Evolving Tort Law in Minnesota

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Introduction

"We must all obey the great law of change. It is the most powerful law of nature.[1]*"*

British political scientist Edmund Burke acknowledged how important forces of change can be in our lives when he spoke these words almost 200 years ago. Change is particularly significant when considering the American legal system today, because an attorney must actively recognize and pursue an understanding of how our society's laws are evolving in order to be successful. The purpose of this honors thesis is to recognize such important changes within Minnesota tort law. Three distinct subjects are used as case studies of changes seen in Minnesota torts: actions relating to dram shop and social host liability, actions involving mentally impaired tortfeasors, and actions dealing with premises liability. These subjects were chosen because they each involve either a radical change in Minnesota law or interpretation of that law in recent decades, or because significant confusion exists as to the future application of the current law.[2]

Each section begins with an overview and history of the subjected area of law, followed by a discussion of recent developments and an analysis of the courts' interpretations of such developments. Case law is relied on heavily to provide information as to how the courts have interpreted the law in the past (if such information is pertinent to how the courts may rule in the future) and in recent years. In some instances, case law from other jurisdictions is utilized where it may be lacking within Minnesota. Finally, predictions are made as to how the law may be interpreted or changed in the future based on the research and developments presented.

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[1] Edmund Burke, *Empire and Community: Edmund Burke's Writings and Speeches on International Relations* 95 (David P. Fidler & Jennifer M. Welsh eds., Westview Press 1999).

[2] This thesis does not attempt to integrate the three subjects, but rather to consider them each independently. A goal of the author is to ultimately develop each section separately into publishable works for a legal journal or periodical.

Section 1: Dram Shop Law

Statutory History of the Civil Damages Act

Under common law, establishments that served alcohol were not held civilly liable for the injuries of a third person caused by someone who had been served alcohol by that establishment.[3] To discourage irresponsible and illegal sales of alcohol, many states have enacted statutes that allow third parties who have been injured by a patron who was illegally served alcohol to recover damages from the establishment that served the alcohol. These statutes are commonly referred to as "Dram Shop" laws. Minnesota's dram shop law, entitled the Civil Damages Act ("CDA"), states in its first subdivision:

> A spouse, child, parent, guardian, employer, or other person injured in person, property, or means of support, or who incurs other pecuniary loss 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.[4]

Statutes pertaining to a third party's ability to recover damages for injuries sustained as a result of an intoxicated individual's actions have been in existence since Minnesota's conception as a state almost 150 years ago in 1858.[5] The original dram shop law provided that liquor sellers who violated the conditions of their license would be "liable for all damages done by persons intoxicated by the liquor obtained from them."[6]

Since the CDA's origination in 1858, it has undergone numerous changes, particularly in the last few decades. "Minnesota courts traditionally have construed [the Civil Damages Act] in

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[3] *Strand v. Village of Watson*, 245 Minn. 414, 419, 72 N.W.2d 609, 614 (1955). The court stated that the plaintiff's cause of action existed only by virtue of the Civil Damages Act, and that no such cause of action existed at common law.
[4] Minn. Stat. § 340A.801(1) (2006).
[5] Minn. Laws ch. LXXIV, § 5 (1858).
[6] *Id.*

a strict fashion. Over its long evolution, the 'duet' of legislative action and court interpretation served to clarify several ambiguities within the Act."[7] Significant changes began in the mid-1970s when the legislature responded to a 1972 Minnesota Supreme Court decision that it disagreed with by amending the CDA and limiting its scope regarding who can be found liable for illegally providing alcohol.[8] The Act was once again amended in 1982 to allow for the recovery of pecuniary losses (it already provided for the recovery of damages for bodily injury, property, and loss of means of support).[9] Additionally, the Act was completely repealed and reestablished as subsection 340A.801 in 1985. All of these changes to the CDA will be discussed in greater detail in this section.

It is important to note that Minnesota's Civil Damages Act does not allow injured intoxicated parties to sue the establishment that illegally served them alcohol in an effort to recover damages; rather, the Act is intended to provide relief to third parties injured as a result of that person's intoxication. The reason the Act is limited in such a way is two-fold: first, it suggests that the victims' comparative fault in contributing to their injuries absolves them from recovering damages from the establishment that served them; second, it discourages individuals consuming alcohol from believing that others can be held accountable for their dangerous actions while impaired.

The Civil Damages Act requires that the sale of alcohol be illegal in order for a cause of action to exist. Minnesota courts have set forth a rather elaborate threshold for what exactly constitutes an illegal sale:

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[7] Christopher E. Celichowski & Michael T. Johnson, *Recent Developments in Minnesota Dram Shop Law*, 30 Wm. Mitchell L. Rev. 613, 614 (2003).
[8] *Ross v. Ross*, 294 Minn. 115, 200 N.W.2d 149 (1972). The court found a social host liable for the injuries caused by an intoxicated guest. This case is discussed in detail in a later section of this thesis.
[9] Celichowski, *supra* n. 5, at 639.

> (1) sales to obviously intoxicated persons[10], (2) sales to minors[11], and (3) miscellaneous others including (a) sales after hours[12], (b) sales on prohibited days[13], (c) sales at prohibited locations[14], (d) sales to nonmembers of a private club[15], and (e) sales by vendors of "on sale" liquor license to patrons that the vendor knows or should know will consume alcoholic beverages off premises.[16] [17]

Additionally, the court also considers whether the illegal sale relates to the intended purposes of the Civil Damages Act.[18] Specifically, the courts have acknowledged that the CDA was intended to apply to illegal sales that "impact … the public's access to and consumption of alcoholic beverages."[19] It is likely that the reason why the threshold of what constitutes an illegal sale is so specific is because the courts wish to avoid assigning liability to an establishment selling alcohol *every* time injuries are sustained as a result of an intoxicated individual, particularly when such individuals are primarily responsible for their own actions.

Ability to Recover

One aspect of the Civil Damages Act that is commonly at issue in the courts is exactly who can recover damages. In *Skelly v. Mount*, the Minnesota Court of Appeals held that the former spouse of an intoxicated individual who was killed in an automobile accident after having been illegally served alcohol had standing to recover damages resulting from the establishment's illegal alcohol sale.[20] Although the Act explicitly provides standing to a spouse, child, parent,

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[10] Celichowski, *supra* n. 5, at 639 (citing Minn. Stat. § 340A.502 (2002).).
[11] *Id.* (citing Minn. Stat. § 340A.503 (2002).).
[12] *Id.* (citing Minn. Stat. § 340A.504 (2002).).
[13] *Id.*
[14] *Id.* (citing Minn. Stat. § 340A.412(4) (2002).).
[15] *Id.* (citing Minn. Stat. § 340A.404(1)(4) (2002).).
[16] *Id.* (citing Minn. Stat. § 340A.101(21) (2002).).
[17] *Id.*
[18] *Id.*
[19] *Rambaum v. Swisher*, 435 N.W.2d 19 (Minn. 1989).
[20] *Skelly v. Mount*, 620 N.W.2d 566 (Minn. App. 2000).

guardian, and employer who suffers a loss caused by an intoxicated person[21], the courts have recently been forced to distinguish who else has standing as an "other person" under the statute as seen in *Skelly*. The ruling in this case presents an interesting issue relating to dram shop laws because it extends standing to recover beyond current spouses and other immediate relatives.[22]

The decision in *Skelly* continued the Minnesota courts' tendency to reject the often-used argument that only third parties with a direct legal relationship with an intoxicated driver can make a claim. Another example of parties whom the courts have ruled has standing is an injured man's fiancé and her children.[23] In *Hoggsbreath*, a man was injured on the eve of his wedding in a collision that occurred as a result of the intoxication of the driver of the vehicle in which he was riding in.[24] The driver had been served at Hoggsbreath Enterprises prior to the accident while obviously intoxicated.[25] Both parties stipulated that Hoggsbreath's sale to the man was illegal; however, the defense argued that neither the injured party's fiancé, nor her daughter, had standing to recover damages because they were not parties that were listed in the Civil Damages Act.[26] The Minnesota Supreme Court held that the woman and her daughter fell under the "other person" provision of the statute.[27] The Court reasoned that even though they had no *legal* relationship with the injured man, they had been financially dependent on him and clearly suffered a pecuniary loss as a result of his injuries.

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[21] Minn. Stat. § 340A.801(1) (2006).
[22] *Skelly,* 620 N.W.2d 566 at 568-569. It is important to note that the court based its decision in *Skelly* at least partly on the nature of the accident victim's and the claimant's relationship. Although they were divorced at the time of the victim's death, they were living together, and the victim was helping to support the claimant financially. Had the two parties had limited or no contact at the time of the accident, with no reliance on one another for financial or other support, the court would likely have ruled otherwise.
[23] *Lefto v. Hoggsbreath Enterprises, Inc.*, 581 N.W.2d 855 (Minn. 1998).
[24] *Id.* at 856.
[25] *Id.*
[26] *Id.*
[27] *Id.* at 857.

Hoggsbreath, in addition to *Skelly*, reflect a loosening of the definitions of exactly who can recover under the Civil Damages Act in Minnesota. It appears that the courts may be allowing for more third parties to recover damages. This means that third parties with relationships of a less obvious nature with an intoxicated individual who is injured as a result of an illegal alcohol sale may be allowed to recover in the future.

Law Limitations: Damages

Not only does the Civil Damages Act establish who has standing to bring a claim against an establishment that illegally served alcohol, but it also sets forth the type of losses that may be recouped. These losses include injuries "in person, property, or means of support, or … other pecuniary loss."[28]

The most recent significant change made to the CDA that relates to damages that may be recovered was the addition of pecuniary losses in a 1982 amendment. The Minnesota courts have determined that pecuniary losses include loss of aid, advice, comfort, and protection.[29] The addition of pecuniary losses as recoverable damages under the CDA generated confusion regarding in what *particular* instances such damages could be recovered. In *Coolidge by Coolidge v. St. Paul Fire and Marine Ins. Co.*, the Minnesota Court of Appeals considered whether or not damages for pecuniary losses could only be recovered in instances of an actual death.[30] The district court in *Coolidge* had determined that pecuniary loss damages could only be recovered if the illegal sale of alcohol and subsequent intoxication resulted in an individual's death. The district court "reasoned that the term 'pecuniary loss,' through its application under

[28] Minn. Stat. § 340A.801 (2006).
[29] *Fussner v. Andert*, 261 Minn. 347, 358, 113 N.W.2d 355, 362 (1962).
[30] *Coolidge by Coolidge v. St. Paul Fire and Marine Ins. Co.*, 523 N.W.2d 5 (Minn. App. 1994).

Minnesota's Wrongful Death Act, related solely to cases involving death. Consequently, it concluded that appellants could not recover for any pecuniary loss because [the injured parties] survived the accident."[31]

Ultimately, the Minnesota Court of Appeals reversed the district court's decision in *Coolidg*e, reasoning that while pecuniary losses may have only applied to cases involving deaths as related to the Wrongful Death Act, the 1982 amendment of the Civil Damages Act did not include such a limitation.[32] The court added, "Had the legislature intended such a limitation, it could have clearly stated that intent."[33]

During the history of the Civil Damages Act, attempts have been made to stretch the Act's damage qualifications to cover other types of financial losses than those explicitly provided. For example, in 1964, Raymond and Rosella Glaesmann, the parents of an 18-year-old girl killed in an automobile accident by an intoxicated driver, brought an action against the municipal liquor store that provided the driver alcohol.[34] The Glaesmann's argued that their daughter's prospective earnings and services, in addition to her funeral expenses, constituted "property" that were recoverable under the CDA.[35] The Minnesota Supreme Court agreed with the parents' argument, explaining, "[A] child's duty to render services to the parent is the right of the parent to own, possess, enjoy, and dispose of such services. The right to own, possess, enjoy, and dispose of a thing is the essence of a property right."[36]

A much more recent claim for damages that stretched the terms of the CDA occurred in 2005. The Minnesota Court of Appeals heard a case brought by Susan and Scott Johnson, co-

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[31] *Id.* at 7.
[32] *Id.*
[33] *Id*.
[34] *Glaesmann v. Village of New Brighton*, 268 Minn. 432, 130 N.W.2d 43 (1964).
[35] *Id.* at 435.
[36] *Id.*

owners of a meat market that was damaged by an intoxicated driver.[37] They brought suit under the Civil Damages Act against Foundry Bar, the establishment that served alcohol to the driver, arguing that the damages to their business caused lost profits, and that the lost profits resulted in a loss of means of support.[38] The Johnson family had previously been able to recover damages under the CDA claiming loss of property in a separate suit, but the limited coverage in Foundry's liquor-liability insurance policy (specifically, in the damaged property clause) did not fully cover their losses, thus resulting in their additional claim for loss of means of support.[39]

The CDA requires plaintiffs to demonstrate that their standard of living has diminished as a result of the intoxicated party's actions when making a loss of means of support claim.[40] The *Johnson* court explained, "The inquiry often revolves around the question of whether the decedent or injured person actually provided financial support."[41] This standard was applied when the court made its decision.[42] The justices reasoned,

> Even if there was some authority for the proposition that a corporation can have 'dependents,' we cannot ignore the large body of case law demonstrating that a loss-of-support claim under the CDA traditionally arises out of injury to, or death of, a person on whom the claimants are financially dependent that prevents the person from contributing to the claimants' support. Corporations do not suffer bodily injury or death. At most, a corporation can have a claim for property damage to property owned by the corporation.[43]

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[37] *Johnson v. Foundry, Inc.*, 702 N.W.2d 274 (Minn. App. 2005).
[38] *Id.*
[39] *Id.* at 278.
[40] *Bundy v. City of Fridley*, 265 Minn. 549, 533, 122 N.W.2d 585, 588-89 (1963).
[41] *Johnson,* 702. N.W.2d at 277.
[42] *Id.*
[43] *Id.* at 277-278.

For these reasons, the owners of the damaged building were not able to obtain a loss-of-means-of-support claim against the establishment that illegally served the intoxicated party who damaged their building.[44]

Changing Law: Social Hosts

Although the courts have historically found commercial vendors that sell alcohol illegally to be civilly liable under the Civil Damages Act, the Minnesota legislature has prevented the courts from finding social hosts liable by amending the Civil Damages Act to create immunity for these social hosts.[45] This immunity was first established in 1977 when the Minnesota legislature amended the CDA by removing the words "or giving" from the Act, therefore requiring alcohol to be sold to qualify.[46]

The legislature's amendment seemed to be in response to a 1972 decision of the Minnesota Supreme Court in *Ross v. Ross* that asserted that the Civil Damages Act did, in fact, apply to social hosts.[47] Action in *Ross* was brought on behalf of an infant son of an underage male who was killed in an automobile accident caused by his own intoxication after the defendants purchased and illegally served the minor man. The Court stated, "We have concluded that the circumstances surrounding the adoption of the Civil Damages Act in 1911 compel a finding that the legislature intended to create a new cause of action against every violator whether in the liquor business or not."[48] In its opinion, the Court further explained, "[N]o reason occurs to us why those who furnish liquor to others, even on social occasions,

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[44] *Id.* at 278.
[45] Stacy E. Cudd, *Social Host Liability in Minnesota*, 56 Bench Bar of MN 26 (June 1999).
[46] *Id.*
[47] *Ross v. Ross,* 294 Minn. 115, 200 N.W.2d 149 (Minn. 1972).
[48] *Id.* at 121.

should not be responsible for protecting innocent third persons from the potential dangers of indiscriminately furnishing such hospitality."[49]

Curiously, the Court predicted that the legislature may respond to its ruling by amending the Civil Damages Act, which did in fact happen five years later. The Court prophesized, "It may well be that the legislature in light of our present holding will amend the Civil Damages Act to permit one who is not in the liquor business to assert the defense of due care."[50] Rather than allow social hosts to assert a defense of due care, the amendment completely preempted the CDA from holding them liable altogether.[51]

The 1977 amendment was applied in 1982 when the Minnesota Supreme Court made a ruling in the case *Cole v. City of Spring Lake Park*.[52] In *Cole*, plaintiffs Jeffrey Cole and Candace Pilarski were seriously injured when LaMont Bookey, an intoxicated driver, hit the pickup truck they were riding in. Cole and Pilarski brought suit against a number of parties that had served Bookey alcohol that day while he was knowingly intoxicated, including a married couple that had served him drinks within their home prior to the accident. The Court ruled that the CDA excluded the married couple, a pair of social hosts who were not profiting from serving Bookey, from being held liable for the injuries he subsequently caused.[53]

The Minnesota Court of Appeals confirmed that social host immunity also applied to cases involving minors in its ruling in *Stevens v. Thielen.*[54] Craig Stevens, a minor who had been served alcohol at another underage acquaintance's birthday party, was struck and killed by a car after he left the party intoxicated. The hostess's parents had provided the alcohol at the party,

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[49] *Id.* at 121-122.
[50] *Id.* at 120.
[51] Minn. Stat. § 340A.801 (2006).
[52] *Cole v. City of Spring Lake Park*, 314 N.W.2d 836 (Minn. 1982).
[53] *Id* at 837.
[54] *Stevens v. Thielen,* 394 N.W.2d 834 (Minn. App. 1986).

and Stevens' parents brought a suit against them.[55] The Minnesota Court of Appeals affirmed the district court's decision to grant summary judgment in favor of the defendants, citing that "the supreme court has consistently indicated that a social host cannot be held liable under the (CDA) 'for negligently serving alcohol, whether it be to an adult or to a minor who subsequently injures a third party.'"[56]

The debate over social host liability did not end with the legislature's 1977 amendment. The issue was hotly disputed in *Koehnen v. Dufuor*.[57] The Minnesota Supreme Court ruled that a social host, even one who charged a nominal fee for the alcohol that he/she provided, was exempt from liability under the state's Dram Shop laws.[58] However, this ruling was extremely close with four of the justices dissenting. The Court held in its ruling that the Civil Damages Act "applied only to commercial vendors and that as a social host, [the defendant] was immune from liability."[59]

In his dissent to the majority's ruling, Justice James Gilbert argued that the plain language of the Civil Damages Act clearly provided that *any* illegal sale of alcohol made the seller subject to liability. Simply because the seller was an individual rather than a business, and the amount earned was nominal, did not make the seller immune from the Act; in fact, Gilbert rationalized that charging any sort of fee for alcohol would disqualify that person from being considered a social host exempt from liability.[60] Gilbert argues,

> The language of the Civil Damages Act clearly and unambiguously provides that a cause of action exists 'against a person who caused the intoxication of [one who injures another person] by illegally selling alcoholic beverages.' The majority

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[55] *Id.*
[56] *Id* at 835.
[57] *Koehnen v. Dufuor*, 590 N.W.2d 107 (Minn. 1999).
[58] *Id.*
[59] *Id.* at 108.
[60] *Id* at 113.

> opinion disregards the letter of the law under the pretext of pursuing the spirit of the judicially-created social host exception to this statute.[61]

Since the 1977 amendment, social host immunity has been largely upheld in the courts, as seen in both *Cole* and *Stevens*; however, common law and growing support to discourage underage drinking have helped to push the legislature to hold social hosts illegally serving alcohol responsible, but only when alcohol is served illegally to minors. This was reflected in 1990 when the legislature amended the Civil Damages Act again, adding subdivision 6, which reads, "Common law claims. Nothing in this chapter precludes common law tort claims against any person 21 years or older who knowingly provides or furnishes alcoholic beverages to a person under the age of 21 years."[62] In a June 1999 article entitled "Social Host Liability in Minnesota" published in *Bench & Bar of Minnesota*, attorney Stacy Cudd explains how this amendment affected social host liability in Minnesota. She states, "As a result of this amendment, the Minnesota Legislature provided a window of opportunity for injured parties to pursue … liability claims that had previously been denied by a long line of Minnesota Supreme Court decisions."

The legislature likely diminished the extent of social host immunity in 1990 as a result of public policy pressures. Proponents of social host liability statutes, such as the University of Minnesota's Alcohol Epidemiology Program, whose position statement asserts "Social host liability laws may deter parents and other adults from hosting underage parties and purchasing/providing alcohol for underage youth,"[63] may have helped push the legislature

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[61] *Id.*
[62] Minn. Stat. §340A.801(6) (2006).
[63] University of Minnesota's Alcohol Epidemiology Program. "Social Host Liability." January 6, 2005. Accessed July 5, 2006. http://www.epi.umn.edu/alcohol/policy/hostliab.shtm.

toward this amendment, in addition to research that supports that social host liability laws may assist in deterring adults from providing alcohol for underage drinkers.[64]

The common law subdivision of 1990 was put to the test five years later. In *VanWagner v. Mattison*, a minor who was served alcohol by a pair of social hosts at a party brought a claim against them based on subdivision 6 of the Civil Damages Act following a one-car collision in which he was injured after driving home intoxicated.[65] Interestingly, the courts determined that the injured minor could bring a claim against the social hosts that served him under the Act even though he was not an injured third party.[66] It appears that the common law subdivision has a broader threshold than its preceding subdivisions. Unlike the rest of the Civil Damages Act, which does not allow injured intoxicated parties themselves to bring claims, the common law subdivision does provide standing to injured intoxicated parties due to their status as minors. In *VanWagner*, the court explained,

> In enacting subdivision 6, … the legislature signaled its intent that the Civil Damages Act *not* pre-empt actions described in that subdivision. The language of subdivision 6 suggests that *anyone* may bring a claim against social hosts who have knowingly furnished alcohol to persons under age 21, as long as the hosts are at least 21 years old. Had the legislature intended to bar a claim brought by the intoxicated person, it could have done so explicitly, as it did for actions under subdivision 1 of the act.[67] [68]

Common law precluded actions against establishments for the injuries caused by one of their intoxicated patrons, which makes it is curious that the 1990 amendment allows for similar

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[64] James M. Goldberg, *Social Host Liability for Serving Alcohol*, 28 Tr. 30 (March 1992).
[65] *VanWagner v. Mattison*, 533 N.W.2d 75 (Minn. App. 1995).
[66] *Id.* at 77.
[67] *Id.*
[68] At issue in *VanWagner* was whether social hosts could be found absolutely liable for injuries resulting from their furnishing of alcohol to minors, or whether liability should be determined using comparative fault. The court determined that comparative fault should apply, reasoning, "The legislature has explicitly made dram shop liability subject to comparative fault. The legislature thereby expressed its intent to allow the defense of [comparative fault] in certain actions involving violations of statutes regulating liquor." *Id.* at 79.

common law claims against social hosts.[69] The *VanWagner* court acknowledged that claims against social hosts did not exist at all from 1977 to 1990 under the CDA or common law.[70] It then cited a previous Minnesota Supreme Court case in which the justices acknowledged:

> [A] strong public policy of discouraging the illegal furnishing of alcohol to minors [exists], but … only the legislature could create social host liability in furtherance of that policy. In 1990, apparently responding to this invitation, the legislature amended the Civil Damage Act by enacting subdivision 6.[71]

Despite making this acknowledgment, the court did not make it apparent where in common law a minor had the right to bring an action against a social host.[72]

Future Changes in the Law

Significant changes to the Civil Damages Act and the judicial rulings relating to this law within the past few decades suggest the possibility of some interesting changes to come. In recent years, the courts have seemed more receptive to a wider array of third parties who may recover under the CDA.[73] This is supported by their willingness to allow an ex-wife to recover in *Skelly* and a fiancé in *Hoggsbreath*.[74] The willingness of the courts to accept claims by third parties who are not directed related suggests that there may be room for claims by people in domestic partnerships, such as same-sex couples. It will be interesting to see whether such a claim will stand because while it may be feasible based on recent decisions under the Civil Damages Act, conservative social policy may prevent it for many years to come.

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[69] *Supra* n. 4.
[70] *VanWagner*, 533 N.W.2d at 77.
[71] *Id.* at 77-78.
[72] *VanWagner*, 533 N.W.2d 75.
[73] See *Skelly,* 620 N.W.2d 566, and *Lefto,* 581 N.W.2d 855, both discussed above.
[74] *Id.*

The courts seem no more willing to allow individuals who are injured as a result of their own intoxication to recover damages regardless of whether they were illegally served alcohol than they were 100 years ago. It is unlikely that the Minnesota courts will become any more receptive to these types of claims in the future. The exception to this, of course, is the relatively new subdivision 6 of the CDA, which does allow *minor* individuals who were injured while intoxicated to recover based on common law claims.

Little change is likely to occur when it comes to what sort of damages can be recovered. The loss of means of support claim brought in *Johnson* is one of many in recent years where the court has rejected injury claims that stretch those explicitly defined in the CDA. The 1982 addition of pecuniary losses to the types of recoverable damages appears to be the last indication of the legislature's willingness to expand this aspect of the CDA, and the courts have followed its lead.

The close ruling in *Koehnen* regarding whether a social host who charged a nominal fee can be held liable for damages caused by an intoxicated guest suggests that we may see changes relating to the issue of social hosts as it is addressed by the CDA; however, these changes can only come about if public policy pressures are placed upon the legislature to amend the CDA once again to allow for bringing suit against social hosts. Without such literal amendments, the courts are not going to be quick to find social hosts liable, even ones charging some sort of nominal fee. Minnesota courts have made it explicitly apparent that they will not find social hosts liable under any conditions unless prompted by legislative amendments or the introduction of new statutes. While an argument exists for finding the liability of social hosts charging a fee for the alcohol they provide, imposing liability on *all* social hosts would be too taxing on the

public at large. Furthermore, it would diminish the impact of the social policy that intoxicated individuals should be held responsible for their own negligent actions.

It is in regard to the illegal sale of alcohol to minors that the courts are likely to become even more stringent in the future. Pressure from external sources to curb underage drinking, in addition to the legislature's amendment to the CDA allowing for social hosts providing alcohol to minors to be found liable, suggest that the courts will have an easier time promoting the deterrence of underage drinking by finding those who illegally serve alcohol to a minor liable for damages that occur as a result of the minor's intoxication.

Summary

Minnesota has had a dram shop law in effect in some form or another for almost 150 years. The Civil Damages Act provides relief to third parties who have been injured as a result of an intoxicated individual being illegally served alcohol by an establishment. The act does not provide standing for the intoxicated individual against the establishment that served him, unless that individual was a minor, and someone over the age of 21 served him. The Minnesota legislature has traditionally provided immunity to social hosts from liability for injuries caused by their intoxicated guests; however, this immunity was eliminated in part in 1990, when the Civil Damages Act was amended to include subdivision 6, which allows minors to seek damages from social hosts as a result of injuries caused by illegally served alcohol from those social hosts. Had *Stevens v. Thielen* been brought after the legislature amended the CDA, it is likely that summary judgment would not have been granted in favor of the defendants, for the CDA would no longer preempt social host liability in cases involving minor consumption.

Section 2: Mentally Impaired Tortfeasors

Mentally Insane and Individual Liability

Although mentally ill individuals can be found not guilty by reason of insanity in the criminal courts for illegal intentional acts, they may be found civilly liable for these same acts even after being deemed mentally insane.[75] This holds true across most jurisdictions in the United States.[76] According to American Jurisprudence, the reasoning behind holding insane persons liable for their intentional torts includes

> (1) The view that where one of two innocent persons must suffer a loss, it should be borne by the one who occasioned it; (2) to induce those interested in the estates of insane persons to restrain and control them, and; (3) the fear that permitting an insanity defense in actions for tort would lead to false claims of insanity.[77]

The first of these three reasons behind holding the mentally insane civilly liable for their intentional torts seems to be consistent with one of the fundamental purposes behind civil liability; that is, that those who suffer a loss should be able to recover damages.[78] However, reasons two and three are worth examining in more detail.

When considering the argument, "to induce those interested in the estates of the insane persons to restrain and control them," we can reasonably infer that the courts are suggesting that those with a financial interest in the estate of the mentally insane person would actively help restrain him from committing harmful acts. It appears that the attitude of the courts has been that caretakers of an insane person would be deterred from allowing that person to act unrestrained on a daily basis because they could suffer a financial loss if that insane person is found liable for

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[75] 53 Am. Jur. 2d *Mentally Impaired Persons* § 155 (2006).
[76] *Id.*
[77] *Id.*
[78] Harry Korrell, *The Liability of Mentally Disabled Tort Defendants*, 45 Defense L.J 651, 668 (1996).

an intentional tort.[79] However, what is to encourage friends and relatives to deter a mentally insane person's unrestrained behavior if that insane person has little or no estate to be lost in a claim of liability? Furthermore, should those interested in an insane person's estate be financially affected by the damages resulting in an intentional tort claim if they had no awareness of that person's insanity in the first place? It is likely that the families of a mentally ill person who are aware of that person's illness would be involved in the management of that person's finances, but that does not mean that they can necessarily prevent him from committing harmful acts, particularly on a 24-hour basis.

The third reasoning behind the courts' stance that insane persons should be held liable for their intentional torts warrants further discussion as well. This reasoning consists of the courts' fear that allowing an insanity defense in civil cases would result in many false insanity claims.[80] It is curious that the risk of false insanity claims is used as justification for disallowing an insanity defense in civil cases but not in criminal. This is not to say that the civil courts are wrong in aiming to avoid false claims of insanity; rather, if the reasoning behind eliminating such claims in civil cases does indeed have to do largely with the risk of false claims of insanity being brought forth, one has to wonder if the same limitations should be placed in criminal cases, since insanity is often a question determined by judge or jury, and the risk for false claims would be just as high.

Civil Insanity Defense

Despite the rationale that allowing insanity defenses would result in an abundance of false claims, some jurisdictions do have what are known as "civil insanity defenses." The range

[79] *Id.* at 676.
[80] 53 Am. Jur. 2d *Mentally Impaired Persons* § 155 (2006).

of cases where such a defense can be applied appears to be extremely narrow, as well as rarely successful. In the Wisconsin Supreme Court case of *Breunig v. American Family Ins. Co.*, a woman with no history of mental illness had a sudden onset of a schizophrenic episode while driving a motor vehicle.[81] She struck another vehicle as a result of the episode. The Court reasoned that if, based on the evidence presented, a jury concluded that a person was "suddenly overcome without forewarning by a mental disability or disorder that incapacitates him from conforming his conduct to the standards of a reasonable man,"[82] then the civil insanity defense could be used to determine that the person was not negligent.

The Minnesota courts have dealt minimally with the issue of the liability of the mentally insane. The closest that the Minnesota Supreme Court has come to indicating its stance on the issue of applying a civil insanity defense to liability cases in the state occurred in *State Farm Fire & Casualty Co. v. Wicka* in 1991.[83] State Farm sought a declaratory judgment as a means of disputing that their insured, Stephen Kintop, was not covered as a result of an "intentional act" exclusion in his insurance policy.[84] Kintop, a man with a known history of mental illness, had attacked Paul Peterson, the new boyfriend of Kintop's ex-girlfriend. After shooting Peterson once in the head and knee, Kintop turned the gun and killed himself.[85] Peterson survived and sued Kintop's estate, the defense of which was maintained by State Farm due to Kintop's homeowner's insurance policy.[86] If the district court determined Kintop's acts were intentional,

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[81] *Breunig v. American Family Ins. Co.*, 45 Wis. 2d 536, 173 N.W.2d 619 (1970).
[82] *Id*. at 543.
[83] *State Farm Fire & Casualty Co. v. Wicka*, 474 N.W.2d 324 (Minn. 1991).
[84] *Id.* at 326.
[85] *Id.*
[86] *Id.*

his estate would not be covered under the State Farm policy due to the "intentional act" exclusion clause.[87]

In its *Wicka* decision, the Supreme Court acknowledged the hesitancy of courts throughout the nation to consider insanity defenses. Justice Gardebring wrote, "The law and society have always approached a person's claimed mental illness with a degree of skepticism and disbelief. The societal mistrust stems, in part, from the fear that mental illness is feigned with ease and frequency."[88] The Court then asserted that there are instances when a person's mental illness can prevent application of the intentional act exclusion.[89] Regarding the intentionality of Kintop's actions, the Court ultimately held,

> An insured's acts are deemed unintentional where, because of mental illness or defect, the insured does not know the nature or wrongfulness of an act, or where, because of mental illness or defect, the insured is deprived of the ability to control his conduct regardless of any understanding of the nature of the act or its wrongfulness.[90]

Although the Court's ruling in *Wicka* that Kintop's actions were not intentional applied only to insurance policy exclusions, the rationale behind its decision suggests the possibility that consideration may be given to the degree and nature of parties' mental illness when determining whether their actions were intentional regarding torts more generally in Minnesota. *Wicka* suggests that there may be limited instances when the Minnesota courts would consider the application of a civil insanity defense in the future.

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[87] *Id.*
[88] *Id.* at 327.
[89] *Id.* at 329.
[90] *Id.* at 331.

Mentally Disabled and Individual Liability

Across the United States, the courts tend to have a similar attitude toward liability of the mentally disabled as they do for the mentally insane. In fact, oftentimes the two are indistinguishable and the term "mentally impaired person" is used to refer to both.[91] Although the Minnesota courts have dealt little with the issue of mentally disabled liability, the courts in neighboring Wisconsin have addressed the topic a number of times with varying results.

In 1996, two parents of a mentally disabled teenage girl brought suit against an insurance company who had insured the family for damages that the mentally retarded girl could possibly cause as a result of her disability.[92] The Burch family brought a claim after the girl's father, Paul Burch, was severely injured when his retarded daughter started the family's truck and knocked it into reverse, causing it to back up and pin him between the truck and the garage. The insurance company refused to pay for the resulting medical expenses, arguing that the father was entirely at fault for the incident because he left the keys in the truck's ignition and his daughter alone in the truck's cab.[93] This case also served as an instance when a case party made no distinction between the mentally ill and the mentally disabled because the insurance company claimed that the civil insanity defense applied, even though the girl was deemed mentally disabled.[94]

One of the main issues in *Burch* was whether the mentally disabled daughter should have been held to the same standard of care as people of normal mentality, as was argued by the plaintiffs, or if her mental incapacity could be invoked and therefore bar any civil liability for

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[91] 53 Am. Jur. 2d *Mentally Impaired Persons* § 155 (2006).
[92] *Burch v. American Family Mutual Insurance Co.*, 198 Wis.2d 465, 543 N.W.2d 277 (1996).
[93] *Id*.
[94] *Id.* at 473.

negligent acts, which the defense reasoned to be true. Both parties of the lawsuit were able to support their particular stance on the issue with conflicting case law.[95]

The Wisconsin Supreme Court first determined that the civil insanity defense did not apply to the disabled daughter, as was argued by the defendants, because the narrow exception allowing for the application of this defense did not apply.[96] Therefore, the Court determined that the disabled daughter must be held to the standard of care applied to a reasonable person and could be found negligent for her actions.[97] Curiously, the Court makes no distinction as to whether application of the civil insanity defense differs for those deemed mentally insane and those diagnosed as mentally disabled.

The Court's ruling in *Burch* was reaffirmed in the decision of *Jankee v. Clark County*.[98] Emil Jankee was a mentally unstable man who was being treated at the Clark County Health Care Center for manic depression and refusal to take treatment medications. During Mr. Jankee's stay at the facility, he attempted to escape by jumping out of his room's window. He suffered paralyzing injuries in the fall and brought suit against the facility and a number of additional defendants (building contractors and architects).[99] As in *Burch*, at issue was whether, as a mentally disabled person, Jankee should be held to the same standard of care as non-mentally disabled persons.

The circuit court in *Jankee* issued a summary judgment in favor of Clark County, arguing that "the doctrine of contributory negligence precluded recovery as a matter of law because

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[95] *Id.* at 468-475.
[96] *Id.* at 473. The Wisconsin Supreme Court found that the narrow exception exists when a person is suddenly mentally incapacitated without forewarning. See *Breunig v. American Family Ins. Co.*, 45 Wis. 2d 536, 173 N.W.2d 619 (1970), discussed above.
[97] *Id*.
[98] *Jankee v. Clark County*, 235 Wis.2d 700, 612 N.W.2d 297, Wis. (2000).
[99] *Id*.

Jankee's negligence was greater than the negligence of each (defendant)."[100] The Wisconsin Court of Appeals reversed this ruling.[101] The court held that Jankee should not be held to a reasonable standard of care because he was incapable of controlling or appreciating his conduct. Therefore, he could not be considered contributively negligent.[102] The Wisconsin Supreme Court, which settled the conflicting decisions of the lower courts, explained,

> The pivotal issue here is whether Jankee's conduct should be assessed under the reasonable person standard of care, or under the subjective, or capacity-based, standard of care. We find that no facts relating to Jankee's contributory negligence are in dispute because … we hold that Jankee's conduct must be measured against the reasonable person standard of care.[103]

The Court's rationale for measuring Jankee against the reasonable person standard of care rather than the capacity-based standard was that the reasonable person standard was "objective" and would not take into account issues of fact relating to Jankee's overall capacity.[104] Justice Prosser acknowledged, "Wisconsin, like the majority of states, holds mentally disabled defendants to the reasonable person standard of care. The general rule is that tortfeasors cannot invoke mental capacity as a defense."[105]

Not all jurisdictions hold the mentally impaired to the same standard of care as a reasonable person.[106] In *Dodson v. South Dakota Dept. of Human Services*, a woman with a history of depression and multiple attempted suicides was released from the psychiatric ward of a South Dakota hospital and committed suicide one day later.[107] Her estate brought suit against the

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[100] *Id*.
[101] *Id.*
[102] *Id.*
[103] *Id.* at 310.
[104] *Id.*
[105] *Id.* at 311-312.
[106] *Dodson v. South Dakota Dept. of Human Services*, 703 N.W.2d 353 (S.D. 2005).
[107] *Id.* at 354-355.

doctor and hospital that released her.[108] In the trial court, the jury was instructed to apply the objective reasonable person standard when considering the woman's contributory negligence, and the defendants were found not negligent as a result.[109] The South Dakota Supreme Court reversed and remanded, explaining,

> One whose mental faculties are diminished … is capable of contributory negligence, but is not held to the objective reasonable-person standard. Rather, such a person should be held only to the exercise of such care as he or she was capable of exercising, that is, the standard of care of a person of like mental capacity under similar circumstances.[110]

The court then asserted that the majority of courts apply a lower standard of care when considering cases where a mentally incapacitated plaintiff cannot care for himself.[111]

> [T]he question shifts from which of two innocents should bear the loss to whether a negligent defendant should pay for the loss he has partially caused to a mentally incapacitated person incapable of properly looking after himself. … [T]he great majority of courts … apply a lower standard of care and consider the plaintiff's incapacity.[112]

Both the South Dakota court and the Wisconsin court insist that the majority of courts follow the juxtaposing standards of care that they set forth. The Minnesota Supreme Court dealt with the issue of applying a reduced standard of care in 1990 when asked a certified question by the Federal District of Minnesota Court. The Supreme Court was asked: "[Does] a capacity-based comparative fault standard [apply] in the context of suicide by a mentally ill patient admitted to a locked hospital ward where the medical staff was aware of his suicidal ideations?"[113] The Court answered in the negative, but explained that the comparative fault did not apply because the victim was within the confines of the hospital and could not be held

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[108] *Id.* at 355.
[109] *Id.*
[110] *Id.* at 357.
[111] *Id.*
[112] *Id.*
[113] *Id.* at 121.

responsible for the duty to care for his own well being because that duty had been assumed by the hospital upon his admission.[114] Of most importance when considering the issue before us of whether Minnesota will apply a capacity-based standard for the mentally disabled in the future, the Court acknowledged, "Our decision in this case should not be construed as a *per se* rejection of a capacity-based comparative fault standard in other factual situations."[115]

Institutional Liability for Actions of Mentally Ill and Disabled

We have considered the liability that may be imposed on individuals with direct relationships to the mentally ill when they are aware of the danger those mentally ill may be to others, but it is also important to consider the liability of institutions who are in charge of caring and restraining those that have been identified as mentally ill or disabled. There is a significant amount of case law in Minnesota relating to institutional liability. One of the courts' fixated principles in determining the liability of institutions regarding injury of the mentally ill within those institutions has been: "A person who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled has a duty to exercise reasonable care to control the third person to prevent him from doing such harm."[116]

The above principle was recently acknowledged but ignored in *Stuedemann v. Nose*.[117] *Stuedemann* was a wrongful death action brought by the next of kin of a woman who was sexually assaulted and then murdered by Roman Nose, a man diagnosed with chemical dependency issues and a known violent history, who had been living and receiving treatment at a

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[114] *Id.* at 125.
[115] *Id.*
[116] *Restatement (Second) of Torts* § 319 (1965).
[117] *Stuedemann v. Nose*, 713 N.W.2d 79 (Minn. App. 2006).

home for the mentally ill in Woodbury, Minnesota.[118] During the summer of 2000, Nose snuck out of the Sherwood Home one evening and subsequently attacked and killed Stuedemann.[119] Suit was brought against the home where he had been treated, as well as his treating psychologist, for negligently allowing his departure from the treatment facility while knowing he was a danger to society.[120]

In *Stuedemann*, the district court acknowledged that generally there is no duty to control the actions of a third party in effort to prevent him from causing harm to others[121]; however, "certain special relationships exist that impose a duty to control the third person's conduct for the protection of others."[122] The court also emphasized that "implicit in the duty to control is the ability to control," suggesting that because the treating institution had a duty to control an individual, they also automatically were required to ensure the ability to control him, as well (in this case, not allowing his unsupervised departure from the facility).[123]

Surprisingly, despite acknowledging the institution's duty to control Roman Nose, the Minnesota Court of Appeals affirmed the district court decision that the Sherwood Home was not liable.[124] The court explained, "The scope of the duty to control another's conduct is also limited by the foreseeability of the harm."[125] Because the court could not conclude that the Sherwood Home could have foreseen Stuedemann's murder, they could not find the institution liable despite its acknowledgment that the institution had a duty to control Nose's conduct.[126]

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[118] *Id.* at 82.
[119] *Id.*
[120] *Id.* at 83.
[121] *Id*.
[122] *Id.* at 84.
[123] *Id.*
[124] *Id.* at 86.
[125] *Id.* at 84.
[126] *Id.* at 85.

State Institutions and Discretionary Immunity

Although case law has set forth the precedent that institutions can be held liable for the injury-causing actions of individuals they house and/or treat, the law has also paved the way for a number of situations when institutions are immune for instances where they could otherwise be held liable. One such situation is that of discretionary immunity, which is a statutorily created immunity that can be applied to state institutions. A municipality shall be immune from liability for "any claim based upon the performance or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused."[127] Discretionary immunity exists in Minnesota "because local governments must make decisions on how best to spend public money and to prioritize the use of limited financial, personnel, and other resources."[128]

Discretionary immunity has been historically applied in Minnesota in cases involving the liability of institutions for injuries caused by a mentally impaired tortfeasors. The exception was applied in the case *Cairl v. State*.[129] The owner of an apartment building that was damaged and the mother of a woman who was killed brought action against the State of Minnesota, Ramsey County, and individual state employees after they released Tom Connolly, a mentally retarded man with a history of starting fires, for Christmas holiday.[130] While released from his treatment facility, Connolly started a fire in the apartment building that killed one young woman and caused extensive damage to much of the property.[131] The plaintiffs alleged that "with a known history of starting fires Connolly's release was negligent, and that the State of Minnesota, County of Ramsey Welfare Department, and certain state and county employees, breached their

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[127] Minn. Stat. § 466.03(3) (2006).
[128] Michael Ehlert, *NFPA and Discretionary Immunity – Build the Record*, League of Minnesota Cities (April 2004).
[129] *Cairl v. State*, 323 N.W.2d 20 (Minn. 1982).
[130] *Id.*
[131] *Id.* at 22.

duty to warn plaintiffs of Connolly's dangerous propensities."[132] In its decision, the Minnesota Supreme Court affirmed the district court's granting of a motion for summary judgment in favor of the defendants, explaining that the exemption of discretionary immunity establishes that "the courts, through the vehicle of a negligence action, are not an appropriate forum to review and second-guess the acts of government which involve 'the exercise of judgment or discretion.'"[133]

Discretionary immunity appears, on its face, to be a fairly obvious method for state agencies to escape liability for their negligent mistakes. The statute was likely created to prevent taxpayers from ultimately enduring the burden of paying for any awards for damages won against liable agencies, but it is not necessarily fair to the victims that suffer as a result of the negligent actions of state agencies who do not receive compensation as a result. Furthermore, perhaps there should be a point when an agency's actions, or the actions of an individual acting on behalf of the agency, are so grossly irresponsible that the courts can choose to disregard the immunity and find the agency liable.

In an opinion that addresses discretionary immunity, but is unrelated to mental health torts, the Court acknowledged that the statutory immunity was not designed to prevent agencies from being liable for every wrong decision they make.[134] The Minnesota Supreme Court explains, "We interpret the discretionary-function exception narrowly. Discretionary immunity … does not protect all acts of judgment by government agents."[135]

Clarification for when the courts should and should not apply discretionary immunity is necessary. The Minnesota courts did bring some clarity to the issue in the decision *Huttner v.*

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[132] *Id* at 21.
[133] *Id* at 23.
[134] *Steinke v. City of Andover,* 525 N.W.2d. 173 (Minn. 1994).
[135] *Id.* at 175.

State.[136] The next of kin of Delores Fenske, a woman who had been murdered by Larry Dewayne Davis, a man who had been provisionally discharged from a commitment for mental illness, brought suit against Ramsey County and the social worker entrusted with intensively supervising him during his discharge.[137] One issue in this case was whether discretionary immunity (also sometimes referred to as official immunity) prevented the Court of Appeals from finding Ramsey County and the social worker liable for Fenske's death.[138]

In making its ruling, the court explained that a government official's acts are either discretionary or ministerial, and that only discretionary decisions qualify for immunity.[139] The court then elaborated on what distinguishes one from the other:

> A discretionary act involves individual professional judgment, reflecting the professional goal and factors of a situation. A ministerial duty is one in which nothing is left to discretion; it is absolute, certain, and imperative involving merely execution of a specific duty arising from fixed and designated facts.[140]

The court determined that the social worker's actions were ministerial, because after being informed by Davis that his psychiatrist had discontinued his medication, she failed to verify this statement with the psychiatrist herself: an act the court asserts was ministerial because the social worker had a statutory duty "to monitor Davis's compliance with his treatment plan."[141] As a result, the court affirmed the district court holding on this aspect of the case, determining that neither the social worker nor Ramsey County could claim discretionary immunity.

Even with the distinction between discretionary and ministerial acts, the line between when the court does and does not apply discretionary immunity remains blurred. For example,

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[136] *Huttner v. State*, 637 N.W.2d 278 (Minn. App. 2001).
[137] *Id.* at 281.
[138] *Id.* at 282.
[139] *Id.* at 284.
[140] *Id.*
[141] *Id.* at 285.

in the *Huttner* decision, the court determined that the social worker's failure to check with the mentally ill man's psychiatrist about the status of his treatment was a ministerial act despite there being no policies or procedures set out by the state or the treatment facility mandating such actions.[142]

Future Changes in the Law

It is challenging to predict what direction Minnesota courts will go when considering the torts of mentally impaired tortfeasors largely due to the lack of case law in this area. Minnesota is unlikely to consider a civil insanity defense for such tortfeasors because they have not done so in the past, and doing so would counter the trend of most jurisdictions to reject insanity defenses in civil claims. However, the Minnesota Supreme Court has hinted that it may allow the mental state of an individual to be a factor when considering whether that tortfeasor's actions were intentional in regard to intentional torts, particularly when insurance coverage for such individuals is at issue. It is curious that the courts can make a distinction between cases involving insurance coverage and those that do not, but case law indicates a marked difference between when the courts will consider the mental state of an individual—primarily when insurance is involved—and when they will not, which is typically when no insurance coverage exists.

Claims for liability against institutions entrusted with the care of mentally impaired tortfeasors are difficult to win due to foreseeability challenges and the discretionary immunity often applied for state agencies. Such claims may be come easier over time if Minnesota follows the general trend within tort law of applying discretionary immunity less and less. It is idealistic

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[142] *Id.*

to as the courts to make an exception from such immunity for actions of agencies that are grossly irresponsible, but it is unlikely that such an exception will be made without legislative prompting.

Summary

Liability for the actions of the mentally ill and disabled have been a sensitive area of law for the Minnesota courts to address. Although nationwide the courts have typically held the mentally disabled to the reasonable person standard of care, some jurisdictions allow for instances of a civil insanity defense barring liability. To date, Minnesota has not applied such a defense, thus making it unlikely that the courts would consider it in the future, though the *Wicka* decision has opened the door regarding when a person's mental state may factor into whether their tortuous actions were intentional. Some discrepancy also exists as to who, if anyone, can be found liable for the torts of the mentally ill and disabled: the individual themselves, the family of the individual, or the institutions responsible for their treatment and care. The doctrine of discretionary immunity, which is often asserted by state institutions responsible for the care of the mentally ill, serves as another roadblock in locating an accountable party to be held accountable for the damages caused by disabled or ill individuals. Furthermore, the distinction between when an act by a state agent is discretionary, and thus qualifies for such immunity, and when it is ministerial, can sometimes be relatively unclear.

Section 3: Premises Liability

Duties of an Owner of Property

Another area of tort law that has evolved significantly in Minnesota in recent decades is that of premises liability. In order to recognize the changes that have been seen in this area of law, it is important to understand the duties owed by property owners that can result in liability if such duties are breached. Minnesota has adopted the following provision on property owner duties from the *Restatement of Torts*[143]:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger.[144]

The "Open and Obvious Danger" Exception

One of the primary defenses for cases of premises liability is the "open and obvious danger" exception, which refers to risks that would be apparent to a reasonable individual and therefore do not necessarily warrant steps by a property owner to prevent injury from such an obvious danger.[145] A case that exemplifies the use of this defense is *Engleson v. Little Falls Area Chamber of Commerce*.[146] Engleson attended an arts and craft fair in the city of Little Falls. After spending approximately three hours at the fair, she tripped over a traffic cone that had been in a line along the curb for traffic control.[147] The cone was approximately 28 inches tall and had reflective collars. Ms. Engleson sustained injuries as a result of her fall and sued the

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[143] See *Louis v. Louis*, 636 N.W.2d 314, 319-21 (Minn. 2001).
[144] *Restatement (Second) of Torts*, § 343 (2006).
[145] *Restatement (Second) of Torts,* § 343A (1965).
[146] *Engleson v. Little Falls Area Chamber of Commerce*, 362 F.3d 525 (D. Minn. 2004).
[147] *Id.* at 527.

city for negligently placing the traffic cones throughout the fair.[148] The district court granted summary judgment in favor of the defendant, asserting that the city owed no duty to forewarn patrons of the presence of safety markers that were obvious as a matter of law.[149] The Court of Appeals confirmed this stance, explaining,

> To a reasonable person who had decided to walk at the edge of traffic in a crowded fair, the cones would have been obvious, or so we conclude the Minnesota courts would hold. An invitee is under a duty to exercise reasonable care for his or her own safety and to observe that which is obvious to the ordinarily prudent person.[150]

In the case of *Engleson*, the cones were an obvious danger that should have been easily recognizable by the average citizen; however, sometimes in instances of premises liability, the lines distinguishing open and obvious dangers to more conspicuous dangers are not so clear. The suit *Rinn v. Minnesota State Agricultural Society*, which was brought after the plaintiff sustained injuries when she slipped in a puddle at a horse show being held at the coliseum located on the state fair grounds, is one such instance.[151] Lorrie Rinn had noticed the puddle on a coliseum step, and had even warned her daughter, who was trailing behind, to be careful before she, herself, attempted to step over it. Despite her own warnings, Mrs. Rinn slipped and fractured her elbow. The district court granted summary judgment in favor of the defendant, concluding that the puddle was, in fact, an open and obvious danger, and that this fact was supported by Rinn's acknowledgment of the puddle's danger before she fell.[152]

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[148] *Id.*
[149] *Id.* at 528.
[150] *Id.* at 529.
[151] *Rinn v. Minnesota State Agricultural Society*, 611 N.W.2d 361 (Minn. App. 2000).
[152] *Id.* at 365.

The Court of Appeals disagreed with the district court's decision regarding the open and obvious nature of the puddle.[153] The court explained, "The test for obviousness is not whether the injured person actually saw the danger, but whether in fact it was visible.[154] Thus, the key consideration is the nature of the condition, and not the injured party's perception."[155] The court then stressed that the open and obvious danger defense not be applied to dangers as small as a temporary puddle:

> The puddle here, which covered a step, was small in comparison to the other conditions that our case precedent has established as 'obvious.' This puddle might have been obvious to appellant as she carefully looked down while descending the coliseum stairs. The same puddle may have, however, easily gone completely unseen by a spectator who, for instance, descended the steps while keeping his or her attention on the activity in the show ring. Recognizing conditions such as the puddle in this case as 'obvious' as a matter of law would extend the 'open and obvious' defense to relatively obscure dangerous conditions, and, in turn, may allow knowing, careless landowners to escape responsibility for less-apparent dangerous conditions created by their negligent actions.[156]

The court raises an interesting point in its *Rinn* decision. It insists that in this instance, it is not important that the plaintiff recognized the puddle's danger before she slipped. The court explains that the open and obvious danger exception would only apply if your average horse show viewer were to pass it by unnoticed when traversing the steps of the coliseum.[157] In its rationale, the Court of Appeals emphasized that it did not matter that Rinn was aware of the puddle before she fell.[158] If it had been determined that the puddle was not open and obvious, then it might be possible for Rinn to succeed in a claim that the defendants breached their duty to protect her from such dangers even if she was aware of the dangers in the first place.

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[153] *Id.*
[154] *Munoz v. Applebaum's Food Market, Inc.*, 293 Minn. 433, 434, 196 N.W.2d 921, 922 (1972).
[155] *Rinn,* 611 N.W.2d at 364.
[156] *Id*.
[157] *Id.* at 364.
[158] *Id.*

Constructive Knowledge/Notice

The *Rinn* case also presented the issue of constructive knowledge. It is important for the plaintiff to establish that the property owner had knowledge of the dangerous condition prior to the resulting injury. According to Don Apfel, author of the article *Overcoming Defenses in Slip and Fall Cases*:

> Proving that the landowner had actual or constructive notice of the condition responsible for the incident is critical. The mere presence of a danger on the premises is not enough to hold the defendant liable. There is a good chance that a defense motion for summary judgment will be granted if a plaintiff fails to prove … that the landowner knew or should have known about the hazard.[159]

The Minnesota courts have specifically held that "a negligence theory of recovery is appropriate only where the landowner had actual or constructive knowledge of the dangerous condition. Appellant has the burden of proving constructive knowledge."[160] This means that Lorrie Rinn needed to prove that the Minnesota Society of Agriculture was aware that the puddle existed or that it had constructive knowledge of the puddle's existence.

It is necessary to define what constructive knowledge is in order to understand how it is applied in premises liability cases. In *Anderson v. St. Thomas More Newman Ctr.*, the Court explained, "Constructive knowledge of a hazardous condition may be established through evidence that the condition was present for such a period of time so as to constitute constructive notice of the hazard."[161] Referring back to *Rinn*, because the plaintiff was unable to prove that any staff for the society or the coliseum was aware of the puddle, she could not meet the burden of proving that the defendants had constructive knowledge of the puddle's existence. As a result, they could not be held liable for her injuries. The Court of Appeals affirmed the district court's

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[159] Dov Apfel, *Overcoming defenses in slip and fall cases*, 33 Tr. 58 (January 1997).
[160] *Messner v. Red Owl Stores*, 238 Minn. 411, 413, 414, 57 N.W.2d 659, 661, 662 (1953).
[161] *Mitchell v. Mall of* America, No. WL1020870 (Minn. App. 2005). (citing Anderson *v. St. Thomas More Newman Ctr.*, 287 Minn. 251, 253, 178 N.W.2d 242, 243-244 (1970).).

motion for summary judgment in favor of the defendants based on the fact that they did not have constructive notice of the puddle.[162]

In recent decades, the Courts have seemed unclear about a definitive amount of time that must lapse before the constructive notice requirement has been satisfied. Consider two Minnesota cases with similar time frames but greatly varying results:

Beverly Otis brought suit against the First National Bank of Minneapolis after she sustained minor injuries when she slipped in a puddle of water that had accumulated near one of the bank teller's windows.[163] It had been raining on the morning she entered the bank, and patrons had been carrying umbrellas into the premises. The Minnesota Supreme Court affirmed the district court's ruling in favor of the defendant primarily because the bank had only been open for 20 minutes and the "circumstances of time and condition were not such as to impose upon defendant a duty to have discovered and removed the puddle."[164]

The Court ruled differently in its decision of *Bahl v. Country Club Market, Inc.*[165] Kenneth Bahl brought an action for wrongful death on behalf of his wife, who died after she slipped and fell on the premises of the Country Club Market, Inc. The district court had a jury verdict finding the defendant negligent. This ruling was affirmed by the Court of Appeals. Sara Bahl died from the head injuries she sustained in a fall near the door of the super market. It had been raining heavily on the evening she arrived there, and testimony was given at the original trial stating that a rug normally covering the area of her fall had recently been removed because it was waterlogged. The area had also been mopped 15 minutes prior to the incident when Ms. Bahl fell. Yet the Court rationalized that,

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[162] *Rinn,* 611 N.W.2d at 365.
[163] *Otis v. First National Bank of Minneapolis*, 292 Minn. 497, 195 N.W.2d 432 (Minn. 1972).
[164] *Id.* at 498.
[165] *Bahl v. Country Club Market, Inc.*, 410 N.W.2d 916 (Minn. App. 1987).

> Under the circumstances … we believe the jury reasonably could infer that appellant knew of the danger that would result from the rapid accumulation of water near the door … a sufficient amount of water could accumulate within ten to fifteen minutes to create a dangerous condition. Even if appellant did not know that there was an unsafe amount of water on the floor at the time Ms. Bahl entered the store, the jury could infer that with reasonable care it should have known of the dangerous condition.[166]

What distinguishes these two cases? The Court seems to have been hesitant in *Otis* to find that the bank should have had constructive notice of the puddle that its patron slipped on approximately 20 minutes after the bank had open, yet it did not hesitate to find the grocery store in *Bahl* negligent for a puddle that had gathered in an area that had been mopped only 15 minutes prior to the victim's fall. Perhaps the extent of damages can partially explain the differing rulings: the first resulted in a minor injury, and the second, a woman's death. Public policy and sympathetic jurors may have influenced the court's determination that the grocery store did indeed have constructive notice of the puddle's danger.

A few more recent cases may help clarify how much time must lapse for the Minnesota courts to determine that constructive notice has occurred. In an unpublished 2001 case, *Pikula v. Wal-Mart*, a man who sustained injuries as a result of a slip on wet entrance mats at the discount store on a rainy day brought suit, arguing that Wal-Mart had constructive notice of the slippery conditions of their entrance.[167] The plaintiff supported his claim with evidence that Wal-Mart had purposefully brought in extra mats as a result of the rain that morning and had failed to change these wet mats for over five hours following the store opening. The Minnesota Court of Appeals agreed with Pikula's claim, acknowledging, "an injured party must present evidence that a hazard existed for a sufficient period of time to give reasonable notice to the defending party.

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[166] *Id.* at 920.
[167] *Pikula v. Wal-Mart*, No. WL1328575 (Minn. App. 2001).

The record demonstrates that a reasonable jury could conclude that Pikula presented sufficient evidence … [and] Wal-Mart should have discovered the hazard."[168]

Another unpublished case, this one from 2005, also addresses the issue of the time requirements necessary for proving a defendant had constructive notice of a hazard. In *Wojciehowski v. Labovitz Enterprises*, the Court of Appeals determined that the owner of a parking lot was not liable for the injuries sustained by an employee walking through the icy parking lot at 7:30 a.m.[169] The court explained, "[T]he estimated duration of time between the presence of ice in the parking lot … and appellant's accident was so limited that respondent cannot be charged with constructive knowledge."

A recent federal court decision also considered this time factor. In *Peterson v. Costco Wholesale Corp.*, a woman filed suit after she sustained injuries as a result of slipping on a slightly overturned rug in the entrance of a Costco Wholesale store in Coon Rapids, Minnesota.[170] Costco, the defendant, brought a motion for summary judgment, arguing that the plaintiff could not establish that the storeowners had actual or constructive notice of the rug's dangerous condition.[171] Costco presented evidence that a store employee would conduct a "floor walk" at least once an hour checking for hazardous conditions, and that such a walk had confirmed that the rug area was clear of any dangers only 30 minutes prior to the plaintiff's fall.[172] The court granted the defendant's motion at least partially based on this evidence, explaining, "If the rug corner was turned up before [the plaintiff] fell, it could not have been

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[168] *Id.*
[169] *Wojciehowski v. Labovitz Enterprises*, No. WL1272745 (Minn. App. 2005).
[170] *Peterson v. Costco Wholesale Corp.*, No. WL518861 (D. Minn. Feb. 15, 2007).
[171] *Peterson*, slip op. at 2.
[172] *Peterson*, slip op. at 1.

turned up for more than twenty to thirty minutes. The Court finds that, as a matter of law, [the plaintiff] cannot establish constructive notice."[173]

None of these three unpublished cases completely clarifies the courts' time discrepancy regarding constructive notice. The five hours presented in the *Pikula* decision confirms that after a certain amount of time has lapsed, a property owner has been given constructive notice of a danger; however, we are unable to see a clear demonstration in recent Minnesota case law of exactly how much time that is. Thirty years of case law does suggest, however, that the *Bahl* decision may have been an anomaly. It appears to be the only instance when the courts of Minnesota found that a property owner had constructive notice of a dangerous condition after only 15 minutes time had passed since the area had been checked for dangers. This theory is supported by the unpublished *Peterson* decision, in which 30 minutes time was not sufficient for finding a property owner to have constructive notice.

Future Changes in the Law

Fewer issues remain unsettled in the area of premises liability than in the previous two areas of law considered. As a result, not as many predictions as how the Minnesota courts will interpret slip and fall cases need to be made for the future. The courts have indicated that in regard to the open and obvious danger exception, it does not matter if the plaintiff was aware of the dangerous condition prior to their injury; instead, if it can be established that the condition was not open and obvious and the property owner had actual or constructive notice of the condition, plaintiffs may succeed even if they had acknowledged the condition before becoming injured.

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[173] *Peterson*, slip op. at 3.

Some discrepancies still exist as to how much time must lapse for a property owner to have constructive notice of a dangerous condition. Recent trends in unpublished case law make it apparent that the Minnesota courts are not going to find such notice for conditions known to exist for less than 30 minutes. The *Bahl* case, in which a woman slipped on a condition that had only existed for approximately 15 minutes, appears to be an extreme anomaly. The Minnesota courts will not find liability under similar circumstances in future cases.

Summary

Actions involving premises liability are difficult to prove from the plaintiff's perspective. If a property owner is able to demonstrate that the danger located on their premise was open and obvious, the plaintiff's claim fails. It also fails if the plaintiff fails to demonstrate that the property owner had actual or constructive notice of the dangerous condition. Case law still does not make it apparent how much time must lapse for an owner to have receive constructive notice of a condition, but the recent unpublished decisions of the Minnesota Court of Appeals see to clarify that the amount of time that must lapse is somewhere greater than 30 minutes. More cases will need to be considered in the future before it will be readily apparent how much time must lapse, though it is doubtful that Minnesota will see any decisions like that of *Bahl* again any time soon.

Closing Discussion

Although the three areas within tort law that have been considered in this thesis differ enormously from one another, it is clear that one common thread exists among them: each has involved contradictory decisions and conflicting interpretations of the law within Minnesota. On its face, premises liability appears to be a relatively settled area of law with few cases reaching the level of the Minnesota Supreme Court, yet ambiguities exist, particularly relating to how much time must lapse for a property owner to have received construct notice of a danger. As for cases involving mentally impaired tortfeasors, it is curious that the Minnesota courts have not had to deal with more instances involving liability of the mentally insane and disabled. With other jurisdictions allowing for some applications of a civil insanity defense, and with state institutions being able to assert the defense of discretionary immunity in actions involving their liability for a mentally impaired person's actions, plaintiffs in Minnesota face serious challenges to a successful claim against this specific type of tortfeasors. Finally, it is the area of dram shop law that seems to generate the most discussion as a result of so many changes to the CDA in recent decades. Public policy pressures and congressional amendments have allowed the courts more latitude to find defendants liable under Minnesota's Civil Damages Act. The many changes, ambiguities, and conflicting decisions seen in these three areas of tort law demonstrate the importance of recognizing where the law is headed for the cases of the future.

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