



# STATE OF IOWA

KIM REYNOLDS  
GOVERNOR

DOUG OMMEN  
COMMISSIONER OF INSURANCE

ADAM GREGG  
LT. GOVERNOR

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## INTEROFFICE MEMORANDUM

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**TO:** DOUG OMMEN, COMMISSIONER OF INSURANCE  
**FROM:** VINCENT LEDLOW, DEPUTY COMMISSIONER  
JOHANNA NAGEL, COMPLIANCE ATTORNEY  
**SUBJECT:** DRAMSHOP LIABILITY  
**DATE:** JANUARY 31, 2018

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The purpose of this memorandum is to provide an overview of dramshop liability law, existing regulations in Iowa, the status of dramshop regulation in Iowa's border states, and the potential advantages and disadvantages of proposed regulation. Generally, the main goal of dramshop liability law is to provide compensation to third parties for injuries resulting from the acts of an intoxicated person.

### I. BRIEF HISTORY OF DRAMSHOP

Historically, common law did not provide a cause of action for injuries caused by an intoxicated person following the sale of intoxicants. This changed during the temperance movement of the 19<sup>th</sup> century when states began to implement dramshop liability statutes.<sup>1</sup> After the temperance movement fell out of favor, many of the enacted statutes were repealed and were not seen widely again until the 1980s.<sup>2</sup>

Today, the majority of states offer some form of dramshop liability. State dramshop laws can differ several ways, including but not limited to, the types of sales that fall under dramshop laws, the types of plaintiffs that can recover, who can be held responsible and to what extent, and types of businesses that are excluded.

### II. CURRENT LAW IN IOWA

Important issues to consider with any dramshop law include what types of transactions give rise to liability, who can recover under dramshop and to what extent, who can be held financially responsible, and what parties are excluded from coverage under dramshop.

#### A. Statute

Iowa's Dramshop Act, found at Iowa Code § 123.92(1)(a), states that "any person who is injured in person or property or means of support by an intoxicated person or resulting from the intoxication of a person, has the right of action for all damages actually sustained, severally or jointly, against any licensee or permittee, whether or not the license or permit was issued by the division or by the licensing authority of any other state, who sold and served any beer, wine, or intoxicating liquor to the intoxicated person when the licensee or permittee knew or should have known the person

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<sup>1</sup> Epscy v. Convenience Marketers Inc., 578 So. 2d 1221, 1229-1231 (Ala. 1991).

<sup>2</sup> Daniel E. Johnson, Drunk Driving—The Civil Responsibility of the Purveyor of Intoxicating Liquor, 37 Ind. L.J. 317, 321 (1961-62); Ling v. Jan's Liquors, 703 P.2d 731, 736 (Kan. 1985) stating that twenty-nine jurisdictions have abolished the common-law doctrine of no liability for the sale of intoxicants.

was intoxicated, or who sold to and served the person to a point where the licensee or permittee knew or should have known the person would become intoxicated.”

The statute explains that the purpose of dramshop liability insurance is “to provide protection for members of the public who experience damages as a result of licensees or permittees serving patrons beer, wine, or intoxicating liquor.”<sup>3</sup> The Supreme Court of Iowa has also affirmed that the dramshop statute was enacted “to provide a remedy to innocent victims harmed by persons who are served excess liquor by licensee and permittees” and was in direct response to the previous absence of any cause of action at common law.<sup>4</sup>

As a condition of receiving a liquor license or permit, proof of financial responsibility in the form of a liability insurance policy in a specified amount must be provided.<sup>5</sup> Furthermore, under Iowa Administrative Code r. 185—5.8(123), licensees or permittees are required to maintain dramshop liability insurance for the duration of the license or permit.

### ***B. Types of Transactions Covered by Dramshop***

In Iowa, a transaction may give rise to dramshop liability if alcohol is sold by a licensee or permittee to an intoxicated person or to a point when the licensee or permittee knew or should have known the person would become intoxicated.<sup>6</sup>

In an action under dramshop, plaintiffs must prove that either the licensee/permittee (or its employee) sold and served the alcohol to the point where the licensee/permittee (or employee) knew or should have known the individual would become intoxicated and the alcohol sold and served to the individual was a proximate cause of the intoxication *or* that the licensee/permittee (or its employee) sold and served alcohol to an individual the licensee/permittee (or its employee) knew or should have known was intoxicated.<sup>7</sup> Unlike the first option, plaintiffs are not required to establish that the individual actually drank the alcohol or that there was proximate cause in the second alternative.<sup>8</sup> In addition to proving one of the previous elements, plaintiffs must also prove that he/she was injured by the intoxicated individual or as a result of the individual’s intoxication. The plaintiff may be injured in person, property, or means of support.<sup>9</sup>

#### **1. Intoxicated Individual**

The initial element an injured plaintiff must prove to recover in a dramshop action is that the individual who was sold and served alcohol by the licensee/permittee was actually intoxicated. “Intoxicated” under the Dramshop Act and “under the influence of intoxicants” as used by motor vehicle laws have been held to mean essentially the same thing.<sup>10</sup> Therefore, an intoxicated individual is someone whose reason or faculties has been affected, is incoherent of speech, has lost control of his bodily actions, is visibly excited, or his judgment impaired by drinking the intoxicants.<sup>11</sup>

#### **2. Sold and served**

The language “sold and served” was added to the Dramshop Act in 1986.<sup>12</sup> Prior to 1986, the statute held those “who shall sell or give” alcohol in violation of the dramshop statute liable.<sup>13</sup> Gifts of alcohol were no longer held

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<sup>3</sup> Iowa Code § 123.92(1)(c).

<sup>4</sup> *Sanford v. Fillenwarth*, 863 N.W.2d 286, 290 (Iowa 2015), citing *Hayward v. P.D.A., Inc.*, 573 N.W.2d 29, 34 (Iowa 1997).

<sup>5</sup> Iowa Code § 123.92.

<sup>6</sup> Iowa Code § 123.92(1)(a).

<sup>7</sup> Iowa Code § 123.92; *Thorp v. Casey’s General Stores, Inc.*, 446 N.W.2d 457, 466 (Iowa 1989).

<sup>8</sup> *Thorp*, 446 N.W.2d at 466.

<sup>9</sup> Iowa Code § 123.92.

<sup>10</sup> *Fournier v. Fraternal Order of Eagles, Waterloo Aerie No. 764*, 368 N.W.2d 849, 852 (Iowa Ct. App. 1985); *State v. Davis*, 196 N.W.2d 885, 890 (Iowa 1972).

<sup>11</sup> *Fournier*, 368 N.W.2d at 852; *State v. Davis*, 196 N.W.2d 885, 890 (Iowa 1972); *State v. Huxford*, 47 Iowa 16, 18 (Iowa 1877); *State v. Pierce*, 65 Iowa 85, 88 (Iowa 1884); *State v. Stout*, 247 Iowa 453, 74 N.W.2d 208, 210 (Iowa 1956).

<sup>12</sup> *Sanford*, 863 N.W.2d at 290.

<sup>13</sup> *Id.*

to be transactions that gave rise to dramshop liability after the 1986 change.<sup>14</sup> However, payment may not always be necessary to prove that a sale occurred. For example, providing alcohol without further charge constituted a sale when it was provided during a boat cruise available to all paying guests at a resort.<sup>15</sup>

The amendment also narrowed liability to transactions during which the alcohol is served for consumption on the premises.<sup>16</sup>

### 3. Knew or Should have Known

The second element to establishing liability under dramshop, the “knew or should have known,” requires the licensee/permittee (or its employee) to either know the individual served was intoxicated or that a “reasonably observant person” under the same or similar circumstances would know that the individual was intoxicated.<sup>17</sup> The standard for establishing the defendant’s knowledge can be subjective or objective.<sup>18</sup>

### 4. Proximate Cause

As previously discussed, the plaintiff can either prove that: 1-the licensee/permittee (or its employee) knew or should have known that the individual would become intoxicated and the alcohol sold and served by the licensee/permittee (or its employee) was the proximate cause of the intoxication or 2-the licensee/permittee (or its employee) sold and served alcohol to someone who they knew or should have known was intoxicated. In this instance where a person is injured by an intoxicated individual, proximate cause is not required to be established.<sup>19</sup> The legislature decided to impose liability on the provider of alcohol to remedy the harm suffered by the innocent individual and in these instances the issue is only whether the intoxicated person committed the act resulting in an injury to another, not whether there is proximate cause.<sup>20</sup> The intoxicated person may seek to prove that the injury was caused by something other than the intoxication as an affirmative defense.<sup>21</sup>

### C. Who can Recover

Dramshop liability is the only remedy available against licensees and permittees for losses relating to the sale of alcohol to patrons.<sup>22</sup> Iowa’s Dramshop Act permits “any person who is injured in person or property or means of support by an intoxicated person or resulting from the intoxication of a person” to recover.<sup>23</sup> Although the Dramshop Act states “any person,” Iowa courts have held that the Act was only intended to protect innocent persons.<sup>24</sup>

Additional parties who may recover under Iowa’s Dramshop Act include the injured person’s spouse, children, employer, the estate of a person killed by the intoxicated person, people who have property damaged by the intoxicated person, and people whose vehicles were driven and damaged by the intoxicated person.<sup>25</sup>

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<sup>14</sup> *Id.* at 291; *Summerhays v. Clark*, 509 N.W.2d 748, 751 (Iowa 1993), holding that gratuitous alcohol provided by a licensee to employees at a holiday party is not a sale.

<sup>15</sup> *Sanford*, 863 N.W.2d at 292-94.

<sup>16</sup> *Kelly v. Sinclair Oil Corp.*, 476 N.W.2d 341, 347 (Iowa 1991), *abrogated on other grounds by* *Thompson v. Kaczinski*, 774 N.W.2d 829, 836, 839 (Iowa 2009).

<sup>17</sup> *Hobbiebrunken v. G & S Enterprises, Inc.*, 470 N.W.2d 19, 21-22 (Iowa 1991).

<sup>18</sup> *Id.* at 22.

<sup>19</sup> *Berte v. Bode*, 692 N.W.2d 368, 373 (Iowa 2005).

<sup>20</sup> *Id.*

<sup>21</sup> *Berte* 692 N.W.2d 373, citing *Bistline v. Ney Bros.*, 134 Iowa 172, 111 N.W. 422 (1907).

<sup>22</sup> *Summerhays*, 509 N.W.2d at 750.

<sup>23</sup> Iowa Code § 123.92.

<sup>24</sup> *Martin v. Hedding*, 373 N.W.2d 486, 488 (Iowa 1985), holding that Iowa’s Dramshop Act was meant to protect innocent individuals, not those who have participated in the intoxicated person’s intoxication by complicity or assumption of risk.

<sup>25</sup> Iowa Code § 123.92; *Ayers v. Straight*, 422 N.W.2d 643, 645 (Iowa 1988); *Goulding v. Phillips*, 124 Iowa 496, 100 N.W. 516 (1904).

Some types of individuals are not entitled to recovery under Iowa's Dramshop Act. The intoxicated individual would not be allowed to recover damages caused by his own intoxication under dramshop.<sup>26</sup> This bar would also apply to any dramshop claims asserted by the parent or estate of the now deceased intoxicated person.<sup>27</sup> Iowa extends this bar even when the intoxicated person was a minor at the time the alcohol was sold by a licensee or permittee.<sup>28</sup> Furthermore, a co-adventurer would likely be unable to recover under dramshop in Iowa. A defendant may assert the following affirmative defenses: contribution, complicity, and assumption of risk. These defenses each operate as a complete bar to a dramshop liability claim.<sup>29</sup> A co-adventurer is likely to run afoul of one of these affirmative defenses.

Per statute, parties eligible to recover must provide written notice of the party's intent to bring a dramshop action to the licensee/permittee or its insurance carrier within six months of the date of the injury.<sup>30</sup> The notice must also provide the time, place, and circumstances causing the injury.<sup>31</sup> In regards to an injured minor, the notice period will only begin to run once a minor reaches the age of majority or becomes emancipated.<sup>32</sup>

#### *D. Types of Damages*

Plaintiffs are entitled to recover several types of damages under Iowa's Dramshop Act. Plaintiffs may receive damages for injuries to person, property, or means of support.<sup>33</sup> These damages would include medical expenses, lost wages, pain and suffering, and any other compensatory damages allowed under law. Consortium claims have been deemed to be "property" under Iowa's Dramshop Act and plaintiffs may also seek to recover consortium claims of a spouse, parent, or child.<sup>34</sup> Lastly, any medical expenses borne by a parent to provide necessary treatment to a minor child are recoverable as "injury in property" under the Dramshop Act.<sup>35</sup>

Plaintiffs are not entitled to recover punitive damages or for any mental anguish suffered by a spouse or parent after the death of a spouse or child.<sup>36</sup>

Currently, there are no caps to the amount of damages recoverable under the Iowa Dramshop Act.<sup>37</sup>

#### *E. Who can be Held Financially Liable*

Only licenses and permittees can be held liable under dramshop.<sup>38</sup> Licensee and permittee is defined as a person (an individual, association, partnership, corporation, club, hotel, motel, or municipal corporation) who has been authorized by the Alcoholic Beverage Division for the manufacture and/or sale of alcoholic liquors, wines, or beers.<sup>39</sup>

##### **1. Apportionment**

Defendants in a dramshop action may be held jointly and severally liable for all damages sustained.<sup>40</sup> Iowa courts have held that joint and several liability is not limited to a plaintiff's economic damages despite the statutory

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<sup>26</sup> *Slager v. HWA Corp.*, 435 N.W.2d 349, 351 (Iowa 1989); *Gremmel v. Junnie's Lounge, Ltd.*, 397 N.W.2d 717, 720 (Iowa 1986); *Martin*, 373 N.W.2d at 488; *Berge v. Harris*, 170 N.W.2d 621, 625-26 (1969).

<sup>27</sup> *Ballard v. Hazel's Blue Sky*, 653 N.W.2d 609, 610-611 (Iowa 2002), holding that a parent of a deceased minor, who was subsequently killed in a car accident after being illegally served alcohol by a licensee, could not maintain a wrongful death action.

<sup>28</sup> *Nutting v. Zieser*, 482 N.W.2d 424 (Iowa 1992).

<sup>29</sup> *Cox v. Rolling Acres Golf Course Corp.*, 532 N.W.2d 761, 763-764 (Iowa 1995).

<sup>30</sup> Iowa Code § 123.93.

<sup>31</sup> *Id.*

<sup>32</sup> *Ehlinger v. Mardorf*, 285 N.W.2d 27, 30 (Iowa 1979).

<sup>33</sup> Iowa Code § 123.92.

<sup>34</sup> *Gail v. Clark*, 410 N.W.2d 662, 667-670 (Iowa 1987).

<sup>35</sup> *Atkins v. Baxter*, 423 N.W.2d 6, 7-8 (Iowa 1988).

<sup>36</sup> *Haafke v. Mitchell*, 347 N.W.2d 381, 389-390 (Iowa 1984); *Nelson v. Restaurants of Iowa, Inc.*, 338 N.W.2d 881, 885 (Iowa 1983).

<sup>37</sup> Iowa Code § 123.92.

<sup>38</sup> *Summerhays*, 509 N.W.2d at 752.

<sup>39</sup> Iowa Code § 123.3(14), (24), and (25).

<sup>40</sup> Iowa Code § 123.92(1)(a).

language found in Iowa Code § 668.4 that does not allow for noneconomic damage awards to be shared jointly and severally. Iowa's Dramshop Act was amended only a year after Iowa Code § 668.4 was enacted, but the legislature did not add "subject to section 668.4" in its amendment to the language dealing with joint and several liability.<sup>41</sup> The Supreme Court reasoned that although Iowa Code §§ 668.4 and 123.92 conflict, the "significant inaction on the part of the legislature that signifies its intent" and this inaction was held to be persuasive evidence that dramshop liability was not intended to be subject to comparative fault.<sup>42</sup>

Apportionment is allowed when the defendants are licensees or permittees. A dramshop may seek contribution from another dramshop when an innocent person is injured by the combined sales of alcohol.<sup>43</sup> Conversely, Iowa courts have not allowed apportionment between a dramshop and an intoxicated person stating that the intent of the legislature would be undermined if a dramshop could reduce its liability by comparing its fault to the fault of the intoxicated person.<sup>44</sup>

## 2. Affirmative Defenses

Defendants may avoid liability by asserting the following affirmative defenses in a dramshop action: contribution; complicity; and assumption of risk.<sup>45</sup>

### a. Lack of Contribution

A plaintiff's claim under dramshop is completely barred if the defendant can prove that the individual's intoxication did not contribute to the injury. The Iowa Supreme Court has held that when the intoxication was not a proximate cause of injuries, for example when a fight resulting in injuries is caused by animosity between the parties rather than by intoxication, the plaintiff is barred from recovery.<sup>46</sup>

### b. Complicity

A plaintiff's claim under dramshop is completely barred if the defendant can prove that the injured plaintiff participated or encouraged the intoxication of the person causing the injuries.<sup>47</sup> However, passive participation is insufficient to establish complicity.<sup>48</sup>

### c. Assumption of Risk

Assumption of risk is the third affirmative defense available in a dramshop action and it differs from complicity in that "assumption of risk is a matter of knowing assent while complicity is a matter of involvement."<sup>49</sup> The plaintiff must have known of the risk, understood the seriousness, and voluntarily assumed the risk for this defense to apply. Whether the plaintiff *should* have known of the risk is not the correct standard in Iowa.<sup>50</sup>

For both complicity and assumption of risk, the courts have refused to allow recovery to people who participate in the individual's intoxication because the dramshop statute is intended to protect innocent parties.<sup>51</sup>

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<sup>41</sup> Slager, 435 N.W.2d at 354; 1985 Iowa Acts ch. 32, § 57.

<sup>42</sup> Slager, 435 N.W.2d at 354-355. *See also* Jamieson v. Harrison, 532 N.W.2d 779, 781 (Iowa 1995) stating that comparative fault is not a defense to dramshop actions.

<sup>43</sup> Schreier v. Sonderleiter, 420 N.W.2d 821, 823-824 (Iowa 1988).

<sup>44</sup> Slager, 435 N.W.2d 349.

<sup>45</sup> Berte, 692 N.W.2d at 373, citing Bistline, 134 Iowa 172, 111 N.W. 422; Cox, 532 N.W.2d at 763-764.

<sup>46</sup> Gremmel v. Junnie's Lounge, Ltd., 397 N.W.2d 717, 721 (Iowa 1986).

<sup>47</sup> Cox, 532 N.W.2d at 764, citing Slager v. HWA Corp., 435 N.W.2d 349, 351 (Iowa 1989); Martin, 373 N.W.2d at 488; Berge v. Harris, 170 N.W.2d 621, 625 (Iowa 1969).

<sup>48</sup> Cox, 532 N.W.2d at 763-764, holding that being a "mere drinking companion of the intoxicated person" is insufficient to constitute complicity.

<sup>49</sup> Cox, 532 N.W.2d at 764, citing Martin, 373 N.W.2d at 490.

<sup>50</sup> Cox, 532 N.W.2d at 764-765.

<sup>51</sup> Slager, 435 N.W.2d at 351-352, citing Gremmel, 397 N.W.2d at 720.

Courts have upheld the rationale that people who participate in the intoxication are not innocent parties and should not be compensated under dramshop.<sup>52</sup>

### 3. Actions against Non-licensees/permittees

Actions against defendants who do not fall under the definition of licensee or permittee may be brought under common law causes of action.<sup>53</sup>

Social hosts are exempt from civil liability if the alcohol was provided to an adult.<sup>54</sup> Conversely, if alcohol is dispensed to a minor, the social host is not exempt from liability.<sup>55</sup> Even the intoxicated minor may pursue action to recover damages against the social host, just not under the Dramshop Act.<sup>56</sup>

#### *F. Parties excluded from liability*

Iowa courts have held that convenience stores which sell alcohol to individuals for off-premise consumption are not liable under Iowa's Dramshop Act.<sup>57</sup> As previously discussed, the 1986 amendment narrowed dramshop liability to transactions during which the alcohol is served for consumption on the premises.<sup>58</sup> This amendment has the effect of excluding businesses, like convenience stores, which sell but do not *serve* alcohol. Iowa courts have held that assistance provided by convenience store employees to customers does not constitute the "serve" requirement found in the Dramshop Act.<sup>59</sup>

## III. PROPOSED BILL

The Iowa Restaurant Association is proposing reforms to the Iowa Dramshop Act in its proposed legislation, SSB1179.

### *A. Proposed Changes*

The proposed legislation would change the current dramshop statute in a few key ways.

#### 1. Damages

The amount of damages recoverable would be capped at \$75,000.00 for injuries in person or property and \$100,000.00 for loss of support, companionship, or consortium, whereas the current law allows for "all damages actually sustained."<sup>60</sup> The proposed legislation would also limit the parties from which a person is able to recover damages. The current language states that a person may pursue an action against any licensee or permittee, regardless of whether the license/permit was issued by Iowa or by another state.<sup>61</sup> The proposed language removes the "or by the licensing authority of any other state" clause.

<sup>52</sup> Cox, 532 N.W.2d at 764, citing Martin, 373 N.W.2d at 489 (quoting Berge, 170 N.W.2d at 625).

<sup>53</sup> Bauer v. Dann, 428 N.W.2d 658, 660-661 (Iowa 1988).

<sup>54</sup> Iowa Code § 123.49(1)(a); Brenneman v. Stuelke, 654 N.W.2d 507 (Iowa 2002).

<sup>55</sup> Iowa Code § 123.92(3)(a); Nutting, 482 N.W.2d at 425.

<sup>56</sup> Sage v. Johnson, 437 N.W.2d 582 (Iowa 1989); Nutting, 482 N.W.2d 424; Blesz v. Weisbrod, 424 N.W.2d 451 (Iowa 1988).

<sup>57</sup> Eddy v. Casey's General Store, Inc. 485 N.W.2d 633 (Iowa 1992).

<sup>58</sup> Kelly, 476 N.W.2d at 347 (Iowa 1991).

<sup>59</sup> Paul v. Ron Moore Oil Co., 487 N.W.2d 337, 338 (Iowa 1992).

<sup>60</sup> Iowa Code § 123.92; Senate Study Bill 1179, GA 87 (2018).

<sup>61</sup> Iowa Code § 123.92(1)(a).

## 2. Knew or Should Have Known

Arguably, one of the most significant changes concerns the transactions that give rise to dramshop liability. The current law concerns the sale and serving of alcohol by a licensee/permittee to “the intoxicated person when the licensee or permittee knew or should have known the person was intoxicated, or who sold to and served the person to a point where the licensee or permittee knew or should have known the person would become intoxicated.”<sup>62</sup> The proposed legislation would only apply to the sale and serving of alcohol by a licensee/permittee “directly to a visibly intoxicated person.”

## 3. Proximate Cause

The proposed legislation would also modify the language of the affirmative defense clause of the Dramshop Act which currently provides that “if an injury was caused by an intoxicated person, a permittee or licensee may establish as an affirmative defense that the intoxication did not contribute to the injurious action of the person.”<sup>63</sup> The proposed legislation would modify this by stating “if the injury was *proximately* caused...”

Case law provides that proximate cause is not an issue if an injury is caused by an intoxicated person.<sup>64</sup> In these circumstances, the Iowa Supreme Court has held that “the only question, as it relates to causation in fact, is whether the intoxicated person committed the injurious act. We do not even reach the proximate cause because the legislature made the policy decision to impose liability on the one who furnished the intoxicating beverage to the one who inflicted the injury.”<sup>65</sup> Furthermore, case law has long held that a defendant has the burden to establish the affirmative defense that “something other than the intoxication was the cause in fact of the injurious act”<sup>66</sup> and this defense was later codified in the Iowa Dramshop Act.<sup>67</sup> The proposed language is contrary to long-standing case law which has held that an affirmative defense that an individual’s intoxication was not the *proximate cause* of the injury when the injury was caused by the intoxicated person is not an appropriate defense. Instead, the defendant must show that the intoxication did not in fact contribute to the injury.<sup>68</sup>

## 4. Any Person

The first sequential change, but the last discussed herein, is the change from “any person” has a right of action to “any innocent third-party.” This change is not as significant because Iowa courts already hold that the Dramshop Act was intended to apply only to innocent parties.<sup>69</sup>

## IV. DRAMSHOP IN BORDER STATES

The Iowa Restaurant Association seeks to reform the Dramshop Act, in part, due to the inability to compete with the more favorable laws of Iowa’s border states.

### A. *No Dramshop Liability Border States*

Only a very small minority of states in the United States do not provide for any dramshop liability. Six states do not have dramshop liability and three of those states surround Iowa.

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<sup>62</sup> *Id.*

<sup>63</sup> Iowa Code § 123.92(1)(b).

<sup>64</sup> Berte, 692 N.W.2d at 373; Walton v. Stokes, 270 N.W.2d 627 at 628-29 (Iowa 1978); Bistline, 134 Iowa 172, 111 N.W. 422.

<sup>65</sup> Berte, 692 N.W.2d at 373, relying on Bistline, 134 Iowa 172, 111 N.W. 422.

<sup>66</sup> Berte, 692 N.W.2d at 373, citing Bistline, 134 Iowa at 184, 111 N.W. at 426; Gremmel, 397 N.W.2d at 721.

<sup>67</sup> Iowa Code § 123.92(1).

<sup>68</sup> Berte, 692 N.W.2d at 375.

<sup>69</sup> See *infra* Part II.C.

## 1. Kansas

Kansas had a dramshop statute from 1859 until 1949. Kansas' dramshop statute was repealed in 1949 with the enactment of the Kansas Liquor Control Act which does not contain any dramshop provisions.<sup>70</sup> Kansas does not recognize dramshop by statute or common law. This is the case even when minors are involved.<sup>71</sup> The Kansas Supreme Court has stated that it is the actions of the individual in drinking the alcohol that is the proximate cause of an injury, not the act of a vendor selling the alcohol.<sup>72</sup>

## 2. Nebraska

Nebraska enacted a dramshop statute in 1881, but this was repealed and replaced with different dramshop provision in 1917.<sup>73</sup> Statutes relating to dramshop liability were completely repealed and replaced in 1935 with the passage of the Nebraska Liquor Control Act.<sup>74</sup> Nebraska courts have declined to impose dramshop liability in the absence of legislative action to reenact dramshop provisions.<sup>75</sup>

Although Nebraska is a no dramshop state, people are restricted in providing alcohol to two groups of people. The Nebraska Liquor Control Act prohibits people from selling, furnishing, giving away, exchanging, or delivering the sale, gift, or procurement of any alcoholic beverages to or for any minor or to any person who is mentally incompetent.<sup>76</sup> Nonetheless, no dramshop or civil liability act exists that would impose strict liability for violating the Nebraska Liquor Control Act.<sup>77</sup> Additionally, the Nebraska Liquor Control Act does not create a civil cause of action or a duty toward third parties.<sup>78</sup>

## 3. South Dakota

South Dakota does not recognize dramshop liability. Courts in South Dakota have stated that the individual's consumption of alcohol is the proximate cause of any injury, not the serving of alcohol.<sup>79</sup>

Although South Dakota is a no dramshop state, licensees are prohibited from selling an alcoholic beverage to an obviously intoxicated person. Violating this statute is a civil misdemeanor, but licensees are not civilly liable to an injured person or the person's estate for injuries, death, or property damage caused by an intoxicated individual.<sup>80</sup>

### *B. Border States with Dramshop Liability*

#### 1. Illinois

Every person injured in Illinois who is injured by any intoxicated person has a right of action against any person licensed under the laws of this state to sell alcoholic liquor who, by selling or giving alcoholic liquor, causes the

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<sup>70</sup> Noone v. Chalet of Wichita, LLC, 32 Kan.App.2d 1230, 96 P.3d 674, 676 (2004); *See also* Compiled Laws of Kansas 1862, ch. 35, sec. 10; G.S. 1868, ch. 35, sec. 10; G.S. 1949, 41-1106.

<sup>71</sup> Ling, 237 Kan. 629, 703 P.2d 731, holding that common law provides no redress against a seller of alcohol for injuries due caused by an intoxicated person; Prime v. Beta Gamma Chapter of Pi Kappa Alpha, 273 Kan. 828 (Kansas 2002), holding that Kansas has no dramshop act and the court will not impose liability on the grounds that this is a policy matter better addressed by the legislature; *See also* Noone v. Chalet of Wichita, LLC, 32 Kan.App.2d 1230, 96 P.3d 674 (2004).

<sup>72</sup> Ling, 237 Kan. at 635.

<sup>73</sup> Rev.Stat. §§ 3859 through 3863 (1913); 1917 Neb.Laws, ch. 187, § 52, p. 448.

<sup>74</sup> Nebraska Liquor Control Act, Comp.Stat. §§ 53-301 to 53-3,107 (Supp.1935); Pelzek v. American Legion, 463 N.W.2d 321, 323 (1990).

<sup>75</sup> Arant v. G.H., Inc., 428 N.W.2d 631 (Nebraska 1998); Holmes v. Circo, 196 Neb. 496, 244 N.W.2d 65 (1976).

<sup>76</sup> Neb. Rev. Stat. § 53-180.

<sup>77</sup> Neb. Rev. Stat. § 53-180; Strong v. K & K Investments, Inc., 216 Neb. 370, 343 N.W.2d 912 (1984), citing Holmes, 196 Neb. 496, 244 N.W.2d 65.

<sup>78</sup> Neb. Rev. Stat. § 53-180; Holmes, 196 Neb. 496, 244 N.W.2d 65; Schroer v. Synowiecki, 231 Neb. 168, 435 N.W.2d 875 (1989).

<sup>79</sup> Baatz v. Arrow Bar, 426 N.W.2d 298 (1988).

<sup>80</sup> SDCL § 35-4-78.



intoxication of such person.<sup>81</sup> Though there is a broad imposition of liability by this provision, there is a cap on the damages recoverable in such an action. As of July 1, 1998, damages for personal injury and property damage were capped at \$45,000.00, while damages for loss of means of support or loss of society resulting from death or injury were capped at \$55,000.00.<sup>82</sup> These liability limits are adjusted annually (either up or down) based on the consumer price index published by the Bureau of Labor Statistics.<sup>83</sup>

## 2. Minnesota

Minnesota law provides a person injured by an intoxicated person has a right of action against a person who caused the intoxication by “illegally selling” alcoholic beverages.<sup>84</sup> Minnesota’s dram shop statute does not itself set forth what constitutes an illegal sale of alcohol, so resort must be made to other statutes. Under that state’s laws, it is illegal to sell alcoholic beverages to “an obviously intoxicated person”.<sup>85</sup> It is also unlawful to sell or furnish alcoholic beverages to a person under the age of twenty-one.<sup>86</sup> Thus, in at least these two instances, dram shop liability will lie.

## 3. Missouri

Missouri’s dram shop statute begins with a declaration that the state follows “the common law rule that furnishing alcoholic beverages is not the proximate cause of injuries inflicted by intoxicated persons.”<sup>87</sup> This declaration of public policy notwithstanding, dram shop liability can be established in Missouri in two circumstances, both of which require proof by clear and convincing evidence.<sup>88</sup>

First, a person licensed to sell intoxicating liquor *on the premises* may be liable to someone suffering personal injury or death where intoxicating liquor was served to a person under the age of twenty-one.<sup>89</sup> This cause of action extends to claims of injury (or death) sustained by the minor who consumed the liquor he or she was served.<sup>90</sup> In an action brought on account of the service of alcohol to a person under that age of twenty-one, it will be relevant to a determination of relative fault that the seller or his agent demanded and was shown a driver’s license or other state or federal personal identification card appearing to be genuine and showing the minor was at least twenty-one years of age.<sup>91</sup>

Second, service of intoxicating liquor to a “visibly intoxicated” person can give rise to dram shop liability.<sup>92</sup> The term “visibly intoxicated” is defined by the statute as meaning a person is “inebriated to such an extent that the impairment is shown by significantly uncoordinated physical action or significant physical dysfunction.”<sup>93</sup> Blood alcohol content is not *prima facie* evidence of visible intoxication, though it may be admissible as relevant evidence of intoxication.<sup>94</sup>

## 4. Wisconsin

The general rule in Wisconsin is that “a person is immune from civil liability arising out of the act of procuring alcohol beverages for or selling, dispensing, or giving away alcohol beverages to another person.”<sup>95</sup> There are, however,

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<sup>81</sup> Ill Rev. Stat. Ch. 235, §5/5-21(a).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> Minnesota Statutes §340A.801(1).

<sup>85</sup> Minnesota Statutes §340A.502.

<sup>86</sup> Minnesota Statutes §340A.503 Subdivision 2.(1).

<sup>87</sup> Missouri Code §537.053(1).

<sup>88</sup> Missouri Code §537.05(2).

<sup>89</sup> *Id.*

<sup>90</sup> Missouri Code §537.053(4).

<sup>91</sup> Missouri Code §537.053(5).

<sup>92</sup> Missouri Code §537.053(2).

<sup>93</sup> Missouri Code §537.053(3).

<sup>94</sup> *Id.*

<sup>95</sup> Wisconsin Code §125.035(2).

two statutory exceptions to this rule. First, dram shop liability will attach if the person “procuring, selling, dispensing, or giving away” the alcohol either causes its consumption by force or by representing the beverages contain no alcohol.<sup>96</sup> Wisconsin is one of three states that provide for these two specific circumstances.

In addition, dram shop liability *might* attach where alcohol is furnished to someone under the legal drinking age and if the alcoholic beverages provided were a “substantial factor” in causing injury to a third party.<sup>97</sup> To give rise to such liability, a plaintiff must show the provider knew or should have known the underage person was under the legal drinking age. Whether the provider had such knowledge is to be determined from “all relevant circumstances surrounding the procuring, selling, dispensing, or giving away of the alcohol beverages”<sup>98</sup>, including:

- (1) Whether the underage person falsely represented that he or she had attained the legal drinking age;
- (2) Whether the underage person supports that representation with documentation that he or she has attained the legal drinking age;
- (3) Whether the alcohol beverages are provided in good faith reliance on the underage person’s representation that he or she has attained the legal drinking age; and
- (4) The appearance of the underage person is such that an ordinary and prudent person would believe he or she had attained the legal drinking age.<sup>99</sup>

Wisconsin statutes provide that where all four of the above-enumerated factors are present, the person providing the alcoholic beverages is exempt from civil liability.<sup>100</sup>

## V. CONCLUSION

Iowa’s Dramshop Act provides a remedy for people injured by an intoxicated person who was sold and served alcohol by a dramshop. Currently, only innocent parties may recover under dramshop for any damages actually sustained.

Iowa is surrounded by border states, the majority of which have more favorable dramshop laws from the perspective of Iowa restaurants and bars. However, it is worth noting that these border states do not represent how the majority of states address dramshop liability.

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<sup>96</sup> Wisconsin Code §125.035(3).

<sup>97</sup> Wisconsin Code §125.035(4)(b).

<sup>98</sup> *Id.*

<sup>99</sup> Wisconsin Code §125.035(4)(b)1-4.

<sup>100</sup> Wisconsin Code §125.035(4)(b).