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## Intoxicating Liquors - Civil Damage Laws - Injuries to Person

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insured for an amount within the policy limits.<sup>11</sup> That liability is measured by the excess of a judgment recovered against the insured over the amount payable by the terms of the policy.<sup>12</sup>

Ordinarily, the question of bad faith is within the jury's province, but the various higher courts have held that such bad faith must be clearly and reasonably shown in order to sustain a verdict against the insurer.<sup>13</sup>

Bad faith has been demonstrated to be a complete disregard of the insured's financial interests,<sup>14</sup> an arbitrary refusal to settle for a reasonable sum where it is apparent from an honest perusal of the facts and the law that a suit would result in a verdict in excess of the policy limits,<sup>15</sup> or a refusal to compromise upon grounds which depart from the grant of power to the insurer to exclusively conduct settlement negotiations.<sup>16</sup>

Whether or not the insurer is liable for the difference in a recovery over the excess of the policy limits depends on the judgment and the good faith of the insurance company and its representatives.

DENNIS M. SOBOLIK.

INTOXICATING LIQUORS — CIVIL DAMAGE LAWS — INJURIES TO PERSON. — In an action under the Illinois Dram Shop Act against defendants who allegedly sold liquor to the driver of the car in which plaintiff was injured, a summary judgment was granted for the defendants on the ground that plaintiff was not an innocent party inasmuch as he participated in the drinking of liquor with the driver. The Appellate Court, Third Division, of Illinois, *held* that whether or not plaintiff was an innocent party under the law was a question of fact for the jury and that the motion for summary judgment should have been overruled. *Ness v. Bilbob Inn*, 15 Ill. App. 2d 340, 146 N.E.2d 234 (1957).

At common law, no legal liability was imposed on a seller of intoxicating liquor for damages resulting from intoxication.<sup>1</sup> Many jurisdictions have, however, created such liability by enacting so called "Dram Shop" or "Civil Damage Acts".<sup>2</sup> These acts have several purposes: they are designed, pursuant to the police power, to promote the public health, safety, morals and welfare by affording a remedy for injuries resulting from the wrongful conduct of intoxicated persons;<sup>3</sup> they promote temperance in the use of intoxicating beverages; and they provide a necessary check on the liquor traffic. Such acts, in this way, shift the burden of potential loss from the defenseless public to the owner of the dram shop who has the choice of bearing the

11. *Mendota Electric Co. v. New York Indemnity Co.*, 175 Minn. 181, 221 N.W. 61 (1928); *Aycock Hosiery Mill v. Maryland Cas. Co.*, 157 Tenn. 559, 11 S.W.2d 889 (1928); *Burnham v. Commercial Cas. Ins. Co.*, 10 Wash.2d 624, 117 P.2d 644 (1941) (A mistake of judgment is not bad faith).

12. *Ibid.*

13. See, e.g., *Wakefield v. Globe Indemnity Co.*, 246 Mich. 645, 225 N.W. 643 (1929); *Mendota Electric Co. v. New York Indemnity Co.*, 175 Minn. 181, 221 N.W. 61 (1928).

14. *Johnson v. Hardware Mut. Cas. Co.*, 109 Vt. 481, 1 A.2d 817 (1938).

15. *Wakefield v. Globe Indemnity Co.*, 246 Mich. 645, 225 N.W. 643, 645 (1929) (dictum).

16. *Hilker v. Western Automobile Ins. Co.*, 204 Wis. 1, 235 N.W. 413 (1931).

1. *Hyba v. C. A. Horneman Inc.*, 302 Ill. App. 143, 23 N.E.2d 564 (1939); *Cruse v. Aden*, 127 Ill. 231, 20 N.E. 73 (1889).

2. E.g., Minn., Mich., Iowa, Wis.

3. See *Gibbons v. Cannaven*, 393 Ill. 376, 66 N.E.2d 370 (1946).

loss himself or spreading the risk via insurance.<sup>4</sup> The justification for imposing liability upon tavern operators is that the right to engage in the liquor business is not absolute, but is a privilege granted by the state.<sup>5</sup> Thus the privilege can be encumbered with vicarious liability.<sup>6</sup>

It would appear that a party suing under the provisions of such acts has stated a good cause of action if the following elements are shown: (1) intoxication of the party causing the damage as the result of defendant-vendor's sale of intoxicating liquor; (2) damage or injury to plaintiff's person, property, or means of support; and (3) noncomplicity of plaintiff in procuring such intoxicants for the party causing damage as shown by the instant case.<sup>7</sup>

North Dakota's Civil Damage Act<sup>8</sup> is similar to acts in other jurisdictions. Contrary to the statutory rule<sup>9</sup> in North Dakota, the Supreme Court of this state has held that cases arising under such acts are *sui generis* and that the only condition necessary for the award of exemplary damages is that a right to actual damages be shown.<sup>10</sup> It should be noted, however, that in North Dakota before liability attaches to the dram shop operators, they must have dispensed intoxicants in violation of the laws pertaining to the sale, licensing, and manufacturing of alcoholic beverages.<sup>11</sup> Hence, it is not sufficient to show merely the three elements to a cause of action as mentioned above. By incorporating such a provision into the act, the legislature has wisely obviated the inequality which exists in holding a dram shop operator liable without regard to any violation of a statutory *duty*.

JAMES M. CORUM.

**LIMITATIONS OF ACTIONS — FRAUDULENT CONCEALMENT OF ACTIONS — IMPLIED EXCEPTION TO STATUTE OF LIMITATIONS.** — In September of 1932, the defendant, a physician, performed surgery on the plaintiff, and negligently failed to remove a portion of a surgical needle from the plaintiff's back. Although plaintiff consulted numerous doctors between September of 1932 and May of 1953, the needle was not discovered until the latter date. Plaintiff

4. See 51 Nw. U. L. Rev. 775 (1957).

5. See McQuillin, *Municipal Corporations* §§ 24.159—161 (3d ed. 1949).

6. See *Hill v. Alexander*, 321 Ill. App. 406, 53 N.E.2d 307 (1944); *Hyba v. C. A. Horneman Inc.*, 302 Ill. App. 143, 23 N.E.2d 564 (1939).

7. *Krotzer v. Drinka*, 344 Ill. App. 256, 100 N.E.2d 518 (1951).

8. N. D. Rev. Code § 5-0121 (1943) "Recovery of Damages for Illegal Sale of Liquor: Every wife, child, parent, guardian, employer or other person who shall be injured in person, property, or means of support by any intoxicated person, or in consequence of intoxication, habitual or otherwise, of any person, shall have a right of action, in his or her own name, against any person who, by selling, bartering or giving away alcoholic beverages contrary to the provisions of this title, shall have caused the intoxication of such person, for all damages actually sustained as well as for exemplary damages . . ."

9. N. D. Rev. Code § 32-0307 (1943) "In any action for the breach of an obligation not arising from contract, when the defendant has been guilty of oppression, fraud or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example and by way of punishing the defendant."

10. *Iszler v. Jorda*, 80 N.W.2d 665 (N.D. 1957), citing *Thill v. Pohlman*, 76 Iowa 638, 41 N.W. 385 (1889); *Scahill v. Aetna Indemnity Co.*, 157 Mich. 310, 122 N.W. 78 (1909).

11. N. D. Rev. Code §§ 5-01—03 (Supp. 1957), §§ 5-04—06 (1943); see also *Sutherland*, *Statutory Construction* § 5208 (3d ed. 1943), § 5A—statute which refers to the law of a subject generally adopts the law on the subject as of the time the law is invoked. This will include all the amendments and modifications of the law subsequent to the time the reference statute was enacted."