

Torts - Liability of Tavern Keepers for Injurious Consequences of Illegal Sales of Intoxicating Liquors

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this is deemed to be an interest of paramount importance which warrants the imposition of absolute statutory liability for its invasion. The instant case appears to present a reasonable application of a statute in furtherance of this policy.

James L. Dennis

TORTS — LIABILITY OF TAVERN KEEPERS FOR INJURIOUS
CONSEQUENCES OF ILLEGAL SALES OF
INTOXICATING LIQUORS

Two recent decisions have imposed upon vendors of intoxicating liquors a hitherto unrecognized liability. In a federal case, plaintiffs sought damages for injuries sustained when their automobile was struck in Michigan by an automobile the intoxicated driver of which had been sold liquor by defendant tavern keepers¹ in Illinois in violation of that state's criminal statute² prohibiting sales to intoxicated persons. The district court sustained defendants' motion to dismiss. On appeal to the United States Court of Appeals, *held*, reversed. One who sells liquor to an intoxicated person in violation of a criminal statute prohibiting such sales is liable for injuries resulting from the drunkenness to which the particular sale contributes. *Waynick v. Chicago's Last Department Store*, 269 F.2d 322 (7th Cir. 1959).

In a New Jersey case, plaintiff sought damages for the death of her husband resulting from a collision between an automobile driven by him and one carelessly driven by an intoxicated minor to whom the defendant tavern keepers had sold liquor in violation of a criminal statute³ and an administrative regulation⁴ prohibiting sales to minors and intoxicated persons. The Law Division granted the defendants' motion for summary judgment. The New Jersey Supreme Court certified the matter on its own motion and, *held*, reversed. A tavern keeper who sells intoxicating liquor to a person whom he knows or should know to be a minor or intoxicated is liable for injuries to third persons resulting from such sales. *Rappaport v. Nichols*, 31 N.J. 188, 156 A.2d 1 (1959).

1. The term "tavern keepers" is used herein to denote vendors of intoxicating liquors generally. Specifically excluded are gifts by a social host to his guest.

2. ILL. REV. STAT. ch. 43, § 131 (Supp. 1959).

3. N.J. Stat. Ann. 33:1-77 (1940) (prohibiting sales to minors).

4. Division of Alcoholic Beverage Control, Regulation No. 20, Rule 1 (prohibiting sales to intoxicated persons).

Hitherto, it has been held without relevant exception⁵ that one injured in person, property, or means of support⁶ by an intoxicated person has no cause of action under a negligence theory against one who sold the liquor that caused the intoxication.⁷ Nor, with one recent exception,⁸ has a cause of action been allowed against a tavern keeper under a negligence theory⁹ for injuries to the intoxicated person himself.¹⁰ Denial of a cause of action has usually been based, in the case of injury to the consumer, on the ground that he was contributorily negligent in drinking the liquor¹¹ or, in the case of injury to another by the consumer, on the ground that the sale was not the proximate cause of the injury.¹² Many courts have added that the imposi-

5. A master has maintained an action against one who illegally sold liquor to his slave resulting in the slave's intoxication and death; a property interest no longer recognized. *Skinner v. Hughes*, 13 Mo. 440 (1850); *Harrison v. Berkley*, 32 S.C.L. 223, 1 Strob. 525 (1847).

6. A wife may maintain an action for loss of consortium against one who has wilfully and over her protests made repeated sales of intoxicating liquor to her husband who lacked the ability to resist the urge to drink. *Pratt v. Daly*, 55 Ariz. 535, 104 P.2d 147 (1940); *Swanson v. Ball*, 67 S.D. 161, 290 N.W. 482 (1940).

7. *Thomas v. Bruza*, 151 Cal. App.2d 150, 311 P.2d 128 (1957) (fight; defendant sold liquor to plaintiff's assailant knowing that he became quarrelsome and pugnacious when drunk); *Fleckner v. Dionne*, 94 Cal. App.2d 246, 210 P.2d 530 (1949) (automobile collision; illegal sale to minor); *Cowman v. Hansen*, 92 N.W.2d 682 (Iowa 1958) (automobile collision, illegal sale to intoxicated person); *State ex rel. Joyce v. Hatfield*, 197 Md. 249, 78 A.2d 754 (1951) (automobile collision, illegal sale to minor); *Barboza v. Decas*, 311 Mass. 10, 40 N.E.2d 10 (1942) (plaintiff deprived of support of son who, while intoxicated, raped woman; illegal sale to minor); *Beck v. Groe*, 245 Minn. 506, 70 N.W.2d 886 (1955) (illegal sale of beer to minor); *Tarwater v. Atlantic Co.*, 176 Tenn. 510, 144 S.W.2d 746 (1940) (defendant gave beer party for his employees, one of whom, while highly intoxicated, dropped plank on plaintiff); *Seibel v. Leach*, 233 Wis. 66, 288 N.W. 774 (1939) (automobile collision).

8. *Schlein v. Goldberg*, 188 Pa. Super. 341, 146 A.2d 648 (1958) (altercation caused by plaintiff's intoxicated condition; illegal sale to intoxicated person).

9. A cause of action has been allowed under what seems to have been an intentional tort theory. *Nally v. Blandford*, 291 S.W.2d 832 (Ky. App. 1956) (alleged that sale was made for the purpose of causing injury); *McCue v. Klein*, 60 Tex. 168 (1883) (habitual drunkard induced on a wager to drink three pints of whiskey which caused his death; defendants' should have known that "fatal results would doubtless follow their acts"; consent to a battery no defense).

10. *Hitson v. Dwyer*, 61 Cal. App.2d 803, 143 P.2d 952 (1943) (plaintiff fell off bar stool; illegal sale to intoxicated person); *Cole v. Rush*, 45 Cal.2d 345, 289 P.2d 450 (1955), vacating earlier holding, 271 P.2d 47 (Cal. 1954) (fight; defendant sold liquor to plaintiff's husband knowing that he became pugnacious and quarrelsome when intoxicated); *Henry Grady Hotel Co. v. Sturgis*, 70 Ga. App. 379, 28 S.E.2d 329 (1943) (bellboy procured whiskey for plaintiff on a binge; scalded to death in hotel shower); *Demge v. Feierstein*, 222 Wis. 199, 268 N.W. 210 (1936) (automobile collision). *Cf. Cruse v. Aden*, 127 Ill. 231, 20 N.E. 73 (1889) (gift by social host to guest who fell from horse).

11. See, e.g., *King v. Henkie*, 80 Ala. 505 (1875); *Cole v. Rush*, 45 Cal. 345, 289 P.2d 450 (1955), vacating earlier holding, 271 P.2d 47 (Cal. 1954). *But see Schelin v. Goldberg*, 188 Pa. Super. 341, 146 A.2d 648 (1958) (contributory negligence no defense since statute prohibiting sales to intoxicated persons was enacted to protect them from their inability to exercise self-protective care).

12. See, e.g., *State ex rel. Joyce v. Hatfield*, 179 Md. 249, 78 A.2d 754 (1951)

tion of such a liability is a legislative, rather than a judicial, function.¹³

The legislatures of many states have enacted statutes, commonly called Civil Damage or Dram Shop Acts, expressly imposing civil liability upon tavern keepers for the injurious consequences of intoxication resulting from certain sales.¹⁴ Generally, liability under these statutes is restricted to the consequences of illegal sales, *e.g.*, sales to minors and intoxicated persons.¹⁵ Two states have statutes containing no such restrictions.¹⁶ In neither of the instant cases was the cause of action given predicated upon a civil damage or dram shop act.

In the instant federal case, the court faced the situation of

(drinking, not sale, proximately caused injury; drinker responsible for own torts); *Barboza v. Decas*, 311 Mass. 10, 40 N.E.2d 10 (1942) (not natural and probable consequence); *Tarwater v. Atlantic Co.*, 176 Tenn. 510, 144 S.W.2d 746 (1940); (voluntary consumption was proximate cause); *Seible v. Leach*, 233 Wis. 66, 288 N.W. 774 (1939) (too remote). One court has openly expressed fear of being "left in the uncharted sea of how far this negligence is legally recognizable as a proximate cause of the injury." *Cowman v. Hansen*, 92 N.W.2d 682, 688 (Iowa 1958).

13. See, *e.g.*, *Cowman v. Hansen*, 92 N.W.2d 688 (Iowa 1958) ("in the field of legislative discretion"); *State ex rel. Joyce v. Hatfield*, 179 Md. 249, 78 A.2d 754 (1951) (would "virtually usurp legislative power").

14. Twenty-one states have such statutes: ALA. CODE tit. 7, §§ 121-122 (1940) (liability for illegal sales); CONN. GEN. STAT. tit. 30, § 30-102 (Supp. 1959) (liability for sale contributing to intoxication); DEL. REV. CODE tit. 4, c. 7, §§ 715, 716 (1953) (for sale to person of known intemperate habits with notice); ILL. STAT. ANN. c. 43, § 135 (Supp. 1959) (liability on seller and owner of premises for any sale contributing in whole or in part to intoxication); IOWA CODE ANN. § 129.2 (1949) (liability for illegal sale); ME. REV. STAT. c. 61, § 95 (1954) (for illegal sale); MICH. STAT. ANN. § 18.993 (Supp. 1959) (for unlawful sale); MINN. STAT. ANN. § 340.95 (1957) (for unlawful sale); NEV. REV. STAT. § 202.070 (1959) (liability to parents only for sales to minors); N.Y. CIVIL RIGHTS LAW § 16 (for unlawful sales); N.C. GEN. STAT. § 14-332 (1953) (liability to parents for sales to minors in violation of law); N.D. REV. CODE § 5-0121 (1943) (for illegal sales); OHIO REV. CODE §§ 4399.01-.05 (1953) (operator and owner with knowledge liable for sale to forbidden person); OKLA. STAT. tit. 37, § 121 (1951) (for illegal sales); ORE. REV. STAT. § 30.730 (1959) (liability to spouse, parent, or child for sales to intoxicated persons and habitual drunkards); R.I. GEN. LAWS § 3-11-1-5 (1956) (for illegal sales and for sales after notice); S.D. CODE § 5.0208 (Supp. 1952) (action against licensee on bond for illegal sales); VT. STAT. § 6214 (1947) (seller and owner of premises liable for illegal sales); WASH. REV. CODE § 71.08.080 (Supp. 1959) (for sales to a habitual drunkard); WIS. STAT. § 176.35 (1957) (for sales to minors and habitual drunkards after notice); WYO. STAT. § 12-34 (1957) (for sales to minors and habitual drunkards after notice).

15. See note 14 *supra*. See, generally, Comment, *Liability Under the New York Dram Shop Act*, 8 SYRACUSE L. REV. 252 (1956). The cause of action given under many of these statutes is substantially the same as that given in the two instant cases.

16. Connecticut and Illinois. See note 14 *supra*. See, generally, Symposium, *Actions Under the Illinois Dram Shop Act*, 1958 U. ILL. L. FORUM 173-284. Since it is unnecessary to prove either negligence or an illegal sale to obtain recovery, this kind of statute has been appropriately described as imposing "liability without fault." *De Lude v. Rimek*, 351 Ill. App. 466, 471, 115 N.E.2d 561, 564 (1953). For a discussion of the principle, see generally EHRENZWEIG, *NEGLIGENCE WITHOUT FAULT* (1951).

an illegal sale in Illinois and a collision in Michigan. Both states had statutes which would have given the plaintiffs a cause of action had the sale and collision both occurred in either state alone,¹⁷ but the court found neither statute applicable where the sale occurred in one state and the collision in another.¹⁸ This left what the court styled a legal "vacuum," which it filled by turning to general principles of tort liability under the common law in effect in Michigan.¹⁹ Confronted with the oft-repeated rule of the earlier cases that the common law affords no remedy for injury resulting from the sale of liquor to an "able bodied" or "ordinary" man,²⁰ the court distinguished the situation before it from the ambit of the rule by finding that an intoxicated man was neither "able bodied" nor "ordinary."²¹ This allowed the court to then find that the Illinois criminal statute²² prohibiting sales to intoxicated persons established a standard of conduct for the protection of the class of persons to which the plaintiff belonged²³ imposed upon the defendants a duty to the plaintiffs, the breach of which constituted negligence.

17. See note 14 *supra*.

18. The suit was brought in the District Court for the Northern District of Illinois, Eastern Division. Since jurisdiction was based on diversity of citizenship, the court was bound to apply the law of Illinois. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1933). Illinois had held that its statute had no extraterritorial effect. *Eldridge v. Don Beachcomber*, 342 Ill. App. 151, 95 N.E.2d 512 (1950). Since Illinois would not have applied the statute, the federal court could not have applied it.

Under the holding of *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941) the court was required to apply the conflict of laws rules of Illinois. It appears to be settled that the Illinois courts will apply the laws of the state of the accident. *Opp v. Pryor*, 294 Ill. 538, 128 N.E. 580 (1920); *Mithen v. Jeffery*, 259 Ill. 372, 102 N.E. 778 (1913). Thus, whether the court was correct in not applying the Michigan statute would seem to depend upon whether it was correct in concluding that the Michigan courts would not have applied it. The court said that it was *probable* that the Michigan courts would not have applied it and referred to a case cited by the defendants in support of that conclusion. The case was not cited in the opinion and this writer has been unable to find it.

19. For the reasons given in note 18 *supra*, it seems that the court was correct in applying the common law as in effect in the State of Michigan.

20. The rule and its language are traceable to *Cruse v. Aden*, 127 Ill. 231, 20 N.E. 73 (1889), which involved injury to the intoxicated person himself rather than injury to an innocent third person and a gift of liquor by a social host to his guest rather than a sale by a licensed vendor.

21. This distinction was unacceptable to the dissenting judge who felt that, although perhaps socially desirable, the result reached by the majority should be achieved by legislative act, rather than by judicial interpretation. *Waynick v. Chicago's Last Department Store*, 269 F.2d 322, 326 (7th Cir. 1959). In support of the dissenting judge's belief that the common law has "always held accountable those responsible for direct injury," see *State ex rel. Joyce v. Hatfield*, 197 Md. 249, 254, 78 A.2d 754, 757 (1954), wherein the court stated: "Human beings, drunk or sober, are responsible for their own torts."

22. ILL. REV. STAT. c. 43, § 131 (Supp. 1959).

23. A judicial finding essential to the imposition of liability here. *RESTATEMENT, TORTS* §§ 285, 286 (1934); *PROSSER, TORTS* § 34 (2d ed. 1955). The leading case is *Gorris v. Scott*, L.R. 9 Ex. 125 (1874). See, generally, *Morris, The Relation of Criminal Statutes to Tort Liability*, 46 HARV. L. REV. 453 (1932).

In the instant New Jersey case, the court relied on the authority of the federal case discussed above and, by analogy, the authority of cases holding persons liable who, by conduct in violation of a criminal statute, created a situation involving an unreasonable risk because of the foreseeable action of another.²⁴ The court reasoned that a tavern keeper²⁵ who sells liquor to one whom he knows or should know to be an intoxicated person or a minor ought to recognize the unreasonable risk of harm to others through the expectable action of the vendee. The court found the New Jersey criminal statute²⁶ and administrative regulation²⁷ prohibiting sales to minors and intoxicated persons were for the protection of the general public and established a standard of conduct, to which failure to adhere could be found by a jury to constitute negligence.²⁸ In light of the common use of automobiles and the frequency of accidents resulting from drinking, the court refused to hold that as a matter of law the accident which did in fact occur was not a normal incident of the risk created or an event which the defendants could not have reasonably foreseen.

It is submitted that the two instant cases were correctly decided in accordance with accepted tort principles and that the result finds support in many comparable situations. A negligent act may be one involving an unreasonable risk to another, either by setting a force in motion or by creating a situation in which the action of another is foreseeable.²⁹ The fact that the intervening act of another is itself a negligent act will not of itself absolve the one who created the situation, if the intervening act was foreseeable.³⁰ Thus, one who entrusts an auto-

24. The court discussed the following cases: *Ross v. Hartman*, 139 F.2d 14 (D.C. Cir. 1943), cert. denied, 321 U.S. 790 (1944) (unlocked truck with key in ignition in violation of ordinance stolen; plaintiff struck while thief driving); *Ney v. Yellow Cab Co.*, 2 Ill.2d 74, 117 N.E.2d 74 (1954) (taxi left with key in ignition in violation of statute stolen); *Semeniuk v. Chentis*, 1 Ill. App.2d 508, 117 N.E.2d 883 (1954) (air rifle sold in violation of ordinance for use by child who put out plaintiff's eye with it); *Anderson v. Settergren*, 100 Minn. 294, 111 N.W. 279 (1907) (unlawful sale of .22 rifle to minor who shot plaintiff).

25. The court specifically limited its holding to those who engage in the liquor business for profit.

26. N.J. STAT. ANN. 33:1-77 (1940) (prohibiting sales to minors).

27. Division of Alcoholic Beverage Control, Regulation No. 20, Rule 1 (prohibiting sales to intoxicated persons).

28. It is interesting to note that under the holding of the court the defendants could defend the tort action against them by proving that they neither knew nor had reason to know that the one to whom they had sold was a minor or intoxicated, whereas this alone would not constitute a defense to a criminal prosecution under the statute. *See, Sportsman v. Board of Comm'rs of the Town of Nutley*, 42 N.J. Super. 488, 127 A.2d 208 (1956).

29. *RESTATEMENT, TORTS* § 302 (1934).

30. *Id.* § 447.

mobile to another known by him to be intoxicated,³¹ likely to become intoxicated,³² or otherwise incompetent to drive safely,³³ may be found to have created a situation involving an unreasonable risk of harm to the interests of innocent third persons and may be held liable for injuries inflicted by the other's negligent operation of the automobile. Here the standard of conduct is a general one of reasonable care; the standard also may be a particular one imposed by a criminal statute prohibiting certain conduct.³⁴ Hence, one who sells or entrusts a firearm to a child in violation of a criminal statute prohibiting such entrusting or sale may be liable for injuries inflicted through the child's misuse of the weapon.³⁵ In either situation, the defendant, by combining gun and child or automobile and intoxicated or incompetent driver, creates a situation involving foreseeable injury to another. It is suggested that there is no basis in principle for distinguishing the gun and automobile entrusting cases from the situation in the instant cases where the dangerous combination of intoxicated driver and automobile is effected through an illegal sale of liquor.³⁶

It is further submitted that the various policy considerations recognized as underlying tort law favor the result reached in the instant cases. The imposition of this liability neither presents the courts with a rule that cannot be successfully administered nor imposes an unbearable or unjustifiable burden on tavern keepers. This has been demonstrated by the successful court administration of civil damage and dram shop acts for

31. E.g., *Tolbert v. Jackson*, 99 F.2d 513 (5th Cir. 1938).

32. E.g., *Mitchell v. Churches*, 119 Wash. 547, 206 Pac. 6 (1922) (going on a drinking party).

33. E.g., *Rounds v. Phillips*, 166 Md. 151, 170 Atl. 532 (1934) (notoriously reckless driver).

34. "Negligence is the breach of legal duty. It is immaterial whether the duty is one imposed by the rule of common law requiring the exercise of ordinary care not to injure another, or is imposed by a statute designed for the protection of others. . . . All that the statute does is to establish a fixed standard by which the fact of negligence may be determined." *Osborne v. McMasters*, 40 Minn. 103, 105, 41 N.W. 543, 544 (1889).

35. *Tamiami Gun Shop v. Klein*, 116 So.2d 421 (Fla. 1959), noted in 20 *LOUISIANA LAW REVIEW* 796 (1960) (minor shot off own thumb); *Semeniuk v. Chentis*, 1 Ill. App.2d 508, 177 N.E.2d 883 (1954) (injury to another); *Anderson v. Settergren*, 100 Minn. 294, 111 N.W. 279 (1907) (same).

36. "If it is negligence to entrust an automobile to an intoxicated person or one addicted to intoxication, why is it not negligence to furnish liquor to a person to the point of intoxication knowing that he is going to drive? The reasoning of the cases that it is the drinking of the liquor and not the selling of it which causes the injury does not impress me. As well say [in the entrusting cases] that it is the driving of the automobile which causes the injury and not the entrusting it to the intoxicated person." *Dooling, J.*, dissenting in *Fleckner v. Dionne*, 94 Cal. App.2d 246, 253, 210 P.2d 530, 535 (1949).

nearly a century and the continued existence of the tavern business in those states having such statutes. This risk can be calculated in advance, insured against, and distributed among the consuming public, through prices, as a cost of the business. Tavern keepers, who operate their business by way of privilege rather than right, can always avoid liability by observing their statutory obligations.

Wellborn Jack, Jr.

TORTS — MUNICIPAL CORPORATIONS — NOTICE OF DEFECTS IN SIDEWALKS CREATED BY MUNICIPAL EMPLOYEES

Plaintiff sued the City of New Orleans to recover for injuries sustained when she stepped on a defective water meter cover located on a portion of the sidewalk. The cover had been broken approximately twenty-two days earlier by employees of the city's park commission engaged in trimming a tree, and this defect had been pointed out to the employees doing the work. The trial court allowed recovery on the ground that the city had failed to repair a dangerous condition in the sidewalk within a reasonable time after gaining knowledge of the condition. On appeal to the Louisiana court of appeal, *held*, affirmed. Notice of the defect to the agency creating it is sufficient to impose upon the city the duty of repairing the defect within a reasonable time. *Haindel v. Sewerage & Water Board*, 115 So.2d 871 (La. App. 1959).¹

As a general rule, municipal corporations are considered immune from tort liability in performance of governmental functions, but are not immune when performing proprietary functions.² Municipalities have generally been held liable on several theories for failure to use reasonable care in maintaining streets

1. Dismissal of the suit as against the sewerage and water board was not appealed by the plaintiff; so the court of appeal was concerned only with the appeal by the city.

2. *Barber Laboratories v. New Orleans*, 227 La. 104, 78 So.2d 525 (1955); *Howard v. New Orleans*, 159 La. 443, 105 So. 443 (1925); *McSheridan v. Talladega*, 243 Ala. 162, 8 So.2d 831 (1942); *Peavey v. Miami*, 146 Fla. 629, 1 So.2d 614 (1941); *Gullikson v. McDonald*, 62 Minn. 278, 64 N.W. 812 (1895). See 63 C.J.S., *Municipal Corporations* § 746 (1950); Notes, 18 LOUISIANA LAW REVIEW 756 (1958), 16 LOUISIANA LAW REVIEW 812 (1956); *Fordham & Pegues, Local Government Responsibility in Tort in Louisiana*, 3 LOUISIANA LAW REVIEW 720, 721-31 (1941).

The distinction between governmental, as compared with proprietary, functions is not entirely clear. Generally a governmental function is one traditionally performed by the state for the health, safety, and welfare of citizens, and not for profit; such as fire and police protection, free garbage service, and maintenance of public parks. Proprietary functions may or may not be profitable, but they are usually paid for by the users and are not considered as traditionally performed