SALE OF INTOXICATING LIQUOR AS PROXIMATE CAUSE OF INEBRIATE'S TORT

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The question as to the liability of a tavern keeper for unlawfully selling alcoholic beverages to a minor, or intoxicated person, who consequently injures a third party, has been the focal point for much litigation based upon Civil Damage Acts, as well as the common law.[1] There is little doubt that ordinarily at common law no action for damages may be maintained against the vendor of intoxicating liquor by one who sustains personal injuries by reason of the conduct of an intoxicated person not on the premises of the vendor.[2]

The philosophy of the law has been that ordinarily it is not actionable negligence to sell intoxicating liquors; that even where the sale is tortious, it is usually considered a remote rather than the proximate cause of the subsequent injury; and that even where the sale is deemed the proximate cause of the injury, the voluntary consumption by the purchaser amounts to contributory negligence.[3] To overcome these obstacles to an action at common law, the Civil Damage Laws, or Dramshop Acts, were enacted. Generally, those states which have such laws have designed them ". . . to give a right of action to any party who is damaged by reason of intoxicants being furnished to any person, and against the individual serving them to him."[4]

Even though no action may lie due to the absence of a Civil Damage Law, this does not mean that the common law is to be ignored or

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[1] Annot., 54 A.L.R.2d 1152 (1957) (liability outside the coverage of Civil Damage Acts); Annot., 130 A.L.R. 357 (1941) (common law action); 30 AM. JUR. *Intoxicating Liquors* § 520 (1958) (Civil Damage Acts); 48 C.J.S. *Intoxicating Liquors* §§ 430, 431 (1947) (Civil Damage Laws).

[2] Authorities cited note 1 *supra*. See Beck v. Groe, 245 Minn. 28, 70 N.W.2d 886 (1955); Cherbonnier v. Raflavich, 88 F. Supp. 900 (1950); Seibel v. Leach, 233 Wis. 66, 288 N.W. 74 (1939); Belding v. Johnson, 86 Ga. 177, 12 S.E. 304 (1890).

The majority of courts have upheld the above premise whether the action was sought on the theory that the sale was a direct wrong or on the premise that it was negligence which imposed a liability upon the seller for damages resulting from intoxication. The liability where found has been a statutory one. Cowman v. Hansen, 250 Iowa 358, 92 N.W.2d 682 (1958); Cole v. Rush, 45 Cal. 2d 345, 289 P.2d 450 (Sup. Ct. 1955), 54 A.L.R.2d 1137; Fleckner v. Dionne, 94 Cal. App. 2d 246, 210 P.2d 530 (Dist. Ct. App. 1949); Kreps v. D'Agostine, 329 Ill. App. 190, 67 N.E.2d 416 (1946).

[3] Cowman v. Hansen, 250 Iowa 358, 92 N.W.2d 682 (1958); Fleckner v. Dionne, 94 Cal. App. 2d 246, 210 P.2d 530 (Dist. Ct. App. 1949); Collier v. Stamatis, 63 Ariz. 285, 162 P.2d 125 (1945); King v. Henkie, 80 Ala. 505, 60 Am. Rep. 119 (1886).

[4] Annot., 54 A.L.R.2d 1152, 1153 (1947).

that it has no application;[5] however, until the decision in the recent case of *Rappaport v. Nichols*[6] the common law coverage had not been recognized or extended to the *sale* of alcoholic beverages which resulted in injury to a third person caused by the inebriate, even where the sale had been illegal.[7] In view of the great weight of authority which separates the selling of liquor from its consumption in determining the proximate cause of the resulting injury to a third party, it is noteworthy that New Jersey, in the *Rappaport* case, has allowed a cause of action against tavern keepers, in the absence of a Civil Damage Law, based upon common law negligence.[8] There the alleged unlawful service of intoxicating liquors resulted in a minor's inebriation which in turn resulted in the death of the plaintiff's testator due to the minor's negligent operation of an automobile.[9] The plaintiff appealed from the order granting defendants motion for summary judgment solely on the basis that her complaint did in fact set forth a common law cause of action grounded upon negligence.

The Supreme Court of New Jersey remanded the case for trial holding that if defendants unlawfully and negligently sold alcoholic beverages to the minor causing his intoxication, which caused or contributed to his negligent operation of a motor vehicle, such negligence was, in fact, a substantial factor in bringing about the resultant injury; and, that if the minor's negligent operation of his motor vehicle was a normal incident of the risk defendants created, or an event which they could reasonably have foreseen, the question of proximate causal relation between the defendants' unlawful negligent conduct and the plaintiff's injuries would be a question for the jury.[10]

The court in the *Rappaport* case did not allow the basic common law principles of negligence to become obscured simply because the legislature had not specifically created the cause of action by statute.[11] The decision points out that ". . . the negligence may consist in the creation of a situation which involves unreasonable risk because of the expectable action of another . . .,"[12] and instead of limiting the interpretation of this principle has extended it to encompass the sale of intoxicating liquor.

The sale of alcoholic beverages may be done in a negligent man-

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[5] Spencer v. Fisher, 161 N.C. 116, 76 S.E. 731 (1912), 130 A.L.R. 352, 361, 369; Struble v. Nodwift, 11 Ind. 64 (1858).
[6] 31 N.J. 188, 156 A.2d 1 (1959).
[7] Cases cited note 3 *supra.*
[8] See Annot., 54 A.L.R.2d 1152 (1947); Annot., 130 A.L.R. 352, 357 (1941).
[9] For other discussions of the *Rappaport* case see 48 GEO. L.J. 791 (1960); 11 MERCER L. REV. 389 (1960); 31 MISS. L. J. 311 (1960).
[10] Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1, 3 (1959).
[11] See Schelin v. Goldberg, 188 Pa. Super. 341, 146 A.2d 648 (1958).
[12] Rappaport v. Nichols, *supra* note 10, 156 A.2d at 8. See also Brody v. Albert Lifson & Sons, 17 N.J. 383, 111 A.2d 504 (1955).

ner, just as any other action which includes a duty to others may be negligently accomplished. That this is so would seem logically clear particularly in view of the inherent evils of intoxicants and the myriad wrongs and injuries which it directly produces on our modern society. While it has been stated that ". . . the inherent evils of intoxicating liquor have not enlarged upon the common law duty of the vendor to his patrons . . .,"[13] what of the common law duty not to set in motion a force which may foreseeably cause injury to third persons?[14]

The New Jersey Statute[15] forbids the sale of intoxicating liquors to minors or intoxicated persons and the *Rappaport* decision, in accord with the majority view,[16] points out that these laws ". . . were not narrowly intended to benefit the minors and intoxicated persons alone but were wisely intended for the protection of the general public as well."[17] It is this basis then upon which the New Jersey court predicates the duty of the vendor of alcoholic beverages to the general public not to sell his product negligently.

The decision counteracts the defendant's claim (that even assuming their conduct was unlawful and negligent, it was nevertheless not the cause of the injuries suffered) by saying that one is liable for the injuries which result in the ordinary course of events from his negligence,[18] and ". . . it is generally sufficient if his negligent conduct was a substantial factor in bringing about the injuries."[19] In such cases the tortfeasor's liability is not extinguished by intervening causes which were foreseeable or were normal incidents of the risk created.[20] Where the breach in the chain of causation is not clearly shown by the intervention of some event which could not under the circumstances have been reasonably foreseen by the average man, the court will not hold as a matter of law that there could have been no causal relation between the negligent conduct and another's injury.[21]

Regarding the contention of an unreasonable burden upon tavern keepers should they be placed in the position that in certain circum-

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[13] Padulo v. Schneider, 346 Ill. App. 454, 105 N.E.2d 115, 116 (1952).

[14] See Palsgraf v. Long Island R.R., 348 N.Y. 339, 162 N.E. 99 (1928), 59 A.L.R. 1263; RESTATEMENT, TORTS § 281 (1934); PROSSER, TORTS § 36 (2d ed. 1955); 2 HARPER & JAMES, TORTS § 18.2 (1956); Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 12-15 (1953).

[15] N.J. REV. STAT. § 33:1-77 (1937).

[16] Mendelsohn v. Superior Court, 76 Ariz. 163, 261 P.2d 983 (1953); Noonan v. Galick, 19 Conn. Sup. 308, 112 A.2d 892 (Super. Ct. 1955).

[17] *Supra* note 10, 156 A.2d at 8.

[18] See PROSSER, TORTS § 48 (2d ed. 1955).

[19] Rappaport v. Nichols, *supra* note 10, 156 A.2d at 9. See Lutz v. Westwood Transp. Co., 31 N.J. Super. 285, 106 A.2d 329 (1954).

[20] See PROSSER, TORTS §§ 44, 47 (2d ed. 1955); 2 HARPER & JAMES, TORTS § 20.5 (1956).

[21] Rappaport v. Nichols, *supra* note 10, 156 A.2d at 9; see Menth v. Breeze Corp., 4 N.J. 428, 73 A.2d 183 (1950), 18 A.L.R.2d 1071.

stances the sale of alcoholic beverages may result in culpable negligence, the court had the following comment:

> . . . [W]e are convinced that recognition of the plaintiff's claim will afford a fairer measure of justice to innocent third parties whose injuries are brought about by the unlawful and negligent sale of alcoholic beverages to minors and intoxicated persons, will strengthen and give greater force to the enlightened statutory and regulatory precautions against such sales and their frightening consequences, and will not place any unjustifiable burden upon defendants who can always discharge their civil responsibilities by the exercise of due care.[22]

The "cause of action" question presented by the facts of the *Rappaport* case invites speculation as to the position which might be taken by the Arizona court. In view of the applicable statutory and common law in Arizona, it would appear that this state would not allow a common law action of negligence to be maintained under the circumstances of the *Rappaport* case.

It is clear that Arizona endorses common law negligence principles and has allowed actions based thereon when the duty, breach, injury and proximate cause has been reasonably set forth by the circumstances of the case.[23] Although Arizona has no Civil Damage Law,[24] it might first appear that vending intoxicating beverages could result in an action grounded on negligence.[25] The Arizona Revised Statutes provide that "It is unlawful . . . for a licensee or other person to sell, furnish, dispose of, give, or cause to be sold, furnished, disposed of or given to a person under the age of twenty-one years, . . . spiritous liquors . . .,"[26] and it has been held that where a valid statute enacted for public safety[27] provides that a certain thing must or must not be done, if a failure to comply with the statute is a proximate cause of the injury to another (which is usually a jury question[28]) such failure is actionable negligence per se.[29]

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[22] *Supra* note 10, 156 A.2d at 10.

[23] Southwestern Coca Cola Bottling Co. v. Northern, 65 Ariz. 172, 177 P.2d 219 (1947); Owl Drug Co. v. Crandall, 52 Ariz. 322, 80 P.2d 952 (1938); Southern Pac. Ry. of Mexico v. Gonzales, 48 Ariz. 260, 61 P.2d 377 (1936); Salt River Valley Water Users' Ass'n. v. Compton, 39 Ariz. 491, 8 P.2d 249 (1932); ARIZ. REV. STAT. ANN. § 4-244 (9) (1956).

[24] Pratt v. Daly, 55 Ariz. 535, 104 P.2d 147 (1940).

[25] *Ibid.*

[26] ARIZ. REV. STAT. ANN. § 4-244 (9) (1956).

[27] Mendelsohn v. Superior Court, 76 Ariz. 163, 261 P.2d 983 (1953).

[28] Nichols v. City of Phoenix, 68 Ariz. 124, 202 P.2d 201 (1949); Valley Transp. System, 67 Ariz. 380, 197 P.2d 269 (1948).

[29] Mercer v. Vinson, 85 Ariz. 280, 336 P.2d 854 (1959); Anderson v. Morgan, 73 Ariz. 344, 241 P.2d 786 (1952); Cobb v. Salt River Valley Water Users' Ass'n. 57 Ariz. 451, 114 P.2d 904 (1941); Pratt v. Daly, 55 Ariz. 535, 104 P.2d 147 (1940).

In Nichols v. City of Phoenix, 68 Ariz. 124, 202 P.2d 201 (1949), involving the negligent operation of a bus, the court pointed out that a person is liable for breach of his duty to provide against another's independent illegal act, which might have been anticipated, notwithstanding production of injuries to third persons by the

In the only two cases bearing upon the liability of the vendor of intoxicating liquors to a third person injured by the actions of one who has become intoxicated, the Arizona court has indicated that the basis of any such liability must be predicated upon legislative direction.[30] The court restated the general principle that at common law there is no liability in tort on the part of the tavern keepers for the actions of their customers which result in injury to third persons off the premises of the vendor.[31] The reasoning has followed the majority decisions which determine the absence of tort liability on the fact that there are no Civil Damage Laws and the fact that the liquor vendor's act is not the efficient cause of the damage. "The proximate cause is the act of him who imbibes in the liquor."[32]

In *Collier v. Stamatis*[33] the Arizona court points out that notwithstanding the illegal sale of intoxicants to a minor, the minor was capable of accepting or refusing the liquor and the act of acceptance and voluntary consumption intervened sufficiently to make the act of service the remote cause of the subsequent loss of the minor's services. Nevertheless, in *Pratt v. Daly*,[34] the same court allowed a common law negligence action against a tavern owner who, after notice from a wife that her husband was an habitual drunkard, continued to serve him notwithstanding his inability to refuse consumption. The court found that the husband who died as a result of consumption of alcohol, was incapable of voluntary action and analogized the case to a situation where an addict was furnished with harmful drugs, the consumption of which was beyond the voluntary control of the individual. The court was able to find that the sale of the intoxicant was so merged with the consumption, due to the lack of the patron's will, that they became one act, and that being the act of the vendor. This act in turn became the proximate cause of the loss of consortium upon the husband's death.

Thus it would appear that the law as it now exists in Arizona, would not under the facts of the *Rappaport* case, allow recovery based upon common law negligence in the absence of a showing that due to the loss of volition or will on the part of the consumer, the sale and the act of consumption had merged to become the same act. Conversely, it is probable that a liquor vendor might be held liable in damages for the reasonably foreseeable results of an illegal sale to persons having no discretion or will to refuse the alcohol and which consumption resulted in injury to third persons.

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intervention of such an act. This reasoning would appear to fit the facts of the *Rappaport* case.

[30] Collier v. Stamatis, 63 Ariz. 285, 162 P.2d 125 (1945); Pratt v. Daly, 55 Ariz. 535, 104 P.2d 147 (1940).

[31] Cases cited note 30 *supra*.

[32] Collier v. Stamatis, *supra* note 30, at 288, 162 P.2d at 126.

[33] *Supra* note 30.

[34] *Supra* note 30.