 52-572h (a) (Supp. 1985); Delaware, DEL. CODE ANN. tit. 10, § 8132 (Supp. 1984); Hawaii, HAWAII REV. STAT. § 663-31(a)(1976); Indiana, IND. CODE ANN. § 34-4-33-4 (West Supp. 1985); Massachusetts, MASS. GEN. LAWS. ANN. ch. 231, § 85 (West 1985); Minnesota, MINN. STAT. § 604.01 (1984); Montana, MONT. CODE ANN. § 27-1-702 (1985); Nevada, NEV. REV. STAT. § 41.141 (1985); New Hampshire, N.H. REV. STAT. ANN. § 507.7a (1983); New Jersey, N.J. REV. STAT. § 2A:15-5.1 (Supp. 1985); Ohio, OHIO REV. CODE ANN. § 2315.19 (Baldwin 1981); Oregon, OR. REV. STAT. § 18.470 (1983); Pennsylvania, 42 PA. CONS. STAT. ANN. § 7102(a) (Purdon 1982); Vermont, VT. STAT. ANN. tit. 12, § 1036 (Supp. 1985); and Wisconsin, WIS. STAT. ANN. § 895.045 (West 1983). The seven states that follow the "not as great as" form of modified comparative fault are Arkansas, ARK. STAT. ANN. § 27-1765 (1983); Colorado, COLO. REV. STAT. § 13-21-111(1)(1973); Idaho, IDAHO CODE § 6-801 (1979); Kansas, KAN. STAT. ANN. § 60-258a(a) (1983); North Dakota, N.D. CENT. CODE § 9-10-7 (1975); Utah, UTAH CODE ANN. § 78-27-37 (1953); and Wyoming, WYO. STAT. § 1-1-109(a) (1985).

Only three states have adopted some version of the "slight-guess" rule. They
jurisdictions have liquor control statutes. In those jurisdictions with dram shop acts similar to Minnesota’s, the complicity doctrine is well-established. Also, these jurisdictions tend to characterize complicity more as a statutory preclusion than as a defense. This characterization would suggest treating complicity as a preclusion, unaffected by comparative fault. It must be noted, however, that there are considerable differences among the various states’ dram shop laws and comparative negligence/fault statutes. These differences include:

- Nebraska, Neb. Rev. Stat. § 25-1151 (1943);
- South Dakota, S.D. Codified Laws Ann. § 20-9-2 (1979); and
- Tennessee, Street v. Calvert, 541 S.W.2d 576 (Tenn. 1976).


100. Id.

101. See supra notes 97-98.
ferences may well undermine the relevance of other states’ decisions to Minnesota’s treatment of the issue.

IV. FACTUAL BACKGROUND

On April 17, 1981, the plaintiff and defendant decided to “go drinking.” Taking turns purchasing drinks, the two friends proceeded to encourage and facilitate each other’s intoxication. From their own admission, their drinking became quite excessive. As Judge Wozniak of the court of appeals stated, “By all rights, they should not have been standing, let alone driving, that night. Drive they did, however, with tragic results.” The bar-to-bar escapade resulted in an auto accident which left the plaintiff a quadriplegic. The liquor vendors asserted the plaintiff’s complicity as an absolute “defense” to liability because of his involvement in the intoxication of the injuring party.

V. ANALYSIS

A. The Court’s Rationale

In Herrly v. Muzik, the Minnesota Supreme Court held that complicity is an absolute preclusion to recovery under the Dram Shop Act. Although the legislature has expressly incorporated comparative fault into the Dram Shop Act, and although Minnesota has an expansive definition of fault, complicity will not be subject to comparison.

The Minnesota Supreme Court based the Herrly decision on two factors: legislative intent and statutory construction. Although the court recognized the dual nature of the Dram Shop Act—both penal and remedial—the penal aspect was emphasized to the exclusion of the remedial aspect. Accordingly, the supreme court construed the statute narrowly, and stated that a clear indication from the legislature was necessary to expand the class of beneficiaries under the Act. The court asserted that “[c]ommon sense leads us to conclude that had the legislature intended to enlarge the class of beneficiaries under the Act . . . different language would have been employed in the amendments.” The court has made no effort to

102. Herrly, 355 N.W.2d at 453.
103. Id.
104. Id.
105. Strictly speaking, complicity is not a defense, but a statutory restriction on the classes of plaintiffs who can maintain a dram shop action. See supra note 48 and accompanying text.
106. 374 N.W.2d at 278-79.
107. See supra text accompanying notes 90-91.
108. Herrly, 374 N.W.2d at 279.
109. Id. at 278.
reconcile this narrow construction with prior court opinions, thereby indicating the fundamentally remedial nature of the Dram Shop Act. This vacillation as to whether the Act is remedial or penal is the primary impediment to viewing *Herrly* as a principled decision.

The second rationale the court presented in reaffirming the complicity preclusion involved the increasing costs and unavailability of dram shop insurance. Referring to the 1985 amendments to the Dram Shop Act, the court noted that the effect of these changes was to reduce aggregate recoveries under the Act.\(^{110}\) In addition, the court believed that the 1977 amendment which incorporated comparative fault into the Dram Shop Act was also intended by the legislature to reduce recoveries, and thereby, to address the issue of insurance costs.\(^{111}\) Since including complicity in comparative fault *may* have the effect of increasing aggregate recoveries, the court imputed the apparent intent of the 1985 amendments to the 1977 amendments and decided that complicity should not be compared under the statutory scheme. The court did not justify imposing the intent of the 1985 amendments onto the 1977 legislative action.

The dissenting opinion\(^{112}\) reached a different conclusion on the issue of legislative intent.\(^{113}\) Given the legislature’s incorporation of comparative fault into the Dram Shop Act, and the expanded definition of fault under Minnesota’s comparative fault statute, the dissent concluded that “it must be presumed, that the legislature clearly intended to preempt the field and eliminate this judicial concept [complicity] as a bar just as it . . . [eliminated] contributory negligence and secondary assumption of risk as a bar in the tort field.”\(^{114}\) The dissent also criticized the majority’s decision as perpetuating “arbitrary distinctions among parties suing under the Act.”\(^{115}\) Specifically, it was unclear to the dissenters why the purchase of one drink, as distinguished from other involvement with the injuring parties’ intoxication, should necessarily bar recovery.\(^{116}\)

**B. Critique**

The majority opinion in *Herrly* can be criticized on four grounds. First, the court’s strict construction of the statute was unwarranted. Second, the clear indication from the legislature, which the court felt

\(^{110}\) *Id.* at 279.

\(^{111}\) *Id.*

\(^{112}\) *Herrly*, 374 N.W.2d at 279-80 (Scott, J., dissenting).


\(^{114}\) *Herrly*, 374 N.W.2d at 280.

\(^{115}\) *Id.*

\(^{116}\) *Id.*; see infra text accompanying note 144.
was necessary to expand the Dram Shop Act's scope, may have already been given. Third, the complicity doctrine has diminished utility in the comparative fault context. Last, the Herrly decision is inconsistent with Minnesota's progressive approach to tort law and its increasingly liberal construction of the Dram Shop Act.

1. Penal vs. Remedial Goals

The prevailing view in Minnesota is that remedial statutes are to be liberally construed. Conversely, penal statutes are to be narrowly or strictly construed. The Minnesota Supreme Court has, at times, construed the Dram Shop Act liberally to provide a remedy, but at other times, it has construed the Act narrowly, focusing only on its penal characteristics. In Herrly, the court narrowly construed the Act and required a "clear indication from the legislature to expand the class of beneficiaries."

As the court noted, the assumption that the Dram Shop Act is a penal statute is not entirely consistent with prior decisions. Past decisions have liberally construed the Act "so as to suppress the mischief and advance the remedy." While the court noted prior inconsistent treatments, it did not reconcile them with the Herrly decision.

The court merely relied on Beck v. Groe in support of the narrow construction it gave the Dram Shop Act in Herrly. The plaintiff in Beck brought an action under the wrongful death statute. As the statute required, the plaintiff was the personal representative of the deceased.

The plaintiff was precluded from bringing a dram shop action for two reasons. First, at that time, 3.2 beer was excluded from the scope of the Act. Since the only liquor sales in Beck were sales of 3.2 beer, the plaintiff had no cause of action under the statute. Second, the Act does not create a cause of action for a personal representative. To circumvent these problems with his dram shop claim, the plaintiff attempted to tie his dram shop action to his negligence-based wrongful death action.

The plaintiff in Beck attempted to expand the scope of the Dram

117. See, e.g., Harrison v. Schafer Constr. Co., 257 N.W.2d 336 (Minn. 1977); State v. Moseng, 254 Minn. 263, 95 N.W.2d 6 (1959); Gleason v. Geary, 214 Minn. 499, 8 N.W.2d 808 (1943).
118. Moseng, 254 Minn. at 268, 95 N.W.2d at 11.
119. See supra text accompanying note 108.
120. See, e.g., Hahn, 238 Minn. at 436, 57 N.W.2d at 261.
121. Id.
122. 245 Minn. 28, 70 N.W.2d 886 (1955).
124. See Beck, 245 Minn. at 33-42, 70 N.W.2d at 892-95.
Shop Act in a way that contravened the direct and express language of the Act. The Beck claim extended well beyond the expansion sought in Herrly. The plaintiff in Herrly sought nothing that directly contravened the statute. Indeed, in contrast to Beck, the entire requirement that plaintiff be an innocent third party is a judicial creation, not derived from the language of the statute. This distinction between the two cases demonstrates that the narrow construction of Beck ought not to govern Herrly.

The court’s attention to the cost and unavailability of dram shop insurance highlights a further difficulty with the narrow penal construction of the Act. By focusing on the effects which the court’s holding would have on the insurance industry in complicity cases, the court was looking at the remedial nature of the Act. Once the court recognized the Act’s remedial nature, it should have gone on to liberally construe the Act as applied to the facts of this case.

In short, though the court claims a narrow reading of the statute is required based on the Act’s penal characteristics, a remedial interpretation, nonetheless, creeps into the Herrly opinion. An acknowledgment of the remedial feature of the Dram Shop Act would require the court to liberally construe the Act and compare the fault of the plaintiff, rather than preclude his claim based upon complicity.

The court has previously recognized that Minnesota’s Dram Shop Act has both a remedial and a penal component. The bare assertion that the statute is penal is inconsistent with previous decisions and with the insurance analysis provided by the court. This narrow construction merely facilitates the decision that complicity precludes the plaintiff’s claim without providing a rationale for overlooking the remedy the Act was meant to provide.

2. Prior Legislative Indications

In 1978, Minnesota expanded its comparative negligence statute into a comparative fault statute. The new definition of “fault” significantly expanded the theories of recovery and the defenses subject to comparison. For example, actions and defenses based on theories other than negligence are now also subject to comparison. The expanded definition of fault expressly creates a possibility of recovery for a plaintiff’s “unreasonable assumption of risk not constituting express consent.” This expansion—to allow recovery for assump-

126. See supra notes 44-45 and accompanying text.
127. Herrly, 374 N.W.2d at 279.
128. Id.
130. See Steenson, supra note 13, at 9.
131. See supra notes 91-94.
tion of risk—is significant in an analysis of the complicity preclusion. In previous decisions, the court has treated complicity and assumption of risk as analogous concepts. Thus, it seems appropriate that where the concepts are analogous, the remedies provided should be similar in both situations. The court could reasonably have concluded that the legislature’s incorporation of assumption of risk into the new definition of comparative fault provided a clear indication of intent to include complicity within the same comparison scheme. The express incorporation of comparative fault into the Dram Shop Act can be viewed as an invitation to compare the actions of a complicious plaintiff to the actions of the defendant and to allow recovery where appropriate.

It is significant that the 1985 dram shop amendments were enacted at a time when the Minnesota Court of Appeals’ decision in Herrly was controlling. The court of appeals held that complicity was a form of fault to be compared. In enacting the 1985 dram shop amendments, the legislature did not attempt to modify the Herrly holding. This inaction indicates acquiescence to the Herrly result, and provides a sufficiently clear indication of legislative intent to enable the supreme court to overrule the complicity preclusion and allow plaintiff’s fault to be compared as any other form of fault.

3. Complicity: An Arbitrary Distinction?

A final criticism of the Herrly decision is that it provides a rule that is inappropriate in a comparative fault context. Minnesota Statutes section 645.17 sets forth presumptions to be made in ascertaining legislative intent. Section one articulates a general canon of construction that the legislature does not intend a result that is “absurd, 

132. The Minnesota Supreme Court has described complicity in terms analogous to those used in describing assumption of risk. See Martinson, 297 Minn. 48, 209 N.W.2d 906; Heveron v. Village of Belgrade, 288 Minn. 395, 181 N.W.2d 692 (1970).

133. See Kentrowicz v. VFW 20, 349 N.W.2d 597, 599 (Minn. Ct. App. 1984) (assumption of risk is comparable fault). The Minnesota Supreme Court has held that assumption of risk is analogous to complicity. See Martinson, 297 Minn. 48, 209 N.W.2d 906; Heveron, 288 Minn. 395. 181 N.W.2d 692. Since comparative fault removes secondary assumption of risk as a complete defense, it should also remove complicity as a complete defense. Martinson and Heveron, however, were pre-comparative fault cases so the complicity/assumption of risk analogy can be questioned in the comparative fault context.


135. Herrly, 355 N.W.2d 452 (holding that complicity is analogous to assumption of risk and is comparative fault).

136. The dissent concurs with this analysis. See supra notes 112-16 and accompanying text.

impossible of execution or unreasonable." It is also implicit in statutory construction that statutes should be interpreted so as to avoid unjust or absurd results.

The continued adherence to the complicity doctrine in a comparative fault context may well result in arbitrary results. Embodied in the complicity doctrine has always been the distinction between the injured party's active participation versus a passive participation in the intoxication of the injuring party. While this distinction may have been viable outside the comparative fault context, the existence of comparative fault substantially lessens the utility of the distinction. Under comparative fault, the factfinder apportions the fault of all the parties. Under such apportionment, it is no longer necessary to assume that an individual who purchased liquor for the injuring party is more responsible for his own injury than the commercial vendor. Given the fair result that can be achieved through apportioning fault, the arbitrary, black/white distinction created by distinguishing between active and passive participation is too simplistic and often unfair.

Hempstead v. Minneapolis Sheraton Corp. provides an example of the inherent unfairness that may result by not comparing fault under the Dram Shop Act. The plaintiff in Hempstead was held not to have been an active participant in the defendant's intoxication and was allowed to recover under the Dram Shop Act. Consistent with the prevailing view, complicity was not present because the plaintiff had purchased no liquor for the defendant. The plaintiff was, however, a participant in the intoxication process. She was the defendant's older sister, and she accompanied her sister to various bars throughout the evening of the accident. She knew that her sister was buying liquor. She knew that her sister was under age. She also knew that her sister was misrepresenting her age to the various liquor vendors. Testimony also suggested that the plaintiff knew that her sister, the driver, was intoxicated when she left the last liquor establishment. Nonetheless, since the plaintiff did not purchase the intoxicants, she was held not to have been an active participant.

The notion that the Hempstead plaintiff is less responsible than one who purchases a single drink presents an absurd result which could be prevented by comparing fault under the comparative fault provi-
sions of the Act. As the dissent in Herrly points out, "It is arbitrary to distinguish between a person who buys one drink for a companion and a person who spends an entire evening with a person, knowing that that person is buying alcohol illegally."\textsuperscript{145}

Even considering the advantages of comparative fault, Herrly may not provide the best case for challenging the continued use of complicity as an absolute preclusion to recovery. The plaintiff in Herrly had such an extensive involvement with the injuring party's intoxication that he may well have been over fifty percent at fault. Thus, comparing his fault may have had no effect on the ultimate outcome of the suit.\textsuperscript{146}

A more difficult issue arises where a would-be plaintiff has purchased only one drink for the injuring party. Under current Minnesota law, the purchase of a single drink can create liability under the Dram Shop Act.\textsuperscript{147} Presumably, then, the purchase of a single drink could raise the complicity doctrine and preclude recovery.

Hempstead demonstrates the "absurd result" that arises when a plaintiff purchasing a single drink for the injuring party is precluded from recovery while a plaintiff such as Hempstead is allowed to proceed with her claim because she was only passively involved.

CONCLUSION

Minnesota has always been a progressive jurisdiction in tort matters.\textsuperscript{148} The supreme court has seldom been reluctant to modify the common law to reflect major shifts in tort doctrine, or to be one of the first jurisdictions to initiate those changes.\textsuperscript{149} Furthermore, Minnesota has, in the past, been willing to expand the scope of the Dram Shop Act without legislative initiation.\textsuperscript{150} Against this backdrop, the Herrly decision is particularly troubling.

Nonetheless, Minnesota will continue to recognize plaintiff complicity as an absolute preclusion to recovery under the Dram Shop Act. Although the court of appeals recognized the advantages of comparing fault under the comparative fault statute,\textsuperscript{151} the Minnesota Supreme Court did not find these advantages compelling. Accordingly, Minnesota courts must continue the mechanistic practice

\textsuperscript{145.} Herrly, 374 N.W.2d at 280 (Scott, J., dissenting).
\textsuperscript{146.} See supra notes 93-95 and accompanying text.
\textsuperscript{147.} See supra notes 62-63 and accompanying text.
\textsuperscript{149.} Id.
\textsuperscript{150.} See, e.g., Wegan v. Lexington, 309 N.W.2d 273 (Minn. 1981) (rejection of historical distinction between 3.2 beer and other intoxicating beverages); Ross, 294 Minn. 115, 200 N.W.2d 149 (imposition of social host liability).
\textsuperscript{151.} Herrly, 355 N.W.2d 455.
of precluding recovery for all plaintiffs who have had any involvement in furnishing the injuring party's intoxicants.

Michael Koziol