Michigan Law Review

Volume 53 | Issue 4

1955

Negligence - Proximate Cause - Liability of Saloon Keeper for Liquor Sale Against Wife's Notice

Stephen C. Bransdorfer
University of Michigan Law School

NEGLIGENCE — PROXIMATE CAUSE — LIABILITY OF SALOON KEEPER FOR LIQUOR SALE AGAINST WIFE'S NOTICE—A wrongful death action was brought by the widow and children of a deceased patron of defendant's saloon, the patron having been fatally injured in a fall while engaged in fisticuffs after consuming liquor sold by defendant. Plaintiffs alleged that defendant knew that deceased became belligerent when intoxicated and that sales were made despite widow's prior request that liquor not be furnished to deceased husband in sufficient quantity to cause intoxication. The trial court sustained a demurrer without leave to amend and gave judgment for defendant. On appeal, *held,* reversed; the trial court abused its discretion. *Cole v. Rush,* (Cal. 1954) 271 P. (2d) 47.

At common law it was not an actionable wrong to sell or furnish liquor to a well and able-bodied man.[1] To overcome this deficiency of the common law, the legislatures of a majority of the states have enacted Civil Damage or Dram Shop Acts.[2] These acts, depending on the nature of their provisions, grant a cause of action against a vendor to those sustaining injury to their persons, property, or means of support in consequence of intoxication resulting from supplying liquor, and some states authorize recovery by the intoxicated person as well.[3] California has no such statute. This decision stands unique. At common law, vendors were absolved from liability for injuries to third persons caused by an intoxicated vendee, on the ground that the drinking rather than the sale of the liquor was the proximate cause of injury.[4] In actions brought for injury or death to the intoxicated person, the double barrier of lack of proximate cause and contributory negligence of the drinker was raised.[5] Even the negligence per se rule arising from violation of a penal statute has been generally disregarded by the courts[6] because of these defenses. Exceptions to the no liability rule have been made, however, where the drinker was supplied after being helplessly drunk.[7] Further, the liquor supplier's general common law immunity to civil liability was qualified prior to this decision by two classes of cases. The first class stresses the duty of an innkeeper to provide for the safety of his guests on the premises.[8] The innkeeper is not held an insurer of his guests' safety, but

[1] BLACK, INTOXICATING LIQUORS, c. 13, §281 (1892); 48 C.J.S., Intoxicating Liquors §430, p. 716 (1947); 30 AM. JUR., Intoxicating Liquors §607, p. 573 (1940).

[2] See 3 VERNIER, AMERICAN FAMILY LAWS 92 (1935), and supp. (1938) p. 87, where 33 jurisdictions are listed.

[3] 30 AM. JUR., Intoxicating Liquors §612, p. 576 (1940); BLACK, INTOXICATING LIQUORS, c. 13 (1892).

[4] Seibel v. Leach, 233 Wis. 66, 288 N.W. 774 (1939); Waller's Admr. v. Collinsworth, 144 Ky. 3, 137 S.W. 766 (1911).

[5] King v. Henkie, 80 Ala. 505, 60 Am. Rep. 119 (1886).

[6] Fleckner v. Dionne, 94 Cal. App. (2d) 246, 210 P. (2d) 530 (1949) (sale to minor); State v. Hatfield, 197 Md. 249, 78 A. (2d) 754 (1951) (sale to minor); Hitson v. Dwyer, 61 Cal. App. (2d) 803, 143 P. (2d) 952 (1943) (sale to intoxicated person); Demge v. Feierstein, 222 Wis. 199, 268 N.W. 210 (1936).

[7] McCue v. Klein, 60 Tex. 168, 48 Am. Rep. 260 (1883); Ibach v. Jackson, 148 Ore. 92, 35 P. (2d) 672 (1934).

[8] Peck v. Gerber, 154 Ore. 126, 59 P. (2d) 675 (1936); Mastad v. Swedish Brethren, 83 Minn. 40, 85 N.W. 913 (1901); 106 A.L.R. 1003 (1937).

rather must use due care to provide for their protection from known[9] risks arising from the use of alcohol.[10] The principal case does not seem to fall into this class since that duty was raised to protect one guest from injury by another, not to protect an intoxicated guest from injuring himself.[11] A second and more recent extension of a liquor vendor's liability involves the continued sale of liquor to a husband against repeated protests from the wife. This has given rise to a cause of action in favor of the wife for the resultant loss of consortium.[12] These cases, in which the continued use of liquor has resulted in the drinker's loss of volition, have been likened to the wrongful sale of drugs.[13] The sale, merging with the drinking, is held to become the proximate cause of the wife's injury.[14] These cases involved an action for a breach of duty to the wife, and were not based on a wrong to the husband.[15] One case specifically pointed out that recovery was allowed for loss of consortium before the husband died, and that a wrongful death action could not have been supported since the deceased, had he lived, could not have brought an action himself.[16] Despite this lack of analogy to the consortium cases, the majority in the principal case reasoned that the act of selling liquor, "merging" with the drinking, was the proximate cause of injury. The adoption of this doctrine, without an allegation that deceased's faculties had been reduced to the point of lack of volition, disintegrates the core of the common law rule that the drinking and not the sale was the proximate cause of an intoxicated person's injury. Therefore, since the defendant was alleged to have known of deceased's tendency to be belligerent when drunk, the court could hold the vendor negligent on the ground that individuals must be held to have contemplated the natural and probable result of their own acts purposely and intentionally committed. By fusing the elements of sale and drinking into one link of the causal chain of injury, the traditional common law immunity of liquor vendors seems to have been overcome in California. This rule could result in liquor sellers being held to a standard of reasonable care as to whom and under what conditions their sales are made. Adoption of this doctrine would permit remedies unknown in states without Dram Shop Acts and would broaden recovery in states with limited civil damage laws.[17]

Stephen C. Bransdorfer

[9] Cherbonnier v. Rafalovich, (D.C. Alaska 1950) 88 F. Supp. 900.

[10] Gurren v. Casperson, 147 Wash. 257, 265 P. 472 (1928).

[11] Curran v. Olson, 88 Minn. 307, 92 N.W. 1124 (1903); Rommel v. Schambacher, 120 Pa. 579, 11 A. 779 (1887).

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

[13] Hoard v. Peck, 56 Barb. (N.Y.) 202 (1867) (laudanum); Moberg v. Scott, 38 S.D. 422, 161 N.W. 998 (1917) (opium); Flandermeyer v. Cooper, 85 Ohio St. 327, 98 N.E. 102 (1912) (morphine).

[14] See 14 So. CAL. L. REV. 91 (1940); 25 MINN. L. REV. 113 (1940); 45 DICK. L. REV. 122 (1941); 2 WASH. & LEE L. REV. 153 (1940).

[15] 59 A.L.R. 680 (1929); 130 A.L.R. 352 (1941).

[16] Swanson v. Ball, 67 S.D. 161 at 164, 290 N.W. 482 (1940).

[17] See 1941 WIS. L. REV. 419, and 22 BOST. UNIV. L. REV. 480 (1942), dealing respectively with lack of liability because of a limited damage act, and because of a repealed damage act.