Common Law Liability of the Liquor Vendor

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The law is in a state of conflict concerning the liability of liquor vendors who contribute to the intoxication of tort-feasors. This issue, which has been humorously expressed by Time magazine in reporting a recent New Jersey case, resolves itself into the question: should a tavern owner be liable in damages for injuries caused — or suffered — by one of his intoxicated patrons? There is something to be said in support of either side of this issue. On one hand is the adage that no man is his brother's keeper. If one who is intoxicated acts negligently and injures himself or another person, the injury is the result of his deliberate act of becoming intoxicated and is therefore his direct responsibility. To hold otherwise would subject the innkeeper to ruinous liability every time he poured a drink, especially in the many cases in which he had no direct knowledge or control of the situation.

On the other hand, the law has not been hesitant in shifting the burdens of other types of "social insurance" to businessmen as a cost of doing business, so why should it absolve the innkeeper? The drunken driver is one of America's greatest menaces, and the person with the most control over his actions is his source of alcohol — the innkeeper. As it is the innkeeper's act in serving the liquor which produces intoxication leading to subsequent injury, he should be held primarily liable.

The controversy has produced two major developments in American jurisprudence. First, over half the states have, at one time or another, experimented with civil damage or "dram shop" acts. Second, a number of jurisdictions have recently recognized that a tavern owner may be liable at common law for injuries resulting from his negligence in supplying liquor to an intoxicated patron.

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*This topic last received coverage in Ohio in Note, 9 CLEV.-MAR. L. REV. 302 (1962), shortly after the landmark decision in Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1 (1959). Since then a number of states have accepted the common law theory of recovery against tavern owners as a result of their negligent serving of intoxicated persons, and the writer feels that another look at this rapidly changing area of the common law is warranted.

1 "A tavern may be liable to an innocent third person injured by a drunk it has helped tank up, but must it also be its pickled brother's keeper?" Time, April 15, 1966, p. 80.


3 For example, courts have long recognized that businessmen may be liable for the negligent acts of their agents, and, in products liability cases, they have shifted the burden of injury for negligent manufacturing to industry's shoulders.

4 According to a survey in Ogilvie, History and Appraisal of the Illinois Dram Shop Act, 1958 U. ILL. L.F. 175, twenty-one states then had dram shop acts, and research
person. It is the purpose of this Note to trace the history of the latter development, including the present state of Ohio law, and to discuss some of the special problems created by the new rule.

I. THE OLD COMMON LAW RULE DENYING RECOVERY

At common law a liquor vendor was not in any way liable to an intoxicated customer who injured himself because of his condition, nor was he responsible for injuries to innocent third parties resulting from his inebriated patron's negligent acts. The theory generally advanced to sustain this rule holds that the drinking of the liquor, not the serving of it, is the proximate cause of intoxication and subsequent injury. Another rationale supporting the old common law rule is that injury to the patron or to a third person is not a foreseeable result of the serving of liquor, and thus the innkeeper's act of supplying the intoxicants is too remote from any injury to give rise to liability. And, against claims by the patron himself, there is the additional defense of contributory negligence.

has revealed no subsequent enactments in other states. The twenty-one states which still have such laws are: ALA. CODE tit. 7, §§ 121-22 (1958); CONN. GEN. STAT. ANN. § 30-102 (1958); DEL. CODE ANN. tit. 4, §§ 715-16 (1953); ILL. ANN. STAT. ch. 43, § 135 (Smith-Hurd Supp. 1965); IOWA CODE ANN. § 129.2 (1954); ME. REV. STAT. tit. 17, § 2002 (1954); MICH. STAT. ANN. § 18.993 (Supp. 1965); MINN. STAT. ANN. § 340.95 (1953); N.Y. GEN. OBLIGATIONS LAW § 19-101; N.C. GEN. STAT. § 14-332 (1953); Okla. REV. CODE § 5-01-21 (1959); OHIO REV. CODE §§ 4399.01-05; Okla. Stat. Ann. tit. 37, § 121 (1951), ORE. REV. CODE ANN. § 71-08.080 (1961); WIS. STAT. ANN. § 176.35 (1955); Wyo. Stat. § 12-34 (1957)


8 See cases cited notes 5-6 supra.

Although this common law tendency to "take the drunk as you find him" found support in virtually every American jurisdiction which had occasion to pass on the question of liability, a few courts raised the possibility that tavern owners might owe some duty to the drunkard to protect him from his own follies. The idea found recognition in an 1883 Texas case in which the court allowed a widow to recover against three sober patrons of a bar who had wagered with her alcoholic husband that he could not consume three pints of whiskey at a sitting. Extremely inebriated at the time, he attempted the feat and died from acute intoxication. This concept of a duty owing to the individual who was past the stage of helping himself found support in a few other jurisdictions. The Iowa Supreme Court expressed the opinion that an action might lie against an innkeeper if the person plied with intoxicants was so helpless with drink that he was incapable of consenting to the sales, but not otherwise. In Oregon, the state supreme court stated that, independent of any statute, it was wrongful for any person repeatedly and continuously to ply another with liquor until intoxication was produced. The opinion held that an action by a woman so mistreated could be maintained unless by voluntary participation she could herself be said to be at fault. The embryonic idea of a duty owing to drunkards was thus closely associated with the degree of the patron's helplessness, although contributory negligence on his part would still bar recovery. In Illinois, these emerging concepts culminated in the theory that sales of liquor to a "strong and able-bodied man" were not actionable, since his voluntary act in becoming intoxicated was the proximate cause of any resulting injuries.

If the common law courts were slow to formulate the notion of a duty owed a drunkard by an innkeeper, they were even less receptive to the idea that there was any duty owed third persons to prevent their injury at the hands of the drunkard. Early cases denying recovery to injured third persons from liquor vendors as

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10 McCue v. Klein, 60 Tex. 168, (1883). See also Nally v. Blandford, 291 S.W.2d 832 (Ky. 1956), in which a package store proprietor sold a quart of whiskey to a drunkard, knowing he had made a bet that he could consume it without stopping. Recovery was allowed on the theory that this was an intentional tort against the drunkard, who died from his feat.

11 Bissell v. Starzinger, 112 Iowa 266, 83 N.W. 1065 (1900) (by implication)


a result of the acts of their intoxicated patrons were legion. True, some authorities hinted that there might be liability to third persons for certain exceptional acts of negligence on the part of liquor vendors, but case support for these statements was scanty. The earliest recorded case recognizing such liability awarded damages to a slave owner because an innkeeper had negligently permitted a slave to become intoxicated resulting in the slave's subsequent death.

In 1896 a Tennessee court held that the wife of an habitual drunkard stated a cause of action by alleging that over her repeated protests, the innkeeper continually sold liquor to her husband in violation of a state statute (not a dram shop act). The next development in the common law rule seems to have occurred in Pratt v. Daly, a 1940 Arizona case holding that a married woman who had the right to sue in her own name could recover against an innkeeper for loss of consortium because that innkeeper sold liquor to her alcoholic husband over her repeated protests.

14 See cases cited notes 5-6 supra.
15 See, e.g., the following passage in Annot., 130 A.L.R. 352, 357 (1941)
While it is true that ordinarily a vendor of intoxicating liquors is not, at common law, answerable to a third person for injury or damages sustained by the latter as a result of the intoxication of the purchaser of the liquor, nevertheless it is established that in some circumstances a vendor's sale of liquor may constitute a willful violation of his duty to one other than the consumer thereof and be the proximate cause of the injury sustained by such third person, so that for such injury the latter may have a right of action at common law against the vendor. See also the following statement from 30 AM. JUR. Intoxicating Liquors § 520 (1958)
However, the common-law rule is generally qualified to the extent of giving a right of action against one furnishing liquor in favor of those injured by the intoxication of the person so furnished, where the liquor was given or sold to a person who was in such a condition as to be deprived of his will power or responsibility for his behavior, or to a habitual drunkard, or in violation of a prohibitory statute. Moreover, liability is sometimes imposed upon proprietors of liquor establishments for failure to exercise reasonable care to protect patrons from injury at the hands of intoxicated fellow patrons. (Footnotes omitted.)
16 Skinner v. Hughes, 13 Mo. 440 (1850).
17 Riden v. Grimm Bros., 97 Tenn. 220, 36 S.W. 1097 (1896) The case seems to have been overlooked in Tarwater v. Atlantic Co., 176 Tenn. 310, 144 S.W.2d 746 (1940), wherein the court refused to allow recovery against a defendant who distributed a large amount of free beer to plaintiff's fellow workers, which resulted in plaintiff's injury when one of the intoxicated workmen dropped a plank on his arm.
The distinguishing feature of a "dram shop" act as opposed to other liquor control legislation is the imposition of civil liability upon a liquor vendor by creating a statutory cause of action against him in favor of his patrons or, more usually, third parties injured as a proximate result of the innkeeper's serving of his patron.
18 55 Ariz. 535, 104 P.2d 147 (1940).
19 Arizona, however, has refused to allow recovery at common law to a non-relative, as opposed to a relative, injured as a result of a drunkard's negligent acts. Collier v. Stamatis, 63 Ariz. 285, 162 P.2d 125 (1945)
opinion relied heavily upon decisions holding that an action would lie against druggists who sold habit-forming drugs to a plaintiff’s spouse with knowledge of their intended use.\textsuperscript{20} South Dakota followed suit a few months later in a virtually identical fact situation.\textsuperscript{21}

Beyond the few exceptional cases noted above, it can safely be said that until the late 1950’s there was no action at common law available to third persons injured by a drunkard as against a liquor vendor who supplied the intoxicants. Nor could the inebriate himself recover for any injuries sustained, unless he was so helpless as to be considered past the stage of consent when purchasing the liquor. The few cases allowing recovery were those in which the factual situations could be considered extreme, yet, even in the extreme cases, recovery was generally limited to members of the drunkard’s immediate family.

II. CASE DEVELOPMENT OF THE COMMON LAW THEORY OF RECOVERY

The genuine assault upon the old common law rule denying recovery began in 1959, with the case of \textit{Waynick v. Chicago’s Last Dept Store}.\textsuperscript{22} After excessive drinking in an Illinois bar, the intoxicated patron drove across the state line into Michigan where his negligent driving resulted in serious injury to motorists of that state. Their petition, based upon diversity, alleged damages at common law as well as under the dram shop acts of both states. After deciding that neither dram shop act applied extra-territorially,\textsuperscript{23}
the court stated that unless a remedy existed at common law the plaintiffs could not recover, since the non-applicability of the acts created a “vacuum” in the law. In holding that a common law negligence action would lie, the court cited the tort principles of duty and proximate cause, concluding that the serving of the liquor set off a foreseeable chain of events for which the innkeeper was ultimately responsible.

Fortified by the Waynck decision, the New Jersey Supreme Court started a wave of judicial commentary shortly thereafter with its landmark decision in Rappaport v. Nichols. The defendant, Nichols, in violation of a New Jersey statute, served liquor to two minors who later drove negligently into the plaintiff's car, killing two persons. Since New Jersey had no dram shop act the petition claimed damages solely on the common law theory. The opinion stated that the prohibitory statute gave rise to a duty on the part of innkeepers, for the protection of the public in general, not to serve minors or intoxicated persons. Although the court alluded to several analogous tort situations in which recovery has never been questioned under the everyday principles of proximate cause and foreseeability, the main thrust of the decision stressed the ridiculousness, considering the widespread use of automobiles on today's highways, of holding that injury to third persons was not a foreseeable result of the excessive serving and use of alcohol.

Since Rappaport there has been a steady erosion of the old common law rule, particularly in the eastern jurisdictions. In Manning v. Yokas, the plaintiff sued under Pennsylvania's civil damage act, which provided that an innkeeper who wrongfully furnished alcoholic beverages to a minor would be liable to anyone injured "in consequence of such furnishing." It was held that the "in consequence" language required a finding of proximate cause between the act of the innkeeper and the resultant injury to the plaintiff.

The court, in rejecting the old common law rule that the furnishing of liquor was not the proximate cause of the subsequent

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25 The New Jersey Dram Shop Act, N.J. Session Laws, 1921, ch. 103, at 184, was repealed by N.J. Session Laws, 1934, ch. 32, at 104.
28 Courts which have dealt with acts containing the "in consequence" language have generally held that there must be a finding of proximate cause between the act of serving the liquor and the injury to the plaintiff. Shugart v. Egan, 83 Ill. 56 (1876). This is to be contrasted with language in the statutes allowing recovery to one injured "by" an intoxicated person, for which proximate cause need not be shown. See Voelker, Parties to Dram Shop Actions, 1958 U. ILL. L.F. 207, 214.
injury, found that the innkeeper was "as much responsible for the accident as if he had stripped the gears of the car or had damaged the steering wheel, which defects in the operation of the car were directly responsible for the uncontrollability which caused the collision."29 One year later, in *McKinney v. Foster*,30 the Pennsylvania Supreme Court rejected the other half of the common law rule, holding it quite foreseeable that a minor who drank intoxicating liquor in the defendant's bar would become drunk and drive negligently, resulting in an accident. From these two decisions it was but a short step to a recovery founded entirely upon the common law; Pennsylvania took that step in 1965, after the repeal of the Civil Damage Act,31 with the case of *Jardine v. Upper Darby Lodge No. 1973, Inc.*,32 in which an injured pedestrian recovered damages from the tavern which served intoxicants to the inebriate who subsequently ran the plaintiff down. The court held intoxication itself to be the proximate cause of the accident and that the plaintiff's injuries were therefore directly attributable to the defendant. The following quotation is illustrative of the court's feeling toward the innkeeper's duty:

The first prime requisite to de-intoxicate one who has, because of alcohol, lost control over his reflexes, judgement 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. An intoxicated person behind the wheel of an automobile can be as dangerous as an insane person with a firearm. He is as much a hazard to the safety of the community as a stick of dynamite that must be de-fused in order to be rendered harmless. To serve an intoxicated person more liquor is to light the fuse.33

Most recently, New York recognized that tavern owners might be liable at common law for the negligent acts of their drunken patrons. In *Berkeley v. Park*,34 a car driven by one of two intoxicated youths collided head on with the plaintiff's car, killing two persons and seriously injuring three others. The complaint alleged damages under the New York Dram Shop Act,35 and at common law. In upholding the common law portion of the complaint, the

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29 389 Pa. at 140, 132 A.2d at 200.
33 Id. at 631-32, 198 A.2d at 553.
34 47 Misc. 2d 381, 262 N.Y.S.2d 290 (Sup. Ct. 1965).
New York court stated that Waynck and Rappaport had “rejected as unreal the distinction that the selling of alcohol is only a remote cause of resulting intoxication while the consumption is the proximate cause.” The court elected to follow the Rappaport reasoning, stressing the duty of the tavern owner to protect the public from intoxicated patrons and the readily foreseeable result of drunkenness — negligent driving.

Perhaps it is now socially acceptable to allow innocent third parties to redress their injuries against tavern owners who set the forces of harm in motion, but should the drunkard himself be allowed to recover for his own negligent acts? The answer is increasingly yes. The courts which have allowed the inebriated patron to recover have made little or no distinction between his situation and that of an injured third party. And, as might be expected, Pennsylvania and New Jersey were among the first states to extend the common law right of action to the drunkard himself.

In Schelin v Goldberg,7 decided after the Pennsylvania Civil Damage Act8 was repealed, an intoxicated customer recovered damages from an innkeeper after the patron’s drunken insults precipitated a fight during which he was severely beaten by a fellow customer. The tavern owner was held liable for the proximate consequences of his negligence in serving a visibly intoxicated person, including the foreseeable assault on the plaintiff by the other customer.

Pennsylvania stretched the Schelin rule to cover the more extreme fact situation presented by Majors v Brodhead Hotel, Inc.9 The plaintiff became intoxicated at a dance in the defendant’s hotel where drinks were served both at a bar and by “set-ups” at the tables. While confined in the men’s room, the plaintiff crawled out of an open window and fell forty-five feet to a roof-top. The court allowed him to recover for his injuries, even though he had been served only one drink at the bar which was under the defendant’s surveillance.

The New Jersey Supreme Court recently held that a complaint stated a cause of action when it alleged that the negligent sale of intoxicants to the plaintiff’s husband while he was “visibly intoxicated” proximately caused him to stumble and fatally strike

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36 47 Misc. 2d at 383, 262 N.Y.S.2d at 293.
38 Pa. Laws 1854, 663 § 3, which was repealed by Pa. Laws 1951, 90, 179 § 901.
39 416 Pa. 265, 205 A.2d 873 (1965)
his head against a pole. The court reaffirmed the principles outlined in Rappaport and remarked that the tavern owner owed a duty to the drunkard himself similar to that owed to innocent third parties. As in Rappaport, the court limited recovery to situations in which the inkeeper knew, or should have known, of the inebriate's condition.

A third state which has allowed the injured customer to recover for his own negligent acts is New Hampshire. In Ramsey v. Anctil, the plaintiff became highly intoxicated in defendant's bar and, oblivious to the glass resting beneath his upraised arm, slammed his fist on the counter, shattering the glass and severing a nerve in his hand. The state supreme court cited Rappaport, Waynick, and Schelin in holding that the action would lie.

Several other jurisdictions have indicated their approval of a common law cause of action in favor of either an injured third party or the drunkard himself or both. In Davis v. Schappacosee, the Florida Supreme Court permitted a parent to recover from a liquor vendor for the vehicular death of a minor son, one of a group of minors to whom the defendant had sold whiskey. The situation was exceptional in that the vendor never bothered to ascertain the ages of his obviously immature customers and in that he served the liquor to them in their car, so that negligent driving was an almost inevitable result. It seems, however, only a step from the exceptional situation in Schappacosee to the rule's application in questions of ordinary third-party liability. In at least two other states, the courts have recognized the right of an injured party to sue at common law for an innkeeper's negligence, while dismissing the complaints for inadequate pleading or evidence. A Tennessee court refused to hold a vendor liable for subsequent injuries when he sold liquor to a

41 Id. at 588, 218 A.2d at 633.
42 Id. at 593, 218 A.2d at 637.
44 Id. at 376, 211 A.2d at 901.
45 Ibid.
46 155 So. 2d 365 (Fla. 1963). The court relied heavily upon an analogy to Tamani Gun Shop v. Klein, 116 So. 2d 421 (Fla. 1959), in which a gun dealer was held liable for injuries resulting from the sale of a firearm to a minor. See the analogous situations discussed in text accompanying notes 101-19 supra. However, in the later case of Reed v. Black Caesar's Forge Gourmet Restaurant, Inc., 165 So. 2d 787 (Fla. Dist. Ct. App. 1964), the court refused to allow the plaintiff to recover for the death of her husband resulting from liquor served him while he was intoxicated. The court there specifically reserved from consideration the possibility of the liquor vendor's liability to third persons injured by an intoxicated patron.
twenty-nine year-old automobile driver who was not drunk at the
time of purchase and who consumed none of the liquor on the
premises, although the several minors in the car subsequently
became intoxicated, took over operation of the vehicle, and, driving
recklessly, caused a fatal accident. Although it refused to impose
liability on the bartender, the court said:

We are unwilling to hold that, no matter what the circum-
stances, the act of the purchaser and not the sale constitute the
proximate cause of injury to third persons or that consumption of
the intoxicant is always an independent, intervening act which
breaks the chain of causation. We can see little difference in
principle between the act of an owner entrusting an automobile to
one known to be an habitual drunkard and the act of a tavern
keeper in plying the driver of a car with intoxicants knowing that
he is likely to drive upon the public highway where he will become
a menace to third persons.

Similarly, a Colorado court dismissed a complaint alleging
common law negligence on the part of a tavern owner but only
because it asserted that the violation of a state prohibitory statute
was negligence per se and that the complaint failed to show action-
able facts of negligence on the part of the innkeeper or a failure
to protect the plaintiffs from injury. The court indicated that a
properly worded complaint, based on common law principles,
would state a good cause of action.

This grouping of cases is not to imply that the old common
law rule is now dead; rather, it seems to be dying the slow death of
the privity doctrine in products liability cases. Considering the
number of jurisdictions which accepted the old common law rule
and which have had no recent opportunity to reconsider their posi-
tions, it is probably still the majority rule in the country.

A few jurisdictions which have reconsidered the old common
law rule have rejected the Rappaport doctrine in its entirety.

48 Id. at 759.
statute forbade the sale or gift of liquor to minors, intoxicated persons, or habitual
drunkards. The court held that this statute was strictly penal and could not be made
the basis of a civil action. The problem of whether or not violation of similar statutes
in other states constitutes negligence per se or merely evidence of negligence is discussed
in text accompanying notes 51-101 infra.
50 Id. at 427-28, 374 P.2d at 352.
51 Carr v. Turner, 238 Ark. 889, 891, 385 S.W.2d 656, 658 (1965); Elder v. Fisher,
205 N.E.2d 335, 340 (Ind. Ct. App. 1965); Lee v. Peerless Ins. Co., 248 La. 982, 990,
183 So. 2d 328, 331 (1966).
Others have quaveringly adhered to the no-liability rule while reserving the right to change their minds. Wisconsin, for instance, discussed the cases on both sides of the question in 1962 in deciding whether the insurer-subrogee of a drunken driver may collect from the tavern owner who had served him. The court finally held that the insurer had no right to recover at common law, for to allow such an action would have necessitated the overruling of two prior Wisconsin cases. The court then asserted:

We do not deem this a proper case in which to do so. Plaintiff stands in the shoes of the purchaser and consumer of the alcoholic beverage, and not of the injured person. Under these circumstances we fail to find compelling, equitable considerations in plaintiff's favor which require this court to consider the advisability of abandoning a common-law rule of long standing.

And in 1965 an Indiana appellate court adhered to the old line while leaving the door open to change. After holding that the Indiana Dram Shop Act had been effectively repealed and that there was no cause of action against the liquor vendor at common law, the court asserted:

While we feel that this decision is well grounded on the common law as it now exists in this State, appellant's argument may have sufficient merit, as evidenced by the recent trend in cases of this nature, to warrant a re-examination and possible reevaluation of this area of the common law; particularly since the General Assembly seems to have abandoned legislation heretofore in vogue in respect to the subject matter.

Apparently the Wisconsin Supreme Court is simply waiting for a more desirable plaintiff than an insurance company before overturning the common law rule, while the Indiana court would like to see more case authority in other jurisdictions. However, a change in the law of both states seems imminent.

While the basic problem of whether a cause of action exists against the liquor vendor at common law is a relatively simple one, a number of jurisdictions have been faced with complications in the forms of contributory negligence, the effect of a statute pro-

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53 Seibel v. Leach, 233 Wis. 66, 288 N.W. 774 (1939); Demge v. Feierstein, 222 Wis. 199, 268 N.W. 210 (1936).
56 Acts of the Indiana General Assembly 1953, ch. 79, § 1, ch. 80, § 40.
hibiting sales of liquor to certain classes, and the pre-emptive effects of the dram shop acts. These problems are more fully discussed in the following section.

III. Specific Problems Under the Common Law Theory

A. The Role of Prohibitory Legislation

Every state has one or more statutes prohibiting the sale of intoxicants to certain classes of people. All states prohibit sales to minors; most forbid any sales to visibly intoxicated persons or habitual drunkards, a fair number include insane persons in the

58 Sales to minors: ALA. CODE tit. 29, § 36 (1958); ALASKA STAT. § 04.15.020 (1962); ARIZ. REV. STAT. ANN. § 4-244 (1956); ARK. STAT. ANN. § 48-901 (1964); CAL. PEN. CODE § 397; COLO. REV. STAT. ANN. § 75-2-37 (1963); CONN. GEN. STAT. ANN. § 30-86 (1960); DEL. CODE ANN. tit. 4, § 715 (1) (1953); D.C. CODE ANN. § 23-121 (1961); FLA. STAT. ANN. § 562.11 (1962); GA. CODE ANN. § 58-1061 (1965); HAWAII REV. LAWS § 159-4 (1955); IDAHO CODE ANN. § 23-312 (1947); ILL. ANN. STAT. ch. 43, § 131 (1944); IND. ANN. STAT. § 12-610 (1956); IOWA CODE ANN. § 123.43 (1946); KAN. REV. STAT. ANN. § 123.46 (1964); LA. REV. STAT. ANN. § 202.050 (1963); ME. REV. STAT. ANN. tit. 28, § 1-77 (1940); MICH. STAT. ANN. § 18.1004 (1957); MINN. STAT. ANN. § 340.73 (1957); MISS. CODE ANN. § 10223 (1952); MO. ANN. STAT. § 312.400 (1963); MONT. REV. CODE ANN. § 397; N.Y. ALCO. STAT. ANN. § 312.400 (1963); MONT. REV. CODES ANN. § 202.050 (1963); N.H. REV. STAT. ANN. § 175.6 (1964); N.J. STAT. ANN. § 18-33 (1957); N.J. COMM. LAWS ANN. ch. 138, § 34 (1958); N.M. STAT. ANN. § 18-46 (1965); N.D. CENT. CODE § 5-05-09 (1959); OHIO REV. CODE § 4301.22; OKLA. STAT. ANN. tit. 37, § 3 (1958); ORE. REV. STAT. § 471.410 (1961); PA. STAT. ANN. tit. 47, § 4-493 (1) (1952); R.I. GEN. LAWS ANN. § 3-8-1 (1956); S.C. CODE § 4-78 (3) (1962); S.D. CODE § 5-0226 (1939); TENN. CODE ANN. § 57-142 (1955); TEX. PEN. CODE ANN. art. 666-26 (b) (1952); UTAH CODE ANN. § 32-7-15 (1953); VT. STAT. ANN. tit. 7, § 224 (1958); VA. CODE ANN. § 4-112 (a) (1950); WASH. REV. CODE ANN. § 66.44.270 (1962); W. VA. CODE ANN. § 5907 (50) (1951); WIS. STAT. ANN. § 176.30 (1957); WYO. STAT. ANN. § 12-33 (1957)

59 Liquor control acts in all states prohibit sales to at least one of these classes; most prohibit sales to both. ALA. CODE tit. 29, § 36 (1958); ALASKA STAT. § 04.15.020 (1962); ARIZ. REV. STAT. ANN. § 4-244 (1956); ARK. STAT. ANN. § 48-901 (1964); CAL. PEN. CODE § 397; COLO. REV. STAT. ANN. § 75-2-37 (1963); CONN. GEN. STAT. ANN. § 30-91 (1960); DEL. CODE ANN. tit. 4, § 715 (5) (1953); D.C. CODE ANN. § 25-121 (1961); FLA. STAT. ANN. § 562.50 (1962); GA. CODE ANN. § 58-1061 (1965); HAWAII REV. LAWS § 159-4 (1955); IDAHO CODE ANN. § 23-312 (1947); ILL. ANN. STAT. ch. 43, § 131 (1944); IND. ANN. STAT. § 12-615 (1956); IOWA CODE ANN. § 123.46 (1946); KAN. STAT. ANN. § 41-715 (1963); KY. REV. STAT. ANN. § 244.080 (1963); LA. REV. STAT. § 26-68 (1950); ME. REV. STAT. ANN. tit. 28, § 151 (1964); MD. ANN. CODE tit. 28, § 118, 119 (1957); MASS. GEN. LAWS ANN. ch. 188, § 69 (1958); MICH. STAT. ANN. § 18.1000 (1957); MINN. STAT. ANN. § 340.73 (1957); MISS. CODE ANN. § 10223 (1952); MO. STAT. ANN. § 312.400 (1963); MONT. REV. CODE ANN. § 4-112 (a) (1947); NEB. REV. STAT. § 202.100 (1963); N.M. REV. STAT. ANN. § 175:6 (1964); N.Y. ALCO. BEV. CONTROL LAW § 65; N.D. CENT. CODE § 5-05-09 (1959); OHIO REV. CODE § 4301.22; OKLA. STAT. ANN. tit. 37, § 3 (1958); ORE. REV. STAT. § 741.410
prohibited class, and a few prohibit sales to criminals or interdicted persons, and Indians. These statutes typically provide that anyone selling intoxicants to a member of the prohibited class will be guilty of a misdemeanor. They differ from the dram shop acts in that the former usually designate fines and penalties for violators, while the latter specifically provide for civil liability.

The question has often arisen whether or not the violation of these statutes constitutes actionable negligence by an innkeeper so as to give the injured party a cause of action at common law. In states which have dram shop acts, the answer has generally been no. Thus, in Connecticut, it was held that the provisions of the Liquor Control Act were criminal and penal in nature and did not give rise to any civil liability. The court felt that the injury suffered was not of the type the statute intended to guard against, hence a common law cause of action against the tavern owner based upon a violation of the statute was not available. A similar result was reached in Illinois, when recovery was attempted under the provisions of the state prohibitory statute. The court there held that the statute was primarily penal and regulatory and did not create a civil liability.

Other jurisdictions without dram shop acts have come to the same conclusion, although the effect of the decisions has been to leave the injured party with no redress whatsoever. The Supreme Court of Arizona, in Collier v. Stamats, held that violation of a statute making it a misdemeanor to sell liquor to a minor was not actionable negligence so as to render the vendor liable in damages

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60 CAL. PEN. CODE § 397; CONN. GEN. STAT. ANN. § 175-6 (1960); KAN. STAT. ANN. § 715 (1964); MD. ANN. CODE art. 2B, § 119 (1957).

61 DEL. CODE ANN. tit. 4, § 715 (1953); IDAHO CODE ANN. § 23-929 (1948).


63 CONN. GEN. STAT. ANN. ch. 545 (1960).


65 Rogers v. Dwight, 145 F. Supp. 537 (E.D. Wis. 1956) (applying Illinois law). Illinois, of course, has said there is no cause of action against the tavern owner at common law. See Schulte v. Schleper, 210 Ill. 357, 71 N.E. 325 (1904); Freese v. Tripp, 70 Ill. 496 (1873). Contra, Colligan v. Consor, 38 Ill. App. 2d 392, 187 N.E.2d 292 (1963) (following the prevailing conflicts of law principles, unproved Indiana law was applied as Illinois common law).

to the minor’s parents. The court said that the purpose of the
section was to regulate the business of selling intoxicants, not to
enlarge civil remedies.68 In a recent Arkansas case,69 the court
pointed out that the state prohibitory statute was not a dram shop
act, since there was no express provision for civil liability and it
could not be turned into one by judicial legislation. The opinion
disposed of cases allowing recovery on negligence principles for
violations of similar statutes by demonstrating that these latter laws
furnished sanctions only against the licensed vendor,70 whereas Ar-
kansas punished sales to the prohibited class by any person.71 The
court was unwilling to create a civil cause of action based upon this
statute, for it felt that such action could render anyone serving a
social drink in his home liable in damages.

The most recent state to reconsider the problem was Louisiana
in the case of Lee v Peerless Ins. Co.,72 wherein the state supreme
court held that there had never been a cause of action against the
innkeeper at common law and that the state prohibitory statute did
not create one.

Despite the prevailing attitude, as evidenced by the decisions
cited above, an increasing number of jurisdictions are recognizing
that the violation of prohibitory statutes is a factor to be considered
in imposing liability based upon common law principles. Five juris-
dictions have indicated that such a statutory violation is negligence
per se.73 Here the prohibitory statutes take on the aspects of a dram
shop act, since it would seem that mere violation of the statute would
automatically create a civil cause of action. The New Hampshire
Supreme Court has stated tersely that violation of the applicable
regulatory statute is evidence of negligence.74

68 Ariz. at 289-90, 162 P.2d at 127
69 Id. at 891, 385 S.W.2d at 656 (1965).
70 Id. at 891, 385 S.W.2d at 657 The court cited cases from New Jersey, Illinois, and
Pennsylvania.
71 See Davis v. Shiappacossee, 155 So. 2d 365 (Fla. 1963); Windorski v. Doyle,
219 Minn. 402, 18 N.W.2d 142 (1945); Mitchell v. Ketner, 393 S.W.2d 775 (Tenn.
Gast, 17 Wis. 2d 344, 117 N.W.2d 347 (1962). The latter three cases denied recovery,
however, and the statements were more or less dicta. Pennsylvania, on the other
hand, has repeatedly held that violation of the state prohibitory statute is negligence per
Clark, 411 Pa. 142, 190 A.2d 441 (1963); Corcoran v. McNeal, 400 Pa. 14, 161 A.2d
367 (1960).
72 Ramsey v. Ancille 211 A.2d 900, 901 (N.H. 1965)
In the remaining states which have passed on the question, the violation of state regulatory provisions has usually been cited in the opinions, but it is not altogether clear just what weight the courts have attributed to such violation. Most of the courts associate the prohibition on sales to certain classes with a duty on the tavern owner's part not to make such sales, and the courts conclude that this duty extends to, and can be enforced by, the public. The language of Rappaport v. Nichols so indicates:

[T]he Division of Alcoholic Beverage Control has provided that no licensee shall permit any minor to be served or consume any alcoholic beverages; and the same regulation contains a provision against service to or consumption by any person "actually or apparently intoxicated." It seems clear to us that these broadly expressed restrictions were not narrowly intended to benefit the minors and intoxicated persons alone but were wisely intended for the protection of members of the general public as well.

Cases in other states have expressly held that the duty created by the regulatory provisions of liquor control acts extends to, and is for the protection of, the public. Indeed, the heart of the question seems to be whether the evil complained of is one which the statute was intended to correct. A reading of the cases denying recovery for the statutory violation indicates that if there is any duty at all it does not extend beyond the specified class of persons. The best that can be said of this problem is that the states are divided in their interpretations of the various liquor control acts, with perhaps half of the jurisdictions which have considered the role of such legislation holding that a violation is some indication of common law negligence.

B. Pre-emption in States With Dram Shop Acts

There are any number of reasons why an injured party may wish to escape from the statutory limitations imposed by state dram shop acts, and the question occasionally arises as to whether or not the

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70 31 N.J. 188, 156 A.2d 1 (1959).
76 Id. at 202, 156 A.2d at 8.
77 Berkeley v. Park, 47 Misc. 2d 381, 262 N.Y.S.2d 290 (Sup. Ct. 1965), wherein the court, referring to § 65 of the New York Alcoholic Beverage Control Law, said that "The purpose of such a statute in imposing such a duty is for the protection of the public." Id. at 384, 262 N.Y.S.2d at 294. See also Waynick v. Chicago's Last Dept Store, 269 F.2d 322 (7th Cir. 1959), cert. denied, 362 U.S. 903 (1960)
78 The two most common reasons are the dollar limits imposed on recovery in many states, e.g., $15,000 limit for injury to persons or property and $20,000 for loss of support, ILL. STAT. ANN. ch. 43, § 135 (Smith-Hurd Supp. 1965); $20,000 limitation for
existence of such an act pre-empts the field, so as to preclude any cause of action at common law. Many of the older cases contain language to the effect that the dram shop laws created rights and liabilities unknown to the common law. A few courts have stated that the statutory remedy is exclusive; however, these statements usually appear in jurisdictions which have never accepted the common law theory of recovery. In one federal case, an attempt to predicate the innkeeper's liability on a violation of Illinois' regulatory legislation was rejected on the grounds that the statute, which forbade the sale of liquor to certain classes, was closely followed by the Illinois Civil Damage Act, and if the regulatory statute created a cause of action at common law, then the dram shop act was just so much excess verbiage.

There seems to be a general rule of tort law, however, that the existence of a statute does not prevent an action for common law negligence. Minnesota, which has a dram shop act, has indicated in at least one case that the statutory and common law causes of action can run concurrently and that the existence of one does not preclude the other. The Wisconsin Supreme Court has held that the existence of a dram shop act precludes any cause of action under the state liquor control act, but in the same opinion the court went on to discuss the common law negligence theory, indicating that if such a cause of action did exist, it may not be precluded by the dram

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injuries to the person and $50,000 for injuries suffered "in consequence" of the innkeeper's acts, CONN. GEN. STAT. ANN. § 30-102 (Supp. 1965); $500 limitation for all types of recovery, Del. Code Ann. tit. 4, § 716 (1953), and the short one-year statute of limitations which is in effect in several states, see, e.g., CONN. GEN. STAT. ANN. § 30-122 (Supp. 1965); ILL. REV. STAT. ch. 43, § 135 (1963). In addition, statutory construction has produced a number of procedural problems under the statutes in some states.

79 Schulte v. Schleeper, 210 Ill. 357, 71 N.E. 325 (1904); Freese v. Tripp, 70 Ill. 496 (1873); Zibold v. Reneer, 73 Kan. 312, 85 Pac. 290 (1906); Gardner v. Day, 95 Me. 558, 50 Atl. 892 (1901); Sworski v. Colman, 204 Minn. 474, 283 N.W. 778 (1939); Hesley v. Cady, 104 Vt. 463, 161 Atl. 151 (1932); Denge v. Feierstein, 222 Wis. 199, 268 N.W. 210 (1936).


83 PROSSER, TORTS § 64 (3d ed. 1964)

84 MINN. STAT. ANN. § 340.95 (1957).

85 Windorski v. Doyle, 219 Minn. 402, 18 N.W.2d 142 (1945). For an excellent discussion of this case and Minnesota law in general, see Note, 49 MINN. L. REV. 1154 (1965).
shop act. In Illinois, the courts have held that a cause of action grounded on common law negligence can be maintained in interstate tort situations in which the state dram shop acts are not applicable.

The only state which appears to have expressly decided the question in favor of allowing the common law action is New York. In Berkeley v. Park, the New York court first decided that a cause of action grounded on ordinary negligence was available against liquor vendors and then addressed itself to the issue of whether this cause of action was abrogated by the statutory remedy. Since nothing in the dram shop act itself purported to do so, the court felt that an injured party should not be restricted to a single remedy if others are available, and the common law action was allowed.

The question of pre-emption has not been frequently litigated either because the common law theory is a recent development or because the issue does not arise in states which have dram shop acts. One may conclude, however, that there are four possible theories as to the pre-emptive effects of state dram shop acts: (1) the statutory remedy is exclusive, and precludes all other theories of recovery; (2) the dram shop and common law actions are coexistent, the former not precluding the latter; (3) the dram shop act is exclusive in situations falling within its coverage, but where the act is not applicable, the common law cause of action can be maintained; and (4) the dram shop act precludes any other statutory theory of recovery but not the common law action based on negligence.

C. Contributory Negligence

If a cause of action exists against the innkeeper at common law, does contributory negligence on the part of the injured plaintiff bar

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87 Waynick v. Chicago's Last Dep't Store, 269 F.2d 322 (7th Cir. 1959), cert. denied, 362 U.S. 903 (1960); Colligan v. Cousar, 38 Ill. App. 2d 392, 187 N.E.2d 292 (1963) (following the prevailing conflicts of law principles, unproved Indiana law was applied as Illinois common law).
89 The courts in Waynick v. Chicago's Last Dep't Store, 269 F.2d 322 (7th Cir. 1959), cert. denied, 362 U.S. 903 (1960), and Colligan v. Cousar, 38 Ill. App. 2d 392, 187 N.E.2d 292 (1963) (following the prevailing conflicts of law principles, unproved Indiana law was applied as Illinois common law), were faced only with situations in which the Illinois Dram Shop Act, Ill. REV. STAT. ch. 43, §§ 135-36 (1963), did not apply because an extra-territorial fact situation was involved. It is interesting to speculate how the same courts would rule in a situation where the dram shop act was not available for other reasons, perhaps because plaintiff had not brought suit within the short one-year statute of limitations prescribed in the act.
recovery? In rare cases, the defense has been held to be available against injured third parties under the dram shop acts. These situations usually arise when the injured party has contributed to the intoxication of the tort-feasor, or voluntarily rides with him in a vehicle.\footnote{Cookinham v. Sullivan, 23 Conn. Supp. 193, 179 A.2d 840 (Super. Ct. 1962); Liff v. Haebroeck, 51 Ill. App. 2d 70, 200 N.E.2d 525 (1964); Engleken v. Hitger, 43 Iowa 563 (1876); Keeney v. Fitzgerald, 43 Iowa 580 (1876).} Other courts have denied the defense because dram shop acts create a wholly statutory cause of action and provide a standard of conduct which enunciates the public policy of the state. Therefore, if the tavern owner violates that standard, he is liable despite the disregard of the claimant for his own safety.\footnote{Zucker v. Vogt, 329 F.2d 426 (2d Cir. 1964); Krotzer v. Drinka, 344 Ill. App. 256, 100 N.E.2d 518 (1951).} No case has been found where the defense of contributory negligence was raised against an injured third person in a common law liquor liability situation, but it would seem that, with no statute involved, such a defense would be available on ordinary common law principles.

Far more important than the question of the contributory negligence of injured third persons is that of the negligence of the injured patron himself. There is a split of authority in the jurisdictions which have faced this question. The Connecticut high court, in denying that there is any remedy available either to the patron or an injured third party in a common law action,\footnote{Noonan v. Galick, 19 Conn. Supp. 308, 112 A.2d 892 (Super. Ct. 1955)} stated that, in any case, contributory negligence would be available as a defense against the patron. The Supreme Courts of Florida,\footnote{Reed v. Black Caesar's Forge Gourmet Restaurant, Inc., 165 So. 2d 787 (Fla. Dist. Ct. App. 1964), cert. denied, 172 So. 2d 597 (Fla. 1965).} New York,\footnote{Moyer v. Lo Jim Cafe, Inc., 19 App. Div. 2d 523, 240 N.Y.S.2d 277 (1963), aff'd, 14 N.Y.2d 792, 200 N.E.2d 212, 251 N.Y.S.2d 30 (1964) The case is of doubtful authority, however, in light of the more recent decision in Berkeley v. Park, 47 Misc. 2d 381, 262 N.Y.S.2d 290 (Sup. Ct. 1965).} and Louisiana\footnote{Lee v. Peerless Ins. Co., 248 La. 982, 183 So. 2d 328 (1966)} have expressed the opinion that if a cause of action does exist in favor of an injured customer at common law, contributory negligence would bar his recovery. New Hampshire, after examining contrasting decisions in other states, notably Pennsylvania and New Jersey, broke with these jurisdictions and decided that contributory negligence would be available to bar the recovery of an injured patron in a common law action based on the violation of a statutory duty.\footnote{Ramsey v. Anctil, 106 N.H. 375, 211 A.2d 900 (1965).} Pennsylvania and New Jersey, two states which allow recovery

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LIQUOR VENDOR LIABILITY

by the injured patron, have almost of necessity found that contributory negligence is not available to the tavern owner as a defense. Their courts have reasoned that since state liquor regulation laws give rise to a duty on the innkeeper’s part not to serve the designated classes of persons, the availability of contributory negligence as a defense would render the statutory duty meaningless. Therefore, these courts follow the general rule and hold that contributory negligence is not available as a defense to a statutory tort where the effect of the statute is to place entire responsibility for the harm upon the defendant. A statement from the recent Pennsylvania case of Majors v. Brodhead Hotel, Inc. is typical. Citing the Restatement of Torts, the court said:

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 recovery for bodily harm caused by the violation of such statute.

A federal court applying New Jersey law in Galvin v. Jennings used a slightly modified version of this reasoning and held that if the defendant innkeeper’s conduct was willful and wanton, contributory negligence would not bar recovery by an injured patron. So far as the intoxicated person himself is concerned, the reasoning of the Pennsylvania and New Jersey courts appears to be sound. If recovery on his part is desirable, then his contributory negligence cannot be a defense, as it would automatically operate to bar his recovery in all cases.

D Causation

As already mentioned, jurisdictions which accept the common law theory of recovery reason that it is the serving and not the consumption of alcohol, which is the proximate cause of intoxication.

98 See, e.g., the statutes cited in notes 58-62 supra.
100 RESTATEMENT (SECOND), TORTS § 483 (1965). See also Comment, Contributory Negligence as a Defense to a Statutory Tort, 18 U. CHI. L. REV. 779 (1948).
101 Id. at 269, 205 A.2d at 876 (citing RESTATEMENT (SECOND), TORTS § 483 (1965)).
102 Id. at 269, 205 A.2d at 876 (citing RESTATEMENT (SECOND), TORTS § 483 (1965)).
103 289 F.2d 15 (3d Cir. 1961). The court held that contributory negligence would not be available as a defense when, after leaving the defendant’s establishment, the plaintiff was so intoxicated that the bartender had to go outside and give the plaintiff specific instructions regarding which way to turn the wheel so that he could drive out of the parking lot.
and which sets off the chain of events leading to ultimate injury. The act of the patron in consuming the liquor is a contributing factor, but it is not such an intervening cause as would break the chain of foreseeable results leading from the original negligent act of the innkeeper to the resultant injury. In actuality this is little more than an application of the accepted tort rule that a foreseeable intervening cause does not break the chain of causation and relieve the original actor from liability.\(^\text{104}\)

Can an innkeeper escape liability by showing that his act of serving alcohol did not contribute to the tort-feasor's intoxication? Generally, the courts which have accepted the common law cause of action have held that the innkeeper's act need only be a "substantial factor" in bringing about the injury in order to sustain liability,\(^\text{105}\) and, as a practical matter, non-contribution to a state of intoxication would be virtually impossible to prove. Most of the courts would probably agree with opinions rendered in dram shop act cases that the serving of one drink is enough to make the innkeeper liable.\(^\text{106}\) The Supreme Court of Pennsylvania, however, has said that the innkeeper may also seek to prove that his customer was already so inebriated when he arrived that the subsequent drink did nothing to worsen his already hopeless condition.\(^\text{107}\)

IV. **ANALOGOUS TORT SITUATIONS AT COMMON LAW**

Courts which have allowed recovery against the liquor vendor at common law have usually supported their reasoning by making some reference to a number of analogous tort situations in which recovery has not been questioned. Some of the more commonly discussed situations are treated below.

\(^{104}\) See, e.g., Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1 (1959); Waynick v. Chicago's Last Dept Store, 269 F.2d 322 (7th Cir. 1959), cert. denied, 362 U.S. 903 (1960) and the discussion therein. See also the excellent discussion of causation in Lee v. Peerless Ins. Co., 248 La. 982, 1002-06, 183 So. 2d 328, 335-36 (1966) (dissenting opinion).


\(^{106}\) See, e.g., Phillips v. Derrick, 36 Ala. App. 244, 54 So. 2d 320 (1951); Pierce v. Albanese, 144 Conn. 241, 129 A.2d 606, appeal dismissed for want of a substantial federal question, 355 U.S. 15 (1957), Tresch v. Nielsen, 57 Ill. App. 2d 469, 207 N.E.2d 109 (1965) Iowa, however, requires a showing that the sale directly contributed to the tort-feasor's intoxication and that the damages are separable. Bellison v. A. Apland & Co., 113 Iowa 599, 89 N.W. 22 (1902)

A. Liability of the Druggist for Sales of Habit-Forming Drugs

One situation commonly referred to in the liquor cases is the liability of a druggist for sales of habit-forming drugs to an addicted customer. Early cases held that the husband or wife of the vendee could recover at common law for loss of consortium if the sale was made by the vendor with knowledge of the intended use. Perhaps the most influential case in this area is Flandermeyer v. Cooper, decided in 1912 by the Ohio Supreme Court. In Flandermeyer the wife of an addict was allowed to recover against a vendor even though he had violated no statute in making the sale and without regard to whether or not the sale had been made with the wife's knowledge. Perhaps the drug cases represent a stronger intra-family tort situation than do the liquor cases and go no further than to recognize a cause of action for loss of consortium, a situation which exists in a greater number of jurisdictions than is true of the ordinary liquor liability case. On the basis of theory, however, the two situations are indistinguishable. The principles of duty, proximate cause, and foreseeability of harm through the negligent acts of the vendor are identical, and it cannot logically be said today that an intoxicated person is any more responsible for his acts than a drug addict.

B. Unlawful Sales of Firearms to Minors

Another analogous situation referred to by courts in sustaining actions against innkeepers at common law is the illegal sale or negligent entrustment of firearms to minors. The classic case is Anderson v. Settergren, a 1907 Minnesota suit in which the defendant sold cartridges and loaned a rifle to a minor in violation of a state statute; the minor subsequently fired it, injuring the plaintiff. The court sustained a common law charge alleging negligence, stating that the prohibitory statute was for the benefit of both the minor and the public and that the firing of the gun was not an intervening act which would break the chain of causation leading back to the negligent vendor. A similar case arose in Illinois in 1954, wherein the

109 85 Ohio St. 327, 98 N.E. 102 (1912).
110 Pratt v. Daly, 55 Ariz. 535, 104 P.2d 147 (1940); Swanson v. Ball, 67 S.D. 161, 290 N.W 482 (1940).
111 100 Minn. 294, 111 N.W 279 (1907)
court sustained a complaint against a vendor who sold an air rifle to a child;\textsuperscript{112} the point most emphasized in the opinion was the foreseeability of harm arising from sales of firearms to those inexperienced in their use and too young to be responsible.\textsuperscript{113} It is also interesting to note that the Minnesota court in \textit{Anderson} held that the violation of the prohibitory statute was negligence per se.\textsuperscript{114} In addition it should be pointed out that the firearms cases were cited with approval in \textit{Rappaport v. Nichols}.\textsuperscript{115}

A recent Florida case allowed recovery against a liquor vendor almost entirely on the authority of a firearms case. In \textit{Davis v Shiappacossee}, referred to earlier,\textsuperscript{116} the court alluded to the case of \textit{Tamami Gun Shop v Klen},\textsuperscript{117} wherein a gun dealer sold a rifle to a minor in violation of a city ordinance, and the minor subsequently shot off his thumb. The court held that the sale in violation of the statute was negligence per se, asserting that the two cases were indistinguishable.\textsuperscript{118}

If accidents and injury are a foreseeable result of negligent entrustment of firearms to minors, they are no less foreseeable to the bartender who serves an intoxicated person, particularly if that customer is driving. Indeed, the drunken driver is a much greater menace to the American public than the incompetent with a firearm, if only by the relative number of incidents.

\textbf{C. Negligent Entrustment of Vehicles}

A third situation often cited by analogy in liquor liability cases is that arising from the negligent entrustment of vehicles to incompetent drivers. In \textit{Sadler v Draper},\textsuperscript{119} the Tennessee Court of Appeals allowed an injured third party to recover against an owner whose agent entrusted the vehicle to an intoxicated driver with a reputation for drunkenness. Similarly, in \textit{V L. Nicholson Constr Co. v Lane},\textsuperscript{120} recovery was allowed against an owner who loaned his car to a known drunkard, even though the latter was not drinking

\begin{footnotes}
\item[113] Id. at 512-13, 117 N.E.2d at 885-86.
\item[114] 100 Minn. at 295, 111 N.W at 279.
\item[115] 31 N.J. 188, 156 A.2d 1 (1959).
\item[116] 155 So. 2d 365 (Fla. 1963) \textit{See text accompanying notes 46-48 supra.}
\item[117] 116 So. 2d 421 (Fla. 1959).
\item[118] 155 So. 2d at 367
\item[120] 177 Tenn. 440, 150 S.W.2d 1069 (1941).
\end{footnotes}
at the time. Both cases were cited by the Tennessee Court of Appeals as being indistinguishable from the negligent sale of intoxicants to minors in a recent case which recognized the common law liability of liquor vendors.\textsuperscript{121} Ohio has also recognized the right of an injured third person to recover against the owner of a vehicle who negligently entrusts it to a driver whom he knows to be a reckless or careless person.\textsuperscript{122}

Several jurisdictions have gone one step further by allowing the injured party to recover against an owner who leaves his vehicle in such a condition that it is likely to be stolen and driven negligently. In \textit{Ney v. Yellow Cab Co.},\textsuperscript{123} the Illinois Supreme Court allowed a motorist to recover for the negligence of a taxicab driver who left his key in the ignition of his unattended vehicle in violation of a statute, thereby allowing a thief to steal the car and run over the plaintiff. The court said that the statute was intended for the safety of the public, that the violation of it was "prima facie evidence of negligence,"\textsuperscript{124} and that the act of the thief was not such an unforseeable intervening cause as to break the chain of causation. Recovery was permitted in a similar case,\textsuperscript{125} wherein a truck was stolen and driven negligently after the keys were left in the ignition in violation of a District of Columbia ordinance. An Ohio common pleas court, in \textit{Garbo v. Walker},\textsuperscript{126} reached a similar result in holding that violation of a city statute prohibiting the parking of a vehicle in the street without securing the ignition switch was negligence per se.

Again, the analogies to the common law liability of the liquor vendor are obvious. Loaning a vehicle to an incompetent person or leaving the keys in the ignition are instances of placing an instrumentality of harm in the hands of the wrongdoer, whereas plying him with intoxicating liquor increases the likelihood that he will use that instrumentality in a negligent manner. Both can be said to be a "proximate cause" or at the very least a "substantial factor" in bringing about any resultant injury, and the forseeability of harm is identical in both situations.

\textsuperscript{122} Elms v. Flick, 100 Ohio St. 186, 126 N.E. 66 (1919).
\textsuperscript{123} 2 Ill. 2d 74, 117 N.E.2d 74 (1954).
\textsuperscript{124} \textit{Id.} at 78-79, 117 N.E.2d at 78.
\textsuperscript{125} Ross v. Hartman, 139 F.2d 14 (D.C. Cir. 1943).
D Failure of a State Mental Hospital To Protect Inmates

Although somewhat remote from the liquor vendor's common law liability situation, a recent New York case readily illustrates how far some courts are extending the proximate cause-foreseeability rationale and why it is ridiculous to hold that it does not apply in allowing a recovery against the tavern owner at common law. In Williams v State, a female inmate of a state mental hospital was sexually assaulted by another inmate and as a result gave birth to a mentally deficient child. The child sued, by its guardian, for the negligence of the hospital in allowing it to be born in such a defective state. The court found that the hospital owed a duty to the mother to protect her from fellow inmates and reasoned that if the hospital was negligent in discharging this duty, a deficient child was a foreseeable result. The hospital was therefore held liable to the child for its injury, from the time of conception.

The above-mentioned cases are illustrative of situations in which the courts have allowed recovery to injured third persons against the party creating the dangerous situation despite the intervening acts of tort-feasors. There would seem to be no logical reason for separating the liquor vendor from this trend, since he creates the dangerous situation by contributing to the intoxication of a potential tort-feasor. There is no reason for the courts to insulate him.

V Liability of the Liquor Vendor in Ohio

Ohio has had a dram shop act since 1854. Originally quite stringent, the statute was amended in 1910 to read as follows:

A husband, wife, child, parent, guardian, employer, or other person injured in person, property, or means of support by an intoxicated person, or in consequence of the intoxication, habitual or otherwise, of a person, after the issuance and during the existence of the order of the department of liquor control prohibiting the sale of intoxicating liquor as defined in section 4301.01 of the Revised Code to such person, has a right of action in his own name, severally or jointly, against any person selling or giving intoxicating liquors which cause such intoxication, in whole or in part, of such person.

Decisions under the amended act have been scarce, but they do seem to indicate that the act is applicable only if the order of the Department of Liquor Control, prohibiting sales to the designated persons,

127 46 Misc. 2d 824, 260 N.Y.S.2d 953 (Ct. Cl. 1965)
128 52 Ohio Laws 153.
129 OHIO REV. CODE § 4399.01.
is in effect. In *Ramon v. Spike*,\textsuperscript{120} one of the few decisions under the amended act, an innkeeper sold liquor to an intoxicated minor who later drove onto the sidewalk, injuring a pedestrian. The complaint did not allege that the innkeeper had notice not to serve the youth, and the court held that the issuance of the order was a prerequisite to suit, without which there was no cause of action under the dram shop act.\textsuperscript{131} Similarly, in *Love v. Fountas*,\textsuperscript{122} the plaintiff alleged that the decedent's death was caused by eight double shots of liquor served to him by the defendant tavern owners in violation of section 4301.22, the Ohio prohibitory statute. The complaint contained no reference to the dram shop act, and the court sustained defendant's demurrer, stating that the only benefits to injured parties arose out of the dram shop act and if the drunkard was not blacklisted as therein provided, there was no cause of action.\textsuperscript{133} Therefore, even if the sale of liquor is illegal, no statutory cause of action arises unless the drunkard has been blacklisted as provided in section 4399.01 of the Ohio Revised Code.

These two cases illustrate the serious deficiency in the Ohio act. Unless a blacklisting order of the Department of Liquor Control is in effect, a patron can become highly intoxicated with the knowledge of the innkeeper, and no liability will attach to the latter if the inebriate subsequently injures himself or another. Moreover, since only habitual drunkards are usually blacklisted, the act makes no provision whatsoever for minors or for the reasonably prudent man who goes on a once-in-a-lifetime drinking spree and then becomes unreasonable, imprudent, and highly intoxicated. Recognition of a cause of action at common law would serve to eliminate this hiatus in Ohio law.

The question of whether or not a cause of action does exist against the innkeeper at common law does not appear to have been litigated in Ohio, unless *Ramon* and *Love* can be read as denying the action. The problem was discussed in *Chrostoff v. Gradsky*,\textsuperscript{124} wherein the court recognized the prevailing view at that time to be that there was no cause of action at common law; however,

\textsuperscript{120} 92 Ohio App. 49, 109 N.E.2d 327 (1951).

\textsuperscript{121} Apparently, under this decision even a minor must be blacklisted, by name, before any cause of action would arise against the innkeeper. In retrospect, it seems ridiculous to require the blacklisting of every individual under the age of twenty-one in order to give rise to liability. There thus seems to be no cause of action under the Ohio act against innkeepers who serve minors.


\textsuperscript{123} *Id.* at 502, 200 N.E.2d at 716.

\textsuperscript{124} 140 N.E.2d 586 (Ohio C.P. 1956).
the discussion appears to have been *dictum* only and antedates more recent decisions in other states recognizing such actions.

A case squarely raising the common law question will soon be considered by the court of appeals of Stark County. In *Robinson v. Stilgenbauer*;\(^{135}\) one Clyde E. Stilgenbauer became intoxicated as a result of early morning drinking in several bars, only one of which apparently had notice from the Board of Liquor Control not to serve him. At least one of the other bars admitted knowledge that Stilgenbauer drank to excess, however, and admitted serving him beer and whiskey at approximately 7:15 in the morning. Counsel for the plaintiff argued that the serving of liquor to Stilgenbauer under such conditions constituted negligence at common law and proximately resulted in the death of four motorists when Stilgenbauer drove across the center line of the highway and collided with their oncoming vehicle. The court, however, granted summary judgment in favor of the tavern owner who had not been served with notice, and at the time of this writing the case is on appeal. The *Robinson* case will afford an excellent opportunity for Ohio to follow the line of reasoning of the more enlightened jurisdictions which have recognized a cause of action at common law against the liquor vendor. Ohio has already recognized common law causes of action arising from the sale of habit-forming drugs\(^{136}\) and from the negligent entrustment of vehicles,\(^{137}\) both of which seem indistinguishable in theory from a common law cause of action against the innkeeper. Moreover, the action would not be unfair to the tavern owner, because he has all the defenses available in ordinary negligence cases, with the possible exception of contributory negligence. He can, for instance, show that his action did not contribute to the intoxication of the patron or that the patron was not visibly intoxicated when served. These defenses would afford the innkeeper more protection than is available under some of the more stringent dram shop acts.

VI. CONCLUSION

It is evident from the declining popularity of dram shop acts that the courts have not accepted them as the final answer as regards the liquor vendor's liability. The most dynamic development in recent years has been the rapid change in the old common law

\(^{135}\) Case no. 108874, Stark County Ct. C.P., Ohio, Aug. 17, 1966.

\(^{136}\) Flandermeyer v. Cooper, 85 Ohio St. 327, 98 N.E. 102 (1912).

\(^{137}\) Elms v. Flick, 100 Ohio St. 186, 126 N.E. 66 (1919) (dictum).
rule that the innkeeper is not responsible for injuries caused or sustained by his intoxicated customer. A number of jurisdictions, including Pennsylvania, New Jersey, New York, New Hampshire, Florida, and Illinois, have reversed this rule and presently allow recovery against liquor vendors in common law actions. Other states have indicated a willingness to follow suit.

There seems to be no good reason why a cause of action at common law against an innkeeper should not lie, when that action is based on duty, proximate cause, and foreseeability of harm. Indeed, the no-liability rule for innkeepers seems to be a novelty which no other businessman enjoys in the historical development of negligence theories. Moreover, the common law action is more equitable to the innkeepers themselves than the dram shop acts, inasmuch as the former preserves for them a number of defenses not ordinarily available under the statutes. It is to be hoped that Ohio will follow the enlightened leadership of other states and recognize the cause of action at common law against innkeepers who knowingly contribute to the intoxication of tort-feasors.

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