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Torts--Wrongful Death Action against Saloon Keeper by Widow and Children

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TORTS. WRONGFUL DEATH ACTION AGAINST SALOON KEEPER BY WIDOW AND CHILDREN

The decision in the case of *Cole v. Rush*,[1] should be of interest to all tavern owners. In this case the Supreme Court of California reversed a prior decision by the Superior Court, Los Angeles County, and held a tavern owner and the bartender liable for the wrongful death of the plaintiff's husband and father.

The action was instituted by the widow and minor children of the decedent to recover damages for loss of comfort and support, suffered by them because of the "wrongful death" of their husband and father. It was alleged that on October 13, 1950, James Bernard Cole was a patron of the Tropic Isle Cafe. This cafe was owned by the defendant who sold and furnished to Cole alcoholic beverages which Cole drank. Prior to going on the defendant's premises Cole was not intoxicated. After he drank the beverages furnished to him he became intoxicated. Plaintiffs alleged that defendant well knew that Cole was normally of quiet demeanor, but that when intoxicated, he became belligerent, pugnacious, and quarrelsome. Prior to the date in question, plaintiff, Dorothea Cole, had requested defendant not to give, sell, or furnish intoxicating beverages to Cole in a sufficient quantity to allow him to become intoxicated. It was alleged that because of such intoxication on the day in question, and as a proximate result of the liquor sold to him, Cole became belligerent, pugnacious, and quarrelsome, and engaged in fisticuffs with one Franklin Leonard. Cole was struck by Leonard and fell to the pavement, striking his head against the concrete. The fall caused a subarachnoid hemorrhage from which Cole died immediately

California has no civil damage, or Dramshop Act. These acts provide in substance for " liability on the part of persons selling or giving away intoxicating beverages to any person who shall sustain injury or damage to his person, property, or means of support in consequence of or on account of intoxication "[2]

The case presents several questions: Whether, at common law, the surviving spouse and children of a decedent has a cause of action against one who, with notice, sells intoxicating beverages to a patron? Whether the selling, or the drinking, of the liquor is the proximate cause of subsequent injuries? Finally, whether the common law drug rule should be applied to these facts?

Since California has no civil damage, or Dramshop Act the common law rule is in effect. The common law gives no remedy for injury or death following the mere sale of liquor to the ordinary man. No liability is imposed on the seller for damages resulting from the intoxication of customers.[3] Therefore, it would seem to follow, that if such a customer were killed, his survivors could not recover.[4]

The cases relied upon by the plaintiffs are distinguishable from the case under

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[1] 271 P.2d 47, 42 A.C. 895 (rehearing granted).

[2] 30 AM. JUR. 612.

[3] Fleckner v. Dionne, 94 Cal.App.2d 246, 210 P.2d 530 (1949), Hitson v. Dwyer, 61 Cal. App.2d 803, 143 P.2d 952 (1943), Lammers v Pacific Electric Ry Co., 186 Cal. 379, 199 Pac. 523 (1921), Howlett v Doglio, 402 Ill. 311, 83 N.E.2d 708, 6 A.L.R.2d 790 (1949), Tarwater v Atlanta Co. Inc., 176 Tenn. 510, 144 S.W.2d 746 (1940), 48 C.J.S., *Intoxicating Liquors* §§ 430–431, 30 AM. JUR., *Intoxicating Liquors*, § 607

[4] Scott v. Greenville Pharmacy, 212 S.C. 485, 48 S.E.2d 324, 11 A.L.R.2d 745 (1948) (barbiturate sale), Demge v. Feierstein, 222 Wis. 199, 268 N.W 210 (1936) (liquor sale), 30 AM. JUR., *Intoxicating Liquors* § 610; 8 CAL. JUR. 988–989.

present discussion.[5] This line of cases is the exception to the common law rule of non-liability, and liability is predicated on the fact that the saloonkeeper does not use reasonable care in maintaining order for the safety of his guests.

In the case of *Pratt v. Daly*,[6] also relied on by the Coles, the plaintiff's wife was permitted to recover damages resulting from defendant's sale of intoxicating liquor to her husband when the defendant had knowledge of the fact that the husband was a habitual drunkard. The court said, " it is incumbent upon the plaintiff to prove that to the knowledge of the defendant such a stage (lack of volition towards intoxicants) has been reached by the consumer . . "[7]

The plaintiff can not obligate the defendant to refuse to sell the deceased any products authorized by his license. Under California Civil Code Section 51, the defendant is under obligation by penalty of fine to sell to the deceased prior to the time of violating the law. Violating the law in the instant case would occur upon serving alcoholic beverages to an "obviously intoxicated person."[8] It was not shown by the plaintiffs that Cole was "obviously intoxicated" at the time of the sale.

In order for the plaintiffs to recover the defendant's act must be the proximate cause of the injury.[9] There are cases holding that it is the consumption of the liquor by the inebriate and not the sale which is the proximate cause of the injury.[10]

In the case of *Reinhardt v. Fritzche*,[11] the court said, "A widow or child, at common law, could recover no damages because of the death of a husband or father resulting from the consumption of intoxicating drinks, although they might both suffer by reason thereof in their means of support."[12] In the decision of *King v. Henkie*,[13] the court stated, "Had it not been for the drinking of the liquor after the sale, which was a secondary or intervening cause coöperating to produce the fatal result, and was the act of the deceased, not of the defendants, the sale itself would have proved entirely harmless. Hence it cannot be said that the wrongful act of the defendants in making the sale of the liquor caused the death, but rather, his own act in drinking it."[14]

The term "wrongful act" as used in California Civil Code Section 377, allowing recovery for wrongful death by heirs or personal representatives, has been held to contemplate an act wilfully or negligently directed against the person and therefore does not include a sale of liquor. The rule is stated in *Britton v. Samuels*,[15] where the court said, "The proximate cause of the death, therefore, was not the wrongful or unlawful act (sale of liquor) complained of."[16] It has never been held

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[5] Cherbonnier v. Rafalovich, 88 Minn. 307, 92 N.W 1124, 60 L.R.A. 773 (1903), Peck v. Gerber, 154 Or. 126, 59 P.2d 675, 106 A.L.R. 996 (1936).

[6] 55 Ariz. 535, 104 P.2d 147 (1940).

[7] See note 6 *supra* at 539, 104 P.2d at 151.

[8] CALIF. STATS. 1935 (Alcoholic Beverage Act) Act 3796, p.1123.

[9] 30 AM. JUR., *Intoxicating Liquor* § 611.

[10] King v. Henkie, 80 Ala. 505, 60 Am. Rep. 119 (1886), Seibel v. Leach, 233 Wis. 54, 288 N.W. 774, 6 N.C.C.A. (N.S.) 629 (1939), 130 A.L.R. 357, 358 (1941), 30 AM. JUR., *Intoxicating Liquors* § 611.

[11] Reinhardt v. Fritzche, 69 Hun. 565, 23 N.Y.S. 958, 130 A.L.R. 365 (1893).

[12] See note 11 *supra* at 569, 23 N.Y.S. at 960.

[13] King v. Henkie, *supra* note 10.

[14] See note 13 *supra* at 510, 60 Am. Rep. at 122.

[15] Britton v. Samuels, 143 Ky. 129, 136 S.W 143, 34 L.R.A. (N.S.) 1036 (1911), 30 AM. JUR., *Intoxicating Liquor, Effect of General Death Act* § 610.

[16] See note 15 *supra* at 130, 136 S.W. at 144.

that the sale of liquor is culpable negligence which would impose legal liability for damages upon the vendor or donor.[17]

The court in the instant case, deciding for the plaintiff, based part of its decision on the following reasoning. That the proximate cause of an injury is the original act even though the act of a third person intervenes, if a person of ordinary prudence could reasonably anticipate the probability of the third person's intervening conduct. The intervention of the independent act of a third party, between the wrong complained of and the injury sustained, breaks the causal connection if the intervening act was the direct or immediate cause of the injury Consequently, in such a case, there can be no recovery except as against the person whose immediate agency produced the injury [18] It has been held that the intoxication is not the proximate cause of death of. or injury to, an intoxicated person caused by another person who is insulted or menaced by the intoxicated person.[19]

The court in the case under discussion felt, by a narrow margin of four to three, that the act of the defendant, the selling of the liquor, and the act of the deceased, the drinking of the liquor, merged into one act and became the act of the defendant, thus rendering the defendant liable for the subsequent injuries. "There is general agreement that the deceased's contributory negligence, assumption of risk, or consent to the defendant's conduct will defeat recovery for his death "[20] Granting that the defendant was guilty of actionable negligence in serving decedent the drink that made him intoxicated, decedent was equally guilty of negligence in drinking it.[21] In some instances at least, the contributory negligence is imputable to the plaintiff and prevents recovery against the vendor.[22]

In *Fleckner v. Dionne*,[23] the defendant tavernkeeper knew that Dionne was a minor and sold the liquors to him while he was already under the "severe influence of intoxicating liquors." He knew also that Dionne had upon or near the premises an automobile and would thereafter drive. Injury did occur from an automobile accident in which Dionne was at fault. The court held for the defendant, even though it would seem that the bartender's knowledge of the possible consequences of his actions was much more specific and extensive in the *Fleckner* case than in the case under comment. The court in this case relied upon *Hitson v. Dwyer*[24] and *Lammers v. Pacific Electric Ry. Co.*[25] In the *Hitson* case it was held that the proximate cause of the injury was the drinking of the liquor rather than the wrongful sale thereof to an obviously intoxicated person. Thus in the *Fleckner* case where the possibility of harm was apparent, recovery was denied. But in the *Cole* case, where it was only alleged that the defendant was informed of the belligerent disposition of the deceased when he was intoxicated, recovery was allowed. Logically the decicions are not consistent.

At common law, it was held that a wife could bring an action for "wrongful death" against one who sold habit-forming drugs to a husband with knowledge

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[17] Cruse v Aden, 127 Ill. 231, 20 N.E. 73, 3 L.R.A. 327 (1889).

[18] Schmidt v Mitchell, 84 Ill. 195, 25 Am. Rep. 446 (1876), 30 AM. JUR., *Intoxicating Liquor, Intervening Wrongful Act* § 623.

[19] Shugart v. Egan, 83 Ill. 56, 25 Am. Rep. 359 (1876).

[20] PROSSER, TORTS 966.

[21] 130 A.L.R. 359.

[22] 130 A.L.R. 358.

[23] Fleckner v Dionne, *supra* note 3.

[24] Hitson v. Dwyer, *supra* note 3.

[25] Lammers v Pacific Electric Ry Co., *supra* note 3.

that the drug was intended to satisfy a craving induced by habitual use.[26] The court in the instant case based part of the decision on the reasoning that it would be illogical to hold because one substance is a drug in the technical sense of the term, and another is a liquor, different rules should apply Therefore, under the application of the common law drug rule the wife and children could bring this action for "wrongful death" for the loss of consortium and support. Yet, the plaintiffs in the instant case alleged no such lack of volition. That is, it was not alleged that the deceased was an alcoholic or was a user of intoxicants to the point that he could no longer control his habits with respect to such intoxicants. In order to have a cause of action for which the plaintiffs could recover, the deceased must have lost his volition and the defendants must have been informed of the lack of such volition. At common law there could be no recovery unless the seller was aware of the purchaser's weakness. Thus, if this were the case, which it is not, the plaintiffs could logically recover. As stated in *Seibel v. Leach,*[27] "Courts may in proper instances apply old rules to newly created conditions, but they can not create new rules for conditions already regulated."[28] In the instant case, the plaintiffs sought to hold the defendants liable, in part, by trying to prove that the defendant's act of selling liquor to the deceased was the proximate cause of the death. This, in the light of the preceding discussion and cases cited relative to the discussion, is not possible logically

If it were held that liability could be imposed upon the vendor, under the common law drug rule, without showing that the decedent lacked volition, and that the vendor had knowledge of this fact, it would place an unreasonable burden upon the vendor. The plaintiffs did not prove or even attempt to prove this fact, but alleged that deceased was an "able-bodied man." The defendant would be able to sell the deceased drinks, but would have to determine at which point he should refuse service. It is a matter of common knowledge that the amount or kind of liquor which will cause intoxication varies with drinkers and occasions. It has been shown that even a medical doctor does not have this knowledge.[29] It would seem that such a responsibility can not logically be imposed.

It would appear that if the legislature wanted to hold the owners and bartenders of taverns liable in such a case they would have revised the common law rule. The fact remains that there has been no such revision. Therefore, in the absence of affirmative legislation the common law rule of non-liability for tavern owners for the sale of intoxicating liquor should be controlling in the instant case. It would seem the Supreme Court was in error in overruling the lower court.

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[26] Tidd v. Skinner, 225 N.Y. 442, 122 N.E. 247, 3 A.L.R. 1145 (1919) (morphine), Hoard v. Peck, 56 Barb. 202 (N.Y. 1867), Holleman v. Harward, 119 N.C. 150, 25 S.E. 972 (1896), Flandermeyer v. Cooper, 85 Ohio 327, 98 N.E. 102, 40 L.R.A. (N.S.) 360 (1912) (morphine), Moberg v. Scott, 38 S.D. 442, 161 N.W. 998, L.R.A. 1917D, 732 (1917) (opium).

[27] Seibel v. Leach, *supra* note 10.

[28] See note 10 *supra* at 55, 288 N.W at 775.

[29] SCIENCE NEWS LETTER, October 11, 1952, p.223.