
Dramshops Act - Wife Permitted To Recover Damages for Loss of Support as Consequence of Intoxication and Death of Husband Whom She Shot in Self-defense - Kirulik v. Cohn, 16 Ill. App. 2d 385, 148 N.E. 2d 607 (1958)

DePaul College of Law

Follow this and additional works at: <https://via.library.depaul.edu/law-review>

Recommended Citation

DePaul College of Law, *Dramshops Act - Wife Permitted To Recover Damages for Loss of Support as Consequence of Intoxication and Death of Husband Whom She Shot in Self-defense - Kirulik v. Cohn*, 16 Ill. App. 2d 385, 148 N.E. 2d 607 (1958), 8 DePaul L. Rev. 109 (1958)
Available at: <https://via.library.depaul.edu/law-review/vol8/iss1/13>

This Case Notes is brought to you for free and open access by the College of Law at Digital Commons@DePaul. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Digital Commons@DePaul. For more information, please contact digitalservices@depaul.edu.

tion.¹⁷ Other courts have allowed the wife recovery where the injury to her husband was intentional¹⁸ but have generally proceeded on the basis of exemplary damages due to the character of the defendant's act.¹⁹

The reasoning of the instant case aligns itself with three recent decisions²⁰ in holding that any change in precedent should come from the legislature. This view, which was also taken by an Illinois court,²¹ fails to acknowledge a principle of the common law which gives a remedy wherever a right is violated. Consortium is a valuable property right which does not stand on subrogation but arises directly from the tort.²² Although there is an almost total lack of precedent in the recognition of this right in negligence cases, the Supreme Court of Iowa recently reasoned:

We deem precedent to be worthy of support only when it can stand the scrutiny of logic and sound reasoning in the light of present day standards and ideals.²³

The concepts to which the courts have reverted in denying a wife recovery for the loss of the consortium of her husband seem to be unsound as well as antiquated. Since a husband and wife have mutual rights and obligations in the marriage relation, if one has a remedy for the invasion of a co-existent right, the other should have the same remedy.

¹⁷ *Helmstetler v. Duke Power Co.*, 224 N.C. 821, 32 S.E. 2d 611 (1945); *Martin v. United Electric Ry.*, 71 R.I. 137, 42 A. 2d 897 (1945); *Blair v. Seitner Dry Goods Co.*, 184 Mich. 304, 151 N.W. 724 (1915); *Marri v. Stamford Street Ry. Co.*, 84 Conn. 9, 78 Atl. 582 (1911); *Bolger v. Boston Elevated RR. Co.*, 205 Mass. 420, 91 N.E. 389 (1910).

¹⁸ Actions for alienation of affections, criminal conversation and selling habit-forming drugs to the spouse are included within this group.

¹⁹ *Hinnant v. Tidewater Power Co.*, 189 N.C. 120, 126 S.E. 307 (1925); *Cravens v. Louisville & Nash. RR. Co.*, 195 Ky. 257, 242 S.W. 628 (1922).

²⁰ *Hartman v. Cold Spring Granite Co.*, 77 N.W. 2d 651 (Minn., 1956); *Nickel v. Hardware Mutual Casualty Co.*, 269 Wis. 647, 70 N.W. 2d 205 (1955); *Ripley v. Ewell*, 61 So. 2d 420 (Fla., 1952).

²¹ *Patelski v. Snyder*, 179 Ill. App. 24 (1913).

²² *Hitaffer v. Argonne Co.*, 183 F. 2d 811 (App. D.C., 1950).

²³ *Acuff v. Schmit*, 248 Iowa 272, 78 N.W. 480 (1957).

DRAMSHOPS ACT—WIFE PERMITTED TO RECOVER DAMAGES FOR LOSS OF SUPPORT AS CONSEQUENCE OF INTOXICATION AND DEATH OF HUSBAND WHOM SHE SHOT IN SELF-DEFENSE

Decedent was a habitual drunkard who, while under the influence of liquor, would become abusive to his wife, the plaintiff, beating her, and threatening her on occasion with a knife. He had been drinking heavily for about ten days when plaintiff went to defendants' liquor store and

tried to induce decedent to return home. Decedent refused, but did arrive home later, at which time he beat plaintiff. The next morning, he attempted to strangle his wife. She found a gun, loaded it and hid it, and then declared she would go with her husband if he left the house for more whiskey. The husband threatened to kill plaintiff and approached her in a menacing manner, whereupon she took the gun which she had hidden and killed him. She brought action against the liquor vendors, under the Dramshops Act, to recover damages for loss of support as consequence of the intoxication and death of her husband. Defendants claimed that this would be giving plaintiff a reward for shooting her husband. Verdict and judgment were for the plaintiff in the sum of \$10,000. *Kirulik v. Cohen*, 16 Ill. App. 2d 385, 148 N.E. 2d 607 (1958).

The Dramshops Act of 1949 states:

Every husband, wife, child, parent, guardian, employer or other person, who shall be injured, in person or in property, or means of support, by an intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her own name, severally or jointly, against any person or persons who shall, by selling or giving alcoholic liquor, have caused the intoxication, in whole or in part, of such persons. . . .¹

The liability for damages by the sale of intoxicating liquors is purely statutory. It was not a tort at common law to sell or give intoxicating liquors to an able-bodied individual.² However, it is the public policy of Illinois, expressed by legislative act:

He who deliberately sells that which he knows will . . . deprive the party of the control of his judgment, and render him, for the time being, incapable of exercising proper care for personal safety, or that of his property, must be prepared for the consequences that may follow.³

The definition and application of the phrase "in consequence of the intoxication" forms the subject matter of a great many of the Dramshops Act cases.⁴ Illinois courts have ruled that, in order for one to be liable un-

¹ Ill. Rev. Stat. (1949) c. 43, § 135. Since the death occurred in 1949, that statute is applicable. The 1957 statute provides the same in the following words: ". . . 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." Ill. Rev. Stat. (1957) c. 43, § 135.

² *Cruse v. Aden*, 127 Ill. 231, 20 N.E. 73 (1889), aff'g 21 Ill. App. 391 (1887); *Four v. DeLazzer*, 348 Ill. App. 191, 108 N.E.2d 599 (1952); *Howlett v. Doglio*, 402 Ill. 311, 83 N.E.2d 708 (1949), aff'g 334 Ill. App. 512, 79 N.E.2d 864 (1948); *Manthei v. Heimerdinger*, 332 Ill. App. 335, 75 N.E.2d 132 (1947); *Hyba v. C. A. Horneman, Inc.*, 302 Ill. App. 143, 23 N.E.2d 564 (1939).

³ *Emory v. Addis*, 71 Ill. 273, 277 (1874). Accord: *Kennedy v. Whittaker*, 81 Ill. App. 605 (1898).

⁴ In writing from this limited viewpoint, there is the danger that other essentials of a Dramshops Act case will be overlooked. Thus, it is well to remember that, "Under the statute, it was necessary for her [the wife] to satisfactorily establish, first, that the de-

der this statute which public policy has dictated, the sale of intoxicating liquor must be at least a contributing proximate cause of the loss or injury.⁵ But between this cause and the final effect arise many occurrences and agents (human and otherwise) which appear to challenge the logical ability of the courts.⁶ In *Haw v. 1933 Grill, Inc.*, the court resolved the problem of an intervening human agent thusly:

While we have a third party, defendant's floor manager, inflicting the injury in this case, the defendant must be presumed to have foreseen that its act of selling the liquor to Haw might have produced or been followed by the alteration in which he was injured. In view of the natural and logical sequence of the events leading up to Haw's injury and the fact that Belmont would not have struck him except for the manner in which he conducted himself as a result of his intoxicated condition, in our opinion such intoxication was a contributing factor and at least a proximate cause of the injury.⁷

In other words, it is not intended that the intoxicating liquor alone, exclusive of other agency, should do the whole injury.⁸ But, on the other hand, the Act was not

[i]ntended to require them [the liquor vendors] to anticipate every personal injury that might occur, even an assault by a person with whose wife the intoxicant has been carrying on an illicit affair, providing, of course, the latter did not provoke the assault by reason of his being intoxicated. The line must be drawn somewhere, for the Statute obviously does not impose absolute liability or make the dramshop owner responsible for every injury incurred by a person to whom he sells liquor.⁹

defendants sold or gave to the deceased intoxicating liquors; second, that the giving or selling of such liquors caused, in whole or in part, his intoxication; third, that such intoxication caused his death; and fourth, that by reason of his death the plaintiff was injured in her means of support." *Flynn v. Fogarty*, 106 Ill. 263, 266 (1883).

⁵ *New Amsterdam Casualty Co. v. Gerin*, 9 Ill. App.2d 545, 133 N.E.2d 723 (1956); *Hill v. Alexander*, 321 Ill. App. 406, 53 N.E.2d 307 (1944).

⁶ That is, it falls upon the court (ordinarily upon the jury as a question of fact) to determine whether such occurrence or agent is an intervening, efficient cause, which cause is "... a new and independent force, the intervention of which was not probable or foreseeable by first wrongdoer, which breaks causal connection between original wrong and injury and itself becomes direct and immediate cause of injury, and intervention of an independent, concurrent, or intervening force will not break causal connection if intervention of such force was itself probable or foreseeable, and in such case the earlier act, if it contributed to injury, may be regarded as a proximate cause." *Danhof v. Osborne*, 10 Ill. App.2d 529, 530, 135 N.E.2d 492, 493 (1956).

⁷ *Haw v. 1933 Grill, Inc.*, 297 Ill. App. 37, 46, 17 N.E.2d 70, 74 (1938). Consult: *Casey v. Burns*, 7 Ill. App.2d 316, 129 N.E.2d 440 (1955), where it was decided that an intervening and unforeseeable agency consisting of the wilful and malicious act of someone else was not the proximate cause of injury.

⁸ "The statute was designed for a practical end, to give a substantial remedy, and should be allowed to have effect according to its natural and obvious meaning." *Klopp v. B.P.O.E., Lodge #281*, 309 Ill. App. 145, 150, 33 N.E.2d 161, 164 (1941).

⁹ *Danhof v. Osborne*, 11 Ill.2d 77, 84, 142 N.E.2d 20, 24 (1957), rev'g 10 Ill. App.2d 529, 135 N.E.2d 492 (1956).

If there is a clear-cut case of an intoxicated person being killed by lightning, or by assault of a highwayman or burglar, or by other means which have no logical relation to the drinking, intoxication cannot be the proximate cause.¹⁰ Just what is a logical result has provoked great controversy.

At times, the intoxicant's inability to act has been the vital link in the chain of consequences joining cause and effect. In *Smith v. People*,¹¹ decedent was killed when the fastenings of a wagon in which he was sitting came loose from the whippletrees to which they were tied and the team ran away. It was decided that intoxication could be the proximate cause of death, since if decedent had been sober, he might have been able to prevent the runaway in spite of the fright of the horses. In much the same vein, *Triggs v. McIntyre*¹² presents the decision that where deceased, while unconscious as a result of intoxication, was unable to change his position to allow the passage of air into his lungs, suffocation was the result of intoxication.

At other times, positive actions on intoxicant's part have come into play. It was held in *Darley v. Donahue*¹³ that taunting and malignant gestures on the part of plaintiff, who was then struck by an intoxicated person did not justify that person in striking plaintiff, and therefore intoxication was the proximate cause of plaintiff's injuries.

A few Illinois decisions indicate weariness of the technical jargon involved in the phrase "proximate cause" or as it is sometimes called, "contributing proximate cause." In attempting to simplify matters, they have ruled specially on cases of loss of support to wife and children. Having done away with all adjectives, they have retained only the word "cause," whether the jury would consider it a proximate or a remote cause.¹⁴

No matter what the actual wordage used by the courts in jury instructions they are simply calling for an investigation of occurrences, beginning with the intoxication and ending with the loss or damage upon which suit is based. The problem, therefore, becomes one of determining whether an independent act has been committed, or an event has occurred, previous to the actual loss, which is, of itself, able to bear the entire "blame" for

¹⁰ *Schwehr v. Badalamenti*, 14 Ill. App.2d 128, 143 N.E.2d 558 (1957); *Hill v. Alexander*, 321 Ill. App. 406, 53 N.E.2d 307 (1944); *Sauter v. Anderson*, 112 Ill. App. 580 (1903).

¹¹ 141 Ill. 447, 31 N.E. 425 (1892).

¹² 115 Ill. App. 257 (1904), *affm'd* 215 Ill. 369, 74 N.E. 400 (1905).

¹³ 3 Ill. App.2d 112, 120 N.E.2d 381 (1957).

¹⁴ *Jack v. Prosperity Globe*, 147 Ill. App. 176 (1909); *Munz v. People*, 90 Ill. App. 647 (1900); *Kennedy v. Whitaker*, 81 Ill. App. 605 (1898). Thus, in *Spousta v. Berger*, 231 Ill. App. 454 (1923), plaintiff's husband, while intoxicated, forged an order for the payment of money to secure liquor. Intoxication was deemed the cause of his conviction and imprisonment for such crime, with resultant loss of support.

such loss. If such independent act is discovered, intoxication is removed from the realm of proximate cause. A finding in favor of plaintiff, on the other hand, will indicate a dependent intervening act or occurrence.

In the topic-case of this note, *Kirulik v. Cohn*, the situation is unique—an act by plaintiff's own hand is the vital intervening cause, or more clearly stated, the immediate cause of injury resulting in loss of support. Defendants, therefore, founded their theory on the principle that no person can profit by his own wrongdoing. They would deny recovery to a person who has contributed in a material and substantial degree to his own injury. Also, in their opinion, a party who shoots her husband is not an "innocent suitor" as required by the courts in applying the Dramshops Act.

The main support for these contentions was the fact that plaintiff was fully aware of her husband's conduct while intoxicated but made no effort to destroy whiskey left on the pantry shelf or to leave the premises or call for help, but instead, obtained and loaded a gun, which she held behind her back for twenty minutes and then shot her husband.¹⁵ Cases cited by defendants' counsel held that a person is not an "innocent suitor" and cannot recover where deceased's wife could have deprived her husband if liquor by breaking the jug or throwing out its contents and does not do so, as she is a willing party to his conduct;¹⁶ or where the injured person purchased liquor for his later assailant;¹⁷ or where the injured party is in a group, the members of which have been drinking, who has been drinking herself and who remains with persons obviously intoxicated;¹⁸ and where the plaintiff provokes the assault.¹⁹ Emphasis was placed on the case of *Reget v. Bell*, in which the Illinois Supreme Court declared:

It seems very plain, from the testimony, the plaintiff, now his widow, could have deprived him of the use of this whiskey, had she been so inclined, by breaking the jug, or throwing away its contents, whilst he was in bed. There was nothing to prevent her from so doing, and if she was not willing her husband should drink the contents of the jug, it was very easy to have prevented it.

We are bound to consider she was a willing party to the conduct of her husband, and instrumental in bringing the loss upon herself.²⁰

¹⁵ Defendants' (appellants') brief at 23.

¹⁶ *Reget v. Bell*, 77 Ill. 593 (1875).

¹⁷ *Swan v. Dilonardo*, 5 Ill. App.2d 233, 124 N.E.2d 657 (1955); *Douglas v. Athens Market Corporation*, 320 Ill. App. 40, 49 N.E.2d 834 (1943); *Forsberg v. Around Town Club, Inc.*, 316 Ill. App. 661, 45 N.E.2d 513 (1942); *Hays v. Waite*, 36 Ill. App. 397 (1890).

¹⁸ *James v. Wicker*, 309 Ill. App. 397, 33 N.E.2d 169 (1941).

¹⁹ *Bowman v. O'Brien*, 303 Ill. App. 630, 25 N.E.2d 544 (1940).

²⁰ *Reget v. Bell*, 77 Ill. 593, 595 (1875).

Plaintiff therefore, defendants argued, was precluded from claiming as an "innocent suitor" because she made no effort to destroy whiskey left on the pantry shelf.

Also, plaintiff's failure to leave the premises, in defendants' opinion, indicated her willingness to remain in a predicament which, in fact, she had created by obtaining, loading and using the gun. Thus, they called for the same conclusion as reached in *Forsberg v. Around Town Club*:

There was no restraint which prevented his leaving the restaurant. . . . He appears to have been satisfied to remain in whatever predicament he now complains he was forced into and in which he suffered his injuries . . . and as a matter of law [he] should not recover.²¹

None of the cases cited, however, was found to be directly on point, so as to declare plaintiff not an "innocent suitor" as a matter of law.²² Evaluation of plaintiff's actions was reserved to the jury. In upholding such procedure, the Illinois Appellate court said:

[W]e think the jury could properly find that plaintiff shot in self-defense, and we cannot say, therefore, that she was not an innocent suitor. Whether she should have left the apartment while he was chasing her, or should have called for help, were matters of defense. The same is true of the question whether she provoked the tragic event by threatening to go with decedent if he left the house for more whiskey. It is also a matter of defense whether her finding and loading the revolver and holding it hidden from decedent for twenty minutes before shooting him made her not an "innocent suitor." All reasonable men might not agree on the answers to these questions. Some might think that she may have feared to call for help or to leave the apartment unless to go with him if he went out for drink, and she may have hidden the revolver with a prudent hope that decedent would desist. . . . Furthermore, plaintiff could reasonably fear harm if she disposed of decedent's liquor.²³

In this manner, the appellate court sanctioned the trial court's theory of solving this complicated case on the basis of either falling within or without the "in consequence" phrase of the Dramshops Act. In other words, favorable verdict and judgment for plaintiff in the trial court evidence an important development in the history of the "in consequence" cases. Commission of what was found by the jury to be an act of self-defense is the proximate result of the actions of an intoxicated individual, and in turn is the proximate cause of that individual's death. The act of self-defense links

²¹ *Forsberg v. Around Town Club, Inc.*, 316 Ill. App. 661, 666, 45 N.E.2d 513, 515 (1942).

²² "She was an 'innocent suitor' if she shot her husband in self-defense and did not help to bring about his habitual drunkenness or his drunken condition which brought about his death." *Kirulik v. Cohn*, 16 Ill. App.2d 385, 390, 148 N.E.2d 607, 609 (1958).

²³ *Ibid.*, at 391, 610.

intoxication and death in the proximate cause-and-effect relationship necessary to recovery.²⁴

This case has enunciated no new theories or rules to be applied to Dramshops Act cases in the future. It has, however, demonstrated something more valuable. A complicated problem stemming from a unique set of facts has been resolved upon the basic principles of cause and effect. In other words, the case of *Kirulik v. Cohn* is an indication of the logical extreme to which the interpretation of the phrase "in consequence of" can be drawn.

²⁴ Instruction given to the jury as to the meaning of the term "proximate cause" directed them to look for "that cause which, in a natural and continuous sequence, unbroken by any other cause, produced the event. The consequences must be natural and probable consequences as distinguished from a possible consequence." Abstract of record, instruction 13 at 340.

EQUITY—LACK OF MUTUALITY OF REMEDY AT INCEPTION OF CONTRACT HELD NO DEFENSE IN ACTION FOR SPECIFIC PERFORMANCE

Manilow was a purchaser of real estate. His agent, Gould, sued the record title holders, the true beneficial owners, and their broker, for specific performance on a contract for the purchase of land. Manilow executed to Gould a general power of attorney in 1948, and on numerous occasions since then, Gould had entered into contracts for the purchases of real property, executing the instruments in her own name but on behalf of Manilow. In 1953, the beneficial owners authorized and directed their broker to put the property in question up for sale. The broker and Manilow negotiated the terms of a contract for the purchase of this land. The broker then obtained the signature of the record title holders and submitted the contract to Manilow who orally instructed Gould to sign her name on his behalf. On many occasions since the contract has been signed, Manilow repeated his affirmation of the contract, including the act of filing suit in this case.

Defendants moved to dismiss upon the ground that the power of attorney authorized Gould to contract in the name of Manilow and on his behalf, and not in her own name. They argued that Manilow was not bound by the contract because there was an absence of mutuality of remedy at the inception which precludes recovery. The trial court sustained the motion to dismiss and Gould appealed directly to the Illinois Supreme Court since a freehold was involved. The supreme court held that lack of mutuality of remedy at the inception of a contract is no longer a defense to a suit for specific performance. *Gould v. Stelter*, 14 Ill. 2d 376, 152 N.E. 2d 869 (1958).