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Thrasher v. Leggett: Judicial Restraint in the Imposition of Liquor Vendor Liability

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States may require the consent of the unwed father, as well as the unwed mother, for adoption. Apparently, state legislatures may, in the alternative, dispense with the requirement of parental consent for adoption and make the "best interests of the child" the controlling standard. According to *Caban* the equal protection clause requires only that the parental rights of unwed fathers be afforded the same degree of protection maternal rights receive. The decision thus gives adequate protection to the unwed father who is interested in his child.

Since the constitutionality of many state adoption statutes is now at least questionable, legislatures should consider a statutory scheme that would serve the state interest in maintaining an efficient adoption program, protect the rights of all concerned parents, and promote the best interests of the child. In *Caban* the Court gives little guidance in this area. By sidestepping the due process issue, the Court avoided deciding whether the child's rights are paramount to those of the parents. The Court could have provided greater protection for children by expressly stating that parental rights may be involuntarily terminated where necessary to allow an adoption in the child's best interests.[89] If the state requires a finding of unfitness before termination of parental rights, the parent's rights, rather than the interests of the child, would be the paramount consideration in adoption proceedings. Instead, the welfare of the child should be paramount, and it seems that parental rights may fairly be predicated on parental responsibility and concern. The parental right is sacred, but it is no more so than the welfare of the child.[90]

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Thrasher v. Leggett: JUDICIAL RESTRAINT IN THE IMPOSITION OF LIQUOR VENDOR LIABILITY

The defendant served liquor to the plaintiff, a highly intoxicated patron, in violation of the Alcoholic Beverage Control Law.[1] After

89. *Stanley* presumably would not allow termination of parental rights without a finding of unfitness where a stranger sought adoption. See text at notes 24-26, *supra*, and accompanying text. But where one having a parent relationship with the child seeks adoption, the best interests of the child should be the controlling factor in the adoption determination.

90. *The Work of the Louisiana Appellate Courts for the 1963-1964 Term—Persons*, 25 LA. L. REV. 291, 301 (1965).

1. LA. R.S. 26:88(2) (1950). This statute provides: "No person holding a retail dealer's permit and no agent, associate, employee, representative, or servant of any

the plaintiff refused to curtail his unruly behavior, the defendant's employee escorted the plaintiff from the premises. Once outside the establishment, the plaintiff, in an attempt to strike the defendant's employee, fell and injured himself. The trial court, relying on *Pence v. Ketchum*,[2] rendered judgment in favor of the plaintiff. The Third Circuit Court of Appeal reversed,[3] finding the rule established in *Pence* inapplicable to the present case.[4] The Louisiana Supreme Court affirmed the court of appeal; reasoning that the "plaintiff's injury was caused not by a breach of duty by the bar owner or his bouncer but rather by the plaintiff's own obstreperous behavior,"[5] the supreme court *held* that a bar owner is not liable for the mere act of furnishing liquor to an intoxicated patron. *Thrasher v. Leggett*, 373 So. 2d 494 (La. 1979).

Historically, at common law no remedy was available when suit was brought against a purveyor of liquor for injuries either sustained[6] or caused[7] by an intoxicated patron. Common bases for denying recovery have included the following: the consumption of the liquor rather than the sale was the proximate cause of the injury;[8] the patron's consumption to the point of intoxication constituted contributory negligence;[9] injury to the patron or to a third party was an

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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. 326 So. 2d 831 (La. 1976). "The trial court . . . found that defendant had a duty not to sell alcohol to plaintiff, that removing plaintiff from the club in his condition was negligence, and that defendant's employees had the last clear chance to avoid the accident." Thrasher v. Leggett, 373 So. 2d 494, 496 (La. 1979).

3. 365 So. 2d 1149 (La. App. 3d Cir. 1978).

4. The basis for the court of appeal's refusal to allow recovery under *Pence* was that plaintiff's aggressive behavior not only *caused* his injury, but also was so sudden that defendant's employee had no *opportunity* to prevent plaintiff's injury; thus, the doctrine of "last clear chance" was not available to circumvent plaintiff's contributory negligence. *Id.* at 1152.

5. 373 So. 2d at 497.

6. *See, e.g.*, Hitson v. Dwyer, 61 Cal. App. 2d 803, 143 P.2d 952 (1943); Noonan v. Galick, 19 Conn. Supp. 308, 112 A.2d 892 (1955); Reed v. Black Caesar's Forge Gourmet Restaurant, 165 So. 2d 787 (Fla. App. 1964); Cruse v. Aden, 20 N.E. 73 (Ill. 1889); Manthei v. Heimerdinger, 332 Ill. App. 335, 75 N.E.2d 132 (1947); Calvin v. Smith, 37 N.W.2d 368 (Minn. 1949).

7. *See, e.g.*, Cherbonnier v. Rafalovich, 88 F. Supp. 900 (D. Ala. 1950); Carr v. Turner, 238 Ark. 889, 385 S.W.2d 656 (1965); Fleckner v. Dionne, 94 Cal. App. 2d 246, 210 P.2d 530 (1949); Nolan v. Morelli, 154 Conn. 432, 226 A.2d 383 (1967); Elder v. Fisher, 247 Ind. 598, 217 N.E.2d 847 (1966); Beck v. Groe, 245 Minn. 28, 70 N.W.2d 886 (1955).

8. "[T]here may be sales without intoxication, but no intoxication without drinking." Collier v. Stamatis, 63 Ariz. 285, 290, 162 P.2d 125, 127 (1945). *See, e.g.*, Cole v. Rush, 45 Cal. 2d 345, 289 P.2d 450 (1955); Cowman v. Hansen, 250 Iowa 358, 92 N.W.2d 682 (1958); Beck v. Groe, 245 Minn. 28, 70 N.W.2d 886 (1955); Mason v. Roberts, 33 Ohio St. 2d 29, 294 N.E.2d 884 (1973); Seibel v. Leach, 233 Wis. 66, 288 N.W. 774 (1939).

9. *See, e.g.*, Cookinham v. Sullivan, 23 Conn. Supp. 193, 179 A.2d 840 (1962);

unforeseeable consequence of the sale;[10] and, the sale of liquor to a strong and able-bodied person was not tortious conduct.[11]

The apparent harshness of the common law rule has been legislatively abrogated in many states by the enactment of civil damage or dram shop statutes.[12] In jurisdictions in which no dram shop statutes were in effect, many courts have devised theoretical frameworks whereby the imposition of liability upon tavern keepers could be effectuated.[13] Adherence to the common law view was overcome, at earliest instance, when the liquor vendor had knowledge that the sale was likely to result in serious injury to the patron.[14] Later, many courts surmounted the common law obstacles to recovery;[15] and, ultimately, a statutory negligence theory[16] emerged

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James v. Wicker, 309 Ill. App. 397, 33 N.E.2d 169 (1941); Randall v. Village of Excelsior, 103 N.W.2d 131 (Minn. 1960); Ramsey v. Anctil, 106 N.H. 375, 211 A.2d 900 (1965); Anslinger v. Martinsville Inn, Inc., 121 N.J. Super. 525, 298 A.2d 84 (1972).

10. *See, e.g.*, Cole v. Rush, 45 Cal. 2d 345, 289 P.2d 450 (1955); Coy v. Cutting, 138 Kan. 109, 23 P.2d 458 (1933); Seibel v. Leach, 233 Wis. 66, 288 N.W. 774 (1939).

11. *See, e.g.*, Cole v. Rush, 45 Cal. 2d 345, 289 P.2d 450 (1955); Cruse v. Aden, 127 Ill. 231, 20 N.E. 73 (1889); James v. Wicker, 309 Ill. App. 397, 33 N.E.2d 169 (1941); Farmers Mut. Auto Ins. Co. v. Gast, 17 Wis. 2d 344, 117 N.W.2d 347 (1962); Seibel v. Leach, 233 Wis. 66, 288 N.W. 774 (1939).

12. Dram shop or civil damage statutes usually impose strict liability on liquor vendors when the intoxication of the customer causes injury to third persons and, in some states, to the patron himself. The Minnesota statute is typical:

> Every husband, wife, child, parent, guardian, employer, or other person who is injured in person or property, or means of support, by any intoxicated person, or by the intoxication of any person, has a right of action, in his own name, against any person who, by illegally selling, bartering or giving intoxicating liquors, caused the intoxication of such person, for all damages, sustained . . . .

MINN. STAT. § 340.95 (1961).

13. As Dean Prosser has noted, courts may control the imposition of liability through their ability to delineate the defendant's duty, and this "duty" is merely "an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." W. PROSSER, THE LAW OF TORTS § 53, at 325 (4th ed. 1971). In deciding whether or not to impose liability on liquor vendors in the absence of a dram shop statute, a court might consider factors such as the bar owner's ability to prevent injury by refusing to sell to an intoxicated patron, the relative ease with which the bar owner can bear the financial loss by passing it on to consumers or by obtaining insurance, and the effect imposing liability may have on deterring negligent sales. *See* Note, *Dram Shop Liability—A Judicial Response*, 57 CAL. L. REV. 995, 1015-19 (1969).

14. *See* McCue v. Klein, 60 Tex. 168 (1883) (habitual drunkard induced to consume excessive amount of liquor with knowledge that serious injury or death would follow; recovery allowed presumably under an intentional tort theory).

15. For example, by imposing upon the liquor vendor a duty which included the protection of the intoxicated patron, the courts effectively removed contributory negligence as a defense. This was most often accomplished by deriving the vendor's duty from a penal statute arguably enacted for the protection of a class of persons of which the patron was a member. The principle adopted by the courts was set forth in the Restatement of Torts: "If the defendant's negligence consists of the violation of a

which culminated in the recognition of a common law cause of action against tavern keepers who sold liquor in violation of penal statutes.[17]

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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 recovery for bodily harm caused by the violation of such statute." RESTATEMENT OF TORTS § 483 (1934). *See, e.g.*, Vance v. United States, 355 F. Supp. 756 (D. Alas. 1973); 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).

Courts also rejected the notion that the consumption of the alcohol rather than the sale was the proximate cause of the accident. They found that injury to an intoxicated patron or to an innocent third party was a foreseeable consequence and thus the proximate result of the negligent sale. *See, e.g.*, Waynick v. Chicago's Last Dep't Store, 269 F.2d 322 (7th Cir. 1959); Vesely v. Sager, 95 Cal. Rptr. 623, 486 P.2d 151 (1971); Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1 (1959); McKinney v. Foster, 391 Pa. 221, 137 A.2d 502 (1958).

16. The practice of adopting a standard of care from a criminal statute was already well-established by the time it was utilized to impose liability on liquor vendors. *See generally* W. PROSSER, THE LAW OF TORTS § 34 (2d ed. 1955); Morris, *The Relation of Criminal Statutes to Tort Liability*, 46 HARV. L. REV. 453 (1932). RESTATEMENT (SECOND) OF TORTS § 286 (1965) provides:

> The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively or in part
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> (a) to protect a class of persons which includes the one whose interest is invaded, and
>
> (b) to protect the particular interest which is invaded, and
>
> (c) to protect that interest against the kind of harm which has resulted, and
>
> (d) to protect that interest against the particular hazard from which the harm results.

Virtually all of the states have statutes which make it unlawful to sell liquor to minors and to intoxicated persons. By construing these laws so as to satisfy the requirements outlined in section 286 of the Restatement, the courts easily overcame the theoretical impasse to the imposition of liquor vendor liability that previously existed at common law. See note 15, *supra*. Prosser apparently found this practice remonstrative as he noted that courts often have "purported to 'find' in the statute a supposed 'implied,' 'constructive,' or 'presumed' intent to provide for tort liability," and that "[i]n the ordinary case this is pure fiction." W. PROSSER, *supra* note 13, at 191. By way of explanation Prosser surmised: "Perhaps . . . the courts are seeking, by something in the nature of judicial legislation, to further the ultimate policy for the protection of individuals which they find underlying the statute, and which they believe the legislature must have had in mind." *Id.*

17. *Waynick v. Chicago's Last Dep't Store*, 296 F.2d 322 (7th Cir. 1959), and *Rappaport v. Nichols*, 31 N.J. 188, 156 A.2d 1 (1959), are two signal cases in the movement toward recognition of a common law cause of action against liquor vendors. *See* Comment, *Negligence Actions Against Liquor Purveyors: Filling the Gap in South Dakota*, 23 S.D. L. REV. 227 (1978); Note, *supra* note 13; Note, *Torts—Liability of Tavern Keepers for Injurious Consequences of Illegal Sales of Intoxicating Liquors*, 20 LA. L. REV. 800 (1960); Note, *Liability of Liquor Vendors to Third Party Victims*, 56 NEB. L. REV. 951 (1977). *See also* Vance v. United States, 355 F. Supp. 756 (D. Alas. 1973); Vesely v. Sager, 95 Cal. Rptr. 623, 486 P.2d 151 (1971); Adamian v. Three Sons, Inc., 353 Mass. 498, 233 N.E.2d 18 (1968); Jardine v. Upper Darby Lodge No. 1973, 413 Pa. 626, 198 A.2d 550 (1964).

Louisiana courts initially followed the traditional common law rule of nonliability for vendors of intoxicating liquor. For example, in *Robinson v. Fidelity and Casualty Co.*,[18] the plaintiff based his cause of action on the defendant's illegal sale of liquor to the plaintiff's minor son, claiming that the violation of related penal statutes[19] constituted fault under Civil Code article 2315.[20] In sustaining the exception of no cause of action, the First Circuit Court of Appeal concluded that the plaintiff's petition contained affirmative allegations showing contributory negligence sufficient to bar the plaintiff's recovery.[21] A recognition of negligence on the part of the liquor vendor was implicit in the court's finding of contributory negligence on the part of the plaintiff; however, in the absence of a dram shop statute, the court felt it inappropriate to allow recovery.[22]

Subsequent to the *Robinson* decision, the Louisiana Supreme Court addressed the issue of a liquor vendor's liability in *Lee v. Peerless Insurance Co.*[23] In *Lee*, the defendant bar owner violated a penal statute[24] by serving drinks to the plaintiff who was visibly intoxicated. The plaintiff relied on this violation as the basis of his right to recover damages. The supreme court dismissed the plaintiff's action—expressly following the common law rule[25]—by reasoning that the proximate cause of the plaintiff's injury was the consumption of the alcohol rather than the sale[26] and that under the facts the doctrine of last clear chance was not available to circum-

18. 135 So. 2d 607 (La. App. 1st Cir. 1961).

19. Revised Statutes 14:91 at that time proscribed the sale of spiritous liquors to any person under twenty-one years of age; Revised Statutes 26:88(1) prohibits a bar owner from selling or serving alcoholic beverages to any person under eighteen years of age.

20. LA. CIV. CODE art. 2315 states in pertinent part: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."

21. The court found: "Unquestionably a simple reading of the recitations of plaintiff's petition conclusively shows that any injuries suffered by plaintiff . . . resulted from [plaintiff's] own misconduct which was the proximate cause of the alleged injury." 135 So. 2d at 609.

22. "The Legislature of Louisiana has not seen fit to subject liquor vendors to civil liability for selling to intoxicated or minor persons alcoholic beverages and deny to the vendor of the liquor the right to plead the contributory negligence of the vendee in consuming the liquor." *Id.*

23. 248 La. 982, 183 So. 2d 328 (1966).

24. LA. R.S. 26:88(2) (1950). See note 1, *supra*.

25. 248 La. at 987, 183 So. 2d at 330. In discussing the propriety of adopting common law notions as "controlling under our jurisprudence," the court perfunctorily disposed of the practice by stating: "In interpreting and carrying out the purposes of our basic law as set out in Article 2315 of the R.C.C., Louisiana has followed the common law in tort cases." *Id.* at 987 n.4, 183 So. 2d at 330 n.4.

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

vent the plaintiff's contributory negligence.[27] Moreover, the court refused to accept the position that Revised Statutes 26:88(2) created by implication a basis for recovery in tort,[28] viewing the absence of a dram shop statute in Louisiana as an indication that no such remedy was intended by the legislature.[29]

With only one member of the court dissenting in *Lee*,[30] the issue of liquor vendor liability seemed firmly resolved in Louisiana. However, under an almost identical factual situation, the court later reversed its position in *Pence v. Ketchum*.[31] In *Pence* the court addressed the narrow question of whether the plaintiff's petition stated a cause of action. Ruling in the affirmative, the court gave two grounds for the decision. First, the court stated that Revised Statutes 26:88(2) imposes a duty on bar owners to refrain from serving liquor to intoxicated patrons and provides "a standard for determining negligence, or fault, under Articles 2315 and 2316 of the Louisiana Civil Code."[32] Additionally, the court determined that a patron's invitee status[33] imposed a separate duty on the bar owner

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27. *Id.* at 993, 183 So. 2d at 332.

28. *Id.* at 990, 183 So. 2d at 331. The court was concerned with acting beyond the limits of its authority: "For us to hold that R.S. 26:88(2), *by implication*, abrogates the common law on this subject . . . would require us to exercise legislative prerogatives which, under our state and national constitutions, the judiciary is prohibited from doing." *Id.* at 992, 183 So. 2d at 332 (emphasis in original).

29. *Id.* at 992-93, 183 So. 2d at 332. The court reasoned:

> Had the legislature intended this result by the adoption of . . . R.S. 26:88, it could have said so in a few plain and simple words. Our conclusion that such a result was not intended is fortified by the fact that although there have been for a number of years decisions at the appellate court level invoking and following the common law in this respect, . . . the legislature, although meeting with regularity since these decisions, has taken no steps to adopt clarifying legislation or require this extraordinary care of intoxicated persons frequenting public places selling and dispensing alcoholic beverages.

Id.

30. Justice Sanders delivered a vigorous dissent. 248 La. at 994, 183 So. 2d at 33.

31. 326 So. 2d 831 (La. 1976). With the passing of a decade between the two decisions, there was a change in the composition of the court. Justice Sanders (the lone dissenter in *Lee*) wrote the majority opinion in *Pence* which was basically a restatement of his earlier dissent.

32. *Id.* at 835. The court reached this conclusion by finding that the statute was intended by the legislature to afford *some* protection to intoxicated patrons from their inability to exercise care on their own behalf; and from this determination, the court concluded: "Under the allegations of the petition, plaintiff falls within the protected class, and the risk encountered was of the type the duty was designed to prevent." *Id.* The court was employing a statutory negligence theory to impose liability. See note 16, *supra*.

33. In two cases after the *Pence* decision, the Louisiana Supreme Court abandoned the common law trespasser-licensee-invitee classifications and chose instead to determine negligence on the basis of a reasonable man standard or a duty of ordinary

to "refrain from affirmative acts which increase the peril to his intoxicated patrons" and that an action in tort will lie against the invitor when a breach of this duty results in foreseeable injury.[34] Addressing the issue of contributory negligence, the court concluded that under the allegations of the plaintiff's petition, the doctrine of last clear chance was available to defeat the defense of contributory negligence by the plaintiff.[35] Thus, the court held that the plaintiff's petition stated a cause of action under Civil Code articles 2315 and 2316 by alleging fault, causation, and damage.[36]

In *Thrasher v. Leggett*, the court rejected the notion set forth in *Pence* that Revised Statutes 26:88(2) provides a basis for a cause of action in tort against bar owners who sell liquor to intoxicated persons. Regarding the circumstance in which an inebriated patron is injured as a result of his intoxicated condition, the *Thrasher* court reasoned that the proximate cause of such injury is the consumption of the alcohol rather than the sale.[37] But while the *Thrasher* court limited the rule in *Pence* regarding liquor vendor liability for serving intoxicating liquors, it found that the *Pence* decision was correct insofar as it determined that Civil Code article 2315 imposed a duty on bar owners to refrain from ejecting a helplessly intoxicated patron into a dangerous environment.[38] In determining whether a bar owner has breached his duty, the court stated that the proper standard for considering wrongful ejectment is "whether his conduct was that generally required of a reasonable man under like circumstances."[39] Applying that standard to the facts of the instant case, the court concluded that because the defendant was obligated by law[40] to maintain order in his establishment and to protect other

care under the circumstances. But regarding the factual situation present in the noted case, the change in analysis has resulted only in a change in terminology. Whereas the bar owner's duty not to increase his patron's peril was formerly imposed by reason of the invitor-invitee relationship, it is now imposed as a duty of ordinary care under the circumstances. *See* Shelton v. Aetna Cas. and Sur. Co., 334 So. 2d 406 (La. 1976); Cates v. Beauregard Elec. Coop., Inc., 328 So. 2d 367 (La. 1976).

34. 326 So. 2d at 836.

35. *Id.* at 837. Examining the plaintiff's petition, the court found that plaintiff's antecedent negligence in consuming the alcohol reduced her to a state of *helplessness* which was *obvious* to the defendant. Thereafter, the defendant had the *opportunity*, in the exercise of reasonable care, to prevent the plaintiff's injury but failed to do so. Thus, all the elements necessary for the application of the doctrine of last clear chance were present in the situation and could be utilized by the plaintiff on remand. *See generally* W. PROSSER, *supra* note 13, at 427-33.

36. 326 So. 2d at 838.

37. 373 So. 2d at 496.

38. *Id.* at 497.

39. *Id.*

40. LA. R.S. 26:88(5) (1950) provides: "No person holding a retail dealer's permit and no agent, associate, employee, representative, or servant of any such person shall

patrons from injury, the removal of the plaintiff from the premises with reasonable force was consonant with that conduct expected of a reasonable man under like circumstances. Thus, the defendant breached no duty it owed to the plaintiff, whose injury was regarded by the court as the direct result of his own aggressive acts.[41]

By rejecting the statutory negligence theory employed in *Pence*[42] and reverting to the proximate cause analysis articulated in *Lee*, the supreme court has effectively removed what it apparently considers to be the strict liability *effect* of the statutory negligence cause of action recognized in *Pence*.[43] This change in legal philosophy by the court is very significant since now a bar owner's mere selling of the liquor will not render him liable to the patron.

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do or permit any of the following acts to be done on or about the licensed premises: . . . (5) Permit any disturbance of the peace . . . ."

41. 373 So. 2d at 497.

42. See note 32, *supra*, and accompanying text.

43. The court found that aspect of the *Pence* decision improper as it recognized a cause of action which has traditionally been supplied in other states by the legislature through the enactment of a civil damage or dram shop act. Writing the opinion for the majority in *Thrasher*, Justice Calogero remarked that writs were granted primarily to re-examine the *holding* in *Pence* that "an alcoholic beverage retailer's sale of alcoholic beverages to an intoxicated person in violation of R.S. 26:88(2) gives rise to a cause of action by such patron who suffers injuries as a result of the intoxication." 373 So. 2d at 495. Notice the similarity between the elements giving rise to a cause of action in *Pence* under the statutory negligence theory, and the elements required under a Connecticut dram shop statute imposing strict liability on liquor vendors for injuries to third parties: "(1) a sale of intoxicating liquor (2) to an intoxicated person (3) who, in consequence of such intoxication, causes injury to the person or property of another." Pierce v. Albanese, 144 Conn. 241, 246, 129 A.2d 606, 610 (Conn. 1957), *citing* CONN. GEN. STAT. § 4307 (Supp. 1955) (current version at CONN. GEN. STAT. § 30-102 (1978)). Theoretically, of course, the two actions are dissimilar as one is based on fault by breach of a duty imposed by statute, and the other is, in concept, liability imposed without fault. However, with regard to the practical consequences, the differences are more semantic than real. Each action requires a sale of liquor to an intoxicated person with injuries resulting from the intoxicated condition. The only real dissimilarity between the two actions is that, presumably, in *Pence*, it was necessary to invoke the doctrine of last clear chance in order to circumvent the plaintiff's contributory negligence in consuming the alcohol; however, this can be seen merely as a technical requirement as the court in *Pence* could simply have defined the bar owner's statutory duty to include the foreseeable consequence of the patron's fault in consuming the alcohol—a position advocated by Justice Dixon in his concurrence and accepted by other courts. *See, e.g.*, Vance v. United States, 355 F. Supp. 756, 759-60 (D. Alas. 1973); Schelin v. Goldberg, 146 A.2d 648, 652-53 (Pa. Super. 1958). Other writers have commented that the court's application of the last clear chance doctrine to the facts of *Pence* was not without conceptual difficulty and was utilized more as a means to allow recovery rather than to perpetuate the proper use of the doctrine. *See* Note, *Bar Owners, Inebriates, and Last Clear Chance*, 37 LA. L. REV. 617, 623 (1977); Note, *Intoxication: No Longer a Bar to Patron's Action Against Tavern Owner*, 22 LOY. L. REV. 867, 874 (1976).

Under the court's rationale, the plaintiff's voluntary and excessive consumption of the alcohol becomes the proximate cause of any resulting injury.

Although the court utilizes the proximate cause analysis which was employed in *Lee*, it does not totally preclude a finding of liability on the part of the bar owner. For example, a bar owner's act in ejecting a helplessly intoxicated patron into the dangers of a nearby highway will render him liable if foreseeable injury results.[44] Under *Thrasher*, the proper standard to determine whether a bar owner has breached his duty to refrain from wrongfully ejecting a helpless patron is "whether his conduct was that generally required of a reasonable man under like circumstances."[45] To determine the present scope of the bar owner's liability, it is necessary to view in conjunction with this statement the rule preserved from the *Pence* decision: "Article 2315 imposes upon a bar owner a duty to avoid affirmative acts which increase the peril to an intoxicated patron."[46] It is submitted that these statements do not represent two separate duties owed by bar owners to their patrons, but rather, the *Pence* rule is merely an amplified statement of the reasonable man standard articulated in *Thrasher* regarding the bar owner's duty to refrain from wrongful ejectment. The court's method of applying the reasonable man standard to the facts of the present case lends credence to this contention.

In applying the *Thrasher* statement of duty, the court first determined whether any *affirmative act* of the defendant caused the plaintiff's injury. Concluding that the injury was caused "not by any affirmative act of defendant's, but simply by plaintiff's inebriated condition,"[47] the court implicitly dismissed the defendant's act of removing the plaintiff as the proximate cause of the injury. Conversely, once the court determined that the defendant did no act which increased the plaintiff's peril, but that the plaintiff's injury was a consequence of the intoxicated condition, the proximate cause of the injury must have necessarily been the plaintiff's voluntary and excessive consumption of the alcohol.[48] Finally, the court ex-

44. 373 So. 2d at 497. The *Thrasher* decision specifically preserved *Pence* as it applies to its facts, and indeed purports to perpetuate the rule of liability for wrongful ejectment.

45. *Id.*

46. *Id.* Of course, in the literal sense every *act* is an *affirmative* act, but the court is referring to acts other than the selling of liquor, *viz.*, an affirmative act of legal significance in the court's method of analysis, the most notable example being the act of ejectment.

47. *Id.*

48. This is a corollary of the principle that "the cause more proximate to an injury to an inebriated patron which results from his intoxication is the consumption of the alcohol and not the sale." *Id.* at 496.

amined in detail the acts of the defendant's employee in dealing with the plaintiff and adjudged them to have been reasonable under the circumstances. In so doing, the court necessarily implied that although the defendant's act in removing the plaintiff was an affirmative act, it did not unreasonably increase the peril to which the plaintiff was already exposed due to his intoxicated condition. To have found otherwise could have entailed the imposition of liability under the *Pence* rationale.

Functionally, a bar owner's liability under *Thrasher* pivots on whether the injury results merely from the intoxicated condition or whether it results from an affirmative act (*e.g.*, ejectment) by the owner which increases the peril to the intoxicated patron. If the injury is deemed to result from the intoxicated condition, that is, if the patron's negligence in consuming the alcohol is operative up until the time the injury is sustained, without any intervening negligence or outside force, the court should find that the proximate cause of the injury is the consumption rather than the sale. Regarding these circumstances, Justice Calogero remarked that "[t]here is a real element of contributory negligence implicit in this situation."[49] But to say that the plaintiff is actually contributorily negligent presupposes negligence on the part of the bar owner; and the only act by the bar owner which could be negligent in this situation is furnishing liquor to an intoxicated patron which is also a violation of Revised Statutes 26:88(2), but which is not actionable negligence. However, it is not necessary to base the determination of negligence on a violation of the statute; a finding that a reasonably prudent bar owner would not serve additional liquor to a visibly intoxicated patron would suffice. In any case, the bar owner's mere furnishing of the liquor to the patron will not render him liable since the plain-

49. *Id.* at 496-97. There is great significance in regarding the voluntary consumption of the alcohol as contributory negligence on the part of the patron. To do so presupposes negligence on the part of the liquor vendor which, under certain circumstances, could be a source of potential liability for his acts in selling the liquor. For example, this bar to recovery which is personal to the patron and prevents him from recovering would not extend to an innocent third party who is injured through the negligence of the intoxicated patron. Conceding that the bar owner is also at fault by reason of the illegal sale, it is conceivable that the courts could find that fault to be a substantial factor in causing the third party's injury. However, there are no reported cases dealing with this situation in Louisiana. Also, under Louisiana's new comparative negligence scheme, the relative culpability of each party's fault would determine whether the intoxicated patron could maintain a cause of action against the liquor vendor for his negligence in selling the liquor. *See* 1979 La. Acts, No. 431. Factors such as whether the vendor had actual knowledge of the patron's intoxication or whether there was a concerted effort on the part of the bar owner and his employees to induce the patron to consume excessive amount of alcohol could be important in assessing the fault of the vendor for the purpose of imposing liability.

tiff's voluntary consumption of the liquor would always bar his recovery.

If the injury is a foreseeable consequence of a bar owner's affirmative acts increasing the patron's peril, then the bar owner has breached the duty imposed by Civil Code article 2315 to act as a reasonable man under the circumstances. And although a person's voluntary intoxication does not relieve him of responsibility for his own negligence,[50] a bar owner's act in ejecting an intoxicated person who is incapable of self-protection into a dangerous environment is an act of negligence subsequent to that person's fault in becoming intoxicated which, under the court's rationale, becomes the proximate cause of that person's injury.[51]

The *affirmative acts* inquiry is merely a concomitant of the broader *Thrasher* statement. It can properly be regarded as an analytical device utilized by the court to discern whether there has in fact been a breach of the duty imposed by Civil Code article 2315 to act as a reasonable man under similar circumstances. Identifying the interrelationship between the *Thrasher* and the *Pence* statements can be best accomplished by expressing them thusly: A reasonably prudent bar owner would not act affirmatively to increase the peril of a person rendered helpless from his intoxicated condition. If this duty is breached and foreseeable injury results therefrom, liability will follow.[52]

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50. *See* Manuel v. United States Fire Ins. Co., 140 So. 2d 702 (La. App. 3d Cir. 1962).

51. The *Thrasher* court quoted the following language from Prosser: "There may be no duty to take care of a man who is ill or intoxicated, and unable to look out for himself; but it is another thing to eject him into the danger of a railroad yard; and if he is injured there will be liability." 373 So. 2d at 497, *quoting* W. PROSSER, *supra* note 13, at 343. Prosser cites *Weymire v. Wolfe*, 52 Iowa 533, 3 N.W. 541 (1879), as authority for this statement.

In *Weymire*, a tavern keeper ejected a helpless, intoxicated patron into the extreme cold of late evening. The patron died from the exposure, and the Iowa court reversed a verdict for the tavern keeper on the basis of an incorrect jury charge. The court found that "if the defendant negligently subjected Dunn to exposure to his injury, knowing that he was unconscious, or even helpless, the defendant cannot escape liability on account of Dunn's negligence prior to the wrongful acts . . . however great Dunn's negligence may have been in allowing himself to become intoxicated." *Id.* at 535, 3 N.W. at 543.

52. Since liability depends only on the bar owner's negligence in affirmatively acting to increase his patron's peril *after* that patron has reached an intoxicated state, the bar owner's antecedent conduct in selling the liquor should not enter into the court's consideration. The analysis seems to be complete at this point. Thus, if a person already intoxicated enters a bar owner's establishment but buys no drinks (no Revised Statutes 26:88(2) violation occurs) and later, the bar owner ejects that person into an area adjacent to a dangerous highway or a railroad yard, liability should be imposed if foreseeable injury results. The act of negligence in ejecting the person remains un-

While the court found that the *Pence* decision may have been correct in applying the doctrine of last clear chance to allow recovery, that doctrine was not available to the plaintiff in *Thrasher*. The court concluded that "[p]laintiff's injury did not result from defendant's *failure to prevent* plaintiff's injury, but rather from plaintiff's own aggressive, violent behavior."[53] Whether the court's unwillingness to apply the doctrine in this situation stems from a determination that the defendant had no *opportunity*[54] to prevent the injury, or simply that the defendant had no *duty*[55] to prevent that particular injury, is unclear. What does seem clear is that the court is emphasizing the contributory negligence that it considers to be implicit in the situation in which a person voluntarily becomes intoxicated. However, it is submitted that the application of the doctrine of last clear chance under the *Thrasher* rationale is unnecessary. In *Pence* the court found the doctrine applicable by finding first, that the defendant was *aware* of the intoxicated patron's helplessness; second, that the defendant had the

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changed regardless of the bar owner's antecedent conduct.

But while the test seems complete in restricting the analysis to the bar owner's affirmative acts, the rule should not be viewed as an inflexible one. For example, if the plaintiff in the instant case had not injured himself as a result of the violent encounter, but instead, after the encounter had wandered onto a nearby highway and been injured, a strict application of the test would result in liability being imposed on the bar owner. The defendant would have ejected an intoxicated patron into a hazardous environment with foreseeable injury resulting. However, while the bar owner would have been guilty of culpable conduct in having served drinks to an intoxicated patron and in removing him from the establishment, thereby increasing his peril, the reasonableness of plaintiff's removal under the circumstances would have militated against a finding of liability. Although the *affirmative acts* test would have been satisfied, it could also be argued that a reasonable man under like circumstances would have so acted, especially since the removal may be viewed as necessary to keep order which is required by law. The outcome in this situation would depend upon the importance placed by the court on Revised Statutes 26:88(5) and whether the policy favoring protection of the intoxicated patron outweighs the bar owner's interest in removing persons engaged in disruptive conduct without any further obligation to care for them.

53. 373 So. 2d at 497 (emphasis added).

54. This was the conclusion reached by the court of appeal in the instant case. That court found:

> The trial judge invoked the doctrine of "last clear chance" on the ground that "Defendant had the last clear chance to see that Plaintiff would not injure himself." The attempted attack on the employee by plaintiff was sudden. The bouncer had *no opportunity* to reflect and avoid the plaintiff's fall as a result of such attack. The doctrine is not applicable.

365 So. 2d 1149, 1151-52 (La. App. 3d Cir. 1978) (emphasis added).

55. If it were determined that at the time the plaintiff's injury occurred, the defendant had not removed the plaintiff into a hazardous area, then there would be no breach of the defendant's duty for failing to prevent an injury caused solely by reason of the plaintiff's intoxicated condition.

opportunity to prevent the increase in the plaintiff's peril;[56] and third, that the defendant *failed* to take that opportunity by ejecting the plaintiff into a hazardous environment.[57] Thus, the plaintiff's contributory negligence in consuming the alcohol was defeated by invoking the doctrine of last clear chance. But it is obvious that the ejectment in this situation is simultaneously the breach of a duty under article 2315 to refrain from acting affirmatively to increase the danger to an intoxicated person, *and* what the court has impliedly deemed to be a negligent failure to take the *last clear chance* to prevent the plaintiff's increased peril. Since the defendant's *act* in ejecting the intoxicated patron into a hazardous environment and his *failure* to refrain from ejecting the intoxicated patron into a hazardous environment are one and the same, it would facilitate a clearer and more logical analysis to view the *act* as the breach of the article 2315 duty to act as a reasonable man under the circumstances. The negligent act of the bar owner in ejecting a helpless person into a perilous environment then becomes the proximate cause of any resulting foreseeable injury.

The *Thrasher* decision represents a retreat by the Louisiana Supreme Court to a more conservative standpoint regarding liquor vendor liability. However, by reverting to the proximate cause analysis articulated in *Lee*, the court has not regressed to the point of reinstating the traditional common law view of nonliability for liquor vendors. By restrictively redefining the scope of the bar owner's duty and by overruling the statutory negligence theory of recovery recognized in *Pence*, the court has undercut the notion that the jurisprudential equivalent of a dram shop statute exists in Louisiana. The decision represents at least a tentative constriction in an otherwise expanding area of liability; the court is apparently unwilling to perpetuate the bold position taken in *Pence* in the absence of legislative approval.

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56. It can only be a failure to prevent the plaintiff's increased peril rather than the plaintiff's injury, because at this point there is no certainty that foreseeable injury will result.

57. Specifically, the *Pence* court found: "Plaintiff's negligence in becoming intoxicated had allegedly placed her in a condition of obvious helplessness. Defendants were aware of her peril. Nonetheless, the defendants failed to use an opportunity to avoid harm to the plaintiff. Hence, the petition leaves adequate room for the application of Last Clear Chance." 326 So. 2d at 837. The cases cited by the court concerning last clear chance all involve a situation in which the person failing to take the opportunity to avoid the accident was in control of the instrumentality which caused the plaintiff's injury. This is not the case when a bar owner ejects a helpless patron into a dangerous area. However, the *Pence* court found the incapacity of the plaintiff to be the relevant factor that gives rise to the duty to save, and, thus, the plaintiff's subsequent movements onto the highway did not render the doctrine inapplicable. *Id.* at 838.