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Torts--Proximate Cause--Liability of Vendor of Intoxicating Liquors to Third Persons

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It appears that the near impossibility of defining a standard to measure degrees of culpability would result at times in an apportionment based on nothing more than the mere conjecture of the jury.[27] Moreover, by permitting one joint tortfeasor to secure several judgments, the plaintiff is necessarily deprived of the opportunity to obtain a joint judgment. As a consequence he is assured compensation for his injuries only if all the tortfeasors were solvent. The concept of a "joint tort" has considerably changed since the enactment of Kentucky Revised Statutes section 454.040, and the underlying purpose of this provision—the modification of the harshness of the joint judgment—could now be served by the existing right of contribution. By either repealing this statute, or by enacting legislation basing recovery in an action of contribution on disparities of fault, the legislature could alleviate the existing inconsistency in the two methods of effecting loss distribution among joint tortfeasors.[28] Such action seems necessary in view of the increasing amount of litigation involving multiple collisions.

Jackson W. White

TORTS—PROXIMATE CAUSE—LIABILITY OF VENDOR OF INTOXICATING LIQUORS TO THIRD PERSONS.— Plaintiff, as administratrix of one whose death was caused by collision with a car negligently driven by an intoxicated minor, brought action for damages against four tavern keepers for wrongful death and, in her capacity as owner, for damages to the car driven by decedent. She alleged that the four defendants negligently and in violation of statute sold liquor to the minor when he was intoxicated. The trial court granted defendant's motion for summary judgment on the ground that these injuries were too remote to have been promimately caused by the sale of the liquor. *Held*: Reversed. The decedent was within the class which the statute was designed to protect. By prohibiting liquor sales to minors and intoxicated persons, the legislature intended to protect the general public as well as these buyers. As to proximate cause,

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he would be assessed with a greater share of the damages, might enter a compromise to avoid this consequence.

[27] For an interesting case on jury apportionment see Beasley v. Evan's Adm'x, 311 S.W.2d 195 (Ky. 1958), in which the court reversed a jury verdict of $15,000 against a non-resident tortfeasor and $642.44 against a local defendant. See also Legis., 49 Harv. L. Rev. 312, 318 (1935).

[28] Arkansas, Delaware, Hawaii, and South Dakota have enacted legislation basing contribution on relative degrees of fault: Ark. Stat. Ann. § 34-1001 to 1009 (1947); Del. Ann. Code, titl. 10 § 6301-08 (1953); Hawaii Revised Laws §§ 10-16 (1955); S.D. Code, § 33.04A01-.04A10 (Supp. 1952). See also Gregory, Legislative Loss Distribution in Negligence Actions 145 (1936).

the vendors should have foreseen the unreasonable risk of harm to the traveling public created by the illegal sale and the subsequent negligent acts of the vendee. *Rappaport v. Nichols*, 31 N.J. 188, 156 A.2d 1 (1959).

Liquor Vendors' Common Law Liability—Majority View

The mere sale of liquor to an able-bodied man was never an actionable wrong at common law.[1] Generally, statutes now prohibit sales to minors, intoxicated persons, habitual drunkards,[2] and certain other classes;[3] however, civil recovery for any injuries caused by violation of these penal statutes has consistently been denied.[4] The lone exception is *Riden v. Gremm*[5] where a wife recovered for her husband's death caused by liquor sold to him by the defendant in violation of a penal statute prohibiting sale to habitual drunkards after written notice to stop was given the defendant. The only other instances where civil action was permitted pertained to injuries to one's slaves, who were not considered *sui juris*.[6]

[1] The two most commonly cited authorities for this proposition are Cruse v. Aden, 127 Ill. 231, 20 N.E. 73, 74 (1889):

> It was not a tort at common law to either sell or give intoxicating liquor to "a strong and able-bodied man," and it can be said safely that it is not anywhere laid down in the books that such act was ever held at common law to be culpable negligence that would impose legal liability for damages upon the vendor or donor of such liquor.

and Hyba v. C. A. Horneman, Inc., 302 Ill. App. 143, 23 N.E.2d 564, 565 (1939):

> The common law gave no remedy for the sale of liquor either on the theory that it was a direct wrong or on the ground that it was negligence, which would impose a legal liability on the seller for damages resulting from intoxication.

For the development of the common law theory see 15 R.C.L. *Intoxicating Liquors* § 7 (1917); *cf.* Britton's Adm'r v. Samuels, 143 Ky. 129, 136 S.W. 153 (1911).

[2] See, *e.g.*, Ky. Rev. Stat. § 244.080 (1959) (hereinafter referred to as KRS).

[3] Kentucky also prohibits sales to "anyone known to the seller to have been convicted of any misdemeanor attributable directly or indirectly to the use of alcoholic beverages, or of a felony." KRS § 244.080. South Dakota also restricts sales to anyone whom the vendee has received written notice from authorities or relatives not to serve; any spendthrift, insane, or feeble-minded person; or anyone known to be the object of charity. S. Dak. Code § 5.0226 (1939). See Am. Jur. *Intoxicating Liquors* §§ 235-247 (1958).

[4] King v. Henkie, 80 Ala. 505, 60 Am. Rep. 119 (1886); Hitson v. Dwyer, 61 Cal. App. 2d 803, 143 P.2d 952 (1943); Britton's Adm'r v. Samuels, 143 Ky. 129, 136 S.W. 143 (1911); Seibel v. Leach, 233 Wis. 66, 288 N.W. 774 (1939); Demge v. Feierstein, 222 Wis. 199, 268 N.W. 210 (1936). This remains the rule even in states with civil damage laws. Rogers v. Dwight, 145 F.Supp. 537 (E.D.Wis. 1956); Busser v. Noble, 22 Ill. App.2d 433, 161 N.E.2d 150 (1959).

[5] 97 Tenn. 220, 26 S.W. 1097 (1896); *but see* Tarwater v. Atlantic Co., 176 Tenn. 510, 144 S.W.2d 746 (1940).

[6] The vendor has been held liable for the value of a slave who dies from exposure because of intoxication if this intoxication was the probable consequence of the illegal sale. Skinner v. Hughes, 13 Mo. 440 (1859); Harrison v. Berkley, 1 Strob. 525, 47 Am. Dec. 578 (S.C.C.E. 1847). A slave was considered incapable of giving legal consent, especially insofar as anything prejudicial

The vendor's civil "immunity" has been based firmly on the proposition that the act of drinking, rather than the wrongful sale, was the proximate cause of injuries to the drinker or to a third party.[7] Contributory negligence through voluntary consumption of liquor has been the second defense against actions for injuries to the drinker.[8]

Wrongful sales of a reckless nature have produced unreliable exceptions[9] to the common-law non-liability rule where the vendee was an habitual drunkard intoxicated beyond volition,[10] or where the sale was accompanied by another tortious act,[11] or made to an alcoholic over the protests of his spouse.[12]

Under the last execption, the courts of Arizona and South Dakota have granted the spouse an action for loss of consortium through the use of an analogy to the common-law liability of a vendor or habit-forming drugs under similar circumstances.[13] They theorized that the vendee's addiction caused the sale to merge with the drinking to form the proximate cause of the injury to the marital relation.[14]

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to his master's property, including himself, was concerned, 15 R.C.L. *Intoxicating Liquors* § 7 (1917).

[7] This type of reasoning is common:

> [I]t has been held by all courts and by every commentator that the proximate cause . . . of the resultant effects arising from voluntary intoxication is the act of the drinker, and not the act of the seller . . . The principle is epitomized in the truism that there may be sales without intoxication, but no intoxication without drinking.

Collier v. Stamatis, 63 Ariz. 285, 162 P.2d 125, 127 (1945). See also Waller's Adm'r v. Collinsworth, 144 Ky. 3, 137 S.W. 766 (1911); Seibel v. Leach, 238 Wis. 66, 288 N.W. 774 (1939).

[8] King v. Henkie, 80 Ala. 505, 60 Am. Rep. 119 (1886); Bissell v. Starzinger, 112 Iowa 266, 83 N.W. 1065 (1900); Hoyt v. Tilton, 81 N.H. 477, 128 Atl. 688 (1925). See also Annot., 54 A.L.R.2d 1152, 1155 (1957).

[9] Some sort of reckless or wanton conduct must be alleged to have accompanied the illegal sale or these exceptions will not apply. For example, in King v. Henkie, *supra* note 8, an action was dismissed where the illegal sale was to a hopelessly intoxicated drunk who died almost immediately from the whiskey.

[10] McCue v. Klein, 60 Tex. 168, 48 Am. Rep. 260 (1883), where against protests of bystanders defendant gave an excessive amount of whiskey to a habitual drunk in order to collect a bet.

[11] See Dunlap v. Wagner, 85 Ind. 529 (1882) (vendor liable where put drunken vendee on wagon behind horse after illegal sale); Nally v. Blandford, 291 S.W.2d 832 (Ky. 1956); Ibach v. Jackson, 148 Ore. 92, 35 P.2d 672 (1954) (host liable for guest's death where gave her liquor until she was in helpless condition and then abandoned her).

[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] *Ibid.* For the common-law liability of a vendor of habit-forming drugs, see Hoard v. Peck, 56 Barb. 202 (N.Y. 1867); Holleman v. Harward, 119 N.C. 150, 25 S.E. 972 (1896); Flandermeyer v. Cooper, 58 Ohio St. 327, 98 N.E. 102 (1912).

[14] As the South Dakota court stated:

> [I]ndependent of any specific statute the wife has a cause of action against anyone wrongfully interfering with the marital relationship regardless of the agency or instrumentality employed to inflict the loss.

Swanson v. Ball, 67 S.D. 161, 290 N.W. 482, 483 (1940).

The courts reasoned that, as in the case of drugs, habitual use of liquor destroys the inebriate's judgment in reference to its use; therefore, the sale merges with the consumption as the sole voluntary act in the chain of causation.[15] The spouse of an alcoholic should be able to rely on this theory.[16] However, the *Restatement Torts*[17] does not support it, and no jurisdiction other than Arizona and South Dakota has utilized it.[18]

Liquor Vendors' Liability Under Dram Shop Acts

In order to insure compensation to injured parties by placing the enormous expense of injuries caused by liquor[19] on the drinking pub lic,[20] many states[21] have adopted dram shop acts,[22] which give injured third parties the right to recover where the common law gave none. The contexts of these acts vary,[23] but they generally provide for liability of liquor vendors to any person who sustains injury to person or property or loss of suport caused *by, or in the consequence of,* the resulting intoxication.[24] The problem of establishing proximate cause has been greatly reduced[25] as a result of the liberal interpre-

[15] For an explanation of this analogy see Case Note, 14 So. Cal. L. Rev. 91 (1940) and Case Note, 9 Ark. L. Rev. 180 (1955). Note that this is a common law theory even though civil actions for the wrongful sale of habit-forming drugs and liquor are usually granted at least to the husband by statute. Restatement, Torts § 696, comment *a* and special note (1938). Note also that this is not the common law action for loss of consortium for injuries caused by negligence of a third party, which is generally granted to husbands but usually denied to wives. See La Face v. Cincinnati, N. & C. Ry., 249 S.W. 534 (Ky. 1952) (wife's action dismissed); Prosser, Torts § 104 (2d ed. 1955); Restatement, Torts § 693 (1938). See also Deshotel v. Atchison, T. & S.F. Ry., 50 Cal. 2d 664, 328 P.2d 449 (1958).

[16] See dissenting opinion in Cole v. Rush, 45 Cal.2d 345, 289 P.2d 450, 457 (1955) and Case Note, 14 So. Cal. L. Rev. 91 (1940).

[17] "The expression 'habit-forming drugs' as used in this section does not include intoxicating liquor." Restatement, Torts § 696, comment *c* (1938).

[18] The only other support found for the "merger" theory is dictum in Hoyt v. Tilton, 81 N.H. 477, 128 Atl. 688 (1925).

[19] See 1959 National Safety Council Accident Facts 49; Note, 42 Iowa L. Rev. 38 & n.4 (1956).

[20] The vendor buys liquor law liability insurance and the premium cost is paid by his customers in increased prices.

[21] See 4 S.D.L. Rev. 149 n. 3 (1959) for the latest listing of states which have dram shop acts. There are now twenty.

[22] Dram shop acts are often referred to as civil damage acts. Technically the latter provide only for civil action against vendors in certain cases, whereas the former also have other provisions pertaining to the regulation of tavern sales.

[23] Probably the most liberal remedial provisions are found in the Illinois act, Ill. Rev. Stat. ch. 43, § 135 (1959), discussed at length in 1958 U. Ill. L.F. 175, 219, 249 and Note, 51 N.W. U.L. Rev. 775 (1957). Compare the more restrictive New York statute, N.Y. Civ. Rights Law § 16 (1959), discussed in Note, 8 Syracuse L. Rev. 252 (1957).

[24] 30 Am. Jur. *Intoxicating Liquors* §§ 540-42 (1958); Annot., 65 A.L.R.2d 923 (1959).

[25] For instance, in Beers v. Walhizer, 50 Sup. Ct. (43 Hun.) 254 (N.Y.), *aff'd,* 53 N.Y. 63 (1887), recovery for injury to means of support was granted where plaintiff's husband was sentenced to life imprisonment for shooting another while under the influence of defendant's liquor. See also Pierce v. Albanese,

tation the acts have received because of their wording and remedial nature.[26] The dram shop acts have created liability unknown to common law. Furthermore, their existence has caused jurisdictions lacking dram shop acts continually to hold that any extension of liquor vendors' liability is for the legislature since that procedure alone has been used in other states.[27]

Liquor Vendors' Common Law Liability—Minority View

New Jersey has had no civil damage act since 1934,[28] but recovery was granted in the principal case by application of two recent holdings,[29] common-law negligence principles, and the policy arguments supporting the adoption of dram shop acts. These three decisions may represent a trend away from the non-liability rule. *Schelin v. Goldberg*,[30] decided after the repeal of Pennsylvania's civil damage act, upheld a common-law action by an intoxicated vendee for injuries received from an assault by another patron whom the plaintiff had offended. The illegal sale was held to be the proximate cause of plaintiff's injuries notwithstanding his contributory negligence. The court reasoned:

> [The liquor control act] making it unlawful to sell, furnish or give any liquor to any person visibly intoxicated was enacted to protect society generally, but to protect specifically intoxicated persons "from their inability to exercise self-protective care."[31]

144 Conn. 241, 129 A.2d 606 (1957); Hill v. Alexander. 321 Ill. App. 627, 53 N.E.2d 307 (1942).

[26] "The [civil damage] act is remedial in character and should be construed to suppress the mischief and advance the remedy." Iszler v. Jorda, 80 N.W.2d 665, 667 (N.D. 1957). Furthermore, it is generally provided that since these statutes are remedial they should be liberally interpreted. See *e.g.* Ill., Rev. Stat. ch. 43, § 94 (1959); R.I. Gen. Laws § 3-1-5 (1957).

[27] In State *ex rel.* Joyce v. Hatfield, 197 Md. 249, 78 A.2d 754 (1951), the court reasoned that since legislatures have always had control over the liquor trade, the absence of a civil damage law expresses the legislative intent as clearly as affirmative legislation would. See also Cole v. Rush, 45 Cal.2d 345, 289 P.2d 450 (1955); Seibel v. Leach, 233 Wis. 66, 288 N.W. 774 (1939). Courts in states with dram shop acts use the same reasoning in refusing to allow actions in situations not covered by the acts. Cowman v. Hansen, 92 N.W.2d 682 (Iowa 1958); Stabs v. City of Tower, 229 Minn. 552, 40 N.W.2d 362 (1949).

[28] 3 Vernier, American Family Laws § 158, at 92 (1st ed. 1935) lists thirty states with some form of civil damage acts, but this oft-cited list is out of date. Several states, including New Jersey and Kentucky, repealed these laws when they repealed their prohibition legislation. See footnote 21 *supra*.

[29] Waynick v. Chicago's Last Dep't Store, 269 F.2d 322 (7th Cir. 1959); Schelin v. Goldberg, 188 Pa. Super. 341, 146 A.2d 648 (1958).

[30] *Supra* note 29.

[31] 146 A.2d at 652. Restatement, Torts § 483 (1938) provides:

> If the defendant's negligence consists in the violation of a statute enacted to protect a class of persons from their inability to exercise self-protective care, a member of such class is not barred from recovering for bodily harm caused by the violation of such statute.

In *Waynick v. Chicago's Last Department Store*,[32] the defendant sold liquor to an intoxicated driver in Illinois who killed the plaintiff's husband in Michigan. The federal court granted recovery even though the provisions for civil damage action of the dram shop acts of both states do not apply extra-territorially. In effect, it held that the violation of the Illinois penal statute prohibiting sales to intoxicated persons[33] subjects a vendor of these illegal sales to liability for the acts of his vendee upon third persons in Michigan. This holding is unique in three respects. (1) A mere illegal sale subjects the vendor to liability for acts of the vendee caused by the intoxication. Only the *Riden* case in 1896[34] and the *Schelin* case in 1958[35] had previously adopted this rule. (2) The violation of an Illinois penal statute is sufficient grounds for a civil action under Michigan common law. However, the Illinois court has since construed the statute to be insufficient grounds for a civil action.[36] (3) A liquor sale to an intoxicated person is not a sale to an "able-bodied man." This definition of an "able-bodied man" amounts in fact to a restriction of the common law non-liability rule.[37] Oddly enough the primary reason given for creation of the common law liability was that to deny extraterritorial effect to one Illinois Act would "leave a vacuum in the law."[38]

In the principal case, the New Jersey court recognized these precedents, found the plaintiff to be within the class protected by the statute prohibiting liquor sales to minors and intoxicated persons,[39] and held the defendants negligent for creating an unreasonable risk of harm to the traveling public. It stated:

> When alcoholic beverages are sold by a tavern keeper to a minor or to an intoxicated person, the unreasonable risk of harm not only to the minor or the intoxicated person but also to members of the traveling public may readily be recognized and foreseen; *this is particularly evident in current times when traveling by car to and from the tavern is so commonplace and accidents resulting from drinking are so frequent.* [Emphasis added.][40]

[32] 269 F.2d 322 (7th Cir. 1959).

[33] Ill. Rev. Stat. ch. 43, §131 (1959) only forbids sales to intoxicated persons while § 135 provides for the civil damage action.

[34] Riden v. Gremm, 97 Tenn. 220, 36 S.W. 1097 (1896).

[35] Schelin v. Goldberg, 188 Pa. Super. 341, 146 A.2d 648 (1958).

[36] Busser v. Noble, 22 Ill. App.2d 433, 161 N.E.2d 150 (1959). Recovery is usually granted only where the state of enactment has construed the penal statute to create a standard of care upon which a civil action could be based.

[37] See quotation from Cruse v. Aden in note 1 *supra*.

[38] 269 F.2d at 324.

[39] "It seems clear that these broadly expressed restrictions [of the New Jersey penal statute] were not narrowly intended to benefit the minors and intoxicatd persons alone but were wisely intended for the protection of members of the general public as well." 156 A.2d at 8.

[40] 156 A.2d at 8.

To establish proximate cause the court employed the negligence principle that intervening causes, such as the vendee's negligence, which are foreseeable or are normal incidents of the risk involved, will not relieve the original tortfeasor of liability.[41] The court further strengthened its position by an analogy to the liability of one who illegally furnishes a minor with firearms or air rifles.[42] It then limited liability to licensed vendors who should know that the vendee is a minor or an intoxicated person likely to be operating a motor vehicle.

Liquor Vendors' Liability in Kentucky

Kentucky's sixty-year-old limited dram shop act[43] was repealed in 1934.[44] Under that statute a right of action was provided only to the inebriate's relatives, and then only if the vendor had received written notice to stop selling to the inebriate.[45] In every common-law action, the Kentucky court has refused to hold that an illegal sale is the proximate cause of resulting injuries. Two 1911 holdings which did not concern the dram shop law still represent the Kentucky law and also continue to influence other common-law jurisdictions. *Britton's Adm'r v. Samuels*[46] dismissed an action for the wrongful death of an intoxicated vendee caused by defendant's liquor because "the unlawful or wrongful act was the sale of the liquor, but death was produced, not by the sale, but by the drinking thereof by the deceased."[47] However, the court's dictum recognized that the action would have been granted if it had been alleged that the sale had been made for the intentional purpose of injuring the vendee.[48]

Waller's Adm'r v. Collinsworth[49] dismissed an action against an unlicensed vendor for the wrongful death of an nitoxicated vendee who was killed by another vendee, an intoxicated minor. The court said the unlawful sale was not the proximate cause of the killing but

[41] Menth v. Breeze Corp., 4 N.J. 428, 73 A.2d 183 (1950); Prosser, Torts § 49 (2d ed. 1955); See also strong dissenting opinions in Cole v. Rush, 45 Cal.2d 345, 289 P.2d 450, 457 (1955) and Fleckner v. Dionne, 94 Cal.App.2d 246, 210 P.2d 530 (1949).

[42] Semeniuk v. Chentis, 1 Ill.App.2d 508, 117 N.E.2d 883 (1954).

[43] Ky. Acts 1893, ch. 182. A licensed tavern keeper who furnished or allowed an inebriate to drink on his premises was subject to a civil action for damages by the wife, father, mother or child or the inebriate.

[44] Ky. Acts 1934, ch. 146.

[45] For an outline of recovery under the Kentucky dram shop act see Keyser v. Damron, 159 Ky. 444, 167 S.W. 381 (1914).

[46] 143 Ky. 129, 136 S.W. 143 (1911).

[47] *Id.* at 132, 136 S.W. at 144.

[48] This dictum is within the exception to the common law non-liability rule where the sale is accompanied by another tortious act. See note 11 *supra.*

[49] 144 Ky. 3, 137 S.W. 766 (1911).

only "produced a condition of mind out of which the killing might have resulted."[50]

Nally v. Blandford[51] followed the dictum of *Britton's Adm'r* and upheld a complaint in a wrongful death action which alleged that defendant vendor sold an excessive quantity of whiskey to the decedent for the purpose of injuring him. The vendor was further charged with knowledge that decedent intended to drink enough to win a bet and that decendent could not be safely trusted with the whiskey. However, the holding was clearly within the exception to the non-liability rule, for recovery was granted solely because the illegal sale was accompanied by an intentional tort.[52]

The 1960 session of the General Assembly failed to adopt a proposed general dram shop law.[53]

Conclusion

If a liquor vendor sells liquor to a minor or intoxicated driver who later, because of his intoxication, injures another traveler, the vendor should be liable. The non-liability rule was developed long before the emergence of the danger imposed by the intoxicated driver. If legislatures lag, the courts could employ general principles of negligence to extend liability of liquor vendors. The majority of jurisdictions, including Kentucky, hold that the lender of a car to a known drinker is liable for injuries to third persons due to borrower's intoxication even if the borrower is sober at the time he is given the car.[54] The unreasonable risk of harm created by the negligent loan of the car is the same risk as that created by the illegal sale of liquor. The sober borrower may later be the intoxicated vendee. Even if they are different persons the foreseeability of the negligent acts of the intoxicated or vendee is clearly more probable than those of the sober borrower. Therefore, justice and consistency would require that the two contributors to the risk be held to the same degree of liability should the risk materialize.

Whayne C. Priest, Jr.

[50] *Id.* at 6, 137 S.W. at 767.

[51] 291 S.W.2d 832 (Ky. 1956).

[52] See notes 11 and 48 *supra.* This decision has been criticized on the ground that the facts fail to support an intentional tort in Comment, 46 Ky. L.J. 176 (1957).

[53] H.B. 257, S. 131, Reg. Sess. (1960).

[54] V. L. Nicholson Construction Co. v. Lane, 177 Tenn. 440, 150 S.W.2d 1069 (1941); 5 Blashfield, Cyclopedia of Automobile Law, § 2927 (1954); 60 C.J.S. *Motor Vehicles* § 431, at 1062-63 (1949). Annot., 168 A.L.R. 1364, 1375 (1947), See Brady v. B & B Ice Co., 242 Ky. 138, 45 S.W.2d 1051 (1931), where recovery was denied for failure to show defendant lendor's knowledge of lendee's habits. See also dissenting opinion in Fleckner v. Dionne, 94 Cal. App.2d 246, 210 P.2d 530, 535 (1949).