



---

1997

## Intoxicating Liquors - Persons Liable: The North Dakota Dram Shop Statute Does Not Supersede the Common Law Duty of a Tavernkeeper to Intervene in a Bar Fight

Rocky West Broncato

Follow this and additional works at: <https://commons.und.edu/ndlr>



Part of the [Law Commons](#)

---

### Recommended Citation

Broncato, Rocky West (1997) "Intoxicating Liquors - Persons Liable: The North Dakota Dram Shop Statute Does Not Supersede the Common Law Duty of a Tavernkeeper to Intervene in a Bar Fight," *North Dakota Law Review*. Vol. 73 : No. 3 , Article 4.

Available at: <https://commons.und.edu/ndlr/vol73/iss3/4>

This Case Comment is brought to you for free and open access by the School of Law at UND Scholarly Commons. It has been accepted for inclusion in North Dakota Law Review by an authorized editor of UND Scholarly Commons. For more information, please contact [und.common@library.und.edu](mailto:und.common@library.und.edu).

INTOXICATING LIQUORS—PERSONS LIABLE:  
THE NORTH DAKOTA DRAM SHOP STATUTE DOES NOT  
SUPERSEDE THE COMMON LAW DUTY OF A TAVERNKEEPER  
TO INTERVENE IN A BAR FIGHT

*Zueger v. Carlson*, 542 N.W.2d 92 (N.D. 1996)

I. FACTS

On October 29, 1993, Lillian Zueger and LeRoy Kudrna were injured in a fight at Boomers, a bar in Mandan, North Dakota.<sup>1</sup> Mark Carlson, an off-duty bouncer at Boomers, attacked Zueger and Kudrna, causing permanent injuries.<sup>2</sup> Zueger and Kudrna later retained counsel and sent a demand letter to Boomers.<sup>3</sup> Boomers had two insurance policies, a dram shop liability policy and a comprehensive premises liability policy.<sup>4</sup> Zueger and Kudrna settled their dram shop claim with Boomers for \$10,000, paid from the dram shop liability policy.<sup>5</sup> Along with the settlement, the parties signed a release that specifically provided that Zueger and Kudrna were releasing only their dram shop claims, and leaving open claims under Boomers' premises liability policy.<sup>6</sup>

---

1. *Zueger v. Carlson*, 542 N.W.2d 92, 93 (N.D. 1996).

2. *Id.* Zueger and Kudrna alleged that Carlson approached Kudrna and asked him whether Zueger was his wife. Appellant's Brief at 7, *Zueger v. Carlson*, 542 N.W.2d 92 (N.D. 1996) (No. 950205). After Kudrna replied that Zueger was his girlfriend, Carlson asked whether he could dance with Zueger. *Id.* Kudrna answered "go ahead, if she wants to." *Id.* While the parties differ thereafter as to what was said, independent witnesses confirmed that Carlson suddenly struck Zueger in the face with his fist. *Id.* The sudden blow caused Zueger to fall to the floor and hit her head on the foot of the bar. *Id.* Carlson began kicking Zueger in the head while she lay on the floor, screaming for help. *Id.* In the meantime, while Kudrna was in the process of attempting to come to Zueger's aid, Carlson struck Kudrna in the face, causing Kudrna to fall to the floor. *Id.* Carlson then began kicking Kudrna in the head. *Id.*

3. See Appellant's Brief at 2, *Zueger* (No. 950205).

4. *Zueger*, 542 N.W.2d at 93. The dram shop liability policy was with Acceptance Insurance Company, and the comprehensive general liability policy was with Capital Indemnity Corporation. *Id.*

5. See *id.* In negotiations with Zueger's and Kudrna's attorneys both insurance companies individually alleged that the other company's coverage should primarily apply. See Appellant's Brief at 2, *Zueger* (No. 950205). Zueger and Kudrna eventually reached a partial settlement with Acceptance, the dram shop carrier, in the amount of \$10,000. *Id.*

6. See Appellant's Brief at 2, *Zueger* (No. 950205). The relevant portion of the release states:

The undersigned . . . do hereby . . . FOREVER DISCHARGE Acceptance Insurance Company, Boomers, . . . and all others who may be liable . . . from any dram shop claim against Boomers, arising out of personal injuries received by Lillian Zueger and Lee Kudrna at Boomers on October 29, 1993. This release includes any damages by Lillian Zueger or Lee Kudrna for personal injuries, physical pain and mental anguish, permanent injuries, past and future medical or other bills, lost income or earning capacity, or any other damages whatsoever, resulting or to result from an incident involving an assault on Lillian Zueger and Lee Kudrna at Boomers, . . . as a result of Boomers' dramshop liability. This release does not include a release of Lillian Zueger and Lee Kudrna's claim against Boomers under Boomers' premises liability policy for any claims for negligent security, failure to provide adequate security, failure to stop an assault or any other premises liability claims. This release is a release of Lillian Zueger and Lee Kudrna's dramshop claim only against Boomers.

Appellant's Brief app. at 24, *Zueger* (No. 950205) (emphasis added).

After settling their dramshop claim, Zueger and Kudrna brought an action in Morton County District Court on their remaining claims against Carlson and Boomers.<sup>7</sup> In their action, Zueger and Kudrna asserted that Boomers failed to provide adequate security and that Boomers' employees and security personnel failed to come to their aid during the attack.<sup>8</sup> Zueger and Kudrna further asserted that the assault was stopped only when other patrons managed to restrain Carlson.<sup>9</sup> Boomers moved for summary judgment, asserting that the premises liability claims were, in fact, dram shop claims by another name.<sup>10</sup> The district court concluded that the North Dakota dram shop statute<sup>11</sup> superseded all other forms of tavernkeeper liability, and that Zueger and Kudrna had failed to establish any common law duty of a tavernkeeper to provide adequate security on its premises.<sup>12</sup> The district court granted Boomers' motion for summary judgment and dismissed all claims against Boomers.<sup>13</sup> Zueger and Kudrna appealed the court's decision.<sup>14</sup> The North Dakota Supreme Court reversed, and *held* that a release of dram shop claims does not release all tort claims against a bar,<sup>15</sup> and further *held* that a

---

7. See *Zueger*, 542 N.W.2d at 94.

8. See *id.* at 93. Zueger and Kudrna alleged that Boomers personnel not only failed to come to their aid, but also that Boomers personnel actually restrained Kudrna from coming to the aid of Zueger, while Carlson was assaulting Zueger. Appellant's Brief app. at 28, *Zueger* (No. 950205).

9. *Zueger*, 542 N.W.2d at 93. Plaintiffs alleged that Kudrna was the first person to attempt to come to Zueger's aid. Appellant's Brief app. at 29, *Zueger* (No. 950205). However, when Kudrna approached Carlson, Carlson struck Kudrna in the face, knocking Kudrna to the floor. *Id.*

10. *Zueger*, 542 N.W.2d at 94. Specifically, defendant argued that summary judgment should be granted for the following reasons: the common law has been superseded by the dram shop statute; the release of any dram shop liability releases all potential liability; plaintiffs cannot split their dram shop claims from their negligence claims; and the plaintiffs' complaint fails to allege a basis for liability separate and apart from the sale of alcohol. Appellant's Brief app. at 18-23, *Zueger* (No. 950205).

11. N.D. CENT. CODE § 5-01-06.1 (1987). Section 5-01-06.1 of the North Dakota Century Code states that:

Every spouse, child, parent, guardian, employer, or other person who is injured by any obviously intoxicated person has a claim for relief for fault under section 32-03.2-02 against any person who knowingly disposes, sells, barter, or gives away alcoholic beverages to a person under twenty-one years of age, an incompetent, or an obviously intoxicated person, and if death ensues, the survivors of the decedent are entitled to damages defined in section 32-21-02. No claim for relief pursuant to this section may be had on behalf of the intoxicated person nor on behalf of the intoxicated person's estate or personal representatives; nor may a claim for relief be had on behalf of an adult passenger in an automobile driven by an intoxicated person or on behalf of the passenger's estate or personal representatives.

*Id.*

12. *Zueger*, 542 N.W.2d at 94.

13. *Id.* Judgment was entered dismissing all claims against Boomers, only after Zueger, Kudrna, and Carlson stipulated to the dismissal of all claims against Carlson. Appellant's Brief app. at 38, *Zueger* (No. 950205). The stipulation apparently arose out of Zueger's and Kudrna's desire to appeal the district court's decision. *Id.* Boomers had filed a motion to dismiss Zueger's and Kudrna's first attempted appeal on the basis that final judgment had not been entered because Mark Carlson still remained a party to the case. *Id.* at 5.

14. *Zueger*, 542 N.W.2d at 94.

15. *Id.* at 97.

tavernkeeper has a duty to exercise reasonable care to prevent and stop assaults on its patrons.<sup>16</sup>

## II. LEGAL BACKGROUND

In most states,<sup>17</sup> when an intoxicated tavern patron assaults another person, the assaulted person may bring an action against a tavernkeeper under a statutorily imposed duty of a tavernkeeper not to serve an obviously intoxicated person.<sup>18</sup> However, an alternative or supplemental cause of action may exist through common law principles of premises liability.<sup>19</sup>

### A. DRAM SHOP LIABILITY

At common law, no remedy existed for injuries to persons resulting from the sale of alcohol, either on the basis that the sale was a direct wrong, or on the grounds of negligence.<sup>20</sup> The rationale for the rule is that the consumption of the alcohol, not the sale itself, is the proximate cause of the purchaser's injuries.<sup>21</sup> To fill the void of the common law, many states have enacted dram shop statutes imposing civil liability on alcohol providers.<sup>22</sup>

---

16. *Id.*

17. See *infra* note 22 (providing citations of existing state dram shop laws).

18. See generally 45 AM. JUR. 2d *Intoxicating Liquors* § 553 (1995) (discussing tavernkeeper liability under dram shop acts). These statutes are commonly known as "dramshop acts" or "civil damage acts." *Id.*; see also BLACK'S LAW DICTIONARY 494 (6th ed. 1990) (defining a "dram-shop" as "[a] drinking establishment where liquors are sold to be drunk on the premises; a bar or saloon"). A "dram" is defined as "[a] drink of some substance containing alcohol; something which can produce intoxication. An apothecary system measurement of fluid, roughly equivalent to four or five cc, or one teaspoonful." *Id.*

19. See *Manuel v. Weitzman*, 191 N.W.2d 474, 478 (Mich. 1971) (holding a tavernkeeper liable under principles of premises liability as well as the Michigan state dram shop act for a third person assault); see also Joan Teshima, Annotation, *Tavernkeeper's Liability to Patron for Third Person's Assault*, 43 A.L.R.4th 281, 308 (1986 & Supp. 1996) (discussing different theories of fault for third person assaults in taverns, including premises liability).

20. *Stewart v. Ryan*, 520 N.W.2d 39, 47 (N.D. 1994); see also Daphne D. Sipes, *The Emergence of Civil Liability for Dispensing Alcohol: A Comparative Study*, 8 REV. LITIG. 1, 3-6 (1988) (comparing different state laws that hold a tavernkeeper liable for injuries caused by an intoxicated third person).

21. *Stewart*, 520 N.W.2d at 47 (citing 45 AM. JUR. 2d *Intoxicating Liquors* § 553 (1969)).

22. ALA. CODE §§ 6-5-70 to -71 (1993); ALASKA STAT. §§ 04.21.020, 04.16.030 (Michie 1994); ARIZ. REV. STAT. ANN. §§ 4-301, 4-311 to -312 (West 1995); CAL. BUS. & PROF. CODE §§ 25602, 25602.1 (West 1985 & Supp. 1995); COLO. REV. STAT. ANN. §§ 12-46-112.5, -47-128.5 (West 1991); COLO. REV. STAT. ANN. § 13-21-103 (West 1987); CONN. GEN. STAT. ANN. § 30-102 (West 1990); FLA. STAT. ANN. § 768.125 (West 1986); GA. CODE ANN. §§ 51-1-18, -40 (Harrison 1994); IDAHO CODE § 23-808 (1995); 235 ILL. COMP. STAT. ANN. 5/6-21 (West 1993); IND. CODE ANN. § 7.1-5-10-15.5 (Michie 1996); IOWA CODE ANN. §§ 123.49, .92 (West 1987 & Supp. 1996); KY. REV. STAT. ANN. § 413.241 (Michie 1992); ME. REV. STAT. ANN. tit. 28-A, §§ 2501-2516 (West 1988); MICH. COMP. LAWS ANN. § 436.22 (West 1995); MINN. STAT. ANN. § 340A.801 (West 1990); MISS. CODE ANN. § 67-3-73 (1991); MO. ANN. STAT. § 537.053 (West 1988); MONT. CODE ANN. §§ 27-1-710, 16-6-305(4) (1995); N.H. REV. STAT. ANN. §§ 507-F:1 to :8 (Supp. 1995); N.J. STAT. ANN. §§ 2A:22A-1 to -7 (West 1987); N.M. STAT. ANN. § 41-11-1 (Michie 1996); N.Y. GEN. OBLIG. LAW § 11-101 (McKinney 1989); N.C. GEN. STAT. §§ 18B-120 to -129 (1995); N.D. CENT. CODE § 5-01-06.1 (1987); OHIO REV. CODE ANN. §§ 4399.01, .02, .07, .08, .18 (Anderson 1989); OR. REV. STAT. §§ 30.950 to .960 (1995); PA. STAT.

Typically, dramshop acts provide for recovery against a provider of alcohol for injury or damage *by* an intoxicated person or *in consequence of* the intoxication of a person.<sup>23</sup> Each of these two formulas has its own significance.<sup>24</sup> In actions brought for an injury inflicted *by* an intoxicated person, the courts are virtually unanimous in holding that it is not necessary for the intoxication to be the proximate cause of the injury.<sup>25</sup> However, in actions brought for an injury inflicted *in consequence of* a person's intoxication, some courts have held that there can be no recovery unless the intoxication was the proximate cause, or at least a contributing cause of the injury.<sup>26</sup>

The current North Dakota dram shop statute,<sup>27</sup> which was amended in 1987, retains the language "injured by any obviously intoxicated person," and no longer contains the words "in consequence of the intoxication."<sup>28</sup> Thus, in North Dakota the proper level of causation

---

ANN. tit. 47, § 4-497 (West Supp. 1996); R.I. GEN. LAWS §§ 3-14-1 to -13 (1987); TENN. CODE ANN. §§ 57-10-101 to -102 (1989); TEX. ALCO. BEV. CODE ANN. §§ 2.01 to .03 (West 1995); UTAH CODE ANN. § 32A-14-101 (1994 & Supp. 1996); VT. STAT. ANN. tit. 7, §§ 501 to 507 (1988); WIS. STAT. ANN. §§ 125.035 to .037 (West 1989); WYO. STAT. ANN. § 12-5-502 (Michie 1996).

23. See *Stewart*, 520 N.W.2d at 47 (quoting *Thompson v. Wogan*, 33 N.E.2d 151, 152 (Ill. 1941) (discussing the difference between injury caused *by* an intoxicated person and injury caused *in consequence of* the intoxication of a person)); *Meshefski v. Shirnan Corp.*, 385 N.W.2d 474, 476 (N.D. 1986) (demonstrating that prior to 1987, section 5-01-06 of the North Dakota Century Code "unambiguously provide[d] two grounds for recovery of damages: (1) injury 'by any intoxicated person'; or (2) injury 'in consequence of intoxication.'"); H.B. Chermiside, Jr., Annotation, *Liability of Liquor Furnisher Under Civil Damage or Dramshop Act for Injury or Death of Intoxicated Person from Wrongful Act of a Third Person*, 65 A.L.R.2d 923, 924 (1954) (examining liability based on the two formulas).

24. *Stewart* 520 N.W.2d at 47; Chermiside, *supra* note 23, at 925.

25. *Meshefski*, 385 N.W.2d at 476 (quoting Chermiside, *supra* note 23, at 925). The *Meshefski* court stated "[i]t is enough that the injury was *by* an intoxicated person, regardless of whether it would have been committed by him if sober. In other words, if *by* an intoxicated person, it is not necessary to prove that the injury was in consequence of intoxication." *Id.* (quoting *Lee v. Hederman*, 138 N.W. 893, 894 (Iowa 1912)). The practical effect of the *Meshefski* decision was to remove the requirement of proximate causation from North Dakota's dram shop act. See *id.*

26. See *Stewart*, 520 N.W.2d at 47 (stating that in order for a dram shop action to be viable, the dram shop violation must have contributed to the intoxicated person's intoxication, and the plaintiff's injury must have been inflicted by the intoxicated person); Chermiside, *supra* note 23, at 925 (noting that proximate cause becomes relevant only in situations concerning *in consequence of*). In reality, an injury inflicted *in consequence of* a person's intoxication must necessarily be inflicted *by an intoxicated person*. See *Meshefski*, 385 N.W.2d at 476-77. The distinction is only relevant to causation. *Id.* While the distinction seems slight, some courts have held that it is reversible error for the court to fail to distinguish between injury *by* an intoxicated person and injury *in consequence of* the intoxicated person in a dram shop action. See *id.* This was the case in *Meshefski*, where the trial court gave a jury instruction that only dealt with injury *as a result of* intoxication. *Id.* The North Dakota Supreme Court concluded that the instruction constituted reversible error. *Id.* at 477.

27. N.D. CENT. CODE § 5-01-06.1 (1987).

28. *Id.* Compare this with the pre-1987 dram shop statute:

Every spouse, child, parent, guardian, employer, or other person who is injured by any intoxicated person, or *in consequence of intoxication*, has a claim for relief against any person who caused such intoxication by disposing, selling, bartering, or giving away alcoholic beverages contrary to statute for all damages sustained, and in the event death ensues, the survivors of the decedent are entitled to damages defined in section 32-21-02.

N.D. CENT. CODE § 05-01-06 (1985) (amended 1987) (emphasis added).

requires that the dram shop violation<sup>29</sup> must have contributed to the intoxicated person's intoxication, and that the intoxicated person must have inflicted the injury.<sup>30</sup> A showing of proximate causation between the intoxication and the injury is no longer a requirement in North Dakota dram shop actions.<sup>31</sup>

Another significant difference between the pre-1987 and 1987 dramshop act is the 1987 act's incorporation of the North Dakota comparative fault statute.<sup>32</sup> In this statutory scheme, the dram shop act specifies the conduct necessary to establish a dram shop violation.<sup>33</sup> These causal requirements are also retained in the comparative fault statute, for the purpose of allocating fault among those persons contributing to the injury.<sup>34</sup>

The North Dakota Supreme Court has noted that the dram shop act is remedial in nature and should be construed to suppress the mischief

---

29. Under the current dram shop act, a "violation" consists of knowingly selling, bartering, or giving away alcoholic beverages to either a minor, an incompetent, or an obviously intoxicated person. N.D. CENT. CODE § 5-01-06.1. Pertaining to the "obviously intoxicated person" prong, the standard for determining whether a provider of alcohol provided the alcohol *knowingly* is as follows:

[T]he person to whom the sale is made must be intoxicated to such an extent that the seller, using his usual and reasonable powers of observation, sees or should see that the buyer is intoxicated. In other words, there must be such outward manifestation of intoxication that a person using his reasonable powers of observation can see or should see that such person has become intoxicated.

*Jore v. Saturday Night Club, Inc.*, 227 N.W.2d 889, 895 (N.D. 1975) (quoting *Strand v. Village of Watson*, 72 N.W.2d 609, 615 (Minn. 1955)). In *Jore*, the court noted that there is a manifest difference between the term "under the influence of intoxicating liquor" as used in traffic laws, and the term "obviously intoxicated." *Id.*

30. *Stewart*, 520 N.W.2d at 46-47. Therefore, the level of causation in the 1987 dram shop act has remained the same since the *Meshefski* interpretation of the pre-1987 dram shop act.

31. *Id.* at 47. *But see id.* at 50 (Levine, J., concurring in part and in the result) (stating that the legislature intended basic tort principles of causation to apply to dram shop actions, including proximate cause).

32. *Id.* at 46 (discussing the use of North Dakota Century Code § 32-03.2-02 (Supp. 1995)). *Cf. Feuerherm v. Ertelt*, 286 N.W.2d 509, 511 (N.D. 1979) (stating that comparative negligence does not apply to actions brought under the dram shop act). North Dakota's comparative fault statute, section 32-03.2-02 of the North Dakota Century Code, states that:

Contributory fault does not bar recovery in an action by any person to recover damages for death or injury to person or property unless the fault was as great as the combined fault of all other persons who contribute to the injury, but any damages allowed must be diminished in proportion to the amount of contributing fault attributable to the person recovering . . . Under this section, fault includes negligence, malpractice, absolute liability, *dram shop liability*, failure to warn, reckless or willful conduct, assumption of risk, misuse of product, failure to avoid injury, and product liability, including product liability involving negligence or strict liability or breach of warranty for product defect.

N.D. CENT. CODE § 32-03.2-02 (Supp. 1995) (emphasis added).

33. *See Stewart*, 520 N.W.2d at 47 (noting that the level of causation requires that the dram shop violation must have contributed to the intoxicated person's intoxication, and that the intoxicated person must have inflicted the plaintiff's injury).

34. *Stewart*, 520 N.W.2d at 46.

and advance the remedy.<sup>35</sup> Therefore, to accommodate this objective, the court has construed the dram shop act broadly.<sup>36</sup>

#### B. PREMISES LIABILITY AS AN ALTERNATIVE TO OR A SUPPLEMENT TO A DRAM SHOP CLAIM

As an alternative or a supplement to a dramshop action, a plaintiff may bring a claim based on a tavernkeeper's premises liability.<sup>37</sup> Generally, dram shop acts afford an exclusive remedy for injuries arising out of an unlawful sale, gift, or furnishing of alcohol.<sup>38</sup> Dram shop acts, however, do not abrogate the duty of tavernkeepers to maintain safe conditions for their patrons.<sup>39</sup>

There is generally no duty to protect others against harm from third persons, absent a special relationship.<sup>40</sup> However, the relationship between a tavernkeeper and a tavern patron is custodial in nature.<sup>41</sup> The general rule is that a tavernkeeper, although not an insurer of the safety of its patrons, has a common law duty independent of the dram shop act to exercise reasonable care to protect patrons from reasonably foreseeable

---

35. *Id.* (citing *Iszler v. Jorda*, 80 N.W.2d 665, 667 (N.D. 1957)).

36. *See, e.g., Born v. Mayers*, 514 N.W.2d 687, 689 (N.D. 1994) (holding social hosts liable under the dram shop act for assaults by third persons).

37. *See generally* Teshima, *supra* note 19, at 288 (discussing different theories of fault for third person assaults in taverns, including premises liability).

38. 45 AM. JUR. 2d *Intoxicating Liquors* § 561 (1969).

39. *See* Manuel v. Weitzman, 191 N.W.2d 474, 476-77 (Mich. 1971) (allowing a dram shop action and a common law premises liability action to be joined into one single action). Taverns, just like bars, theaters, parking garages, hotels, and stores, have a duty to maintain safe conditions for their patrons. Martin J. Rooney, *Liability of a Premises Owner for the Provision of Security: The Massachusetts Experience*, 29 SUFFOLK U. L. REV. 51, 54 (1995).

40. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 56 (5th ed. 1984).

41. *Id.* (distinguishing between *protective* and *custodial* relationships). *Protective* relationships require the defendant to *guard* its charge against harm from others. *Id.* For example, "the duty of a carrier toward its passengers may require it to maintain order in its trains and stations, and to use reasonable care to prevent not only conduct which is merely negligent, but also physical attacks or thefts of property on the part of other passengers or strangers." *Id.* *Custodial* relationships, on the other hand, require the defendant to *control* its charge and to guard other persons against its dangerous propensities. *Id.* For example, "[a] tavern keeper must act reasonably to prevent intoxicated patrons from injuring others." *Id.*

injury at the hands of other patrons.<sup>42</sup> To determine if an injury was foreseeable, many courts have considered the tests set out in *Nevin v. Carlasco*.<sup>43</sup> These tests include whether a tavernkeeper: 1) allowed on the premises a patron with a known propensity for fighting; 2) allowed a patron whose conduct had become too aggressive to remain on the premises; 3) failed to act after being warned of a patron's threat; 4) tolerated disorderly conditions; 5) failed to intervene in a fight as soon as possible; 6) failed to provide an adequate staff to police the premises; or 7) failed to summon police.<sup>44</sup> A tavernkeeper's duty to maintain safe conditions for patrons is triggered if one or more of these factors are met.<sup>45</sup>

### III. CASE ANALYSIS

In *Zueger v. Carlson*,<sup>46</sup> the North Dakota Supreme Court faced two issues.<sup>47</sup> First, whether a tavernkeeper has a duty to exercise reasonable care to prevent and stop assaults on tavern patrons.<sup>48</sup> The court answered

---

42. See *Manuel*, 191 N.W.2d at 477-78. A tavernkeeper's liability for assaults upon its patrons is often premised upon section 344 of the Restatement (Second) of Torts, which states:

A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to (a) discover that such acts are being done or are likely to be done, or (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

RESTATEMENT (SECOND) OF TORTS § 344 (1965). Comment "f" to section 344 clarifies the extent of the duty:

f. *Duty to police premises.* Since the possessor is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring, or are about to occur. He may, however, know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual. If the place or character of his business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection.

RESTATEMENT (SECOND) OF TORTS § 344 cmt. f (1965).

43. 365 P.2d 637, 638 (Mont. 1961); see generally *Teshima*, *supra* note 19, at 289 (referring to *Nevin v. Carlasco*, 365 P.2d 637 (Mont. 1961)).

44. See *Teshima*, *supra* note 19, at 289 (quoting *Nevin*, 365 P.2d at 638).

45. *Nevin v. Carlasco*, 365 P.2d 637, 638 (Mont. 1961).

46. 542 N.W.2d 92 (N.D. 1996).

47. *Zueger v. Carlson*, 542 N.W.2d 92, 93 (N.D. 1996). The Appellant phrased the issues as follows:

- I. Whether the district court erred in holding that Boomers owed no duty to come to the aid of the plaintiffs or to provide reasonable security services on its premises.
- II. Whether the district court erred in holding that passage of the dram shop act extinguished all other forms of common law premises liability for tavern owners.

Appellant's Brief at 1, *Zueger* (No. 950205) (capitalization altered).

48. *Zueger*, 542 N.W.2d at 93.

this question in the affirmative, noting that this duty is triggered when an assault is foreseeable.<sup>49</sup> Second, the court faced the issue of whether a release of dram shop claims releases all tort claims against a bar.<sup>50</sup> The court answered this question in the negative, noting that Boomers expressly consented to keeping Zueger's and Kudrna's premises liability claims open, and noting that dram shop statutes do not supersede common law negligence actions.<sup>51</sup>

#### A. TAVERNKEEPER'S DUTY TO EXERCISE REASONABLE CARE TO PREVENT AND STOP ASSAULTS ON TAVERN PATRONS

A tavernkeeper's duty to protect patrons from third party assaults was an issue of first impression for the North Dakota Supreme Court.<sup>52</sup> The court noted that liability of a tavernkeeper for assaults upon patrons is often premised upon section 344 of the Restatement (Second) of Torts,<sup>53</sup> and Comment "f" of the Restatement.<sup>54</sup> The court agreed with other courts that have relied upon section 344 to conclude that a tavernkeeper owes a duty to patrons to protect them from assaults by other patrons "when the owner has reasonable cause to anticipate conduct on the part of third persons which is likely to endanger the safety of patrons."<sup>55</sup>

The court noted that Zueger had asserted that Boomers knew that fights had occurred on the premises in the past, that Carlson was a violent

49. *Id.* at 97.

50. *Id.* at 93.

51. *Id.* at 97.

52. *Id.* at 96.

53. *Id.* (referring to RESTATEMENT (SECOND) OF TORTS § 344, (1965)).

54. RESTATEMENT (SECOND) OF TORTS § 344 cmt. f (1965).

55. *Id.* at 97 (citing *Cotterhill v. Bafile*, 865 P.2d 120, 122-23 (Ariz. Ct. App. 1993); *Observatory Corp. v. Daly*, 780 P.2d 462, 468-69 (Colo. 1989); *Stevens v. Jefferson*, 436 So. 2d 33, 34-35 (Fla. 1983); *Lucht v. Stage 2, Inc.*, 606 N.E.2d 750, 754 (Ill. 1992); *Seibert v. Vic Regnier Builders*, 856 P.2d 1332, 1337 (Kan. 1993); *Sweenor v. 162 State St., Inc.*, 281 N.E.2d 280, 281-82 (Mass. 1972); *Bencivenga v. J.J.A.M.M., Inc.* 609 A.2d 1299, 1302 (N.J. Super. Ct. App. Div. 1992); *Stevens v. Kirby*, 450 N.Y.S.2d 607, 610 (App. Div. 1982); *Jones v. Oberg*, 628 P.2d 773, 775-76 (Or. 1981)). Zueger and Kudrna also argued an alternative basis, aside from section 344 of the Restatement (Second) of Torts, for finding a duty of a tavernkeeper to come to the aid of its patron. Appellant's Brief at 11, *Zueger* (No. 950205). This argument arises out of section 322 of the Restatement (Second) of Torts, which states:

If the actor knows or has reason to know that by his conduct, whether tortious or innocent, he has caused such bodily harm to another as to make him helpless and in danger of further harm, the actor is under a duty to exercise reasonable care to prevent such further harm.

RESTATEMENT (SECOND) OF TORTS § 322 (1965); see also *South v. National R.R. Passenger Corp.*, 290 N.W.2d 819, 837 (N.D. 1980) (holding a railroad liable, under Section 322 of the Restatement (Second) of Torts, for its engineer's failure to aid an automobile passenger whose automobile was struck by a train). Zueger and Kudrna argued that Boomers knew that Carlson was a violent person and that, by allowing Carlson to remain in the bar, Boomers subjected Zueger and Kudrna to bodily harm. Appellant's Brief at 12, *Zueger* (No. 950205). This knowledge gave Boomers a duty, independent of its duty under dram shop, to intervene in the fight and minimize the plaintiff's harm. *Id.* The court did not address this theory in its opinion. *Zueger*, 542 N.W.2d at 92.

person, and that Carlson had been involved in previous fights at Boomers.<sup>56</sup> This was enough to raise material issues of fact on the foreseeability of the assault.<sup>57</sup> The court stated that the district court erred in ruling, as a matter of law, that Boomers had no duty to protect Zueger and Kudrna from Carlson's attack or to intervene once it began.<sup>58</sup>

**B. RELEASE OF DRAM SHOP CLAIMS—THE DRAM SHOP ACT DOES NOT SUPERSEDE ALL COMMON LAW LIABILITY OF A TAVERNKEEPER**

Boomers argued that the dram shop act supersedes all common law liability of a tavernkeeper.<sup>59</sup> Therefore, Boomers contended, the release of Zueger's and Kudrna's dram shop claims released Boomers from all liability arising from the assault.<sup>60</sup> Boomers based their argument on two different grounds.<sup>61</sup> First, Boomers relied on section 1-01-06 of the North Dakota Century Code,<sup>62</sup> which purports to abolish common law in cases where the law is declared by code.<sup>63</sup>

The court rejected this theory on the ground that dram shop laws are *sui generis*.<sup>64</sup> The court stated that the legislature intended to create

56. *Zueger*, 542 N.W.2d at 97.

57. *Id.* The court stated, "If the assault was foreseeable, Boomers had a duty to use reasonable care to protect its patrons from injury. Even if the specific attack was not foreseeable, Boomers had a duty once the attack began to exercise reasonable care to stop the attack." *Id.*

58. *Id.*

59. *Id.* at 95.

60. *Id.*

61. *Id.* at 95-96.

62. N.D. CENT. CODE § 1-01-06 (1987).

63. *Zueger*, 542 N.W.2d at 95 (quoting N.D. CENT. CODE § 1-01-06 (1987)). Boomers also quoted *Thoring v. Bottonsek*, which referred to section 1-01-06 of the North Dakota Century Code in concluding that "[c]ommon law has been superseded by the dram shop act." Appellee's Brief at 10, *Zueger* (No. 950205) (quoting *Thoring v. Bottonsek*, 350 N.W.2d 586, 588 (N.D. 1984)). In *Thoring*, Michael Bottonsek, a North Dakota resident, drove to Montana and consumed alcohol in a Montana tavern. *Thoring v. Bottonsek*, 350 N.W.2d 586, 587 (N.D. 1984). While returning to North Dakota the next morning, Bottonsek drove his vehicle on the wrong side of a North Dakota highway and collided head-on with another vehicle. *Id.* Plaintiff's decedent, a passenger in Bottonsek's car, died as a result of the collision. *Id.* Plaintiff brought suit in North Dakota against Bottonsek and the Montana tavern that served Bottonsek. *Id.* The court stated that since North Dakota's dram shop statute does not have an extraterritorial effect, the only way a Montana tavern could be held liable would be either through North Dakota or Montana common law. *Id.* at 588. The court noted that, under section 1-01-06 of the North Dakota Century Code, common law was superseded by the dram shop act. *Id.* Therefore, the court concluded the only way to hold a Montana tavern liable would be through Montana common law, which was nonexistent at the time. *Id.*

In district court, Zueger and Kudrna opposed Boomers' motion for summary judgment and argued that "common law" under *Thoring* and section 1-01-06 of the North Dakota Century Code refers to a cause of action for the negligent sale of alcohol to an obviously intoxicated person. Appellant's Brief app. at 30, *Zueger* (No. 950205). Zueger and Kudrna contended that their common law claim was not for the negligent sale of alcohol to an intoxicated person. *Id.* Rather, their common law claim pertained to Boomers' failure to come to the aid of an invitee on its premises. *Id.* In *Zueger*, the North Dakota Supreme Court did not address *Thoring v. Bottonsek*.

64. *Zueger*, 542 N.W.2d at 95 (citing *Stewart v. Ryan*, 520 N.W.2d 39, 45 (N.D. 1994); *Day v. General Motors Corp.*, 345 N.W.2d 349, 355 (N.D. 1984)). "Sui generis" is defined as "[o]f its own kind or class; *i.e.*, the only one of its own kind; peculiar." BLACK'S LAW DICTIONARY 1434 (6th ed. 1990) (emphasis original).

a new, distinct cause of action unrelated to any recognized by the common law.<sup>65</sup> The court also noted that the dram shop act does not purport to cover the entire field of bar owner liability.<sup>66</sup> The court therefore reasoned that it is axiomatic that the legislature did not intend to supersede unrelated premises liability actions against tavernkeepers.<sup>67</sup>

Boomers' second argument in favor of the proposition that the dram shop act supersedes all common law liability of a tavernkeeper arose out of language in the North Dakota Supreme Court's decision of *Stewart v. Ryan*.<sup>68</sup> The court in *Stewart* stated that "negligence, willful conduct, and dram shop liability are all integrated."<sup>69</sup> Boomers asserted that the express language in *Stewart* indicates that, under the 1987 statutory amendments, the dram shop act includes all forms of liability.<sup>70</sup>

The court rejected this argument, noting that a careful reading of the relevant portion of *Stewart* clarifies that negligence, willful conduct, and dram shop liability are integrated only for fault allocation under comparative fault.<sup>71</sup> The court further noted that *Stewart* expressly stated that negligence is a separate theory from dram shop liability.<sup>72</sup>

---

65. *Zueger*, 542 N.W.2d at 95 (citing *Aanenson v. Bastien*, 438 N.W.2d 151, 153 (N.D. 1989)).

66. *Id.* The court indicated that if the dram shop statute had intended, either expressly or implicitly, to cover the entire field of bar owner liability, then a basis might exist for superseding the common law. *Id.* (citing *Board of County Comm'r v. Peterson Excavating, Inc.*, 406 N.W.2d 674, 675-76 (N.D. 1987)). In *Peterson Excavating*, the court stated "if a particular statute is so designed that it covers the entire field to which it relates, it does so to the exclusion of the common law." *Peterson Excavating*, 406 N.W.2d at 676 (quoting *In re White*, 284 N.W. 357, 358 (N.D. 1939)).

67. *Zueger*, 542 N.W.2d at 95. The court quoted a case from the Supreme Court of Michigan, stating:

The common law duty of a liquor establishment to maintain a safe place of business for its customers is the same duty any business owes to those it invites upon its premises. The dram shop act was not intended to affect that duty. Dram shop acts were passed because under the common law it was not a tort to sell or furnish intoxicating liquor to an ordinary able-bodied man, even though as a result of his becoming intoxicated injury resulted to himself or to others. Their purpose was to fill a void in the law, not to remove the well-recognized duty of a tavern keeper to exercise due care for the welfare and safety of invited patrons.

*Id.* (quoting *Manuel v. Weitzman*, 191 N.W.2d 474, 476 (Mich. 1971) (footnote omitted)).

68. *Zueger*, 542 N.W.2d at 96 (referring to *Stewart v. Ryan*, 520 N.W.2d 39 (N.D. 1994)).

69. *Stewart*, 520 N.W.2d at 46. The relevant portion of the text that Boomers relied upon is as follows:

*The dram shop amendments specifically incorporate the requirement of N.D.C.C. § 32-03.2-02, for allocation of fault among all persons 'who contributed to the injury.'* Sections 32-03.2-01 and 32-03.2-02, N.D.C.C., expressly define 'fault' in terms of 'negligence,' 'reckless or willful conduct,' and 'dram shop liability.' That definition indicates that negligence remains a separate theory from dram shop liability, and contemplates that negligence, willful conduct, and dram shop liability are all integrated for the allocation of fault among those 'who contributed to the injury.' . . . The Legislature has therefore recognized that a person's willful or criminal conduct does not automatically extinguish dram shop fault and, instead, is an integrated part of the allocation of fault among those 'who contributed to the injury.'

*Zueger*, 542 N.W.2d at 95-96 (quoting *Stewart*, 520 N.W.2d at 46 (emphasis added)).

70. *Zueger*, 542 N.W.2d at 96.

71. *Id.* (quoting *Stewart*, 520 N.W.2d at 46).

72. *Id.* (quoting *Stewart*, 520 N.W.2d at 46).

The court therefore concluded that dram shop statutes do not supersede all common law liability of tavernkeepers.<sup>73</sup>

Boomers finally asserted that it would be an improper splitting of a cause of action to allow Zueger and Kudrna to pursue common law claims after releasing their dram shop claims.<sup>74</sup> The court rejected this argument, noting that the general rule against splitting a cause of action does not apply because the defendant had consented to the splitting of the claim.<sup>75</sup>

#### IV. IMPACT

The court's decision in *Zueger v. Carlson* effectively brings North Dakota in accord with the majority of state case law that allows a person injured by an obviously intoxicated third person to bring a claim against a tavernkeeper based on premises liability.<sup>76</sup> The court deemed it axiomatic that tavernkeepers have a duty to prevent and stop assaults on their patrons.<sup>77</sup> The court further held that a release of dram shop claims does not release all tort claims against a bar.<sup>78</sup> These two holdings, taken together, will increase a plaintiff's likelihood of recovery in alcohol-related assaults.

Prior to *Zueger*, the North Dakota Supreme Court had never heard a case where a plaintiff had brought a common law premises liability cause of action against a tavernkeeper for injuries caused by an intoxicated

---

73. *Id.* The court further noted that:

Boomers' argument is premised upon the logical fallacy that, because 'all fault' under comparative fault includes 'dram shop,' then "dram shop" must include 'all fault.' Besides defying logic, Boomers' argument demonstrates a misreading of *Stewart*. *Stewart* holds only that dram shop liability is to be considered in comparing fault under N.D.C.C. ch. 32-03.2. It did not imply dram shop liability extends to supersede other common law negligence claims.

*Id.*

74. *Id.* at 97.

75. *Id.* (citing *Klem v. Greenwood*, 450 N.W.2d 738, 742-43 (N.D. 1990)); *see also supra* note 6 (providing the relevant portions of *Zueger*, *Kudrna*, and *Boomer's* release). In a footnote, the Court stated:

Boomers argues there are insurmountable practical problems in attempting to try a case where the dram shop claims have been settled. *Zueger* responds dram shop and alcohol consumption will not be issues in the trial. Under our comparative fault law, however, it appears Boomers is entitled to have all theories of fault submitted to the jury. *See* N.D.C.C. § 32.-03.2-02. Accordingly, if requested by any party, the court should provide separate interrogatories to the jury on Boomers' dram shop fault and common law fault, and the jury is free to assess separate percentages of fault for those claims. Although we recognize this procedure may be cumbersome and create confusion, any difficulties in this regard were created by the parties when they settled the dram shop claims against Boomers and expressly reserved for trial other claims against Boomers.

*Zueger*, 542 N.W.2d at 97 n.3.

76. *See* *Teshima*, *supra* note 19, at 293-384 (1986 & Supp. 1996).

77. *Zueger*, 542 N.W.2d at 96.

78. *Id.*

third person.<sup>79</sup> This lack of assertion arises, in part, out of the fact that North Dakota has long had a codified cause of action for persons injured by obviously intoxicated persons.<sup>80</sup> Also contributing to this effect is section 1-01-06 of the North Dakota Century Code, which purports to abolish common law, in cases where the law is declared by code.<sup>81</sup> Finally, North Dakota's small population size limits fact patterns that would give rise to a significant number of alcohol-related premises liability cause of actions.

Now that the North Dakota Supreme Court has recognized common law premises liability for tavernkeepers as an alternative to or a supplement to a dram shop claim, plaintiffs will have more flexibility in their claims process. In cases where a tavernkeeper is insured through multiple policies, for example one dram shop policy and one premises liability policy, it may be in the interest of all parties involved to settle as soon as possible. Insurance companies may want to quickly offer settlement through a contract releasing all claims of the type the insurance company covers, and expressly leaving all other tort claims open.<sup>82</sup> The insurer settling first can then avoid litigation and pin a large portion of liability on the remaining insurer(s).

Plaintiffs may also bring suit against multiple insurers, on multiple theories of fault.<sup>83</sup> This could be especially helpful when there is a strong question whether the assailant was obviously intoxicated. In these cases, a plaintiff may not satisfy the requirements of the dram shop statute.<sup>84</sup> Having a common law premises liability action joined to a dram shop action gives a plaintiff an extra cushion of recovery if the plaintiff fails to satisfy the requirements of the dram shop statute.<sup>85</sup>

*Rocky West Broncato*

---

79. *Zueger*, 542 N.W.2d at 96. A tavernkeeper's duty to protect its patrons from third party assaults was an issue of first impression in *Zueger v. Carlson*. *Id.*

80. See Daniel R. Conrad, Case Comment, 71 N.D. L. REV. 743, 750-51 (1994) (laying out the history of North Dakota dram shop acts from 1877 to 1994). It is a fair assertion that a codified cause of action seems to be the most logical place to start in any claim for relief.

81. N.D. CENT. CODE § 1-01-06 (1987).

82. This scheme does not violate the general rule against splitting a cause of action, as long as the release is express. *Zueger*, 542 N.W.2d at 97 n.3.

83. See *id.* (stating that plaintiffs in dram shop actions are entitled to have all theories of fault submitted to the jury).

84. In order to be held liable under the dram shop act, a tavernkeeper must knowingly provide alcoholic beverages to either a minor, an incompetent, or an obviously intoxicated person. N.D. CENT. CODE § 5-01-06.1 (1987). Common law premises liability actions do not focus on whether the assailant was obviously intoxicated, but rather, whether the assault was foreseeable. Paula C. Murray, *Premises Liability: Owner Liability for Criminal Acts of Third Parties*, 22 REAL EST. L.J. 341, 343 (1994).

85. A problem posed by cases in which dram shop and common law claims are joined is whether the cause of action arises under the dramshop act, under the breach of common law duty, or under both theories of liability. *Manuel v. Weitzman*, 191 N.W.2d 474, 477 (Mich. 1971).