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Negligence - Proximate Cause - Liability of Tavern-Keeper to Third Person Injured by One to Whom Tavern-Keeper Had Made and Unlawful Sale of Liquor

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NEGLIGENCE—PROXIMATE CAUSE—LIABILITY OF TAVERN-KEEPER TO THIRD PERSON INJURED BY ONE TO WHOM TAVERN-KEEPER HAD MADE AN UNLAWFUL SALE OF LIQUOR—In a jurisdiction having a statute prohibiting sales of liquor to minors and persons actually or apparently intoxicated, defendants, four tavern-keepers, served alcoholic beverages to an eighteen-year-old minor. Fifteen or twenty minutes after leaving the last of the taverns, the intoxicated minor negligently drove a motor vehicle and collided with plaintiff's car, killing plaintiff's husband. Plaintiff brought this action as representative of her husband's estate and as owner of the damaged car. Her complaint charged not only that defendants unlawfully and negligently sold and served alcoholic beverages to a minor under circumstances constituting notice that he was a minor, but also that the sale and service by one or more of the defendants was at a time when the minor's intoxicated condition was apparent. The trial court granted defendants a summary judgment on the ground that the complaint failed to state a cause of action. On certification directly to the Supreme Court, *held,* reversed. Plaintiff's complaint states a cause of action in negligence. *Rappaport v. Nichols,* 31 N.J. 188, 156 A. (2d) 1 (1959).

It was not an actionable tort at common law to sell or give intoxicating liquor to a strong, able-bodied man.[1] The consumption, rather than the supplying of the liquor, was held to be the proximate cause of any injury to the recipient or a third person resulting from intoxication of the recipient.[2] If the recipient himself was injured, the supplier of the liquor had the added defense of contributory negligence.[3] However, there were some

[1] Cruse v. Aden, 127 Ill. 231, 20 N.E. 73 (1889); Howlet v. Doglio, 402 Ill. 311, 83 N.E. (2d) 708 (1949); Seibel v. Leach, 233 Wis. 66, 288 N.W. 774 (1939); BLACK, INTOXICATING LIQUORS §281, p. 333 (1892).

[2] Fleckner v. Dionne, 94 Cal. App. (2d) 246, 210 P. (2d) 530 (1949); Collier v. Stamatis, 63 Ariz. 285, 162 P. (2d) 125 (1945); Hitson v. Dwyer, 61 Cal. App. (2d) 803, 143 P. (2d) 952 (1943).

[3] Cole v. Rush, 45 Cal. (2d) 345, 289 P. (2d) 450 (1955).

exceptions to a supplier's immunity to civil liability. If the recipient was so drunk that he could be said to have lost his volition, the act of supplying him more liquor could constitute an assault and battery.[4] Also, since an innkeeper had a duty to use reasonable care in protecting guests from injury by fellow guests,[5] he could be held liable to a guest injured by another guest who had become intoxicated on liquor obtained from the innkeeper. Although this was not technically an exception to the rule that the furnishing of liquor was not the proximate cause of ensuing injuries,[6] it did make the supplier liable for the results. Finally, one could be held liable for interference with a wife's right to consortium by supplying liquor to her husband, resulting in his death, after having been expressly warned that he was a habitual drunkard.[7] Here the sale was analogized to the wrongful sale of habit-forming drugs.[8] The habitual drunkard was said to have lost his volition,[9] and the sale was viewed as merging with the consumption, thus becoming the proximate cause of the injury to the wife. Many states have dram shop acts extending the liability of suppliers of liquor.[10] Under these statutes proximate cause considerations have not stood in the way of holding suppliers liable for injuries to third persons.[11] The furnishing of the liquor is specifically made the liability-creating act, and intervening acts, such as driving a car, have been found not to break the causal connection between the furnishing and the injury.[12] In the absence of an applicable dram shop act, however, only one other court has held that plaintiff had a good cause of action against a supplier who violated a statute prohibiting sales of liquor to minors and intoxicated persons.[13] The reasoning of the principal case is that a

4 McCue v. Klein, 60 Tex. 168 (1883); Ibach v. Jackson, 148 Ore. 92, 35 P. (2d) 672 (1934).

5 Peck v. Gerber, 154 Ore. 126, 59 P. (2d) 675 (1936); Reilly v. 180 Club, Inc., 14 N.J. Super. 420, 82 A. (2d) 210 (1951). Cf. Mastad v. Swedish Brethren, 83 Minn. 40, 85 N.W. 913 (1901).

6 See Cherbonnier v. Rafalovich, (D.C. Alaska 1950) 88 F. Supp. 900, holding that reliance on only the innkeeper's sale of liquor to the intoxicated guest was not sufficient to state a cause of action.

7 Swanson v. Ball, 67 S.D. 161, 290 N.W. 482 (1940); Pratt v. Daly, 55 Ariz. 535, 104 P. (2d) 147 (1940).

8 See Hoard v. Peck, 56 Barb. (N.Y.) 202 (1867), for an example of a habit-forming drug case.

9 Cole v. Rush, (Cal. 1954) 271 P. (2d) 47, note, 53 MICH. L. REV. 632 (1955), revd. 45 Cal. (2d) 345, 289 P. (2d) 450 (1955), almost broke away from the requirement of loss of volition, a step which would have allowed the sale to be considered a proximate cause.

10 For a list of states with such acts, see Ogilvie, "History and Appraisal of the Illinois Dram Shop Act," 1958 UNIV. ILL. L.F. 175 at 180, n. 30. Prior to 1934 New Jersey had a civil damage law imposing strict liability on unlawful sellers of alcoholic beverages.

11 McKinney v. Foster, 391 Pa. 221, 137 A. (2d) 502 (1958); Manning v. Yokas, 389 Pa. 136, 132 A. (2d) 198 (1957); Benes v. Campion, 186 Minn. 578, 244 N.W. 72 (1932).

12 Ibid.

13 Waynick v. Chicago's Last Department Store, (7th Cir. 1959) 269 F. (2d) 322, note, 45 VA. L. REV. 1224 (1959), a recent federal case purporting not to rest on a dram shop act, held that the unlawful sale of liquor, which contributed to the intoxication of the

statute making sales of liquor to certain persons unlawful may raise a duty on the part of the seller toward third persons,[14] and that the sale may be a proximate cause of injuries to such third persons when any intervening acts which occur are foreseeable.[15] The court in the principal case stresses as necessary to finding the supplier negligent that the supplier knows, or should know, that the recipient is a minor, or that he is intoxicated.[16] This scienter requirement should prevent the extension of liability from placing too great a burden[17] on the supplier in states, such as New Jersey, in which the violation of a statute is only evidence of negligence.[18] It might seem that no such limitation would be available in states in which the statutory violation is negligence per se.[19] Such a court could, however, restrict liability if the scienter requirement were not met by introducing the scienter requirement as a proximate cause consideration and finding the injury in such a case not to be reasonably foreseeable. The result in the principal case seems desirable both in attempting to keep the number of intoxicated drivers on the highways to a minimum and in compensating the injured third party, who may have a better chance of collecting damages from a tavern-keeper than from the driver. If a tavern-keeper has unlawfully, with knowledge, contributed to the intoxication of a person who, because of such intoxication, negligently injures a third person, the tavern-keeper evokes little sympathy as against the innocent third party.

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purchaser, was a proximate cause of injuries to a third person, the injuries resulting from the purchaser's negligent operation of an automobile. *Contra:* Cowman v. Hansen, (Iowa 1958) 92 N.W. (2d) 682; State v. Hatfield, 197 Md. 249, 78 A. (2d) 754 (1951); Fleckner v. Dionne, note 2 supra; Seibel v. Leach, note 1 supra. In the Cowman case the lack of proximate cause was attributed to the intoxicated person's driving a car. The court said that the natural result of furnishing liquor to an intoxicated person might be injury to that person, but not injury to a third as a result of the negligent driving of the intoxicated person. This seems a tenuous conclusion in a day when so many people drive cars.

14 See PROSSER, TORTS, 2d ed., 162 (1955).

15 Principal case at 8 (duty) and 9 (proximate cause).

16 Principal case at 9. Language indicating a similar requirement appears in Waynick v. Chicago's Last Department Store, note 13 supra: "It is apparent in the case at bar that there are circumstances which make the sales of liquor . . . willful violations. . . ."

17 For criticism of a liberal dram shop act, see Ogilvie, "History and Appraisal of the Illinois Dram Shop Act," 1958 UNIV. ILL. L.F. 175.

18 See Evers v. Davis, 86 N.J.L. 196, 90 A. 677 (1914).

19 See PROSSER, TORTS, 2d ed., 161 (1955). Hitson v. Dwyer, note 2 supra, at 808, indicated that violation of a statute constituting negligence per se must be the proximate cause of the injury to result in liability. Se 29 KY. L.J. 489 at 494 (1941). The negligence per se doctrine has not, therefore, interfered with the supplier's immunity to civil liability in jurisdictions adhering to such a doctrine.