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Intoxicating Liquors - Proximate Cause of Injury - Liability of Tavern Owner for Torts Committed by Intoxicated Patron

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cational specifications, and residency at the time of application for admission.[38]

Commentators have expressed favorable opinions as to the desirability of minimal residency requirements[39] while the length of such periods remain currently debatable. *Lipman* in failing to recognize the presence of a fundamental right, avoided the application of the strict compelling state interest test which would place such short term pre-admission residency requirements for bar applicants on a doubtful constitutional footing. The significance of the decision can be appreciated with the recognition that many states require six months of residency[40] while most others vary in decreasing magnitude.[41] The logical extension of *Lipman* in light of the *Keenan* decision would seem to indicate further abrogation of residency requirements in the future, with a narrowing definition of their permissible length measured against a demonstrable state interest.

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INTOXICATING LIQUORS — PROXIMATE CAUSE OF INJURY — LIABILITY OF TAVERN OWNER FOR TORTS COMMITTED BY INTOXICATED PATRON—Appellant, motorist, brought an action against a tavern

38. N.D. CENT. CODE § 27-11-03 (Supp. 1971).

39. Note, *Residence Requirements For Initial Admission To The Bar: A Compromise Proposal For Change,* 56 CORNELL L. REV. 831, 843 (1971). *See generally* Horack, *"Trade Barriers" to Bar Admissions,* 28 J. AM. JUD. SOC'Y. 102 (1944); Note, *Restrictions on Admission to the Bar: By-Product of Federalism,* 98 U. PA. L. REV. 710 (1950).

40. The validity of a six month residency requirement for bar applicants now appears to be questionable after the recent decision of Potts v. Honorable Justices of Supreme Court of Hawaii, 332 F. Supp. 1392 (D. Hawaii, 1971). Plaintiff was a member of the armed services stationed in Hawaii and had statutorily qualified for the bar examination in all respects except for residency. A statute required all voters over the age of fifteen years-six months to reside within the state six months before being eligible to register. By Hawaii Supreme Court Rules, rule 15(c), all bar applicants had to be eligible registered voters in order to qualify for examination. The Federal District Court found a violation of Equal Protection stating:

> The periods of required residency in the statute and the rule here bear no valid relation to the educational and moral qualifications of bar applicants, and are thereby arbitrary and capricious and constitutionally impermissible. Both the act and the rule thus severally invidiously discriminate against an identifiable class, favoring registered voters or six-months residents over otherwise equally qualified applicants who have not the same residential status.

Id. at 1398.

In applying the traditional test, *Potts,* along with *Shapiro, Webster,* and *Lipman* left no indication as to the presence or absence of a compelling state interest. Effectively avoiding the latter issue the *Potts* court opined:

> By so holding, we need not consider plaintiff's contention that the residency requirements impermissibly penalize his constitutional rights to interstate travel or any other constitutional right.

Id. at 1398.

41. *See* Note, *Residence Requirements For Initial Admission To The Bar: A Compromise Proposal For Change,* 56 CORNELL L. REV. 831 (1971).

owner for injuries sustained when appellant was struck by an automobile driven by an intoxicated patron. Appellee demurred to the complaint on the ground that at common law a vendor of intoxicating liquors is not liable for injuries sustained by third persons by reason of a patron's intoxication. Finding the common law rule patently unsound, the Supreme Court of California *held* that the sale of liquor to an intoxicated patron was the proximate cause of appellant's injuries thereby imposing liability on the vendor. *Vesely v. Sager*, 5 Cal.3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971).

Traditionally, the common law does not impose liability on the vendor[1] of intoxicating liquors for injuries sustained by third parties who have been injured by an intoxicated patron.[2] This is to be distinguished from those cases in which the consumer himself has sustained personal injuries which have resulted from his intoxication.[3] Although several states have enacted Dram Shop or Civil Damages Acts[4] which provide a remedy unknown to the common law,[5] this comment will restrict its examination to an analysis of the reasoning behind the traditional common law rule and that of the case at bar which has found the common law rule unsound.

The common law rule of non-liability to the vendor of intoxicating liquors for injuries sustained by third persons due to the intoxication of a patron is generally based on three arguements. First, some courts consider it the patron's own failure to exercise ordinary

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1. The word vendor as used within this comment is intended to designate one who sells liquor and not one who furnishes liquor gratuitously.

2. Cherbonnier v. Rafalovich, 88 F. Supp. 900 (D. Alas. 1950); Collier v. Stamatic, 63 Ariz. 285, 162 P.2d 125 (1945); Carr v. Turner, 238 Ark. 889, 385 S.W.2d 565 (1965); Henry Grady Hotel Co. v. Sturgis, 70 Ga. App. 379, 28 S.E.2d 329 (Ct. App. 1943); Meade v. Freeman, 93 Idaho 389, 462 P.2d 54 (1969); Cowman v. Hansen, 250 Iowa 358, 92 N.W.2d 682 (1958); Stringer v. Calmes, 167 Kan. 278, 205 P.2d 921 (1949); Lee v. Peerless Ins. Co., 248 La. 982, 183 So. 2d 328 (1966); State *ex rel.* Joycee v. Hatfield, 197 Md.249, 78 A.2d 754 (1951); Hamm v. Carson City Nugget, Inc., 85 Nev. 99, 430 P.2d 358 (1969); Hall v. Budagher, 76 N.M. 591, 417 P.2d 71 (1966); Seibel v. Leach, 233 Wis. 66, 288 N.W. 774 (1939).

3. In the absence of statute the consumer of intoxicating liquor has been unable to recover against the person furnishing the drinks for personal injuries which have resulted from the intoxication caused by the liquor. The prevalent view, appears to be that whatever wrong may have been committed by the person supplying the liquor, its effect or causation of the ultimate injury is considered to be terminated by the voluntary act of the consumer in drinking the liquor. Annot., 54 A.L.R.2d 1152 (1965); *See* Noona v. Galick, 19 Conn. Supp. 308, 112 A.2d 892 (1955).

4. ILL. ANN. STAT. ch. 43, §§ 135-36 (Smith-Hurd Supp. 1972) (liability on seller and owner of premises for any sale contributing in whole or part to intoxication); IOWA CODE ANN. § 129.2 (1946) (liability for illegal sales and compensation for care where sale is illegal); MICH. COMP. LAWS § 436.22 (1967) (liability in cases of illegal sales); MINN. STAT. ANN. § 340.95 (1972) (liability for injuries caused by intoxicated person); N.D. CENT. CODE § 5-01-06 (Supp. 1971) (liability for sales in violation of law); N.Y. GEN. OBLIGATIONS LAW § 11-101 (McKinney Supp. 1964) (liability in case of unlawful sales); WIS. STAT. ANN. § 176.35 (1957) (liability for sales to minors and habitual drunkard after notice).

5. The Civil Damages Acts provide a remedy unknown to the common law in so far as they impose upon a liquor vendor liability to third persons for the resulting sale of intoxicating liquors where such sales are lawfully made and not made in violation of any duty owed to a third person. In many cases involving Civil Damages Acts the courts have said in effect that the particular act under consideration provided remedies unknown to the common law. Annot., 130 A.L.R. 361 (1941); *See* Demge v. Feierstein, 222 Wis. 199, 268 N.W. 210 (1936); Healy v. Cady, 104 Vt. 463, 161 A. 151 (1932).

care by his excessive voluntary consumption of intoxicating liquor which relieves the vendor of liability for any injury resulting from a patron's intoxication.[6] Some courts have even extended this to situations in which the patron has become so intoxicated as to render himself incapable of exercising any resistance to further consumption.[7] The reasoning behind these decisions is that it is the patron's own voluntary consumption which created his intoxicated condition in the first place.[8]

Second, courts have held that the common law does not recognize any duty owed by the vendor of intoxicating liquor to patrons or third persons who may be injured by an intoxicated patron far removed from his establishment.[9] The basis for this reasoning is that it is not reasonably foreseeable that the sale of intoxicating liquor to a patron will naturally result in an injury to some third person. The Supreme Court of Iowa, in *Cowman v. Hansen*,[10] stated that "[W]hile it may be foreseen, or it may be a natural result of furnishing an alcoholic beverage to an intoxicated person, that he himself will get hurt, it is not at all clear that he will naturally assault someone, drive a car and injure or kill another or do some other tortious act."[11]

Finally, some courts have held that under the common law the voluntary consumption of the intoxicating liquor, and not the sale, is the proximate cause of any injury sustained by third persons.[12] Any

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6. Cherbonnier v. Rafalovich, 88 F. Supp. 900 (D. Alas. 1950); Collier v. Stamatis, 63 Ariz. 285, 162 P.2d 125 (1945); State *ex rel.* Joyce v. Hatfield, 197 Md. 249, 78 A.2d 754 (1951); Beck v. Groe, 245 Minn. 28, 70 N.W.2d 886 (1955); Seibel v. Leach, 233 Wis. 66, 288 N.W. 774 (1939).

7. King v. Henkie, 80 Ala. 505, 60 Am. Rep. 119 (1886); Demge v. Feierstein, 222 Wis. 199, 268 N.W. 210 (1936). Nolan v. Morelli, 154 Conn. 432, 226 A.2d 383 (1967). This case, although not directly in point, would seem to support the reasoning that the voluntary consumption by the patron in rendering him incapable of consent to further sales relieves the vendor of any liability for further sales once the patron has become incapable of consent. *Contra,* Pratt v. Daly, 55 Ariz. 353, 104 P.2d 147 (1940). In this case the court took the view that one may become so addicted to the use of alcohol as to be utterly incapable of resisting the urge to consume liquor, and therefore incapable of consenting to receive and drink it, thus bringing a vendors sale of intoxicating liquor to one known to be so addicted to its use within the rule of the habit forming drug cases. *See* Annot., 130 A.L.R. 353 (1941), Third Persons Right of Action Against a Vendor of Habit Forming Drugs.

8. King v. Henkie, 80 Ala. 505, 60 Am. Rep. 119 (1886); Nolan v. Morelli, 154 Conn. 432, 226 A.2d 383 (1967); Demege v. Feierstein, 222 Wis. 199, 268 N.W. 210 (1936). *Contra,* Pratt v. Daly, 55 Ariz. 353, 104 P.2d 147 (1940). *See* Annot., 130 A.L.R. 353 (1941), Third Persons Right of Action Against a Vendor of Habit Forming Drugs.

9. Nolan v. Morelli, 154 Conn. 432, 226 A.2d 383 (1967). This case involved a wrongful death action brought on behalf of the deceased patron whose death was brought about by his consumption of intoxicating liquor furnished by the vendor. Although Connecticut did have a Dram Shop Act, the Act was held not to extend to the consumer.

10. Cowman v. Hansen, 250 Iowa 358, 92 N.W.2d 682 (1958). This case involved a wrongful death action in which the defendant vendor sold 3.2 beer to a patron who became intoxicated and negligently drove his automobile resulting in his death. Although Iowa had a Dram Shop Act, it did not apply to beer containing less than 4 percent of alcohol by weight.

11. *Id.*

12. Cherbonnier v. Rafalovich, 88 F. Supp. 900 (D. Alas. 1950); Collier v. Stamatis, 63 Ariz. 285, 162 P.2d 125 (1945); Cowman v. Hansen, 250 Iowa 358, 92 N.W.2d 682 (1958); State *ex rel.* Joyce v. Hatfield, 197 Md. 249, 78 A.2d 754 (1951); Beck v. Groe, 245 Minn. 28, 70 N.W.2d 886 (1955); Seibel v. Leach, 233 Wis. 66, 288 N.W. 774 (1939).

injury that may result from the sale of intoxicating liquor is considered only remotely possible and that various unforeseeable intervening circumstances are more directly responsible for the injury sustained by third persons.[13]

To the extent that the common law rule of nonliability to the vendor of intoxicating liquors is based on the absence of any duty owed to third persons who may be injured by reason of a patron's intoxication, and application of common law principles of foreseeability and proximate cause to the vendor of intoxicating liquor, the court in the instant case was persuaded by the reasoning of the recent trend of decisions and rejected the common law rule.[14]

This trend in reevaluating the traditional application of proximate cause and foreseeability to the vendor of intoxicating liquor was strongly stated by the New York Supreme Court of Otsego County in *Berkely v. Park*.[15] In that decision the New York court strongly attacked the common law application of proximate cause to vendors of intoxicating liquor rejecting as "simply unreal" the distinction that the sale of liquor is only a remote cause of resulting injury to third persons due to intoxication while consumption is a proximate cause.[16] The rule is well settled that for a negligent act to be a proximate cause of injury, the injury need be only a natural and probable result of the negligent act; and the consequence be one which in the light of the circumstances should have been reasonably foreseen or anticipated.[17] In applying this rule to the vendor of intoxicating liquor, the court cited *Rappaport v. Nichols*[18] which held that the negligent operation of an automobile by an intoxicated patron is a normal incident of intoxication, which may have reasonably been foreseen by the vendor.[19] "This is particularily evident in current times where traveling by car to and from the tavern is so common place and accidents resulting from drinking are so frequent."[20]

In the instant case, the California court relying on the basic prin-

13. Cherbonnier v. Rafalovich, 88 F. Supp. 900 (D. Alas. 1950); Collier v. Stamatis, 63 Ariz. 285, 162 P.2d 125 (1945); Cowman v. Hansen, 250 Iowa 358, 92 N.W.2d 682 (1958); State *ex rel.* Joyce v. Hatfield, 197 Md. 249, 78 A.2d 754 (1951); Beck v. Groe, 245 Minn. 28,70 N.W.2d 886 (1955); Seibel v. Leach, 233 Wis. 66, 288 N.W. 774 (1939).

14. Vesely v. Sager, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971).

15. Berkely v. Park, 47 Misc. 2d 381, 262 N.Y.S.2d 290, (Sup. Ct. Otsego County 1965). Although New York had a Dram Shop Act, the plaintiff chose to bring the action against the vendor for both negligence and under the Dram Shop Act. The case was heard on a motion by the defendant vendor to dismiss the causes of action based on allegations of common law negligence. The court denied defendant's motion holding that the existence of a statute does not prevent an action for common law negligence. *But see* Garcia v. Hargrove, 46 Wis. 2d 724, 176 N.W.2d 566 (1966).

16. Berkely v. Park, 47 Misc. 2d 381, 262 N.Y.S.2d 290 (Sup. Ct. Otsego County 1965).

17. Elder v. Fisher, 247 Ind. 598, 217 N.E.2d 847 (1966). *See also* RESTATEMENT (SECOND) OF TORTS 449 (1966).

18. Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1 (1959).

19. *Id.*

20. *Id.*

ciples of proximate cause and foreseeability, established by other negligence cases decided in California[21] and similar to those stated in *Berkely*[22] held that the furnishing of an alcoholic beverage to an intoxicated person may be a proximate cause of injuries inflicted by that individual upon a third person.[23] "If such furnishing is a proximate cause, it is so because the consumption, resulting intoxication, and injury-producing conduct. . . is one of the hazards which makes such furnishing negligent."[24]

The primary question to be answered in any case involving the liability of the vendor of intoxicating liquor for injuries sustained by reason of a patron's intoxication is whether the vendor owes any duty of care to those individuals who may be injured by an intoxicated patron. Once a duty of care is established the issues of foreseeability and proximate cause are submitted to the jury for their determination.

In *Berkely*[25] the court stressed the point that:

> [E]arly cases did not recognize any duty of an innkeeper to the traveling public because a serious hazard did not exist. Through lack of necessity, this phase of negligence liability did not develop. However, there did exist General Common Law Rules of negligence liability based on foreseeability and proximate cause. Under the skillful interpretation of our courts, it has been adapted to changing times and conditions of our civilization.[26]

Many courts have held, through the doctrine of *negligence per se,* that particular legislation can create both a duty and standard which constitutes the proper conduct of a reasonable man.[27] This occurs when a court determines that certain legislation is designed to protect a class of persons which includes the plaintiff against a type of harm which has in fact occured as a result of violation of the statute.[28]

In the instant case a duty of care was imposed upon the vendor by Business and Professions Code section 25602.[29] This provision

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21. Vesely v. Sager, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971).
22. Berkely v. Park, 47 Misc. 2d 381, 262 N.Y.S.2d 290 (Sup. Ct. Otsego County 1965).
23. Vesely v. Sager, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971).
24. *Id.* at 159.
25. Berkely v. Park, 47 Misc. 2d 381, 262 N.Y.S.2d 290 (Sup. Ct. Otsego County 1965).
26. *Id.* at 293.
27. Deeds v. United States, 306 F. Supp. 348 (D. Mont. 1969); Waynick v. Chicago's Last Dept. Store, 269 F.2d 322 (7th Cir. 1959), *cert. denied,* 362 U.S. 903 (1960); Davis v. Shiappacossee, 155 So. 2d 365 (Fla. 1963); Elder v. Fisher, 247 Ind. 598, 217 N.E.2d 847 (1966); Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1 (1959).
28. Deeds v. United States, 306 F. Supp. 348 (D. Mont. 1969); Waynick v. Chicago's Last Dept. Store, 269 F.2d 322 (7th Cir. 1959), *cert. denied,* 362 U.S. 903 (1960); Davis v. Shiappacossee, 155 So. 2d 365 (Fla. 1963); Elder v. Fisher, 247 Ind. 598, 217 N.E.2d 847 (1966); Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1 (1959).
29. Vesely v. Sager, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623, 631 (1971).

was held to have been adopted for the purpose of protecting members of the general public from injuries and damage resulting from the excessive use of intoxicating liquor.[30] The court found support for its interpretation in the decisions of those jurisdictions in which similar statutes have been enacted and were found to be enacted for the purpose of protecting the general public against injuries resulting from intoxication.[31]

Some courts have found a duty of care imposed on the vendor of intoxicating liquor in the absence of statute.[32] Justice Musmanno, speaking for the Pennsylvania Supreme Court, found a duty to exist in the absence of statute when he stated that:

> The first prime requisite to de-intoxicate one who has, because of alcohol, lost control over his reflexes, judgment and sense of responsibility to others, is to stop pouring alcohol into him. This is a duty which everyone owes to society and to law entirely apart from any statute.[33]

Aside from the purely legal arguments which have been put forth by the recent trend of decisions abrogating the common law rule, there are several policy reasons which deserve mention. First, the risk of damage and personal injuries to members of the public caused by alcohol far outweigh any social utility gained by the sale of alcohol.[34] Second, by the exercise of ordinary care, the vendor, operating at the source of the problem is much better able to control the consumption of liquor by the patron and the ultimate damage and injury he may cause.[35] Third, extension of liability to the vendor will assure an injured third person an adequate remedy while ultimately shifting the loss from the vendor to that segment of the population which consumes alcoholic beverages.[36] "The cost of the vendor's liabililty insurance would be reflected in the price of his product, resulting in the cost of liquor-caused injuries being borne by those who consume the liquor."[37] Finally, subjecting the vendor to liability for injuries sustained by third persons who may be in-

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Business and Professions Code § 25602 provides: "Every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any habitual or common drunkard or to any obviously intoxicated person is guilty of a misdemeanor."

30. *Id.* at 159.

31. Deeds v. United States, 306 F. Supp. 348 (D. Mont. 1969); Waynick v. Chicago's Last Dept. Store, 269 F.2d 322 (7th cir. 1959), *cert. denied*, 362 U.S. 903 (1960); Davis v. Shiappacossee, 155 So. 2d 365 (Fla. 1963); Elder v. Fisher, 247 Ind. 598, 217 N.E.2d 847 (1966); Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1 (1959); *contra*, Collier v. Stamatis, 63 Ariz. 285, 162 P.2d 125 (1945).

32. Jardine v. Upper Darby Lodge No. 1973, Inc., 413 Pa. 626, 198 A.2d 550 (1964).

33. *Id.* at 553.

34. 57 CALIF. L. REV. 1017-18 (1969).

35. *Id.* at 1017.

36. *Id.*

37. *Id.*

jured by an intoxicated patron would be an effective deterent to unlawful and negligent sales by the vendor.[38]

By application of standard principles of tort analysis, applicable statutory standards, and its own holdings in closely analogous cases, the Supreme Court of California has rendered a decision in accordance with today's standards of wisdom and justice.

SCOTT BALLOU

CRIMINAL LAW—RIGHT TO COUNSEL—EXTRAJUDICIAL PHOTOGRAPHIC IDENTIFICATION—Appellant was arrested and charged with the commission of several bank robberies. Three days after counsel had been appointed, appellant was placed in a lineup which was conducted by law enforcement authorities and attended by appellant's counsel and fifty eyewitnesses to the various bank robberies. Prior to this lineup, the authorities had confronted each of the eyewitnesses with photographs, including that of the appellant, for identification. The photographic display was conducted in the absence of accused's counsel. The United States Court of Appeals, Third Circuit, reversed the convictions, holding that an accused who is in custody is entitled to counsel at photographic confrontations with prospective witnesses and that it was error to allow evicence of the identification of accused. *United States v. Zeiler*, 427 F. 2d 1305 (3rd Cir. 1970).

The Sixth Amendment of the Constitution of the United States guarantees that anyone who is a defendant in a criminal prosecution shall enjoy the right to have assistance of counsel in preparing a defense.[1] Failure of authorities to comply with this fundamental right is deemed to contravene the Fourteenth Amendment[2] requiring that convictions be reversed.[3]

The purpose of this comment is to determine whether the right to counsel is applicable to photographic pretrial identification procedures conducted by law enforcement authorities. To achieve this purpose, it is necessary to examine some of the cases that have developed the law as it relates to pretrial identification procedures and the Sixth Amendment.

The United States Supreme Court cases of *United States v.*

38. *Id.*

1. U.S. CONST. amend. VI: "In all criminal prosecutions, the accused shall enjoy the right . . . to have Assistance of Counsel for his defense."
2. U.S. CONST. amend. XIV.
3. Powell v. Ala., 287 U.S. 45, 71 (1932); Gideon v. Wainwright, 372 U.S. 335, 341 (1963).