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Applying Concepts of Indemnification Between Active and Passive Tort-Feasors to Actions Brought Under the Illinois Dram Shop Act

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APPLYING CONCEPTS OF INDEMNIFICATION BETWEEN ACTIVE AND PASSIVE TORTFEASORS TO ACTIONS BROUGHT UNDER THE ILLINOIS DRAM SHOP ACT

Larry Keith Wessel was killed as a result of an automobile accident caused by an alleged intoxicated person. Wessel's administratrix brought an action for damages under the Illinois Dram Shop Act[1] against the Carmi Elks Home, the owner of the dram shop where the driver became intoxicated. The Elks Home filed a third party action, seeking indemnification against the intoxicated person who allegedly caused Wessel's death. The Circuit Court of White County dismissed the third party claim for indemnity on the pleadings, and the third party plaintiff appealed. The Appellate Court of Illinois for the Fifth District affirmed the lower court's decision and refused to allow indemnification in *Wessel v. Carmi Elks Home, Inc.*[2]

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1. ILL. REV. STAT. ch. 43, § 135 (1971):
Every person who is injured in person or property by any intoxicated person, has a right of action in his own name, severally or jointly against any person who by selling or giving alcoholic liquor, causes the intoxication of such person. Any person owning, renting, leasing or permitting the occupation of any building or premises with knowledge that alcoholic liquors are to be sold therein, or who having leased the same for other purposes, shall knowingly permit therein the sale of any alcoholic liquors that have caused the intoxication of any person, shall be liable severally or jointly, with the person selling or giving the liquors. . . . An action shall lie for injuries to means of support caused by an intoxicated person or in consequence of the intoxication, habitual or otherwise, of any person resulting as aforesaid. The action, if the person from whom support was furnished is living, shall be brought by any person injured in means of support in his name for his benefit and the benefit of all other persons injured in means of support. . . . The amount recovered in every such action is for the exclusive benefit of the person injured in loss of support and shall be distributed to such persons in the proportions determined by the judgment or verdict rendered in the action. . . . In no event shall the judgment or recovery under this Act for injury to the person or to the property of any person as aforesaid exceed $15,000, and recovery under this Act for loss of means of support resulting from the death or injury of any person, as aforesaid, shall not exceed $15,000 for each person so injured where such injury occurred prior to July 1, 1956, and not exceeding $20,000 for each person so injured after July 1, 1956. Every action hereunder shall be barred unless commenced within one year next after the cause of action accrued.
2. — Ill. App. 3d —, 272 N.E.2d 416 (1971).

This decision reemphasizes the difference in treatment of indemnification in Dram Shop Act cases by the fourth and fifth districts. The fifth district, by its refusal to allow a dram shop owner or operator indemnification for liability imposed by the Act, followed its earlier decision in *Coffey v. ABC Liquor Stores, Inc.*[3] and rejected the conclusion reached in two later fourth district cases, *Geocaris v. Bangs*[4] and *Walker v. Service Liquor Store, Inc.*,[5] which had allowed indemnification to dram shop owners and operators by third party active tortfeasors. The difference in these holdings raises the issue to be discussed in this article: Should the concept of indemnification between active and passive tortfeasors be applied to actions brought under the Illinois Dram Shop Act, thus allowing dram shop owners and operators the possibility of recouping their losses, suffered under the Act, from active tortfeasors?

The problem arises because the Dram Shop Act itself says nothing about indemnity. It neither permits nor precludes it. The courts have had to look to legislative intent and case law to aid them in reaching their holdings. Nevertheless, the two districts, using the same information, have arrived at irreconcilable positions. The disparity results from differing views of the underlying policy of the Act.

The *Wessel* court held that the Act is penal in nature and that the proscribed act of causing intoxication is entirely separable from the act causing injury. The court said that the Act's rationale "is that the intoxicated person who negligently or willfully inflicts harm on another would not have done so but for his intoxication."[6] This interpretation seems to rely on the premise that selling liquor is a legal activity but not one that is favored by the law; therefore, the one who sells it should be strictly liable for the consequences of his sale.

On the other hand, the *Geocaris* court viewed the primary purpose of the statute to be to provide a remedy to the injured party. The Dram Shop Act provides an alternative remedy to a plaintiff injured by an intoxicated person. The injured party can collect damages up to the ceiling set by the Act even though the intoxicated tortfeasor is judgment proof. Since it considered that this statutory remedy would

3. 13 Ill. App. 2d 510, 142 N.E.2d 705 (1957). At the time of the *Coffey* decision, the fourth district was composed of those counties which are in the fifth district today.
4. 91 Ill. App. 2d 81, 234 N.E.2d 17 (1968). This case was decided by the fourth district sitting in the first district.
5. 120 Ill. App. 2d 112, 255 N.E.2d 613 (1970).
6. — Ill. App. 3d at —, 272 N.E.2d at 419.

in no way be diminished by indemnification, the *Geocaris* court held that indemnification was permissible.[7] Indemnification would also have the obvious benefit of frustrating any attempts at fraud and collusion between the injured party and the intoxicated person.[8]

HISTORY OF ILLINOIS DRAM SHOP LEGISLATION

In order to understand the bases of these disparate interpretations of the Act's policy, it will be helpful to analyze the language of the statute and its history. The Dram Shop Act was a product of the temperance movement of the mid-Nineteenth Century. The temperance forces wanted the enactment of a law which would "provide against the evils resulting from the sale of intoxicating liquors in the State of Illinois."[9] In 1872, they were victorious when the Temperance Bill was passed. It was a very strong bill, and the forces backing it claimed to have all the elements of morality, decency, and honesty on their side.[10] It contained stringent provisions regarding Sunday closing and other penalties for violations of the Act. The law also required a tavernkeeper to give a $3,000 bond with two good sureties[11] to the local liquor licensing agency. This money was to be applied toward payment of damages if the dram shop keeper was found guilty under the Act. The licensee was to "pay all damages to any person or persons which may be inflicted upon them, either in person or property, or means of support, by reason of the person so obtaining the license."[12]

In 1874, the first general Dram Shop Act was enacted by the legislature. It was substantially the same as the present Act, except that it provided for the same bond "in the penal sum of $3,000 . . . with at least two good and sufficient sureties"[13] as required by the 1872 Bill. The Supreme Court of Illinois held that the 1874 Act was penal in nature in *Wanack v. Michels*.[14]

The Act was impliedly repealed in 1921 because Prohibition made it superfluous. Then, in 1934, after the eighteenth amendment was

7. 91 Ill. App. 2d 81, 234 N.E.2d 17 (1968).
8. J. APPLEMAN, ILLINOIS DRAM SHOP BRIEFS 221 (2d ed. 1960) [hereinafter cited as APPLEMAN] *as cited in* Wessel v. Carmi Elks Home, Inc., — Ill. App. 3d —, —, 272 N.E.2d 416, 420 (1971) (dissenting opinion).
9. 4 E. BOGART & C. THOMPSON, THE CENTENNIAL HISTORY OF ILLINOIS 43 (1920) [hereinafter cited as BOGART & THOMPSON]; *see also* Ogilvie, *History and Appraisal of the Illinois Dram Shop Act*, 1958 U. ILL. L. FORUM 175 (1958).
10. BOGART & THOMPSON at 44.
11. The requirement of sureties for the bond was yet another manifestation of the prevailing distrust of anyone engaged in the liquor trade. Two citizens were required to guarantee payment should the dram shop keeper default on his bond.
12. BOGART & THOMPSON at 43.
13. Dram Shop Act of 1874, ILL. REV. STAT. ch. 43, § 5 (1874).
14. 215 Ill. 87, 94-96, 74 N.E. 84, 86-87 (1905).

repealed, the legislature again enacted a Dram Shop Act.[15] It readopted the wording of the old statute, eliminating the section requiring that tavern owners and operators furnish a penal bond. However, times had changed, and the type of cases brought under the new Act reflected this.[16] The use of automobiles had increased greatly; and this, in turn, affected peoples' drinking habits. The roadhouse was a popular place to drink, and the patron who drove there was more likely to cause harm as a result of his intoxication than the patron who walked to his neighborhood tavern. The drunken driver also had the potential to involve more people in his accident. Consequently, the automobile's capacity for causing harm enlarged the group of possible plaintiffs. All of the other people involved in the accident were potential plaintiffs, as were the people dependent on the accident victims for support. The dram shop operator's potential liability multiplied in terms of both scope and intensity of injuries.

The practical effect of this social change was to increase the burdens borne by dram shop owners and operators. Dram shop insurance became a necessity and increased the cost of doing business. Since the owner of the building housing the tavern could be liable under the Act,[17] landlords increasingly required dram shop insurance as one of the terms of their leases. The cost of insurance, added to the other costs of doing business, would cut into the operators' profits.

In addition, the Act was arguably deficient from the owners' viewpoint in various aspects. Fraud and collusion could occur between the wrongdoer, attempting to escape responsibility for his acts, and the party seeking recovery. Furthermore, barkeepers complained that a responsible barkeeper was also penalized because under the terms of the Act the selling of even one drink which contributed to eventual intoxication made him liable. The bartender who sold one beer to a customer in the afternoon was as liable for the customer's actions as the irresponsible bartender who sold many drinks to the same person later that evening.[18]

The Illinois legislature appears to have taken these problems into account in recent years. Amendments to the Act have been aimed at de-

15. 1934, Jan. 31, Laws 1933-34, 2d Spec. Sess., p. 57, art. VI, § 13.
16. Prior to 1934, most cases brought under the Act were for loss of support or habitual drunkenness. After 1934, the cases increasingly involved drunken drivers. *See* APPLEMAN for an exposition of the various facts upon which dram shop actions have been based.
17. ILL. REV. STAT. ch. 43, § 135 (1971).
18. Bliss, *Enforcement of Judgments,* 1958 U. ILL. L. FORUM 273 (1958).

creasing the liability of dram shop owners and operators. The changes have been gradual, but the trend indicates an easing of their burdens. For example, prior to 1949, the general statute of limitations applied to the Dram Shop Act. But, in 1949, the Act was amended to provide for a two-year statute of limitations;[19] and, in 1959, the statute of limitations was further reduced to one year.[20] This limitation of the period of the owners' and operators' liability is to their benefit since they rarely have any actual knowledge of the events upon which their alleged liability is based.[21] The dram shop operator is better equipped to establish a defense if he learns of the suit soon after it occurs.[22] It is difficult, especially if the dram shop is not a neighborhood tavern where most of the customers are known, to remember whether the active tortfeasor was in the tavern on the date of the accident and whether he was intoxicated or not at that time. A prolonged lapse of time could benefit only the plaintiff and harm the dram shop operator's defense.

These occupational burdens have also been eased by varying approaches to the question of damages under the Act. Prior to 1949, there was no ceiling on the amount of damages which could be awarded. In 1949, the amount for which the dram shop owner could be liable was limited to $15,000;[23] and the provision which had allowed exemplary damages was eliminated.[24] A 1959 amendment maintained the $15,000 ceiling for injury to the person or to the property of any person.[25]

A more recent change in the act is aimed[26] at removing another

19. ILL. REV. STAT. ch. 43, § 135 (1947), *as amended*, 1949, Aug. 10, Laws 1949, p. 816, § 1.

20. ILL. REV. STAT. ch. 43, § 135 (1957), *as amended*, 1959, July 15, Laws 1959, p. 1075, § 1.

21. Orlicki v. McCarthy, 4 Ill. 2d 342, 353, 122 N.E.2d 513, 518 (1954).

22. Other states provide in their dram shop statutes that notice of the intended suit be given to the dram shop keeper. For example, the Connecticut law establishing liability for selling liquor to an intoxicated person requires the aggrieved person to give notice of the intention to bring an action under the statute within sixty days after the occurrence of the injury. CONN. GEN. STAT. ANN. § 30-102 (Supp. 1971).

23. ILL. REV. STAT. ch. 43, § 135 (1947), *as amended*, 1949, Aug. 10, Laws 1949, p. 816, § 1.

24. Exemplary damages are not specifically barred by the Act as it is presently written. In Kimes v. Trapp, 52 Ill. App. 2d 422, 202 N.E.2d 42 (1964), exemplary damages were allowed. However, De Lude v. Rimek, 315 Ill. App. 466, 115 N.E.2d 561 (1953), held that recovery is limited to the actual damages sustained and any payments made to the end of making the plaintiffs whole must be deducted from the recovery. The court interpreted the Dram Shop Act as remedial and not punitive.

25. ILL. REV. STAT. ch. 43, § 135 (1957), *as amended*, 1959, July 15, Laws 1959, p. 1075, § 1. This amendment did, however, raise the ceiling for recovery for loss of means of support resulting from the death or injury of any person to $20,000.

26. There is room for doubt as to the legislative intent of the 1971 amendment. In a House Judiciary Committee meeting on March 9, 1971, Representative John S.

gross inequity which was caused by the fact that the Act formerly penalized good barkeepers as well as irresponsible ones. A bartender who had earlier sold a few beers to a customer was as liable for a resulting tort as the irresponsible bartender who allowed the customer to become intoxicated elsewhere. The 1971 amendment should remove this inequity. The older standard for determining liability under the Act had been "causes the intoxication, in whole or in part."[27] The 1971 amendment changed the standard to "causes the intoxication."[28] This revision should lessen the liability of the conscientious barkeeper who is careful not to serve drinks to customers who are approaching intoxication. In addition, the new wording is a significant step toward establishing a standard of care for bartenders. It should make the incidence of liability more predictable in that a bartender will know that if he does not cause the intoxication he probably will not be held liable for its consequences.[29]

Thus, the trend in Illinois dram shop legislation appears to be favorable to dram shop owners and operators. The statutory changes discussed above indicate a response on the part of the legislature to the plight of dram shop keepers. The amendments seem to be haphazard attempts to lessen their previously expanding burdens in a mobile America. They imply a recognition that the Dram Shop Act was passed at a time when conditions were quite different.[30] The tenor of these amendments demonstrates that the legislative intent is to remove inequities in the Act and lessen the burden of dram shop keepers and

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Matijevich (D., North Chicago), the proponent of the amendment, was questioned by the members of the committee as to the reasons or necessity for the bill's passage. The representative was vague in answering; and, when pressed, he said that perhaps it would fasten liability only on the last tavern furnishing the liquor. When questioned further, he said, "Do it for me, fellows. One hand washes the other."

The committee then refused to send it to the house, but Representative Matijevich appeared on the floor of the house and garnered enough votes to get it passed without committee approval. David Alswang, "Recent Changes in Dram Shop Act and Common Law Liability," lecture before the Chicago Bar Association's Seminar on Torts and Tactics, November 9, 1971.

27. ILL. REV. STAT. ch. 43, § 135 (1969).

28. *See* note 1, *supra.*

29. However, the conscientious bartender can still be sued jointly with other bartenders. The question of causation will continue to be present because the amended statute still says that the injured party has a right of action, "severally or jointly against any person." Thus, it is possible to sue more than one owner or operator.

For instance, it would be difficult for a jury to determine the one dram shop where the intoxication was caused when the harmdoer had spent a night on the town. "In such case, it would be impossible for the jury to say which particular glass of liquor was the proximate cause of his death [the injured party whose estate brought the suit]. Each glass did its share of the work." Taylor v. Wright, 126 Pa. 617, 621, 17 A. 677, 678 (1889).

30. Comment, *Dram Shop Liability—A Judicial Response,* 57 CALIF. L. REV. 995, 996 (1969).

owners. At the same time, the plaintiff, the primary beneficiary of the Act, continues to be entitled to recover damages for injury to person or property or for loss of income. In this way, the remedial function of the Act is served while dram shop owners and operators are "benefited."

Therefore, since the Act itself neither permits nor precludes indemnification, this legislative trend would seem to indicate that it is permissible. If indemnification were to be applied to actions brought under the Dram Shop Act, it would be another way to ease the burden on dram shop owners and operators without harm to plaintiffs' rights. Thus, the question becomes: Is the Dram Shop Act, as it is presently worded, compatible with the concept of indemnification? Two points must be examined in answering this question: first, the Illinois law of indemnification between active and passive tortfeasors and, secondly, the nature of the Dram Shop Act itself.

THE ILLINOIS LAW OF INDEMNIFICATION

In general, the law seeks to impose the burden of liability commensurate with fault.[31] One device that is used to achieve this goal is the concept of indemnification. As Prosser defines it:

> Indemnity is a shifting of responsibility from the shoulders of one person to another; and the duty to indemnify will be recognized in cases where community opinions would consider that in justice the responsibility should rest upon one rather than the other. This may be because of the relation of the parties to one another, and the consequent duty owed; or it may be because of a significant difference in the kind or quality of their conduct.[32]

There are varying standards which must be met before a party may seek indemnification in a tort action. Formerly, in Illinois, indemnification was allowed to innocent parties only. Therefore, given the supposed penal nature of the Dram Shop Act, a dram shop owner who violated it was considered to be a guilty party and, consequently, not entitled to indemnification from an intoxicated tortfeasor.[33]

However, the Illinois law of indemnification underwent a significant change in 1967 when the Illinois Supreme Court decided *Miller v. De-*

31. Sargent v. Interstate Bakeries, Inc., 86 Ill. App. 2d 187, 229 N.E.2d 769 (1967).
32. W. PROSSER, LAW OF TORTS § 48 (3d ed. 1964) *as cited in* Walker v. Service Liquor Store, Inc., 120 Ill. App. 2d 112, 115, 255 N.E.2d 613, 614-15 (1970).
33. Coffey v. ABC Liquor Stores, Inc., 13 Ill. App. 2d 510, 514, 142 N.E.2d 705, 707 (1957).

Witt.[34] In that case, the court followed in spirit Prosser's "significant difference in the kind or quality of their conduct" standard when it held that indemnification should be allowed among active and passive tortfeasors. It was the court's opinion that, while Illinois law does not allow contribution among joint tortfeasors, it does allow a passively negligent tortfeasor to obtain indemnification from an actively negligent tortfeasor.

In an action brought under the Illinois Structural Work Act,[35] the court held that third party architects who were not actively negligent could obtain indemnification from a contractor who was. In *Miller*, the architects allegedly failed to act in fulfillment of the duty of care placed on them by the Structural Work Act. But if, on remand, the contractor were found to have actively participated in the conduct which caused injury, the court said that he must indemnify the architects for damages for which they were liable under the statute. Indemnity was to be allowed if the negligence of the architects was found to be passive in relation to that of the contractor.

This was the holding in *Miller* despite the fact that there was no express indemnification agreement between the architects and the contractor and despite the fact that, under the Structural Work Act, architects are liable for the injuries of workmen if their actions are found to be willful. Yet, the court would permit indemnification in this situation if the fault of the contractor could be characterized as active negligence while that of the architects was only passive negligence. In this context, the *Miller* decision indicates that the law of Illinois will avoid the terms of a statute if the conduct of the person liable under the statute is passive when compared to another party's active conduct: "[T]he lesser delinquent, if held accountable by the plaintiff, can transfer its statutory liability to the active delinquent, whose dereliction from duty brought about the plaintiff's injury."[36] In *Sargent v. Interstate Bakeries, Inc.*,[37] the Illinois Appellate Court for the First District extended the *Miller* rule and permitted a third party complaint seeking indemnification among tortfeasors even though there was an absence of a prior legal relationship. The *Sargent* court elaborated on the *Miller* decision's consideration of the indemnification issue with an extensive discussion of the history of the law of indemnification in Illinois and its

34. 37 Ill. 2d 273, 226 N.E.2d 630 (1967).
35. ILL. REV. STAT. ch. 48, §§ 60 and 69 (1971).
36. 37 Ill. 2d at 291-92, 226 N.E.2d at 642.
37. 86 Ill. App. 2d 187, 229 N.E.2d 769 (1967).

rationale, that is, that the right to indemnity stands upon the principle that everyone is responsible for the consequences of his own acts.

Quoting cases from courts outside of Illinois, the *Sargent* court adopted as its own the following distinctions between active and passive negligence:

> Passive negligence exists where one person negligently brings about a condition or an occasion and active negligence exists where another party negligently acts upon that condition and perpetrates a wrong.
>
> . . . [O]ne is passively negligent if he merely fails to act in fulfillment of a duty of care which the law imposes on him. . . . One is actively negligent if he participates in some manner in the conduct or omission which caused the injury.[38]

On the basis of the above definitions, it can be seen that the negligence of dram shop operators is usually passive; that is, there is a failure to fulfill the duty of care imposed by the Act, and the condition of intoxication is caused thereby.

THE DRAM SHOP ACT—PENAL OR REMEDIAL?

The Dram Shop Act itself must also be examined to determine if it is compatible with the concept of indemnification. The crux of the problem is that, while the Act is to be liberally construed,[39] it is worded so as to make dram shop owners and operators strictly liable for the consequences of their actions.

The Act is designed to discipline a legal but ill-favored trade. It affords a remedy against those who profit from the sale of liquor to mitigate the evils and dangers that flow from that sale, and yet it is a remedy not necessarily based on fault or negligence. Therefore, the Act is penal in a severe sense in that an obvious purpose of it is to strictly discipline those who participate in the liquor traffic. It makes tavern owners and operators liable without fault. The only thing that they must do to be liable under the Act is cause the intoxication of a person

38. 86 Ill. App. 2d at 192-93, 229 N.E.2d at 772, *citing* Southwestern Greyhound Lines v. Crown Coach Co., 178 F.2d 628 (8th Cir. 1949) and King v. Timber Structures, Inc., of California, 240 Cal. App. 2d 178, 49 Cal. Rptr. 414 (1966) respectively.

39. ILL. REV. STAT. ch. 43, § 94 (1971):

> This Act shall be liberally construed to the end that the health, safety, and welfare of the People of the State of Illinois shall be protected and temperance in the consumption of alcoholic liquors shall be fostered and promoted by sound and careful control and regulation of the manufacture, sale and distribution of alcoholic liquors.

This section applies to the entire Liquor Control Act of which section 135, the Dram Shop Act, is a part.

who commits a tort because of his intoxicated condition. The Act even goes so far as to make liable without fault those persons who as lessors or owners permit their premises to be used for the sale of liquor.[40] Transferring such liability to another seems incompatible with the strict terms of the Act.

However, by its terms, the Act is to be "liberally construed." The question then becomes what does "liberal construction" mean in relation to the "strict" liability imposed by the Act? In this vein, the remedial aspect of the Act—the reimbursement of the plaintiff for losses sustained as a consequence of the evils growing out of the liquor traffic—is sometimes emphasized. However, this does not change the essentially disciplinary and regulatory character of the Act.[41] Furthermore, this nature has not been changed expressly despite all the amendments to the Act. Tavern operators and owners of the buildings housing taverns are still liable regardless of fault for the consequences of the actions of their intoxicated customers.

This directive to construe the Dram Shop Act liberally, compounds the question of whether or not indemnification of dram shop owners and operators should be allowed. Without it, the strict liability imposed by the Act would seem to require that indemnification be denied in order to effectuate its penal nature. But, a liberal construction of the Act, emphasizing its remedial aspect, along with consideration of Illinois' changed law of idemnification, emphasizing the difference in types of negligent conduct, would indicate that it should be allowed. This is the situation the *Wessel* court faced. In order to discuss its decision on the matter in context, it should be helpful to consider in detail the cases that preceded it on this subject.

Appellate Court Decisions in Conflict

Coffey v. ABC Liquor Stores, Inc.[42] was the first case under the Act in which dram shop operators sought indemnification from an active tortfeasor. The Illinois Appellate Court for the Fifth District held that an action for indemnification was not justifiable under the provisions of the Dram Shop Act. The court reasoned that the regulations of the Act were established for the purpose of protecting the health, morals, and safety of the people, that the liability under the Act is penal in nature, and that tavern owners do not have the inherent right to sell

40. Lichter v. Scher, 11 Ill. App. 2d 441, 452, 138 N.E.2d 66, 71 (1956).
41. *Id.*
42. 13 Ill. App. 2d 510, 142 N.E.2d 705 (1957).

liquor without such jeopardy. Also, since the Act made the selling of liquor a tort if the result was the intoxication of a person who caused injury while so intoxicated, the tavern operator was a tortfeasor and, as such, could not be an innocent party. Because Illinois law at that time allowed indemnification only to innocent parties, *Coffey* held that indemnification could not be granted to the dram shop operator. This case served as precedent for the majority opinion in *Wessel v. Carmi Elks Home, Inc.*[43]

However, the Illinois law of indemnification has changed since 1957,[44] the date of the *Coffey* decision. Based on this broader interpretation of indemnification, the fourth district appellate court, in *Geocaris v. Bangs*,[45] refused to follow the *Coffey* holding. Instead, it adopted the reasoning of *Sargent v. Interstate Bakeries, Inc.*[46] that the right to indemnity stands upon the principle that everyone is responsible for the consequences of his own acts, and applied it to a dram shop action. The *Geocaris* court held that an intoxicated person should be liable for the consequences of his actions. It stated that it could not agree with the *Coffey* court's conclusion that allowing an action for indemnity would violate the public policy of Illinois as expressed in the Dram Shop Act. The *Geocaris* court said: "The *remedy* afforded by the statute is in no way diminished by the allowance of indemnification in a case such as this. *The plaintiff does not suffer a decrease in his rights.*"[47]

Walker v. Service Liquor Store, Inc.[48] followed *Geocaris* in holding that a dram shop operator may seek indemnity from an intoxicated person for damages paid by the operator resulting from the willful, deliberate, and malicious acts of the intoxicated person. The *Walker* court said that the terms of the Dram Shop Act itself were of no help since they neither permitted nor precluded indemnification. It then looked to the law of Illinois regarding indemnification as developed in the *Miller* and *Sargent* cases. With this reference, the facts as stated in the pleadings in *Walker* especially appeared to allow for indemnification. The third party defendant purchased liquor from the defendant package liquor store. Two days later he positioned himself on a bridge above the traffic lane of an interstate highway and dropped an automobile

43. — Ill. App. 3d —, 272 N.E.2d 416 (1971).
44. *See* discussion at p. 351-53, *supra.*
45. 91 Ill. App. 2d 81, 234 N.E.2d 17 (1968).
46. 86 Ill. App. 2d 187, 229 N.E.2d 769 (1967).
47. 91 Ill. App. 2d at 86, 234 N.E.2d at 19-20 (emphasis added).
48. 120 Ill. App. 2d 112, 255 N.E.2d 613 (1970).

wheel and tire through the windshield of a car below. The driver lost control of the car and sustained severe injuries. The court said that indemnification was justifiable in such a case because the conduct of the intoxicated person was more reprehensible than that of the liquor store operator. The significant difference in the active and passive conduct of the parties was held to be of the type necessary to permit indemnification.

Consequently, after the change in the Illinois law of indemnification, *Geocaris* and *Walker* indicated that it was the law of Illinois to allow indemnification to tavern owners and operators in actions brought against them under the Dram Shop Act. Without doubt, the main basis for these decisions was an interpretation of the prime purpose of the Act as remedial.

However, the issue was not laid to rest for long. One year after the *Walker* decision, the fifth district reached the opposite result in *Wessel.* The court concluded that indemnification was incompatible with the terms of the Dram Shop Act. It said that the *Geocaris* and *Walker* decisions had repudiated the public policy of Illinois as it is expresed in the Act itself and that the character of the liability imposed by the Act is such that it is an ultimate liability fixed by public policy on an industry.[49] In addition, it was the majority's opinion that applying indemnification principles to a dram shop action would negate the liability imposed on owners and operators by the Act:

> By the very nature of the dram shop action, and in the sense of the "active-passive" concept of indemnity law, the intoxicated person will always be "active" and the dram shop operator or owner "passive."[50]

On the other hand, as the dissent pointed out, a dram shop operator would not always be able to obtain indemnification. An action for indemnification would not be permitted if the operator were actually at fault; for example, selling liquor to a minor or to a person already intoxicated or in other situations where a loss may be foreseeable would be sufficient "activity" on the operator's part to warrant denial of indemnification.[51] In addition, even if the operator were entitled to indemnification, the possibility that a tortfeasor would be judgment proof could deny it to him. If the drunken tortfeasor were judgment proof, the injured party would still be protected. It is the dram shop owner or operator who must assume the risk of a tortfeasor, whose intoxica-

49. — Ill. App. 3d at —, 272 N.E.2d at 419.
50. *Id.*
51. — Ill. App. 3d at —, 272 N.E.2d at 421.

tion he has caused, not being financially responsible. This would be in keeping with the purpose of the Dram Shop Act of insuring recovery for injured parties.

Thus, although the *Wessel* court denied indemnification under the Dram Shop Act, neither of its opinions is a very convincing answer to the question of whether indemnification is compatible with the terms of the Act. This question, in turn, must be answered before the issue of allowing or denying indemnification in these cases can be resolved. And yet, the majority focused on the penal nature of the Act and its strict liability and said that indemnification was incompatible with it. The dissent focused on the remedial aspect of the Act and showed that indemnification was compatible with it.

The question of which policy of the Dram Shop Act predominates invariably leads to a decision regarding indemnification. If the answer is "strict liability," then indemnification is incompatible with that policy and will not be allowed, as in *Wessel.* If the answer is "remedy," then indemnification is compatible with that policy and indemnification will be allowed, as in *Geocaris* and *Walker.* And yet there is no simple answer to the question. The policy of the Act would seem to be penal, and yet the legislature has instructed that it should be "liberally construed."

Towards A Solution

Without any indication from the legislature, the position allowing indemnification is likely to prevail since indemnity is an equitable way to require the active tortfeasor to bear the burden of his own wrongdoing. It would avoid obvious injustices such as were demonstrated in the *Walker* case, where a dram shop owner, although liable under the Act, could conceivably have been denied indemnification for damages resulting from an action which occurred two days after the sale of the liquor. Fraud and collusion between the plaintiff and the active tortfeasor will be discouraged if indemnification is allowed. A primary purpose of the Act will still be served in that the plaintiff will be able to recover for his injury.

Indemnification should prevail because the Dram Shop Act, as it is presently written, is a patched-up relic of a bygone era. The Act does not adequately serve its purpose of providing satisfactory protection for society. Rather, it unfairly castigates liquor vendors and saddles them with an unreasonable burden. The Act, if only penal in nature, is an

attempt to legislate morals and suffers from the deficiencies inherent in such attempts.[52]

However, the legislature is the proper body to decide this conflict. Allowing indemnification in dram shop cases amounts to a judicial re-writing of the Dram Shop Act. The court is taking on the legislature's role, albeit only because the legislature has been derelict in giving the Act the overhauling it obviously needs. The amendments to the Act have been frequent but undirected, resulting in such a legal patchwork that the current Dram Shop Act should not be given weight as the considered judgment of the legislature but as a judgment by default.[53] Also, indemnification is but a poor substitute for a legislative re-thinking and re-working of the Act—and yet it will be used by the courts. Given the Act as it is presently written, it is a means to more satisfactory allocation of burden commensurate with fault.

Although the legislature may have been content, after *Geocaris* and *Walker*, to allow the courts to effectuate this goal in dram shop cases by allowing indemnification, the problem is more acute now that *Wessel* has denied it. The laws of the fourth and fifth districts are in conflict. It is unfortunate that the Illinois Supreme Court has not heard a case on this question; for, if it had, the law of Illinois would at least be uniform.

Even though unity of the law among the districts of Illinois is a desirable result and could be achieved by a supreme court decision allowing or denying indemnification, the legislature can, and should, be the body to bring about this end. It is the policy-making body of Illinois and should be looked to when the policy and workings of one of its statutes are in doubt.

The most forthright solution to the problem would be for the legislature to amend the Illinois Dram Shop Act to specify whether indemnification is or is not to be allowed. The same result could be reached if the Act were amended to either specify or stress one of the policies as predominant. In that case, following the reasoning of the cases discussed above, indemnification in dram shop actions would be allowed or denied to tavern owners or operators by implication. Whichever the means, it is to be hoped that the legislature will recognize the need to act and will do so without delay.

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52. Comment, *Dram Shop Liability—A Judicial Response,* 57 CALIF. L. REV. 995, 1000 (1969).
53. Krause, *Statutory Torts in Illinois,* 1967 U. ILL. L. FORUM 1, 11 (1967).