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Bar Owners, Inebriates, and Last Clear Chance

Linton W. Carney

NOTES

BAR OWNERS, INEBRIATES, AND LAST CLEAR CHANCE

Defendant violated the Alcoholic Beverage Control Law[1] by serving liquor to the plaintiff who was obviously intoxicated. After plaintiff was forced to leave the bar, she was struck by an automobile and severely injured. She sued the owner of the bar but her suit was dismissed for failure to state a cause of action. In reversing the lower courts, the Louisiana Supreme Court *held* that the plaintiff's petition did state a cause of action based on the duties owed her under the statute and under the invitor-invitee relationship of bar owner and patron and that her action was not barred by contributory negligence because the doctrine of last clear chance was applicable. *Pence v. Ketchum*, 326 So.2d 831 (La. 1976).

At common law a tavern keeper who serves an intoxicated patron is not responsible in tort for either the patron's injuries or the damages the patron causes.[2] Suits brought by injured customers have often been barred by contributory negligence,[3] while those brought by third parties have frequently been dismissed on the theory that the consumption of the alcohol and not its sale was the proximate cause of the accident.[4]

In recent years, however, there has been a trend away from this rigid common law position. Some courts have discarded the notion that a patron's contributory negligence always bars his action and have accepted the theory that the plaintiff's negligence does not prevent recovery if the defendant has violated a statute enacted to protect members of the plaintiff's class from

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1. LA. R.S. 26:88 (2) (1950): "No person holding a retail dealer's permit and no agent, associate, employee, representative, or servant of any such person shall do or permit any of the following acts to be done on or about the licensed premises: . . . (2) Sell or serve alcoholic beverages to any intoxicated person."

2. *E.g.*, Noonan v. Galick, 19 Conn. Sup. 308, 112 A.2d 892 (1955); Robinson v. Bogdanno, 213 N.W.2d 530 (Iowa 1973); Halvorson v. Birchfield Boiler, Inc., 76 Wash. 2d 759, 458 P.2d 897 (1969).

3. *E.g.*, Cole v. Rush, 45 Cal.2d 345, 289 P.2d 450 (1955); Hitson v. Dwyer, 61 Cal. App. 2d 803, 143 P.2d 952 (1943); Demge v. Feierstein, 222 Wis. 199, 268 N.W. 210 (1936).

4. *E.g.*, Nolan v. Morelli, 154 Conn. 432, 226 A.2d 383 (1967); Meade v. Freeman, 462 P.2d 54 (Idaho 1969); Hamm v. Carson City Nuggett, Inc., 450 P.2d 358 (Nev. 1969).

their own helplessness.[5] These courts have also rejected the ruse of declaring that the consumption and not the sale is the proximate cause of the injury[6] and have chosen to follow the well-established tort doctrine that intervening acts that are the foreseeable or the natural results of the created risk do not necessarily relieve a tortfeasor from liability.[7] Thus in jurisdictions without dram shop statutes (and even where such statutes have been repealed[8]) courts have allowed recovery by customers[9] and third parties[10] for injuries arising from the sale of alcohol to intoxicated persons.

The Louisiana Supreme Court rejected this recent trend in 1966 in *Lee v. Peerless Insurance Company*.[11] On facts almost identical to those of the instant case, the court dismissed a suit against a bar owner who had served liquor to an intoxicated customer.[12] The court stated that no remedy was available absent a dram shop statute and that, in any case, the sale of the liquor was not the proximate cause of the plaintiff's injuries.[13] The court also held that contributory negligence barred the suit because the doctrine of last clear chance did not apply under such circumstances.[14]

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5. Many courts relied upon RESTATEMENT OF TORTS § 483 (1934): "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 by his contributory negligence from recovering for bodily harm caused by the violation of such statute." This provision was replaced by RESTATEMENT (SECOND) OF TORTS § 483 (1965): "The plaintiff's contributory negligence bars his recovery for the negligence of the defendant consisting of the violation of a statute, unless the effect of the statute is to place the entire responsibility for such harm as has occurred upon the defendant."

6. *E.g.*, Berkeley v. Park, 262 N.Y.S.2d 290, 293 (1965): "These cases rejected as simply unreal the distinction that the selling of alcohol is only a remote cause of resulting intoxication while the consumption is the proximate cause."

7. *See* RESTATEMENT (SECOND) OF TORTS § 442A: "Where the negligent conduct of the actor creates or increases the foreseeable risk of harm through the intervention of another force, and is a substantial factor in causing the harm, such intervention is not a superseding cause." *See also* Soronen v. Olde Milford Inn, 84 N.J. Super. 372, 202 A.2d 208 (1964); Majors v. Brodhead Hotel, 416 Pa. 265, 205 A.2d 873 (1965).

8. Ramsey v. Anctil, 211 A.2d 900 (N.H. 1965).

9. *E.g.*, Vesely v. Sager, 5 Cal. 3d 153, 95 Cal. Rptr. 623, 486 P.2d 151 (1971); Ramsey v. Anctil, 211 A.2d 900 (N.H. 1965); Soronen v. Olde Milford Inn, 84 N.J. Super. 372, 202 A.2d 208 (1964).

10. *E.g.*, Marusa v. District of Columbia, 157 App. D.C. 348, 484 F.2d 828 (1973); Watnick v. Chicago's Last Dep't Store, 269 F.2d 322 (7th Cir. 1959), *cert. denied*, 362 U.S. 903 (1960); Jardine v. Upper Darby Lodge No. 1973, Inc., 413 Pa. 626, 198 A.2d 550 (1964).

11. 248 La. 982, 183 So. 2d 328 (1966).

12. *Id.* at 987, 183 So. 2d at 330.

13. *Id.*

14. *Id.* at 993, 183 So. 2d at 332. This view is criticized in *The Work of the*

Writing the plurality opinion for the court in *Pence v. Ketchum*, Chief Justice Sanders concluded that the Alcoholic Beverage Control Law created a duty on the part of the tavern keeper not to serve liquor to intoxicated persons and that a breach of this duty constituted fault under Articles 2315 and 2316 of the Louisiana Civil Code.[15] The court found that the plaintiff was a member of the protected class and that the risk that she encountered was of the sort that the duty was designed to protect against.

The court also held that a separate duty arose from the invitor-invitee relationship between the bar owner and his customers and that an invitor owes customers a duty of reasonable care under the circumstances. If the circumstances include intoxication, increased caution on the invitor's part is required. The court also added that the invitor's duty requires at least that he refrain from affirmative acts which increase the invitee's peril, and if foreseeable harm results from a breach of his duty, the invitor will be held liable.

Finally the court concluded that even a contributorily negligent patron can recover because "if a person is in an advanced state of intoxication so as to render him helpless, or incapable of self-protection, the law affords him the benefit of the doctrine of Last Clear Chance."[16] Thus Chief Justice Sanders concluded that the plaintiff's petition stated a cause of action by alleging fault, causation, and damage.

Distinguishing the particular class of persons protected by the Alcoholic Beverage Control Law is difficult. In his dissent in *Lee v. Peerless*, Justice Sanders concluded that the statute was enacted, "at least in part, to protect intoxicated patrons as a class from helplessness and incompetence."[17] The statutory language draws no distinction between one who is legally intoxicated but appears sober and one who is grossly or obviously intoxicated. Moreover, others besides intoxicated persons may fall within the protected class: certainly innocent third parties can argue that their protection was also a possible motive for the law's enactment[18] and that the legislature would not provide a remedy for contributorily negligent patrons

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Louisiana Appellate Courts for the 1965-1966 Term—Torts, 26 LA. L. REV. 510, 511 (1966); Note, 27 LA. L. REV. 146 (1967); Note, 13 LOY. L. REV. 204 (1966).

15. In dissent, Justice Marcus suggested that the only duty imposed on the bar owner is to quit serving the customer who has become intoxicated. This is a duty owed to the state to obey a manifestation of its police power.

16. 326 So. 2d at 837 (La. 1976).

17. Lee v. Peerless Ins. Co., 248 La. 982, 1001, 183 So. 2d 328, 335 (1966).

18. A number of jurisdictions have decided that similar statutes were enacted to protect third parties. *E.g.*, Giardina v. Solomon, 360 F. Supp. 262 (M.D. Pa. 1973); Vance v. United States, 355 F. Supp. 756 (D. Alaska 1973); Trail v. Christian, 213 N.W.2d 618 (Minn. 1973).

but deny one to innocent victims. If third parties are given a remedy, the courts will have to decide either that all third parties are protected by the statute, which places everyone within the protected class, or that some distinctions can be drawn between third parties who are differently situated. The unforeseeability of a person's being injured and the presence of contributory negligence on his part are possible limitations on the protected class.

A determination of which risks are within the statute's ambit of protection is also difficult. Recent jurisprudence has recognized that Louisiana courts determine these risks by analyzing legislative intent[19] and by making policy decisions,[20] with "foreseeability" as only a persuasive guideline.[21] Accepting Chief Justice Sanders' statement that "the risk encountered was of the type the duty was designed to prevent,"[22] it is nevertheless difficult to distinguish the sort of risk encountered in the instant case from numerous others. Certainly other risks are arguably within the statute's contemplation, including the large variety of injuries which an intoxicated person can inflict on the general public. Many occurrences can be viewed as foreseeable risks engendered by a tortious sale to an intoxicated person, especially since the court specifically rejects the argument that the sale is not the proximate cause of the injury.[23] However the court provides no guidelines for determining which risks are within the scope of the statute.

19. *E.g.*, Hill v. Lundin & Associates, Inc., 260 La. 542, 550, 256 So. 2d 620, 622 (1972): "Where the rule of law upon which a plaintiff relies for imposing a duty is based upon a statute, the court attempts to interpret legislative intent as to the risk contemplated by the legal duty, which is often a resort to the court's own judgment of the scope of protection intended by the legislature."

20. *E.g.*, Pierre v. Allstate Ins. Co., 257 La. 471, 499, 242 So. 2d 821, 831 (1971): "The keys for the solution of the issue of responsibility when there is more than one cause-in-fact of damages are (1) a determination of the exact risk or risks anticipated by the imposition of the legal duty which has been breached and (2) the legal or policy considerations which grant excuses from certain consequences which follow an act of negligence. This requires, under the facts and law of each case and the attendant exigencies, a jurisprudential determination which will implement and make effective our broad codal provisions concerning those who should respond in damages for their faults."

21. Hill v. Lundin & Associates, Inc., 260 La. 542, 256 So. 2d 620 (1972); Chavers v. A.R. Blossman, Inc., 45 So. 2d 398 (La. App. 1st Cir. 1950); Lynch v. Fisher, 34 So. 2d 513 (La. App. 2d Cir. 1948). *See generally* Robertson, *Reason Versus Rule in Louisiana Tort Law: Dialogues on Hill v. Lundin & Associates, Inc.*, 34 LA. L. REV. 1 (1973).

22. 326 So. 2d at 835.

23. *Id.* at 836.

A second area of the opinion which merits attention concerns the duty created by the invitor-invitee relationship between the parties. The general standard of care for an invitor is to use reasonable efforts to protect his guests and to warn them against hidden defects, traps, or pitfalls.[24] On the other hand the invitee is expected to assume the obvious, normal, or ordinary risks attendant to use of the premises.[25] Addressing this issue, the court stated: "If the defendant ejects an intoxicated patron into an environment made hazardous by known dangers, such as a highway in the present case, and foreseeable injury results, the invitor is guilty of actionable negligence."[26] This statement appears to place an unreasonable burden on the invitor, for in this case the known danger was as evident to the invitee as to the invitor and the invitor certainly could not eliminate the danger of the highway. While perhaps the underlying rationale is that a grossly intoxicated person has so lost his power of reasoning that obvious dangers appear benign, no indication can be found in the decision that this was the court's reasoning. Indeed, the statement applies to all intoxicated persons, including those who have drunk enough to be arrested for driving while intoxicated[27] but still have their faculties, and those who do not display their intoxication as well as those obviously intoxicated. The court stated that the invitor's duty requires at least that he refrain from affirmative actions which increase his guest's peril, but it actually imposed upon the invitor who ejects intoxicated invitees from his premises the duty to protect them from obvious dangers, "such as a highway in the present case."[28] In *Lee v. Peerless* Justice Sanders suggested that the bar owner should telephone the police to remove the grossly intoxicated patron,[29] but such a solution seems very impractical if required for all intoxicated persons who remain in bars at closing time. A further implication of such an extension of the invitor-invitee relationship should be noted. Although recent decisions may have implied a disavowal of the common law classifications,[30] social guests have

24. *E.g.*, Foggin v. General Guar. Ins. Co., 250 La. 347, 195 So. 2d 636 (1967); Afeman v. Insurance Co. of North America, 307 So. 2d 399 (La. App. 4th Cir. 1975); Hawsey v. United States Fidelity & Guar. Co., 211 So. 2d 417 (La. App. 1st Cir. 1968).

25. *E.g.*, Foggin v. General Guar. Ins. Co., 250 La. 347, 195 So. 2d 636 (1967); Mouton v. Vanguard Ins. Co., 293 So. 2d 604 (La. App. 3d Cir. 1974); King v. Investment Equities Inc., 264 So. 2d 297 (La. App. 1st Cir. 1972).

26. 326 So. 2d at 836.

27. Under LA. R.S. 32:662 (Supp. 1968), 0.10 per cent or more alcohol by weight in the blood sets up the presumption of intoxication.

28. 326 So. 2d at 836.

29. Lee v. Peerless Ins. Co., 248 La. 982, 1008, 183 So. 2d 328, 337 (1966).

30. Shelton v. Aetna Cas. and Sur. Co., 334 So. 2d 406 (La. 1976); Cates v.

been considered invitees in Louisiana[31] and this same standard of care may be applied to a social host who allows his guests to leave after they become intoxicated. Several jurisdictions have accepted this extension of the duty.[32]

The application of the doctrine of last clear chance also poses problems of interpretation. Perhaps because "last clear chance has been applied almost exclusively to traffic and transportation cases,"[33] the court seemed somewhat uncomfortable with the doctrine and gave only perfunctory attention to its application under the facts of this case. For the doctrine to be invoked, the plaintiff must show that he was in a position of helplessness of which he was unaware or from which he could not extricate himself, that the defendant was or should have been aware of his peril, and that the defendant had an opportunity to avoid harming him.[34] The court extended the doctrine to a person in such an advanced state of intoxication as to be helpless, which is to say that the initial requirement of helplessness and ineptitude was presumed. The second requirement, that the defendant be aware of the plaintiff's peril, was recognized by the court's statement that "plaintiff's negligence in becoming intoxicated has allegedly placed her in a position of obvious helplessness."[35] Finally the court referred to the actual existence of the chance: "Nonetheless, the defendants failed to use an opportunity to

Beauregard Elec. Cooperative, Inc., 328 So. 2d 367 (La. 1976). In these cases the court declared that the duty owed by the landowner could be determined by the facts of the case without a resort to the common law classifications. However in *Shelton*, the court held the landowner to the duty to discover unreasonably dangerous conditions and either to correct them or to warn others of them. The abolition of common law concepts is thus more apparent than real.

31. *E.g.*, Foggin v. General Guar. Ins. Co., 250 La. 347, 195 So. 2d 636 (1967); Flettrich v. State Farm Auto Ins. Co., 238 So. 2d 220 (La. App. 4th Cir. 1970); Alexander v. General Accident, Fire, and Life Ins. Co., 98 So. 2d 730 (La. App. 1st Cir. 1957).

32. Giardina v. Solomon, 360 F. Supp. 262 (M.D. Pa. 1973); Vance v. United States, 355 F. Supp. 756 (D. Alaska 1973); Brockett v. Kitchen Boyd Motor Co., 24 Cal. App.3d 87, 100 Cal. Rptr. 752 (1972); Brattain v. Herron, 309 N.E.2d 150, (Ind. App. 1974); Thaut v. Finley, 50 Mich. App. 611, 213 N.W.2d 820 (1973); Linn v. Rann, 140 N.J. Super. 221, 356 A.2d 15 (1976); Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity, 258 Ore. 632, 485 P.2d 18 (1971). These cases may be read to place a heavier burden on social hosts than on bar owners, for the bar owner is apparently liable only for *ejecting* an intoxicated patron whereas a social host is liable for *allowing* his intoxicated guest to depart. Moreover, the host may also commit a tort if he forces his inebriated guest to stay.

33. Comment, *The Last Clear Chance Doctrine in Louisiana—An Analysis and Critique*, 27 LA. L. REV. 269, 273 (1967).

34. *E.g.*, Leake v. Prudhomme Truck Tank Serv. Inc., 260 La. 1071, 258 So. 2d 358 (1972); Gregoire v. Ohio Cas. Ins. Co., 158 So. 2d 379 (La. App. 1st Cir. 1963). *See* Comment, *The Last Clear Chance Doctrine, supra*, note 33, at 282.

35. 326 So. 2d at 837.

avoid harm to the plaintiff."[36] However, this conclusory statement does not specify when this opportunity arose or what the discovered peril was which the defendants could have removed or suppressed.

Presumably the plaintiff's peril could have arisen at three different times: when she first became very intoxicated; when she was forced to leave in an obviously helpless state; or when she walked into the highway and was hit by a car. If the peril was the mere state of drunkenness, then the bar owner can be held liable for any harm which comes to his patrons after they become intoxicated. However, this explanation appears unlikely because one can certainly be helpless without being in peril; being incapable of self-protection does not assure that one will be harmed. The plaintiff's peril may have arisen when she was forced to leave the defendant's premises in an impaired condition. If so, the defendant is in effect being held to have knowledge of what are only possible risks. Application of the last clear chance doctrine at this point would, however, somewhat limit the number of contributorily negligent persons able to recover while nevertheless providing a remedy for this plaintiff. If the peril was the risk of being hit by a car, the plaintiff's peril was at most only foreseeable when she left the bar. Such a construction would place upon the bar owner an affirmative duty either to rescue his patrons or at least to prevent them from deepening their peril when he does not know that they are in peril. However, the court never revealed when the defendant's chance arose.

The rather perfunctory treatment of last clear chance suggests that the court was more interested in eliminating the defense of contributory negligence than in the application of the doctrine to the facts at hand. The instant case places responsibility on a bar owner for an occurrence that resulted from actions by both plaintiff and defendant; the plaintiff's injuries arose from her voluntary consumption of the alcohol as well as from the defendant's illicit sale to her. In effect the defendant had no affirmative defense of contributory negligence, at least insofar as patrons of his establishment were concerned, because the risk produced in part by the plaintiff's negligent behavior was included within the scope of protection of the rule violated by the bar owner.[37] Such a construction of a duty is

36. *Id.*

37. Justice Dixon seems to take this position in his concurrence: "The duty-breach of duty approach adopted by this court negates the need for inquiry into the doctrines of contributory negligence and last clear chance. The proper test is whether the duty imposed on the defendant, whether statutory or non-statutory, is designed to protect this plaintiff (in her intoxicated condition) from the risk to which she was

common for certain statutes, such as those prohibiting child labor,[38] the sale of dangerous things to minors,[39] and the sale of liquor to intoxicated persons.[40] It may be that the court does not want to eliminate completely contributory negligence as a defense because the doctrine could be useful at some later instance, particularly with regard to contributorily negligent third parties who are injured by an intoxicated patron of a bar. Nevertheless it appears that the duty of a bar owner may encompass risks created in part by the negligence of patrons and that he should not be able to defend against their actions by invoking contributory negligence.

The limited nature of the actual holding (that plaintiff's petition stated a cause of action)[41] and the unusual facts make it hard to predict how lower courts will apply the decision. However the Louisiana Supreme Court seems willing to interpret the Alcoholic Beverage Control Law in a way that could greatly increase the duty of tavern keepers to protect voluntarily intoxicated patrons and perhaps even to rescue them from situations of danger which subsequently arise. But despite the broad interpretation which the court gives to the statute, some restrictions seem certain to surface. The statute may require some sort of knowledge on the part of the owner or his employees that the patron is actually intoxicated.[42] Secondly, the court suggested by its invocation of last clear chance that contributory negligence may sometimes be a defense to the action. Whether the court will follow this course or will decide that the bar owner's duty under the statute encompasses contributorily negligent acts by patrons is unclear. However, if contributory negligence is a defense, the plaintiff will have to demonstrate that he was in an advanced state of intoxication to have the benefit of last clear chance and will have to show that the defendant knew of his peril and had the

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exposed." *See* Malone, *Contributory Negligence and the Landowner Cases*, 29 MINN. L. REV. 61, 68 (1945): "It is not a matter of importance that the plaintiff's conduct was legal or illegal, reasonable or unreasonable. There is only one inquiry; did the plaintiff's behavior create a situation which the defendant could meet only through an adjustment which the court or jury is unwilling to impose on him?"

38. *E.g.*, Boyles v. Hamilton, 235 Cal. App. 492, 45 Cal. Rptr. 399 (1965); Tampa Shipbuilding and Engineering Corp. v. Adams, 132 Fla. 419, 181 So. 403 (1938); Vincent v. Riggi & Sons, Inc., 30 N.Y.2d 406, 334 N.Y.S.2d 380, 285 N.E.2d 689 (1972).

39. *E.g.*, Tamiami Gun Shop v. Klein, 116 So. 2d 421 (Fla. 1960); Bernard v. Smith, 36 R.I. 377, 90 A. 657 (1914).

40. *E.g.*, Taggart v. Bitzenhofer, 35 Ohio App. 2d 23, 299 N.E.2d 901 (1972); Schelin v. Goldberg, 188 Pa. Super. 341, 146 A.2d 648 (1958). See note 5, *supra*.

41. 326 So. 2d at 838.

42. See note 1, *supra*.

opportunity to act in a way that would have prevented the plaintiff's injuries. Such a showing will be more difficult to maintain the further removed in time and space the plaintiff is from the defendant's establishment.

Linton W. Carney

NONPECUNIARY DAMAGES IN BREACH OF CONTRACT: LOUISIANA CIVIL CODE ARTICLE 1934

An action for breach of contract was brought against an automobile repairman who had unnecessarily delayed completion of repairs for five months. In addition to direct pecuniary loss, plaintiff sought damages for aggravation, distress, and inconvenience under Louisiana Civil Code article 1934(3).[1] The Louisiana Supreme Court *held* that plaintiff could not recover for the nonpecuniary damages because article 1934(3) contemplates only contracts a principal object of which is intellectual enjoyment notwithstanding other peripheral, incidental, or concurrent objects of physical gratification. *Meador v. Toyota of Jefferson, Inc.*, 332 So.2d 433 (La. 1976).

Article 1934 governs damages recoverable for breach of contract.[2] Excepting contracts having as an object the payment of money, the general rule is that damages due are the amount of the loss sustained and profit deprived.[3] The first two modifications of this rule affect the quantum or

1. LA. CIV. CODE art. 1934 provides *inter alia*: "Where the object of the contract is any thing but the payment of money, the damages due to the creditor for its breach are the amount of the loss he has sustained, and the profit of which he has been deprived, under the following exceptions and modifications:

1. When the debtor has been guilty of no fraud or bad faith, he is liable only for such damages as were contemplated, or may reasonably be supposed to have entered into the contemplation of the parties at the time of the contract. By *bad faith* in this and the next rule, is not meant the mere breach of faith in not complying with the contract, but a designed breach of it from some motive of interest or ill will.

2. When the inexecution of the contract has proceeded from fraud or bad faith, the debtor shall not only be liable to such damages as were, or might have been foreseen at the time of making the contract, but also to such as are the immediate and direct consequence of the breach of that contract; but even when there is fraud, the damages can not exceed this.

3. Although the general rule is, that damages are the amount of the loss the creditor has sustained, or of the gain of which he has been deprived, yet there are cases in which damages may be assessed without calculating altogether on the