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New Common Law Dramshop Rule

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THE SUPREME COURT of New Jersey in the recent case of *Rappaport v. Nichols*[1] has announced a doctrine of common law liability of tavern keepers very much contra to the existing law as presently understood and applied by the vast majority of the courts of this country. This decision, if indicative of a trend, will serve to impose liability upon tavern keepers where previously it appears that none has existed in the absence of statute.

In the case cited, the plaintiff brought an action in the New Jersey Superior Court, Law Division, for the death of her decedent and for damages to her automobile received in an automobile accident. It was alleged that Robert Nichols, a minor, one of the defendants, while intoxicated collided with the automobile of the plaintiff being driven by the plaintiff's decedent, and further that Nichols was intoxicated by reason of the negligent and unlawful sale of intoxicating liquor to him by the co-defendant tavern keepers. It should be noted that a Dram Shop Act was in force in New Jersey at one time but it was repealed in 1934.

The tavern keepers moved in the Law Division Court for a summary judgment on the grounds that the plaintiff's complaint failed to state a cause of action and that as a matter of law they were entitled to judgment. This motion for summary judgment was granted by the judge, who stated that while in some other jurisdictions outside of New Jersey one may be held responsible for the actions of another to whom he has sold intoxicating liquor, such was not the law in New Jersey, and that to apply the doctrine of foreseeability to the facts in this case would stretch the intent of the doctrine too far.

The plaintiff appealed to the Appellate Division of the Superior Court, and the Supreme Court of New Jersey certified the matter on its own motion. The result in the Supreme Court was to reverse and remand the case for trial on the factual issue of proximate causation between the defendant's unlawful negligent conduct and the plaintiff's injuries. The Supreme Court found that a proximate cause relation may be found between the unlawful sale of alcoholic beverages by tavern keepers and the subsequent injury to a third person caused by the intoxicated person.

As the court stated in its opinion:

> If the patron is a minor or is intoxicated when served, the tavern keeper's sale to him is unlawful; and if the circum-

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[1] 156 A. 2d 1 (N. J. 1959).

> stances are such that the tavern keeper knows or should know that the plaintiff is a minor or is intoxicated, his service to him may also constitute *common law negligence.*[2] (Emphasis added.)

The Supreme Court has stated a rule attributable to the common law, but which the common law never knew according to the decisions of the vast majority of our courts.

The Common Law Doctrine

It had been uniformly held that there was no remedy at common law, against persons selling or giving intoxicating liquor, for the resulting injuries or damages due to the acts of the intoxicated person, whether on the theory that the dispensing was a direct wrong or on the ground that it was negligence which raises a liability for resulting damages.[3] The Wisconsin court stated the rule succinctly in *Damage v. Feierstein*: [4]

> The cases are overwhelmingly to the effect that there is no cause of action at common law against a vendor of liquor in favor of those injured by the intoxication of the vendee.

The reason generally given for this rule is that the proximate cause of the injury is not the furnishing of the liquor, but the drinking of it.[5] A good example of this reasoning is to be found in the Tennessee case of *Tarwater v. Atlantic Co.*[6] There, a painter, the plaintiff, was employed by a contractor to do painting at the defendant's place of business. The defendant distributed a large quantity of free beer to plaintiff's fellow employees and they became highly intoxicated. One of them dropped a large plank on the plaintiff. It was held by the court that the voluntary act of drinking the beer, by the fellow employee, and not the furnishing of the beer by the defendant, was the proximate cause of the injury; therefore, the defendant was not liable for the plaintiff's injuries.

The common law doctrine has also been upheld by the courts in the case of service to minors by the tavern keeper. Service to a minor is generally an unlawful act in all jurisdictions. The California Appeals case of *Fleckner v. Dionne*[7] is a case very similar to the one here discussed. In this case, Fleckner sued Dionne, a minor, and co-defendant tavern keeper for damages

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[2] *Id.* at p. 9.

[3] Christoff v. Gradsky, 140 N.E. 2d 586 (Ohio C. P. 1956); Cruse v. Aden, 127 Ill. 231, 20 N.E. 73 (1889); Sworski v. Colman, 204 Minn. 474, 283 N.W. 778 (1939); Hitson v. Dwyer, 61 Cal. App. 2d 803, 143 P. 2d 952 (1943); Hill v. Alexander, 321 Ill. App. 406, 53 N.E. 2d 307 (1944); Howlett v. Doglio, 402 Ill. 311, 83 N.E. 2d 708 (1949).

[4] 222 Wis. 199, 268 N.W. 210, 212 (1936).

[5] Hitson v. Dwyer, *supra* note 3; Beck v. Groe, 245 Minn. 28, 70 N. W. 2d 886 (1955); Cherbonnier v. Rafalovich, 88 F. Supp. 900 (Alaska 1950).

[6] 176 Tenn. 510, 144 S.W. 2d 746 (1940).

[7] 94 Cal. App. 2d 246, 210 P. 2d 530 (1949).

allegedly suffered in an automobile collision. The complaint alleged that the defendant tavern keeper knew that defendant Dionne was a minor and that he knew that Dionne was already under the influence of intoxicating liquor and also that Dionne had an automobile on or near the premises, which he would drive. The California District Court of Appeals held that the sale of the liquor to the minor defendant was not the proximate cause of plaintiff's injuries, and that the complaint did not state a cause of action against the tavern keeper. California does not have a Dram Shop Act and therefore the plaintiff had no cause of action, either by statute or under the common law, against the tavern keeper.

Another case coming to the same conclusion is a Maryland case[8] where the defendant tavern keeper allegedly sold intoxicating liquor to a minor motorist, and the minor as a result of his intoxicated condition drove his automobile at an excessive rate of speed and collided with the automobile driven by the plaintiff's intestate. The court held that the plaintiff had no cause of action for the wrongful death of her husband against the defendant tavern keeper for the selling of intoxicating liquor to the minor or for causing the intoxication of the minor motorist whose negligent or wilful act caused the death of the plaintiff's intestate.

In *Barboza v. Decas*,[9] it was held that the mere violation of a statute forbidding sale of liquor to a minor and imposing as a penalty a fine or imprisonment, in itself and independent of any other ground does not give the plaintiff a cause of action.

In those states where liability is placed on the tavern keeper by statute in the case of an illegal sale (i.e., a sale to a minor), the courts have naturally found liability, but not without some difficulty. The Pennsylvania case of *Manning v. Yokas*[10] illustrates this. Pennsylvania had a statute, repealed later between the time of the injury sustained by the plaintiff and the time of trial. The statute made it a misdemeanor to willfully furnish intoxicating drinks to a minor, and further provided that any person violating the statute shall be held civilly responsible for any injury in consequence of such furnishing. The Common Pleas Court held that where the injury is in consequence of his act in conjunction with the act of another there would appear to be no remedy under the statute. Upon appeal the Supreme Court of Pennsylvania reversed,[11] holding the tavern keeper liable and stating that the lower court went astray from the plain wording of the statute.

In summary, at common law and apart from statute no redress exists against persons selling or giving intoxicating liquors

[8] State for use of Joyce v. Hatfield, 197 Md. 257, 78 A. 2d 754 (1951).

[9] Barboza v. Decas, 311 Mass. 10, 40 N.E. 2d 10 (1942).

[10] 43 Del. Co. (Pa.) 171, 70 York 73 (1956).

[11] Manning v. Yokas, 389 Pa. 136, 132 A. 2d 198 (1957).

for the injuries sustained by third persons as a result of the intoxication of the vendee or recipient of the liquor. The reason generally stated is that the drinking of the intoxicants is the proximate cause of the injury, and the sale resulting in the intoxication is considered as too remote from the injury.

Civil Damage Acts

In view of the common law rule, it has been considered necessary, where opinion favored the creation of such a cause of action, to enact Civil Damage Acts, or, as they are popularly known, Dram Shop Acts. The term "dramshop" is generally used to designate a place where intoxicating liquors are sold at a public bar frequented by the public without restriction.[12] The civil damage acts are statutes providing that certain classes of persons, upon sustaining injuries from the acts of an intoxicated person, or in consequence of his intoxication, habitual or otherwise, shall have a right of action against the persons, who by selling or giving him liquor, produced the intoxication.[13]

The effect of the statutes is to create a new cause of action, in tort, which was unknown at common law.[14] Their object, as viewed by the courts, is to suppress the sale and use of intoxicating liquor to drunkards or minors, and to punish those who furnish means of intoxication to them, by making the vendor liable for damages caused by the persons who furnished these means.[15]

The statutes in the various states are not uniform, either in their wording, extent of liability imposed, or in their judicial interpretation. A study of the statutes in the twenty-one states where they are now in force,[16] and a study of their annotations, will serve to confirm this point. In the states in which no statute is in effect, and where the courts dogmatically follow the old common law rule, a person injured by an intoxicated person has

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[12] South Shore Country Club v. People, 228 Ill. 75, 78, 81 N.E. 805, 806 (1907).

[13] Moran v. Goodwin, 130 Mass. 158, 39 Am. Rep. 443 (1881).

[14] Hyba v. C. A. Horneman, Inc., 302 Ill. App. 143, 23 N.E. 2d 564 (1939); Boniewsky v. Polish Home of Lodi, 103 N. J. L. 323, 333, 136 A. 741, 746 (1927).

[15] Mead v. Stratton, 87 N. Y. 493, 496, 41 Am. Rep. 386, 388 (1882).

[16] Ala. Code tit. 7, ss. 121, 122 (1940); Conn. Gen. Stat. c. 204, s. 4307 (1949), as amended s. 2172d (supp. 1955); Del. Rev. Code, tit. 4, c. 7 ss. 715, 716 (1953); Ill. Rev. Stat., c. 43, ss. 135, 136 (1957); Iowa Code, s. 129.2 (1954); Me. Rev. Stat., c. 61, s. 95 (1954); Mich. Comp. Laws, s. 436.22 (1948); Minn. Stat., s. 340.95 (1953); Nev. Rev. Stat., s. 202.070 (1957); N. Y. Civil Rights Law, s. 16; N. C. Gen. Stat., s. 14-332 (1953); N. D. Rev. Code, s. 5-0121 (1943); Ohio Rev. Code, ss. 4399.01-.05 (1953); Okla. Stat., tit. 37, s. 121 (1951); Ore. Rev. Stat., s. 30.730 (Repl. 1955); R. I. Gen. Laws, s. 3-11-1 to -5 (1956); S. D. Code, s. 5.0208 (1939); Vt. Stat., s. 6214 (1947); Wash. Rev. Code, s. 71.08.080 (1951); Wis. Stat., s. 176.35 (1955); Wyo. Comp. Stat., s. 53-226 (1945).

a right of action only against that person actually negligent rather than against the person furnishing the intoxicants.

A brief study of the history of these statutes reveals that the first such act was passed in Maine in 1851,[17] and provided for outright prohibition. Thereafter, other states passed these statutes imposing liability upon tavern keepers in various degrees. The Illinois Act[18] is probably the most stringent since it imposes liability not only upon tavern keepers, but also upon lessors of the premises where the liquor is sold. This act has remained substantially unchanged from the date of its enactment in 1874.

It is not the purpose of this note to make a comparison of the relative merits or demerits of the various civil damage acts now in force. A study of them by the interested reader will reveal their basic differences. It is the purpose of this note to determine whether the New Jersey Supreme Court has adequate grounds upon which to overrule the common law rule.

It has been seen that a number of states have considered the common law doctrine of no liability of tavern keepers, and feeling that a remedy for a wrong is desirable for the protection of innocent third persons injured as a result of the intoxication of persons served by the tavern keeper, have legislated upon the subject in varying degrees. In those states the only function of the court is to interpret the act according to the intent of the legislature which passed the act. There is no authority under any rule of statutory construction to add to, enlarge, supply, expand, extend or improve the provisions of the statute to meet a situation not provided for.[19] If the act is not very broad in its application because of the express provisions of the statute, nevertheless the court still is bound to apply it as it is passed, and not broaden it by judicial fiat.

The question then to be determined is the state of the law in those states wherein the legislature has not acted to pass a civil damage act, and further, the state of the law in those states where the legislature had at one time enacted such a statute that it later has expressly repealed. New Jersey is a state in this latter classification. Is there good reason and compelling necessity to hold tavern keepers liable for the drunken acts of their patrons? This question has been answered in the affirmative by the passage of civil damage acts by a number of states and the upholding of these statutes by the courts against attack. Do the courts have the power and authority to impose this liability in the absence of statute? This question is much more difficult to answer positively.

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[17] 3 Dictionary of Am. History 327 (1940).

[18] Ill. Rev. Stat., c. 43, ss. 135, 136 (1957).

[19] State ex. rel. Foster v. Evatt, 144 Ohio St. 65, 105, 56 N.E. 2d 265, 282 (1944).

The Situation in New Jersey

The New Jersey Legislature enacted a Civil Damage Act in 1921[20] and 1922.[21] This act imposed strict liability for compensatory and punitive damages, upon unlawful sellers of alcoholic beverages. This statute was repealed by the Legislature in 1934, at the termination of national prohibition.[22] Therefore New Jersey at the time *Rappaport v. Nichols*[23] was decided is not a state with a civil damage act in full force and effect. It has already been noted that the overwhelming authority is that in the absence of statute the common law knows no such remedy in an action of the type brought. The State of New Jersey at the present time has the Alcoholic Beverage Control Act in effect; [24] however there is no right of action provided for which would be similar to the Dram Shop Act previously in force.

The New Jersey Constitution adopted the English Common Law bodily as part of the jurisprudence of that state, and under that constitution the common law remains in force until it expires by its own limitation or is altered or repealed by the legislature.[25]

Georgia also follows the common law in the absence of statute.[26] There is no dramshop act in effect in Georgia. In the case of *Henry Grady Hotel Co. v. Sturgis*,[27] the court stated that, whatever were the reasons for the common law rule of lack of right of recovery for selling or furnishing intoxicating liquor to an intoxicated person, and whether the courts agree or disagree with such reasons, the courts have no authority to grant recoveries. They may not authorize actions unknown to the common law; that is for the legislature to do. In addition the same court stated that the courts may, in proper instances, apply old rules to newly created situations; but they cannot create new rules for situations already regulated. The court held that the drinking of the intoxicating liquor was the proximate cause of such injuries, and the alleged negligent acts of the Hotel Company were too remote to authorize a recovery in the absence of a Dram Shop Act to the contrary. Here the court followed the common law rule in the absence of a statute, although it would appear from the opinion that perhaps the court did not fully agree with the common law rule.

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[20] N. J. Session Laws, 1921, c. 103, p. 184.

[21] *Id,* 1922, c. 257, p. 628.

[22] *Id,* 1934, c. 32, p. 104.

[23] *Supra* note 1.

[24] N. J. S. A., R. S., 33:1-1 et. seq. (1937).

[25] N. J. S. A., Const., Art. 11, Sec. 1, par. 3. See also N. J. Const. of 1844, Art. 10, Par. 1, N. J. S. A., Const., p. 712. Scudder v. Trenton Delaware Falls Co., 1 N. J. Eq. 694, 23 Am. Dec. 756 (1832).

[26] Parrish v. Taggart-Delph Lumber Co., 11 Ga. App. 772, 76 S. E. 153 (1912).

[27] 70 Ga. App. 379, 28 S. E. 2d 329 (1943).

Must a court in a common law jurisdiction follow the common law rule in the absence of legislation on the subject before the court? While some courts would state that they must, as witness the court in the *Henry Grady Hotel Co.* case[28] it appears that the better rule is to the contrary.

It has been said by the courts that the common law does not consist of absolute, fixed and inflexible rules, but rather of broad and comprehensive principles based on justice, reason and common sense, and that it is of judicial origin and promulgation and its principles are susceptible of adaptation to new conditions, interests, relations and usages as the progress of society may require.[29] The common law is not a static but a growing thing, and its rules arise from application of reason to the changing conditions of society.[30] The Ohio court in *Bloom v. Richards*[31] stated:

> The English Common Law, as far as it is reasonable in itself, suitable to the conditions and business of our people, and consistent with the letter and spirit of our Federal and State Constitution and statutes, has been and is followed by our courts and may be said to constitute a part of the Common Law of Ohio. But wherever it has been found wanting in either of their requisites, our courts have not hesitated to modify it to suit our circumstances or if necessary wholly to depart from it.

The New Jersey Supreme Court, in *Breen v. Peck*[32], has stated that there can hardly be any question of the court's power to remold the English Common Law.

In 1958, the Supreme Court of New Jersey in the case of *Collopy v. Newark Eye and Ear Infirmary*[33] overruled the immunity of all non-profit eleemosynary corporations, holding that it could constitutionally overturn the tort immunity doctrine with respect to non-profit eleemosynary corporations based on the common law, in view of the fact that the common law is not so inflexible as a statute, but may be modified as circumstances require. The New Jersey court in that case was only following the trend exemplified by the 1956 Ohio decision of *Avellone v. St. Johns Hospital*[34], where the court at page 476 stated:

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[28] *Supra* note 27.

[29] Miller v. Monson, 228 Minn. 400, 406, 37 N. W. 2d 543, 547 (1949).

[30] Barnes Coal Corp. v. Retail Coal Merchants Ass'n., 128 F. 2d 645, 648 (4th Cir. 1942).

[31] 2 Ohio St. 387, 390 (1853).

[32] 28 N. J. 351, 146 A. 2d 665 (1958).

[33] 27 N. J. 29, 141 A. 2d 276 (1958).

[34] 165 Ohio St. 467, 476, 135 N. E. 2d 410, 416 (1956). See Lipson, Charitable Immunity—the Plague of Modern Tort Concepts, 7 Clev.-Mar. L. R. 483 (1958).

> Whatever the reasons for the public policy that gave rise to the rule of immunity, public policy today, examined in the light of present day conditions, will not support such a rule.

Another case decided earlier in 1959 than *Rappaport v. Nichols*[35] is *Waynick v. Chicago's Last Dept. Store*,[36] decided in the United States Court of Appeals. This was a diversity action for damages sustained by the plaintiffs when the automobile in which they were riding collided in the State of Michigan with the automobile driven by defendant. The sale of the intoxicating liquor to defendant was in Illinois. The court held that neither the Illinois nor the Michigan Civil Damage Act applied in this case, due to the way the statutes were written. However, the court held that the plaintiffs had a cause of action in tort against the defendant tavern keepers for the damages and injuries sustained by them as a proximate result of the unlawful acts of the tavern keepers in making the sale of intoxicating liquor to an intoxicated person. The court stated that the common law of Michigan as to tort liability controlled. The common law, by virtue of the penal section which makes the sale of liquor to an intoxicated person unlawful, gives a civil right of action in tort against the sellers. There was a strong dissent in the case: that while it may be socially desirable to hold tavern keepers responsible under the circumstances presented by this case, that result however should be achieved through a congressional act rather than by judicial interpretation. It can be seen that the minority opinion in this case clings to the view expressed in *Henry Grady Hotel Co. v. Sturgis*.[37]

Another case recently decided by the Pennsylvania Superior Court is that of *Schelin v. Goldberg*,[38] also in the absence of a dram shop act and on general common law negligence rules. This was an action against a bar owner for injuries sustained in a bar after the patron, plaintiff, was allegedly intoxicated. A Civil Damage Act had been in force in Pennsylvania for some time but had been repealed before the right of action in this case arose. The court stated that the section of the Liquor Code making it unlawful to sell, furnish or give any liquor to any person visibly intoxicated was enacted to protect society generally and to protect specifically intoxicated persons from their inability to exercise self-protective care. As a matter of law the plaintiff could not be guilty of contributory negligence in getting intoxicated voluntarily. It was negligence for the bar owner to serve intoxicating beverages to an intoxicated patron, and this negligence was the proximate cause of the plaintiff's injuries for which he could sue.

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[35] *Supra* note 1.

[36] 269 F. 2d 322 (7th Cir. 1959).

[37] *Supra* note 27.

[38] 188 Pa. Super. 341, 146 A. 2d 648 (1958).

Conclusion

If the tort immunity of non-profit eleemosynary corporations may be overturned by the decisions of a court in the absence of statute, it is not very difficult to see that in our changing times the immunity of a tavern keeper may also be overturned, in the absence of statute, no matter how well established the common law rule seems to be. No one can seriously dispute the fact that the drinking of intoxicants is too prevalent in our society, and further that we live in an era of widespread car ownership, not only among adults, but also among minors. The court in *McKinney v. Foster* states: [39]

> It is common knowledge that great numbers of persons, minors as well as adults, drive automobiles while intoxicated, and it is well within the realm of possibility that one illegally served with intoxicants might negligently drive an automobile and cause injury to persons or property.

Negligence is the doing of that thing which a reasonably prudent person would not have done, or the failure to do that thing which a reasonably prudent person would have done, in like or similar circumstances.[40] It is not beyond the realm of possibility, and even very probable, that a person who is served intoxicants will soon be driving. A tavern keeper owes a duty to the public not to serve intoxicated persons or minors; and if he does so serve them, why should he not be held liable along with the vendee for his negligence in so doing?

The New Jersey Supreme Court has stated that service to a minor or to an intoxicated person may constitute common law negligence.[41] When a tavern keeper sells alcoholic beverages to a person who is visibly intoxicated or to a person whom he knows or should know is a minor, he ought to be able to recognize and foresee the unreasonable risk of harm to others through the action of the intoxicated person or the minor.

It appears that the New Jersey case of *Rappaport v. Nichols*[42] is the first where a Supreme Court of a state has permitted civil liability to be imposed upon tavern keepers, in the absence of statute, for their negligence in service to a minor or to an intoxicated person. However it is safe to say that it will not be the last.

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[39] 391 Pa. 221, 225, 137 A. 2d 502, 504 (1958).

[40] Biddle v. Mazzocco, 204 Or. 547, 284 P. 2d 364 (1955).

[41] Rappaport v. Nichols, *supra* note 1 at 9.

[42] *Supra* note 1.