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Torts - Liability of Tavern Owner to Intoxicated Patron

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factors are relevant in such consideration. First, its application is expressly limited to instances in which the law the parties have made for themselves by their contract is silent. Here such is not the case. Second, the basic equities of *Acosta v. Cole* tend to favor a strict interpretation of the contractual provision. While acknowledging the court's finding of fact in this case, this writer concludes the defendant did not, at any time, attempt to get something for nothing. By the terms of the contract defendant incurred the obligation to teach a given number of dancing lessons, and though his high pressure sales technique may be the subject of considerable inquiry and criticism, he at all times acknowledged this obligation and urged his readiness to perform.

The court's interpretation of article 2003 was well reasoned. However, it is submitted that the application of the article to the circumstances of the *Richardson* and *Acosta* cases was ill-founded. Unless a court can conclude that the circumstances of such a contract warrant a finding of lack of capacity[29] or that the contract itself is *contra bonos mores*,[30] the contractual stipulation, if unambiguous, should prevail over article 2003.

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TORTS — LIABILITY OF TAVERN OWNER TO INTOXICATED PATRON

Although under the influence of alcohol when he arrived at defendant's tavern,[1] plaintiff was rational and in control of his faculties. He immediately ordered several drinks, and later was repeatedly coaxed to drink and plied with drinks by defendant's barmaids. Consumption of some thirty to forty drinks rendered him, to the knowledge of defendant and his employees, almost totally helpless, both mentally and physically.[2] Nevertheless, defendant ejected plaintiff from the tavern on to grounds adjacent to U.S. Highway 80 at closing time. Plaintiff wandered on the highway and was injured by a passing motorist; he sought damages for personal injuries in an action ex delicto against the tavern owner and his insurer. Defendants filed an exception of no cause of action alleging plaintiff was contributorily negli-

29. *Id.* art. 1779: "Four requisites are necessary to the validity of a contract: (1) Parties legally capable of contracting . . . ." See also *id.* art. 1788.

30. *Id.* arts. 1779(4), 1893, 1895.

1. Sak's Lounge.

2. Plaintiff fell down several times, breaking his watch on one such occasion, all to the knowledge of the defendant and his employees.

gent.[3] The trial court sustained the exception, and the Second Circuit Court of Appeal affirmed. The Supreme Court *held* that by voluntarily consuming the liquor plaintiff was guilty of contributory negligence and thus barred from recovery for the injury he suffered as a result of his inebriation. *Lee v. Peerless Ins. Co.*, 248 La. 982, 183 So. 2d 328 (1966).

The prevailing common law view absolves a tavern keeper who sells liquor to an intoxicated consumer from liability for injuries caused the latter either by his own act[4] or by the act of another.[5] Denial is usually based on the theory that the contributory negligence of the consumer bars his recovery.[6] Some courts have occasionally allowed the injured consumer recovery on the basis of willful and wanton conduct by the tavern keeper[7] or through the application of criminal statutes.[8]

Numerous jurisdictions deny recovery in actions by third parties against tavern owners for injuries to them caused by the inebriated consumer.[9] In these situations, recovery is usually denied on the basis of proximate cause, voluntary consumption

3. LA. CODE OF CIVIL PROCEDURE art. 922 (1960) provides that three exceptions and no others shall be allowed: the declinatory exception, the dilatory exception, and the peremptory exception. *Id.* art. 923 provides: "The function of the peremptory exception is to have the plaintiff's action declared legally nonexistent, or barred by effect of law, and hence this exception tends to dismiss or defeat the action." *Id.* art. 927 states the objections which may be raised through the peremptory exception, but are not limited to the following: "(4) No cause of action; and (5) No right of action, or no interest in the plaintiff to institute the suit."

4. Hitson v. Dwyer, 61 Cal. App. 2d 803, 143 P.2d 952 (1943) (plaintiff fell off bar stool and injured himself; illegal sale to intoxicated person); Reed v. Black Caesar's Forge Gourmet Restaurant, 165 So. 2d 787 (Fla. App. 1964) (intoxicated plaintiff drove his car into bay); Henry Grady Hotel Co. v. Sturgis, 70 Ga. App. 379, 28 S.E.2d 329 (1943) (plaintiff scalded to death in his own hotel room shower).

5. See, *e.g.*, Cole v. Rush, 45 Cal.2d 345, 289 P.2d 450 (1955).

6. See notes 4 and 5 *supra;* King v. Henkie, 80 Ala. 505, 60 Am. Rep. 119 (1886); Noonan v. Galick, 19 Conn. Sup. 308, 112 A.2d 892 (1955); Buntin v. Hutton, 206 Ill. App. 194 (1917).

7. Nally v. Blandford, 291 S.W.2d 832 (Ky. App. 1956); Tabor v. O'Grady, 61 N.J. Super. 446, 161 A.2d 267 (1960); Ibach v. Jackson, 148 Ore. 92, 35 P.2d 672 (1934); RESTATEMENT, TORTS § 482 (1934): "Except as stated in subsection (2), a plaintiff's contributory negligence does not bar recovery for harm caused by the defendant's reckless disregard for the plaintiff's safety."

8. Soronen v. Olde Milford Inn, 84 N.J. Super. 372, 202 A.2d 208 (1964); Jardine v. Upper Darby Lodge No. 1973, Inc., 413 Pa. 626, 198 A.2d 550 (1964); Schelin v. Goldberg, 188 Pa. Super. 341, 146 A.2d 648 (1958) (these recent cases indicate that the violation of penal statutes constitutes negligence per se in these respective jurisdictions); RESTATEMENT, TORTS § 483 (1934); see Prosser, *Contributory Negligence as Defense to Violation of Statute*, 32 MINN. L. REV. 1054 (1948); see generally Comment, 12 BAYLOR L. REV. 388 (1960); Note, 49 MINN. L. REV. 1154 (1965).

9. See note 10 *infra.*

of liquor by the actor, rather than the sale to him, being the proximate cause of the injury.[10]

Many jurisdictions[11] have adopted statutes commonly known as civil damage or "dram shop" acts[12] which generally impose strict liability on the vendor of intoxicating liquor when the intoxication of the buyer results in injury to third persons.[13] Such an act has been held to preempt the field of civil remedies for injuries caused by an intoxicated person.[14] Under the Illinois Dram Shop Act anyone whose person or property is injured by an intoxicated person has a right of action in his own name, severally or jointly, against any persons who, by selling or giving alcoholic liquor, caused the intoxication, in whole or in part.[15] Even in Illinois, however, the person whose voluntary intoxication results in his own injury is denied recovery.[16]

Many states also have statutes which make it a crime or a misdemeanor to sell liquor to an intoxicated person.[17] These

10. See, *e.g.*, Fleckner v. Dionne, 94 Cal. App. 2d 246, 210 P.2d 530 (1949) (illegal sale of liquor not proximate cause); Cowman v. Hanson, 250 Iowa 358, 92 N.W.2d 682 (1958) (sale too remote to be proximate cause); State for the Use of Joyce v. Hatfield, 197 Md. 249, 78 A.2d 754 (1951) (proximate cause of collision not unlawful sale of liquor but rather negligence of person who drank it); *contra*, Waynick v. Chicago's Last Dep't Store, 269 F.2d 322 (7th Cir. 1959), *cert. denied.* 362 U.S. 903 (1960) (plaintiff injuries were proximate result of the unlawful sale by defendant); Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1 (1959) (proximate cause is a question for the jury).

11. Twenty-nine states have had civil damage of "dram shop" acts on their books at one time or another, *i.e.*, Arkansas, Colorado, Connecticut, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Washington, West Virginia, and Wisconsin. 183 So. 2d at 330. See generally Note, 20 LA. L. REV. 800 (1960).

12. Although these acts confer a right of damages to third persons in specified conditions, only Illinois and Connecticut subject the seller to liability without requiring proof that the sale was illegal or was made to a person known to be intoxicated. See generally Note, 20 LA. L. REV. 800 (1960).

13. Colligan v. Cousar, 38 Ill. App. 2d 392, 187 N.E.2d 292 (1963); Manning v. Yokas, 389 Pa. 136, 132 A.2d 198 (1957); see Appleman, *Civil Liability Under the Illinois Dram Shop Act*, 34 ILL. L. REV. 30 (1939); Ogilvie, *History and Appraisal of the Illinois Dram Shop Act*, 1958 U. ILL. L. FORUM 175; Comment, 4 VILL. L. REV. 575 (1959); PROSSER, TORTS § 79 (3d ed. 1964).

14. See, *e.g.*, Knierim v. Izzo, 22 Ill. 2d 73, 174 N.E.2d 157 (1961); Cunningham v. Brown, 22 Ill. 2d 23, 174 N.E.2d 153 (1961).

15. ILL. REV. STAT. c. 43, § 135 (1961). Recovery under this act is limited for injury to person or to property of such third person to $15,000 and recovery for loss of means of support resulting from the death or injury of any person shall not exceed $20,000 provided also that these actions are barred if not commenced within one year after the cause of action occurred.

16. See, *e.g.*, Holmes v. Rolando, 320 Ill. App. 475, 51 N.E.2d 786 (1943) (intoxicated consumer injured while being evicted by bartender); see also Randall v. Village of Excelsior, 258 Minn. 81, 103 N.W.2d 131 (1960).

17. See, *e.g.*, LA. R.S. 26:88 (1950); MINN. STAT. § 340.95 (1961); N.J. STAT. ANN. § 33, 1-39 (1940).

states generally deny recovery to the injured consumer himself, indicating that the statute is not a proper basis upon which to predicate civil liability.[18] A few courts, though, have interpreted such a statute as designed to include protection of the interest of the voluntarily intoxicated consumer.[19] Normally, these statutes are not a basis for recovery by third parties, denial of relief being usually supported by the observation that the unlawful sale was not the proximate cause of the injury.[20] Here, too, however, a few courts have allowed recovery to third persons predicated upon the violation of the criminal statute.[21]

In Louisiana, *Robinson v. Fid. & Cas. Co. of New York*[22] dealt with the father of a seventeen-year old boy suing for damages allegedly caused by the defendant liquor dealer's illegal sale[23] to his son. The defendant's exception of no cause of action was sustained by the First Circuit Court of Appeal, on a finding that the son was contributorily negligent in purchasing and voluntarily consuming the liquor. Thus it seems clear that the Louisiana courts follow the majority common law view in denying recovery to one injured while intoxicated, on the ground that he was contributorily negligent, and in refusing to predicate civil liability on the violation of a criminal statute.

In the instant case the majority held there is no civil action against persons selling intoxicating liquors for resulting harm to the consumer, apart from statute. The court said the only relevant statute was La. R.S. 26:88 (1950) which makes criminal the act of a retail liquor dealer selling alcoholic beverages to any intoxicated person. It rejected the argument that adoption of this statute *impliedly* created a right to recover civil damages in those persons intended to be protected thereunder irrespective of the defense of contributory negligence. Also the court noted that Louisiana has never adopted a civil damage or "dram-shop"

18. See notes 4, 5, and 16 *supra*.

19. See note 8 *supra*.

20. See, *e.g.*, Davis v. Shiappacossee, 145 So. 2d 758 (Fla. App. 1962); Joyce v. Hatfield, 197 Md. 249, 78 A.2d 754 (1951).

21. See Waynick v. Chicago's Last Dep't Store, 269 F.2d 322 (7th Cir. 1959); *cert. denied*, 362 U.S. 903 (1960); Rappaport v. Nichols, 31 N.J. 189, 156 A.2d 1 (1959).

22. 135 So. 2d 607 (La. App. 1st Cir. 1961), *cert. denied*.

23. LA. R.S. 14:91 (1950) makes it unlawful for a liquor dealer to sell spirituous liquors to anyone under the age to twenty-one. *Id.* 26:88 prohibits a retail dealer from selling or serving alcoholic beverages to any person under the age of eighteen years.

act. The majority likewise held that the doctrine of last clear chance did not place civil liability upon the defendant.

Justice Sanders, in a vigorous and well-reasoned dissent, suggested that for an action of this type to succeed under Louisiana Civil Code articles 2315 and 2316 three things must be shown: fault, causation, and damage. Justice Sanders divided the fault requirements into duty and breach of duty and was of the opinion that defendant had breached at least three duties he owed plaintiff. The first breach was sale of liquor in violation of La. R.S. 26:88. Causation between the illegal sale and the resulting injuries was clear to Justice Sanders since, but for the sale, the injuries would not have occurred. Defendant's second breach, according to Justice Sanders, emanated from the invitor-invitee relationship, defendant's duty as an invitor requiring at the very least that he refrain from conduct which increased the peril of an intoxicated patron; hence, if the invitor ejected his inebriated patron into an area of known danger, the invitor was guilty of actionable negligence.[24] The third duty breached was that of failing to avert the harmful consequences of his illegal sale to plaintiff. Justice Sanders concludes his opinion by reasoning that the circumstances surrounding plaintiff's eviction gave defendant the last clear chance to avoid harm to the plaintiff.

While it is undoubtedly true that the court was simply unwilling to place the burden of this class of injury upon the tavern keeper, it is submitted that this policy decision should not have been couched in terms of contributory negligence, but should have been handled by using the "duty approach" as exemplified by Justice Sanders dissenting opinion, and by the following reasoning. The traditional formula[25] for a negligence cause of action is, in essence, as follows: (1) a duty recognized by law, requiring the actor to conform to a certain standard of conduct for the protection of others against unreasonable risks, (2) a failure on his part to conform to the standard required, (3) a relationship of "proximate cause" between failure and injury and, (4) absence of conduct by the injured person that will disable him from bringing an action.[26] As has been seen, in an

24. Waymire v. Wolfe, 52 Iowa 533, 3 N.W. 541 (1879); Houston v. Strickland, 184 Va. 994, 37 S.E.2d 64 (1946); PROSSER, TORTS § 54 (3d ed. 1964); *cf.* Black v. New York, N.H. & H.R.R., 193 Mass. 448, 79 N.E. 797 (1907); Depue v. Flateau, 100 Minn. 299, 111 N.W. 1 (1907).

25. PROSSER, TORTS § 30 (3d ed. 1964).

26. RESTATEMENT, TORTS § 281 (1934).

action by the consumer against the vendor, part four of the formula is the usual basis for denial — that is, contributory negligence of the consumer. In the action by the third party against the tavern keeper, part three, lack of proximate cause, is the usual basis for denial of recovery. Thus the courts are not consistent in their bases for denial of recovery in a suit by the consumer on one hand, and by a third party on the other. It is submitted that denial of recovery in both situations should be predicated on part one of the formula; that is to say, the tavern keeper simply owes no duty to the consumer or to the third party to refrain from selling liquor to the intoxicated patron.[27] While the ultimate result would be the same as that now achieved, by using the duty approach in both cases, the basis for denial would be more clearly stated.

It is further submitted that the majority opinion was correct in refusing to predicate civil liability on breach of La. R.S. 26:88 since it is a criminal statute and not intended to create civil liability. However it seems that from the very nature of the invitor-invitee relationship, the defendant should be made civilly liable to an intoxicated patron whom he physically ejects from his establishment into a position of peril. It seems clear that the defendant in the instant case breached his duty of reasonable care in physically ejecting the helpless and intoxicated plaintiff into an area of known dangers.[28]

Lastly, it is submitted that even if the court chooses to continue speaking of contributory negligence rather than an absence of duty, the peculiar facts[29] of the instant case would seem to

27. This duty is unrelated to any criminal statute.

28. In Galvin v. Jennings, 289 F.2d 15 (3d Cir. 1961), defendant served drinks to an intoxicated consumer. Plaintiff became totally inebriated. Defendant put plaintiff in his car and gave him specific instructions as to how to turn his steering wheel in order to drive his car from defendant's parking lot. Plaintiff was later injured in an auto collision. Held, these facts were sufficient to state a cause of action notwithstanding the patron's violation of a statute by driving while intoxicated.

In Black v. New York, N.H. & H.R.R., 193 Mass. 448, 79 N.E. 797 (1907), Black was a passenger on the railroad and entered the train in an intoxicated condition, which was apparent. When the train arrived at the destination, the conductor and brakeman helped him down from the train and led him to a series of steps leading up from the platform to the station. They got him about half way up and left him there. He fell down the steps and injured himself. Chief Justice Knowlton for the court said that not only in the act of removal but in the place where they left him, it was their duty to have reasonable regard for his safety in view of his manifest condition.

29. (1) Defendant plied plaintiff with drinks and (2) defendant physically ejected plaintiff onto premises adjacent to a busy interstate highway.

make the defendant liable under the doctrine of last clear chance.[30] The defendant himself exposed the helpless plaintiff to peril. He obviously knew or should have known that the plaintiff would be unlikely to avoid the peril, yet he failed to act to avert the harm that ensued. Hence, the plaintiff should have been allowed to recover as the tavern owner had the last clear chance.

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30. RESTATEMENT, TORTS § 480 (1934) provides: "[A] plaintiff who, by the exercise of reasonable vigilance could have observed the danger created by the defendant's negligence in time to have avoided the harm therefrom, may recover if, but only if, the defendant (a) knew of the plaintiff's situation and (b) realized or had reason to realize that the plaintiff was inattentive and therefore unlikely to discover his peril in time to avoid the harm, and (c) thereafter if negligent in failing to utilize with reasonable care and competence his then existing ability to avoid harming the plaintiff."