ACTIONS BASED ON

STATUTES150.00

DRAM SHOP ACT

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INTRODUCTION

Section 6-21 of the Liquor Control Act of 1934 (the Dramshop Act) (235 ILCS 5/6-21 (2000)) creates a cause of action against owners of businesses that sell liquor, and also against lessors or owners of the premises on which the liquor is sold, for physical injury to a person, for injury to tangible property, or for injury to means of support or loss of society, but not both, caused by an intoxicated person.

The plaintiff must prove that the intoxication was caused by consumption of liquor provided by a defendant and that the injury, property damage, or loss of means of support or loss of society was caused by the act of an intoxicated person. Davis v. Oettle, 43 Ill.App.2d 149, 193
N.E.2d 111 (4th Dist.1963); Hernandez v. Diaz, 31 Ill.2d 393, 202 N.E.2d 9 (1964); Clifton v. Nardi, 65 Ill.App.3d 344, 382 N.E.2d 514, 22 Ill.Dec. 194 (1st Dist.1978). The concept of causation is one commonly understood and the jury need not be instructed as to its meaning. Kingston v. Turner, 115 Ill.2d 445, 505 N.E.2d 320, 106 Ill.Dec. 14 (1987). More than one dram shop may cause a single intoxication. In order to "cause" the intoxication the liquor must be a material and substantial factor in the intoxication. There is no liability for providing a de minimus amount. However, two 12 ounce cans of beer sold immediately before the collision is sufficient. Mohr v. Jilg, 223 Ill.App.3d 217, 586 N.E.2d 807, 166 Ill.Dec. 849 (4th Dist.1992). See also Kingston. An example of an action is one brought as the result of a collision of a car driven by an intoxicated person with another car, injuring its driver and killing the passenger, the father of four. In that case, there would be injury to the person of the driver, to the property of the driver, and injury to the means of support of the family of the passenger or, at his election, loss of society.

The practitioner should consider whether there is a basis to seek recovery simultaneously for property damage, personal injury, and damage to means of support or loss of society. Shiflett v. Madison, 105 Ill.App.2d 382, 388-389, 245 N.E.2d 567, 570-571 (1969); Kelly v. Hughes, 33
Ill.App.2d 314, 179 N.E.2d 273 (2d Dist.1962). Separate recoveries can be obtained as to each of these types of damage where applicable, and statutory limitations upon the amount of recovery apply to each element separately and not to the aggregate amount recovered. However, a plaintiff must elect between loss of society and loss of means of support as the

statute provides that the plaintiff may not recover for both. 235 ILCS 5/6-21(a) (1998). Note, however, that if more than one dram shop is liable, the limits apply to all dram shops liable as a group. In other words, dram shops cannot be "stacked."

Pursuant to the Dram Shop Act, recovery is limited to $15,000 for personal injury and property damage and $20,000 for loss of support for actions arising prior to September 12, 1985. However, for causes of action arising after that date, the limits of recovery have been raised by the 1985 amendment to the Dram Shop Act to $30,000 for personal injury and property damage and $40,000 for loss of support. Effective July 1, 1998, the limits were raised to $45,000 for personal injury or property damage and $55,000 for either loss of means of support or loss of society. Beginning in 1999 the amount is to be adjusted for inflation. It has been held that the legislature's increase in the liability limits did not change existing case law in regard to stacking. Rinkenberger v. Cook, 191 Ill.App.3d 508, 548 N.E.2d 133, 138 Ill.Dec. 903 (4th Dist.1989).

The dram shop litigant must also be aware of the types of expenditures which qualify as recoverable damages. As a general rule, medical expenses incurred on behalf of the injured person constitute personal injury damages, not property damage. Thorsen v. City of Chicago, 74
Ill.App.3d 98, 392 N.E.2d 716, 30 Ill.Dec. 61 (1st Dist.1979); Rinkenberger v. Cook, 191 Ill.App.3d 508, 548 N.E.2d 133, 138 Ill.Dec. 903 (4th Dist.1989). However, if the injured person is a minor or spouse physically injured by an intoxicated person, and the parent or non-injured spouse is obligated to pay the medical expenses under the family expense statute, 750 ILCS 65/15 (1994), these medical expenses may be considered property damage. Thompson v. Tranberg, 45 Ill.App.3d 809, 360 N.E.2d 108, 4 Ill.Dec. 361 (2d Dist.1977); Kelly v. Hughes, 33
Ill.App.2d 314, 179 N.E.2d 273 (2d Dist.1962); Shepherd v. Marsaglia, 31 Ill.App.2d 379, 176 N.E.2d 473 (2d Dist.1961); Fortner v. Norris, 19 Ill.App.2d 212, 153 N.E.2d 433 (3d Dist.1958).

In Ragan v. Protko, 66 Ill.App.3d 257, 383 N.E.2d 745, 22 Ill.Dec. 937 (5th Dist.1978), the court concluded that in order for a parent to recover for his adult child's medical and funeral expenses, he must be legally liable for the charges, and this liability must not arise due to a voluntary assumption of financial responsibility. Maras v. Bertholdt, 126 Ill.App.3d 876, 467 N.E.2d 599, 81 Ill.Dec. 728 (2d Dist.1984), also suggested (in dictum) that if the plaintiff-estate has paid the decedent's medical and funeral bills, the bills would be recoverable as property damage inasmuch as the estate has a legal obligation to pay the bills and suffered a loss of property.

Relying on Demikis v. One Cent Club, 319 Ill.App. 191, 48 N.E.2d 782 (1943), and Shiflett v. Madison, 105 Ill.App.2d 382, 245 N.E.2d 567 (1969), the court in Maras v. Bertholdt, supra, held that pain and suffering is an element recoverable as a personal injury. The Maras court further held that recovery for pain and suffering survives the death of the injured party, and that the plaintiff could recover for decedent's pain and suffering if the plaintiff could prove that the decedent consciously suffered pain following the accident. Prior to the 1998 amendment, loss of consortium was not recoverable under the Dram Shop Act. Knierim v. Izzo, 22 Ill.2d 73, 174

N.E.2d 157 (1961). Effective July 1, 1998, plaintiff may recover loss of society. 235 ILCS 5/6-
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(1998).

Recovery for loss of support under the Act is justified under the theory that a person actually contributing to support prior to the time of his death would likely have continued such support had he lived. Angeloff v. Raymond, 70 Ill.App.3d 594, 388 N.E.2d 1128, 27 Ill.Dec. 165 (2d Dist.1979). The law requires a showing that support was in fact rendered, and recovery cannot be based upon the future potential of support not presently provable. Angeloff v. Raymond, supra, Penoyer v. Hare, 76 Ill.App.3d 225, 394 N.E.2d 1082, 31 Ill.Dec. 764 (2d Dist.1979). Support must be measured by such tangibles as loss of wages and inability to continue to earn a living. Stevens v. B & L Package Liquors, Inc., 66 Ill.App.3d 120, 383 N.E.2d
676, 22 Ill.Dec. 868 (5th Dist.1978). It need not be proven that the decedent had a legal obligation to support the plaintiff. Support actually received, though voluntarily contributed, is sufficient and there need not be a legal claim to support. Robertson v. White, 11 Ill.App.2d 177, 136 N.E.2d 550 (1st
Dist.1956).

Services rendered by a wife in performance of her household and domestic duties do not constitute a loss of means of support under the Act. Although there is a language in Weiner v. Trasatti, 19 Ill.App.3d 240, 311 N.E.2d 313 (1st Dist.1974), suggesting that domestic services are a means of support, the Illinois decisions since Weiner have continued to back away from that language. These courts construe the Wiener language as dicta, having no precedential value. See Farmers State Bank & Trust Co. v. Lahey's Lounge, Inc., 165 Ill.App.3d 473, 519 N.E.2d
121, 116 Ill.Dec. 531 (4th Dist.1988) (summarizing decisions); Wilberton v. Freddie's Pepper Box, Inc., 148 Ill.App.3d 319, 499 N.E.2d 615, 102 Ill.Dec. 58 (1st Dist.1986); Maras v. Bertholdt, 126 Ill.App.3d 876, 467 N.E.2d 599, 81 Ill.Dec. 728 (2d Dist.1984); Penoyer v. Hare, 76 Ill.App.3d 225, 394 N.E.2d 1082, 31 Ill.Dec. 764 (2d Dist.1979); Martin v. American Legion Post No. 784, 66 Ill.App.3d 116, 383 N.E.2d 672, 22 Ill.Dec. 864 (5th Dist.1978); Stevens v. B & L Package Liquors, Inc., 66 Ill.App.3d 120, 383 N.E.2d 676, 22 Ill.Dec. 868 (5th Dist.1978). Means of support as defined in the post Weiner decisions relates to a party's wage earning potential and does not include maternal duties and domestic chores. Note however that the cases holding loss of society is not recoverable as part of loss of support have been affected by the statutory amendment effective July 1, 1998, allowing recovery for loss of means of support.

The presumption of loss existing under the Wrongful Death Act when beneficiaries are lineal next of kin does not exist under the Dram Shop Act. Howlett v. Doglio, 402 Ill. 311, 83
N.E.2d 708 (1949); Knierim v. Izzo, 22 Ill.2d 73, 174 N.E.2d 157 (1961).

In addition to those statutory amendments noted above, other amendments of significance to the Dram Shop Act occurred in 1965, 1971, 1986 and 1998. The

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Amendment allowed a person who was injured in means of support to maintain a loss of support action in his own name, even if the person providing the support was alive at the time the action was brought. Prior to 1965, the person providing the support was a necessary party in such cases. See Simmons v. Hendricks, 32 Ill.2d 489, 207 N.E.2d 440 (1965).

The 1971 amendment eliminated the words "in whole or in part" from the first sentence of the Act. Prior to the 1971 amendment, liability was imposed upon any defendant who "by selling or giving alcoholic liquor has caused the intoxication, in whole or in part, of such person
..." Thus, a dram shop plaintiff must now prove that the defendant dram shop "caused" the intoxication of the allegedly intoxicated person. The amendment established a requirement that the charged defendant must have done more than furnish a negligible amount of intoxicating liquor. Kingston v. Turner, 115 Ill.2d 445, 457; 505 N.E.2d 320, 325; 106 Ill.Dec. 14, 19 (1987); Caruso v. Kazense, 20 Ill.App.3d 695, 697, 313 N.E.2d 689, 691 (3d Dist.1974); Nelson v. Araiza, 69 Ill.2d 534, 372 N.E.2d 637, 14 Ill.Dec. 441 (2d Dist.1977); Henry v. Bloomington Third Ward Community Club, 89 Ill.App.3d 106, 411 N.E.2d 540, 44 Ill.Dec. 418 (4th Dist.1980). However, more than one dram shop can be liable if more than one "caused" the intoxication. Thompson v. Tranberg, 45 Ill.App.3d 809, 812; 360 N.E.2d 108, 111; 4 Ill.Dec.
361, 364 (2d
Dist.1977).

A 1986 amendment provides that anyone at least 21 years old, who pays for a hotel or motel room or facility knowing that such place is to be used by anyone under 21 for the unlawful consumption of liquor and such consumption causes the intoxication of the person under 21, shall be liable to anyone who is injured by the intoxicated person. 235 ILCS 5/6-21.

The 1998 amendment increased the limits, provided for limit "indexing" and allowed for recovery for loss of means of support. The definition of loss of means of support is identical to the language of IPI 31.11. The Dram Shop Act itself contains a one-year limitations period. 235
ILCS 5/6-21 (1998). This restriction is statutory and not subject to the general provisions of the Limitations Act (735 ILCS 5/13-101 et seq. (1994)). The dram shop limitations period is not tolled for injuries to minors. Seal v. American Legion Post No. 492, 245 F.2d 908 (7th Cir.1957); Lowrey v. Malkowski, 20 Ill.2d 280, 170 N.E.2d 147 (1960); cert. denied, 365 U.S. 879, 81 S.Ct. 1029, 6 L.Ed.2d 191 (1961); Demchuk v. Duplancich, 92 Ill.2d 1, 440 N.E.2d 112, 64 Ill.Dec. 560 (1982). Nor is it equitably tolled merely because discovery could not be obtained because of a driver's invocation of the fifth amendment based on pending criminal charges. Bradford v. Soto, 159 Ill.App.3d 668, 512 N.E.2d 765, 111 Ill.Dec. 376 (2d Dist.1987).

The Dram Shop Act has limited extra-territorial effect. Thus, no cause of action arises under the Act for injuries occurring outside the State of Illinois, even though the gift or sale of alcoholic liquors which caused the occurrence may have occurred within this state and the person harmed is a resident of Illinois. Graham v. General U.S. Grant Post No. 2665, V.F.W.,
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Ill.2d 1, 248 N.E.2d 657 (1969); Colligan v. Cousar, 38 Ill.App.2d 392, 187 N.E.2d 292 (1st Dist.1963); Eldridge v. Don Beachcomber, Inc., 342 Ill.App. 151, 95 N.E.2d 512 (1st Dist.1950). This holding was codified by Public Act 84-1381, effective September 12, 1986, which explicitly provided that only persons injured "within this state" have a cause of action under the Dram Shop Act. However, that same amendment to the Act states that a cause of action can be maintained against any person, "licensed under the laws of this state or of any other state to sell alcoholic liquor," who sells or gives liquor "within or without the territorial limits of this state." Thus, although a prerequisite to a cause of action is that the injury occur within Illinois, a sale of liquor outside of Illinois causing injury within Illinois is now actionable under the Illinois Dram Shop Act. This 1986 amendment statutorily overrules prior cases (e.g., Wimmer v. Koenigseder,
108 Ill.2d 435, 484 N.E.2d 1088, 92 Ill.Dec. 233 (1985)) which held that no cause of action arises for injuries occurring in Illinois following the sale of alcoholic liquors outside of Illinois to Illinois residents.

An insurance carrier which has paid first party benefits to the injured victim has the right, as subrogee of an injured party, to bring an action against the responsible dram shop. Dworak v. Tempel, 17 Ill.2d 181, 161 N.E.2d 258 (1959).

An intoxicated person has no cause of action for his own injuries. Holmes v. Rolando,
320 Ill.App. 475, 51 N.E.2d 786 (4th Dist.1943); Monsen v. DeGroot, 130 Ill.App.3d 735, 475
N.E.2d 5, 86 Ill.Dec. 199 (1st Dist.1985). Contributory negligence is not a defense in dram shop cases. Merritt v. Chonowski, 58 Ill.App.3d 192, 373 N.E.2d 1060, 15 Ill.Dec. 588 (3d Dist.1978). Also, the doctrine of comparative negligence has not been recognized in a dram shop action. Reeves v. Brno, Inc., 138 Ill.App.3d 861, 486 N.E.2d 405, 93 Ill.Dec. 304 (2d Dist.1985). Furthermore, the Dram Shop Act does not create tort liability for purposes of the Contribution Act, since the liability created by the Dram Shop Act does not sound in tort. Hopkins v. Powers, 113 Ill.2d 206, 497 N.E.2d 757, 100 Ill.Dec. 579 (1986); Jodelis v. Harris, 118 Ill.2d 482, 517
N.E.2d 1055, 115 Ill.Dec. 369
(1987).

The Dram Shop Act provides the sole remedy against tavern operators and owners of tavern premises for any injury caused by an intoxicated person or in consequence of intoxication. Knierim v. Izzo, 22 Ill.2d 73, 174 N.E.2d 157 (1961); see also Hopkins v. Powers, 113 Ill.2d 206,
497 N.E.2d 757, 100 Ill.Dec. 579 (1986). However, the Dram Shop Act does not insulate a tavern owner from all potential common law liability. Thus, a tavern keeper has a duty to see that his guests are free from annoyance of injury as much as any possessor of land must act as a reasonable man in avoiding harm to invitees from negligence or even intentional attacks of third persons. Lessner v. Hurtt, 55 Ill.App.3d 195, 371 N.E.2d 125, 13 Ill.Dec. 430 (2d Dist. 1977). It has been held that this duty of a tavern keeper to a patron is a "high duty of care." Hayes v. O'Donnell, 76 Ill.App.3d 695, 395 N.E.2d 184, 32 Ill.Dec. 237 (2d Dist. 1979). While the tavern owner's duty may decrease when the patron leaves the bar, the tavern operator is

in a special relationship with third persons on his premises and has a duty to take reasonable action to protect invitees from foreseeable damages caused by third persons. St. Phillips v. O'Donnell, 137 Ill.App.3d 639, 484 N.E.2d 1209, 92 Ill.Dec. 354 (2d Dist. 1985). The tavern keeper must take reasonable affirmative action to protect against misconduct of third parties, when the danger is apparent and the circumstances are such as to put a prudent person on notice of the probability of danger. Yangas v. Charlie Club, Inc., 113 Ill.App.3d 398, 447 N.E.2d 484, 69 Ill.Dec. 267 (3d Dist. 1983). See also Osborne v. Stages Music Hall, Inc., 312 Ill.App.3d 141, 726 N.E.2d 728, 244 Ill.Dec. 753 (1st Dist. 2000).

A tavern keeper may be liable to his business invitees on the same basis as any other owner or occupier of property, even though the sale and consumption of alcoholic beverages may have been a factor in the injury. In Harris v. Gower, Inc., 153 Ill.App.3d 1035, 506 N.E.2d 624, 106 Ill.Dec. 824 (5th Dist. 1987), a complaint alleging that the tavern owners negligently removed an unconscious and intoxicated patron from the tavern and placed him in his car where he subsequently froze to death was held to state a cause of action for common-law negligence rather than negligence in the sale of intoxicating liquor, and thus was not barred by the existence of the Dram Shop Act as the exclusive remedy against tavern owners for injuries resulting from intoxication.

The two defenses which were generally recognized are commonly referred to as "complicity" and "provocation." Earlier cases based the defense of complicity on the proposition that a plaintiff cannot recover for injuries or damage inflicted by an intoxicated person when the plaintiff contributes to a material and substantial degree to the intoxication. Osinger v. Christian, 43 Ill.App.2d 480, 193 N.E.2d 872 (1st Dist. 1963); Holcomb v. Hornback, 51 Ill.App.2d 84, 200 N.E.2d 745 (4th Dist. 1964). In Nelson v. Araiza, 69 Ill.2d 534, 543; 372 N.E.2d 637, 641; 14 Ill.Dec. 441, 445 (1978), a number of inconsistent judicial definitions and applications of the complicity doctrine were "distilled" into this rule of law: "only one who actively contributes to or procures the intoxication of the inebriate is precluded from recovery." See also Parsons v. Veterans of Foreign Wars Post 6372, 86 Il.App.3d 515, 408 N.E.2d 68, 41 Ill.Dec. 722 (5th Dist. 1980). Following Nelson, there were several decisions that seemed to authorize other definitions of complicity. In Walter v. Carriage House, Hotels Ltd., 164 Ill.2d 80, 646 N.E.2d 599, 207 Ill.Dec. 33, (1995), the Supreme Court noted the bright line drawn by the Nelson court and found that IPI 150.17 did not reflect the law following Nelson. IPI 150.17 has been amended to follow Nelson.

Whether or not a plaintiff is barred by his conduct under the doctrine of complicity is generally a question of fact for the jury. Complicity is an affirmative defense which must be raised by the defendant. Goodknight v. Piraino, 197 Ill.App.3d 319, 554 N.E.2d 1, 7; 143 Ill.Dec. 208, 214 (4th Dist. 1990); cf. Darguzas v. Robinson, 162 Ill.App.3d 362, 515 N.E.2d

451, 452; 113 Ill.Dec. 642, 643 (2d Dist. 1987) (referring to the "affirmative defense of complicity").

Since complicity is not predicated on the plaintiff's contribution to his injury, but only upon his contribution to the intoxication, the question arises as to whether or not provocation is a defense to a claim under the Illinois Liquor Control Act. In Nelson v. Araiza, 69 Ill. 2d 534, 372
N.E.2d 637, 14 Ill.Dec. 441 (1978), the Illinois Supreme Court held that since the Illinois Liquor Control Act was not predicated on negligence, contributory negligence was not a defense in a dramshop case, and held that the doctrine of complicity was an affirmative defense under the Act. The Nelson court did not specifically address the issue of provocation. Before and after Nelson, but preceding Walter v. Carriage House Hotels, 164 Ill.2d 80, 646 N.E.2d 599, 207
Ill.Dec. 33 (1995), a variety of cases held under the old Act that provocation was an affirmative defense which must be raised by the defendant. Tresch v. Nielsen, 57 Ill.App.2d 469, 207 N.E.2d 109 (1st Dist. 1965); Williams v. Franks, 11 Ill.App.3d 937, 298 N.E. 401 (1st Dist. 1973); Aiken v. J.R.'s Lounge, Inc., 158 Ill.App.3d 834, 512 N.E.2d 130, 111 Ill.Dec. 226 (3rd Dist. 1987); Gilman v. Kessler, 192 Ill.App.3d 630, 548 N.E.2d 1371, 139 Ill.Dec. 657 (2nd Dist. 1989).

However, Galyean v. Duncan, 125 Ill.App.3d 464, 466 N.E.2d 264, 80 Ill.Dec. 812 (5th Dist. 1984), held that provocation was not a defense to the Act, refusing a defendant's proposed instructions on provocation. But see Werner v. Nebal, 377 Ill.App.3d 447, 878 N.E.2d 811, 316 Ill.Dec. 89 (1st Dist. 2007) (refusing an instruction on the issue of provocation because the facts did not warrant it, but stated that provocation is an affirmative defense under the Act.)

Charitable organizations selling liquor are liable, as is a trustee operating a dram shop pursuant to testamentary direction. Klopp v. Benevolent Protective Order of Elks, 309 Ill.App. 145, 33 N.E.2d 161 (3d Dist.1941); Moran v. Katsinas, 17 Ill.App.2d 423, 150 N.E.2d 637 (3d Dist. 1958), aff'd, 16 Ill.2d 169, 157 N.E.2d 38 (1959). However, a trustee under a land trust is not liable under the Dram Shop Act. Wendt v. Myers, 59 Ill.2d 246, 319 N.E.2d 777 (1974); Robinson v. Walker, 63 Ill.App.2d 204, 211 N.E.2d 488 (1st Dist. 1965).

Because the Dram Shop Act is designed to regulate the liquor traffic as a business, it does not apply to an individual who serves intoxicants to his guests. Cruse v. Aden, 127 Ill. 231, 20
N.E. 73 (1889); Blackwell v. Fernandez, 324 Ill.App. 597, 59 N.E.2d 342 (1st Dist. 1945). Thus, social hosts whose guests became intoxicated are not liable under the Act. Miller v. Moran, 96
Ill.App.3d 596, 421 N.E.2d 1046, 52 Ill.Dec. 183 (4th Dist. 1981); Richardson v. Ansco, Inc., 75
Ill.App.3d 731, 394 N.E.2d 801, 31 Ill.Dec. 599 (3d Dist. 1979); Heldt v. Brei, 118 Ill.App.3d 798, 455 N.E.2d 842, 74 Ill.Dec. 413 (1st Dist. 1983); Wienke v. Champaign County Grain Ass'n, 113 Ill.App.3d 1005, 447 N.E.2d 1388, 69 Ill.Dec. 701 (4th Dist. 1983); Puckett v. Mr. Lucky's, Ltd., 175 Ill.App.3d 355, 357; 529 N.E.2d 1169, 1170; 125 Ill.Dec. 93, 94 (4th Dist. 1988). The Act has also been held not to be applicable to a noncommercial supplier and employer who served intoxicating liquor to his minor employee. Martin v. Palazzolo Produce

Co., 146 Ill.App.3d 1084, 497 N.E.2d 881, 100 Ill.Dec. 703 (5th Dist.1986).

Illinois does not recognize a common law action for negligently furnishing alcoholic beverages which cause intoxication and result in injury. See e.g., Puckett v. Mr. Lucky's, Ltd., 175 Ill.App.3d 355, 357-358; 529 N.E.2d 1169, 1170-1171; 125 Ill.Dec. 93, 94-95 (4th Dist. 1988) (holding that there is no common law right to recover against a tavern for giving away or selling intoxicating liquor because the Dram Shop Act provides the exclusive source of such liability); but see Quinn v. Sigma Rho Chapter of Beta Theta Pi Fraternity, 155 Ill.App.3d 231, 237; 507 N.E.2d 1193, 1197-1198; 107 Ill.Dec. 824, 828-829 (4th Dist. 1987), recognizing that the furnishing of intoxicating beverages to underage persons does not of itself create a legal duty necessary for the establishment of a common law negligence action, but also finding that a fraternal organization may be held liable in negligence, under appropriate circumstances, for foreseeable injuries sustained by membership applicants required to engage in illegal and excessively dangerous activities.

Comments, instructions and related notes to "in consequence" actions have been omitted in that they apply only to causes of action accruing before 9/12/85. In the event a practitioner should need to review those, they are in the 1995 edition.

Introduction revised October 2008.