Missouri Law Review

Volume 44
Issue 4 *Fall 1979*

Article 7

Fall 1979

Tort Liability for Suppliers of Alcohol

Steven P. Callahan

TORT LIABILITY FOR SUPPLIERS OF ALCOHOL

Alcohol consumption is a widely-accepted form of social conduct which many people consider a necessary gesture of hospitality. At the same time, it is certainly this nation's greatest drug abuse problem in terms of wide-spread use and direct causal relationship with accidental injuries and criminal conduct.[1] The role of alcohol consumption in traffic accidents is well-known and extensively documented.[2] Some studies indicate that as many as 73% of traffic fatalities involved drivers who were at least partially inebriated.[3]

The role of alcohol in violent crimes is not so widely understood. Research in some cities has shown that an extraordinary proportion of murders and violent assaults involved perpetrators and *victims* who were under the influence of alcohol at the time of the crime.[4] Statistics of the Federal Bureau of Investigation reveal that drunkenness, disorderly conduct, and other alcohol-related crimes comprise a significant percentage of all arrests in this country.[5]

Because of the danger to human life and property inherent in the abuse of alcohol, an increasing number of jurisdictions impose tort liability on persons whose acts of supplying alcohol to another result in injury. The development of this tort has been hampered by the importance of alcohol as a social institution. Courts have been reluctant to treat the act of supplying alcohol as dangerous when so many people consider it a friendly gesture. This comment will examine the development of this tort, the rationale for imposing liability, and the trend toward expanding liability.

An essential element of tort liability is a wrongful or negligent act which results in injury to another person.[6] The sale or distribution of

---

1. E. BRECHER, LICIT AND ILLICIT DRUGS 260-64 (1972).

2. *See generally* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: DRUNKENNESS (1967) [hereinafter cited as TASK FORCE REPORT: DRUNKENNESS].

3. J. COLEMAN, ABNORMAL PSYCHOLOGY AND MODERN LIFE 414 (5th ed. 1976); J. FINCH & J. SMITH, PSYCHIATRIC AND LEGAL ASPECTS OF AUTO FATALITIES 49 (1970) (concerning automobile fatalities in Houston, Texas, from October 15, 1967, to April 15, 1968).

4. Researchers in Ohio during 1954 found that 43% of killers studied had been drinking at the time of the offense. Another study of 588 homicides in Philadelphia in 1958 showed that 64% were committed while the victim, perpetrator, or both were under the influence of alcohol. Both of these studies and others are cited in TASK FORCE REPORT: DRUNKENNESS, *supra* note 2, at 40-41.

5. FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS 175 (1977).

6. W. PROSSER, THE LAW OF TORTS 7 (4th ed. 1971).

alcoholic beverages to a minor or intoxicated person can be a wrongful act under the laws of almost every state, as such sale or distribution is illegal.[7] In addition, several states have statutes specifically authorizing tort actions when the wrongful delivery of alcohol results in injury.[8] These "dramshop acts" often expand the situations in which distribution of alcohol may be tortious.

Injuries resulting from alcohol use fall into two general categories. Occasionally, the plaintiff will suffer injury because of his own intoxication. More often, an inebriated minor or drunken adult who was illegally served alcohol injures another person, the plaintiff, who sues the supplier of the alcohol.

Even when these two elements of tort liability—the wrongful act and subsequent injury—are present, the third essential element, proximate causation, has been a major stumbling block to the development of tort liability for suppliers of alcohol.[9] The question is not whether intoxication is a cause of the injury; rather, it is whether the act of supplying the beverage or the act of consuming it is the proximate, or nearest, cause.

Until twenty years ago, most courts held that the consumption of the alcohol was the proximate cause of the ensuing injuries, and that the supplier of the liquor was not liable.[10] There have been, however, several exceptions to this general rule. Dramshop acts are one such exception. The

---

7. The Missouri statute is typical. Under RSMo § 311.310 (1978):

> [A]ny person whomsoever, except his or her parent or guardian, who shall procure for, sell, give away or otherwise supply intoxicating liquor to any person under the age of twenty-one years, or to any intoxicated person or any person appearing to be in a state of intoxication . . . shall be deemed guilty of a midemeanor.

See, e.g., ARK. STAT. ANN. § 48-901 (Supp. 1977); ILL. REV. STAT. ch. 43, § 131 (1976); KY. REV. STAT. § 244.080 (1972); OKLA. STAT. tit. 37, § 537 (1971).

8. Fifteen states currently have civil damage acts: ALA. CODE tit. 7, §§ 121-122 (1968); CONN. GEN. STAT. § 30-102 (1960); ILL. REV. STAT. ch. 43, §§ 135-136 (1969); IOWA CODE § 123.92 (1971); MICH. COMP. LAWS § 436.22 (1976); MINN. STAT. § 340.95 (1978); NEV. REV. STAT. § 202.070 (1969); N.Y. GEN. OB. LAW § 11-101 (McKinney 1978); N.D. CENT. CODE § 5-01-06 (1975); OHIO REV. CODE ANN. §§ 4399.01, .05, .07, .08 (Page 1973); OR. REV. STAT. § 30.730 (1977); R.I. GEN. LAWS §§ 3-11-1,-2 (1976); VT. STAT. ANN. tit. 7, § 501 (1972); WIS. STAT. § 176.35 (1975); WYO. STAT. § 12-5-502 (1977). Nevada and Oregon restrict recovery to members of the families of persons to whom alcohol is supplied illegally. Most statutes allow recovery by any injured person. At least five states (Delaware, Maine, North Carolina, Oklahoma and Washington) have repealed dramshop acts since 1962. Compare the above list with that in Johnson, *Drunken Driving—The Civil Responsibility of the Purveyor of Intoxicating Liquor*, 37 IND. L.J. 317, 321 n.27 (1962).

9. 48 C.J.S. *Intoxicating Liquors* § 430, at 717 (1947).

10. *See, e.g.*, King v. Henkie, 80 Ala. 505 (1886); Collier v. Stamatis, 63 Ariz. 285, 162 P.2d 125 (1945); Fleckner v. Dionne, 94 Cal. App. 2d 246, 210 P.2d 538 (1949); Nolan v. Morelli, 154 Conn. 432, 226 A.2d 383 (1967); Howlett v. Doglio, 402 Ill. 311, 83 N.E.2d 708 (1949).

other major exception involves various factors which transform the delivery of alcohol into an intentional tort.

One such factor is the supplier's knowledge that providing alcohol to a certain person will probably cause injury. Sometimes, an alcoholic's spouse or a close family member will request that the proprietor of the alcoholic's favorite drinking establishment stop selling to him. Such a request rarely succeeds.

Swanson v. Ball[11] typifies a not uncommon situation. Mr. Swanson's addiction to alcohol interfered with his health and home life. His wife sent several letters to the local tavern, telling the proprietor to refrain from serving liquor to her husband. The bartender continued to sell drinks to Mr. Swanson, who became ill and died. Mrs. Swanson sued the tavern-owner for loss of her husband's aid, society, and comfort. The petition, which stated that the barkeep's actions were willful, malicious, and illegal, was held to state a cause of action at common law.

Pratt v. Daly[12] was a similar case. The plaintiff's husband was an alcoholic. Pratt sued the bartender, alleging that he sold liquor to her husband knowing of his addiction. The Arizona Supreme Court held that Pratt's petition stated a claim for an intentional tort.

The appellate courts in *Swanson* and *Pratt* took an interesting approach in deciding these cases. Both courts recognized the dangerous addictive properties of alcohol, and relied on an older line of cases holding that druggists who sold customers laudanum (a distillation of opium and alcohol) knowing of the customers' addictions were liable in tort to the families of the addicts.[13]

Just as alcohol addicts have particular problems, so do persons who are unfamiliar with the effects of liquor. In *Ibach v. Jackson,*[14] the plaintiff's decedent, a woman who rarely drank, was lured to a hotel room by the defendant and plied with liquor. The defendant was not a commercial supplier of alcohol, and was obviously not interested in selling anything on this occasion. The next morning, the decedent was found beaten to death by persons unknown. Her next of kin sued the defendant for wrongful death. Unable to prove that he killed the decedent, the plaintiffs alleged that he had forced her to drink and failed to properly care for her while she was in his control. The Oregon Supreme Court held that this petition stated a cause of action.

The *Ibach* case is representative of situations in which the defendant plays an active role (beyond the act of providing liquor) in causing the plaintiff's injury. The types of actions which can constitute an intentional tort in this area are limited only by one's imagination.

11. 67 S.D. 161, 290 N.W. 482 (1940).
12. 55 Ariz. 535, 104 P.2d 147 (1940).
13. *See* Tidd v. Skinner, 225 N.Y. 422, 122 N.E. 247 (1919); Moberg v. Scott, 38 S.D. 422, 161 N.W. 998 (1917).
14. 148 Or. 92, 35 P.2d 672 (1934).

One such example is the Kentucky case of *Nally v. Blandford.*[15] Nally entered the defendant's liquor store and announced to all present that he would down an entire quart of whiskey in one long swallow. The defendant sold him a quart and several bets were made. Nally then emptied the bottle, fell into a coma, and died. His wife's petition was held to state a cause of action for an intentional tort on the basis of an allegation that the defendant knew of the decedent's dangerous intention at the time of the sale.

In other cases, the intentional aspects of the defendant's actions were even more blatant. In *Galvin v. Jennings,*[16] the plaintiff became so intoxicated in the defendant's bar that the bartender had to help him out of the building at closing time. Although the plaintiff was too drunk to move under his own power, the defendant's employees placed him inside his car and gave him instructions on how to turn the steering wheel to get out of the parking lot. A collision ensued shortly thereafter. The Third Circuit reversed a judgment for the defendant, holding that the plaintiff's contributory negligence was no bar in a case alleging an intentional injury.

The other major exception to the traditional rule that a supplier of alcohol is not responsible for resulting injury exists when there is a dramshop act in force.[17] Generally, dramshop acts create a statutory cause of action for injuries caused by intoxicated persons against the persons who supplied them with alcohol. The wording of many of these statutes indicates that their primary purpose is to protect the families of intoxicated persons from the disruption often caused by habitual drunkenness.[18]

Because this tort is statutorily defined, the appellate decisions usually concern matters of interpretation. Two questions dominate the recent case law in this area. The first is whether the intoxicated party himself has a cause of action for his own injuries. The second issue is undoubtedly the most important question in the development of tort liability for suppliers of liquor: Is the social supplier liable as well as the seller?

The question of whether the intoxicated person may sue for his own injuries raises the issue of contributory negligence. In most cases, the consumption of alcohol is a voluntary act, and the consumer is at least as much at fault as the supplier. In that sense, he contributes to his own injury in a

15. 291 S.W.2d 832 (Ky. 1956).

16. 289 F.2d 15 (3d Cir. 1961). Similarly, in Brockett v. Kitchen-Boyd Motor Co., 24 Cal. App. 3d 87, 100 Cal. Rptr. 752 (1972), a youthful and intoxicated guest at an office party was loaded into his car by fellow employees. His petition for injuries resulting from a subsequent crash was held to state a claim.

17. Missouri's Dramshop Act, codified in RSMo § 4487 (1929), was repealed in 1939.

18. Michigan's statute is typical: "Every wife, husband, child, parent, guardian, or other persons who shall be injured in person or property, means of support or otherwise, by an intoxicated person . . . shall have a right of action." MICH. STAT. ANN. § 18.993 (1969). *See also* RSMo § 4487 (1929) (repealed 1939), which began with the same words.

way that a third party injured by a drunk does not. For that reason, many courts refuse to grant relief to the intoxicated party.[19] However, the next of kin may recover for the death or loss of services of the intoxicated person in spite of his negligence.[20]

The issue of contributory negligence has been overshadowed by the more controversial question of what parties are liable under the dramshop acts. It is clear that liability extends to commercial suppliers. In fact, dramshop acts approach a strict liability theory in their application to liquor vendors.

The strict liability aspects of the dramshop acts for sellers of alcohol are demonstrated in *Kiriluk v. Cohn.*[21] In that case the plaintiff's husband was served liquor at the defendant's bar until he became extremely intoxicated. When he returned home, he began to chase his wife around the house, threatening to kill her. She grabbed a pistol and shot him to death. She then sued the tavern owner for the wrongful death of her husband under the Illinois Dramshop Act and recovered $10,000. The Illinois Court of Appeals affirmed the verdict, holding that the jury could have found the serving of the liquor to be the proximate cause of his death.

The more controversial question under the dramshop acts is whether liability extends to the social purveyor of alcohol. Although most dramshop statutes specify that "giving" as well as selling alcohol may be a tortious act,[22] most courts are less willing to extend liability to the social supplier of alcohol. The courts treat this question as one of statutory interpretation, but it should be noted that most dramshop statutes are nearly uniform in wording.

While in force, the former Iowa statute was identical in part with the current language in the Illinois statute: "Every person who is injured" shall have a cause of action "against *any* person" who contributed to that injury by selling or *giving* liquor contrary to the laws of the state.[23] But while the

---

19. James v. Wicker, 309 Ill. App. 397, 33 N.E.2d 169 (1941); Hollerud v. Malamis, 20 Mich. App. 748, 174 N.W.2d 626 (1969); Mitchell v. Shoals, Inc., 19 N.Y.2d 338, 280 N.Y.S.2d 113, 227 N.E.2d 21 (1967).

20. Allowing the negligent acts of the intoxicated person to bar recovery by his relatives would defeat the purpose of the dramshop acts, which is to reimburse persons injured by the drunk. *See* Williams v. Klemesrud, 197 N.W.2d 614, 617 (Iowa 1972). The Minnesota Dramshop Act specifies that the state comparative fault laws do not apply to actions brought by spouses and children under the dramshop statute. MINN. STAT. ANN. § 340.95 (1967).

21. 16 Ill. App. 2d 385, 148 N.E.2d 607 (1958).

22. *See, e.g.*, ILL. REV. STAT. ch. 43, § 135 (1969); IOWA CODE § 123.92 (1977); MICH. STAT. ANN. § 18.993 (1969).

23. *Compare* former IOWA CODE § 129.2 (1966) *with* ILL. REV. STAT. ch. 43, § 135 (1969). Both state that "[e]very person who is injured in person or property . . . by any intoxicated person has a right of action . . . against any person who by selling or giving to another contrary to the provisions of this title any intoxicating liquors."

Iowa court in *Williams v. Klemesrud*[24] was willing to extend liability to a non-vendor who bought a bottle of vodka for a twenty-year-old friend as a favor (after which the minor collided his car with the plaintiff's vehicle), the Illinois courts have refused to hold social suppliers liable.[25]

The reasons for the distinction are twofold. While Iowa courts interpreted their act as primarily remedial,[26] the Illinois courts hold that their act is punitive, and must be strictly construed. This reason is largely illusory, however, since the Iowa act in effect at the time of the *Williams* decision specifically provided for exemplary damages.[27] The major reason for the reluctance of Illinois and other jurisdictions to expand liability is that it "would open the floodgates of litigation."[28] The liability of social suppliers of alcohol will continue to be an important area of development, both under the dramshop acts and in common law negligence actions.

In fact, dramshop acts and actions based on intentional injuries are of limited importance in this area of tort law, while the significant developments are occurring in common law negligence actions. Until recently, courts have almost universally held that "it is not a tort to sell liquor to an able-bodied man."[29] This general rule protected persons who sold liquor to able-bodied women and able-bodied minors as well.[30]

The usual justification for this rule was that supplying alcohol was not the cause of the ensuing injury.[31] In every negligence action, the plaintiff must show the existence of a duty, and a breach of that duty which was the proximate cause of the plaintiff's injury.[32] The breach of duty occurs when the supplier gives or sells liquor to another in violation of a statute or regulation. Even when such a breach existed, however, most courts held

---

24. 197 N.W.2d 614 (Iowa 1972). *See also* Ross v. Ross, 294 Minn. 115, 200 N.W.2d 149 (1972), a similar case imposing liability on a person who gave liquor to his minor brother.

25. Miller v. Owens-Illinois Glass Co., 48 Ill. App. 2d 412, 199 N.E.2d 300 (1964). In LeGault v. Klebba, 7 Mich. App. 640, 152 N.W.2d 712 (1967), the Michigan court also declined to hold social suppliers liable.

26. Wendelin v. Russell, 259 Iowa 1152, 147 N.W.2d 188 (1966). In 1971, the Iowa legislature amended the dramshop statute to limit liability to licensees and permitees only. IOWA CODE § 123.92 (1973). It is interesting to note that Iowa has only state-run liquor stores. *See* IOWA CODE §§ 123.22-.23 (1977).

27. Dramshop liability at the time of the *Wendelin* decision was governed by IOWA CODE § 129.2 (1966). The "exemplary damages" provision was deleted in 1971. *See* IOWA CODE § 123.92 (1973).

28. Miller v. Owens-Illinois Glass Co., 48 Ill. App. 2d 412, 423, 199 N.E.2d 300, 306 (1964).

29. Cruse v. Aden, 127 Ill. 231, 234, 20 N.E. 73, 74 (1889).

30. *See* Collier v. Stamatis, 63 Ariz. 285, 162 P.2d 125 (1945) (no recovery for the mother of a 15-year-old girl who was arrested after the defendant gave the child liquor); Fleckner v. Dionne, 94 Cal. App. 2d 246, 210 P.2d 530 (1949) (plaintiff was hit by an automobile driven by an intoxicated minor).

31. 48 C.J.S. *Intoxicating Liquor* § 450, at 717 (1947).

32. Nichols v. Blake, 418 S.W.2d 188 (Mo. 1967).

that the consumption, rather than the supplying of liquor, was the proximate cause of the injury.[33]

These holdings stated a conclusion rather than a reason, and merely reflected the reluctance of many courts to extend tort liability. One possible logical basis for the general rule is that the supplier of liquor could not be expected to foresee the likelihood of injury. This argument may be tenable in the sense that a statistically small percentage of any tavern's or liquor store's customers will suffer injury as a result of intoxication in any given time period.

But foreseeability and proximate causation are not really questions of quantity or frequency of injury. The two concepts are closely intertwined and concern logical possibilities of injury rather than statistical probabilities.[34]

The questions of causation and foreseeability were considered by the New Jersey Supreme Court in its landmark decision in *Rappaport v. Nichols.*[35] The defendant Hub Bar served liquor to a minor, who crashed his automobile into that of Arthur Rappaport, killing him. The New Jersey Dramshop Act has been recently repealed, but the supreme court held that the petition stated a cause of action against Hub Bar at common law:

> When alcoholic beverages are sold by a tavern keeper to a minor or intoxicated person, the unreasonable risk of harm not only to the minor or intoxicated person, but also to the traveling public may readily be recognized and foreseen; this is particularly evident in current times when traveling by car to and from the tavern is so commonplace and accidents resulting from drinking are so frequent.[36]

The California Supreme Court accepted this reasoning in *Vesely v. Sager:* "If such furnishing [of alcohol] is a proximate cause, it is so because the consumption, resulting intoxication, and injury-producing conduct are foreseeable intervening causes, or at least the injury-producing conduct is one of the hazards which makes such furnishing negligent."[37]

With the collapse of the protective walls of causation and forseeability, the "floodgates of litigation" were open, at least where commercial suppliers of alcohol were concerned. Since the decision in *Rappaport,* a number of states and federal circuits have recognized common law negligence actions against persons who furnish alcohol in violation of the law.[38]

---

33. *See* cases cited note 10 *supra.*

34. Milwaukee & St. P. Ry. v. Kellogg, 94 U.S. 469, 475 (1876); Steele v. Woods, 327 S.W.2d 187, 195 (Mo. 1959); W. PROSSER, THE LAW OF TORTS § 43 (4th ed. 1971).

35. 31 N.J. 188, 156 A.2d 1 (1959).

36. *Id.* at 201, 156 A.2d at 8.

37. 5 Cal. 3d 153, 164, 486 P.2d 151, 159, 95 Cal. Rptr. 623, 631 (1971).

38. *See* Waynick v. Chicago's Last Dept. Store, 269 F.2d 322 (7th Cir. 1959), *cert. denied,* 362 U.S. 903 (1960); Deeds v. United States, 306 F. Supp.

Liquor laws are important in common law negligence actions because they provide a basis for finding a breach of duty: suppliers of alcohol have a duty to the public not to furnish alcohol to minors or intoxicated adults.[39] Because the statutes and regulations play such a crucial role in this tort, allegations of negligence per se are commonly joined with allegations of common law negligence.[40]

Negligence per se is an attractive concept to plaintiffs because once they demonstrate a violation of a statute, they are relieved of the burden of showing that the defendant's action was negligent.[41] However, the plaintiff in a negligence per se action must show in addition that the statute was designed to protect the class of persons of which he was a member against the type of injury actually suffered.[42]

Only the first requirement, that the plaintiff be a member of the class protected by the statute, has been a subject of much appellate litigation. The question arises in the following context: Did the legislature intend to protect only minors and intoxicated persons by prohibiting the delivery of liquor to them, or was the statute designed to protect the public in general?

Some courts have held that such legislative prohibitions were intended to protect only minors and intoxicated adults. In such a jurisdiction, a plaintiff who is injured by a minor or intoxicated adult who was served alcohol illegally cannot recover.

Missouri may follow this approach. In *Moore v. Riley,*[43] the plaintiff was struck in the face with a glass thrown by an underage patron of a Kansas City bar. The supreme court held that city ordinances prohibiting minors from being on the premises of taverns were for the protection of the minors' morality and that the plaintiff could not recover on the basis of negligence per se.

---

348 (D. Mont. 1969); Vesely v. Sager, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971); Prevatt v. McClennan, 201 So. 2d 780 (Fla. App. 1967); Elder v. Fisher, 247 Ind. 598, 217 N.E.2d 847 (1966); Pike v. George, 434 S.W.2d 626 (Ky. 1968); Adamian v. Three Sons, Inc., 353 Mass. 498, 233 N.E.2d 18 (1968); Ramsey v. Anctil, 106 N.H. 375, 211 A.2d 900 (1965); Berkely v. Park, 47 Misc. 2d 381, 262 N.Y.S.2d 290 (Sup. Ct. 1965); Weiner v. Gamma Phi Chapter of Alpha Tau Omega Fraternity, 258 Or. 632, 485 P.2d 18 (1971); Jardine v. Upper Darby Lodge, Inc., 413 Pa. 626, 198 A.2d 550 (1964); Mitchell v. Ketner, 54 Tenn. App. 656, 393 S.W.2d 755 (1965).

39. *See, e.g.,* RSMo § 311.310 (1978).

40. *See, eg.,* Coulter v. Superior Court, 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978); Colligan v. Cousar, 38 Ill. App. 2d 392, 187 N.E.2d 292 (1963); Elder v. Fisher, 247 Ind. 598, 217 N.E.2d 847 (1966); Soronen v. Olde Milford Inn, 84 N.J. Super. 372, 202 A.2d 208 (1964).

41. W. PROSSER, THE LAW OF TORTS § 36, at 200 (4th ed. 1971). In some states, however, proof of violation of the statute is merely "some evidence" of negligence. *See* Adamian v. Three Sons, Inc., 353 Mass. 498, 233 N.E.2d 18 (1968).

42. Endicott v. St. Regis Inv. Co., 445 S.W.2d 122 (Mo. 1969).

43. 487 S.W.2d 555 (Mo. 1972).

The same approach was followed by the Supreme Court of Oregon in *Weiner v. Gamma Phi Chapter of Alpha Tau Omega Fraternity.*[44] Jane Weiner was a guest at a fraternity party where liquor was served indiscriminately. She accepted a ride home with an intoxicated minor, who made an unsuccessful attempt to drive his car through a brick wall. She sued the fraternity, the owners of the ranch where the party was held, and the fraternity member who actually bought the liquor. The action against the individual fraternity member was based on negligence per se in supplying liquor to a minor. The court held that Weiner had no cause of action against him because the statute was for the protection of minors, not for the public in general.

Most jurisdictions which have considered this question hold that these statutes are for the protection of the general public, including minors and intoxicated adults. Thus, in these states, persons injured *by* intoxicated persons, as well as the minors and drunken adults themselves, can maintain actions against liquor suppliers.[45] At any rate, it is difficult to gauge the importance of problems which are unique to negligence per se actions for several reasons. First, most petitions in this area of tort law request relief for both common law and per se negligence.[46] Also, the wording of the petitions often makes it difficult to tell whether the claim is based on common law negligence, negligence per se, or both, because common law negligence petitions often incorporate statutes to establish the existence and breach of a legal duty.[47] Finally, it is not always clear whether the appellate decisions are upholding actions on the basis of one theory or both.[48]

Whichever theory is used, identical issues arise concerning the identity of the plaintiff and the type of injury suffered. In most cases, the plaintiff is injured by a minor or drunken adult who was illegally given liquor. Occasionally, the minor or drunken adult may recover for injuries he suffers himself. The causes of injuries suffered fall into two general categories: automobile accidents and violent conduct.

Most of the early negligence cases allowing recovery for wrongful sales of alcohol involved plaintiffs who were injured by minors or intoxicated adults in automobile crashes. *Waynick v. Chicago's Last Department Store*[49] involved a sale of liquor to an intoxicated person in Illinois and an

---

44. 258 Or. 632, 485 P.2d 18 (1971).

45. *See, e.g.,* Giardina v. Solomon, 360 F. Supp. 262 (M.D. Pa. 1973); Deeds v. United States, 306 F. Supp. 348 (D. Mont. 1969); Prevatt v. McClennan, 201 So. 2d 780 (Fla. Ct. App. 1967); Stachniewicz v. Mar-Cam Corp., 259 Or. 583, 488 P.2d 436 (1971).

46. *See, e.g.,* Elder v. Fisher, 247 Ind. 598, 217 N.E.2d 847 (1966); Soronen v. Olde Milford Inn, 84 N.J. Super. 372, 202 A.2d 208 (1964).

47. Colligan v. Cousar, 38 Ill. App. 2d 392, 187 N.E.2d 292 (1963); Jardine v. Upper Darby Lodge, 413 Pa. 626, 198 A.2d 550 (1964).

48. *See* Pike v. George, 434 S.W.2d 626, 629 (Ky. 1968); Jardine v. Upper Darby Lodge, 413 Pa. 626, 632, 198 A.2d 550, 553 (1964).

49. 269 F.2d 322 (7th Cir. 1959), *cert. denied,* 362 U.S. 903 (1960).

automobile crash in Michigan. The Seventh Circuit rejected the application of the dramshop statute of either state, but held that the petition stated a claim at common law. Another pioneer decision, *Rappaport v. Nichols,*[50] was a wrongful death case based on a sale to a minor and an ensuing two-car collision in which the plaintiff's decedent was killed.

Other cases arise from barroom brawls. *Corcoran v. McNeal*[51] involved a plaintiff who was attacked and thrown down a flight of stairs by a drunk in the defendant's tavern. The action was based on the failure of the taproom employees to protect the plaintiff, whose cries for help were ignored. In *Giardina v. Solomon,*[52] the court held that the defendant fraternity could be liable for furnishing liquor to a minor who assaulted the plaintiff at a party. In *Prevatt v. McClennan,*[53] the defendant tavern owner was held liable for serving liquor to two minors who, while engaging in a gunfight, shot the plaintiff. The causes of injuries which might suffice as a basis for liability are almost unlimited. Any injury traceable to a state of inebriation—falling or losing money[54]—could constitute a basis of recovery.

While most of the recent cases in this area of tort law have expanded liability, a number of defenses are available to liquor suppliers. Where a person who is served liquor in violation of a statute consequently suffers an injury, contributory negligence may be a defense. If the plaintiff or plaintiff's decedent is a minor who was wrongfully supplied with alcohol, some courts do not even address the issue of contributory negligence. A strong statutory policy of protecting minors from alcohol and its effects[55] bars the

50. 31 N.J. 188, 156 A.2d 1 (1959). *See also* text accompanying notes 35-36 *supra.*

51. 400 Pa. 14, 161 A.2d 367 (1960).

52. 360 F. Supp. 262 (M.D. Pa. 1973).

53. 201 So. 2d 780 (Fla. Ct. App. 1967). *See also* Stachniewicz v. Mar-Cam Corp., 259 Or. 583, 488 P.2d 436 (1971). In *Stachniewicz,* the court held that OR. REV. STAT. § 471.410(3), which prohibited supplying alcohol to "visibly intoxicated" persons, was too vague to be used as a basis for negligence per se. Nevertheless, a state liquor control regulation against permitting "loud, noisy, disorderly or boisterous conduct on licensed premises" would allow the plaintiff to recover for negligence per se. The author has found no cases in which a statute prohibiting sales to "intoxicated persons" has been held too vague, despite the fact that such a statute imposes a heavier burden on the liquor supplier than one which prohibits sales to "*visibly* intoxicated persons." Some people can, of course, be intoxicated without showing it. Oregon and California are among the few states using the words "visibly" or "obviously" in their statutes prohibiting sales to intoxicated persons. *See* CAL. BUS. & PROF. CODE § 25602 (West 1974). The vagueness argument was raised and rejected in Coulter v. Superior Court, 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978).

54. In an action under New York's dramshop statute, a plaintiff was allowed to recover an amount of money which was taken from her intoxicated husband in a robbery at the defendant's bar. Wilcox v. Conti, 174 Misc. 230, 20 N.Y.S.2d 106 (1940).

55. *See* Davis v. Shiappacossee, 155 So. 2d 365 (Fla. 1963); Smith v. Clark, 411 Pa. 142, 190 A.2d 441 (1963).

defendant from relying on this defense, but where the plaintiff is an adult, the defense of contributory negligence succeeds more often. In *Ramsey v. Anctil,*[56] the plaintiff was already intoxicated when the defendant sold him several drinks. Ramsey became boisterous and began to pound his fist on the table. His hand hit a glass, which shattered and severed a nerve in his wrist. The New Hampshire legislature had repealed that state's dram-shop act, but the state supreme court held that the petition stated a cause of action at common law. The court also noted that Ramsey's contributory negligence in consuming the alcohol might bar recovery.

Several jurisdictions, however, reject the defense in negligence per se actions. In *Soronen v. Olde Milford Inn,*[57] the plaintiff's husband was already drunk when he entered the defendant's bar. After a few more drinks, he fell off his barstool and became literally "dead drunk" when his head hit a support beam as he fell to the floor. The New Jersey Superior Court held that the defense of contributory negligence was unavailable, relying on *Restatement of Torts* section 483. Under this rule, no contributory negligence is possible where the defendant violates a statute designed for the protection of a particular class of persons. The New Jersey statute outlawing sales to intoxicated persons was held to be for their protection. A Pennsylvania court reached the same result in *Schelin v. Goldberg,*[58] where the plaintiff, after being served alcohol until he was highly intoxicated, picked a fight with another customer in the bar and lost an eye in the ensuing brawl.

Where the defense of contributory negligence is not available, defendants have asserted similar defenses with varying degrees of success. When the action is based on an illegal sale to an intoxicated plaintiff, the defendant might attempt to show that the plaintiff's prior state of intoxication, rather than the defendant's act in giving him more liquor, was the cause of the injury.

In *Majors v. Brodhead Hotel,*[59] the plaintiff, who was already inebriated, attended a party at the defendant's hotel. He became extremely drunk and began to annoy other guests at the party. At that point, someone locked him in the restroom. He attempted to escape through the window and climbed on a fence outside. After crawling a few yards across the fence, he fell forty-five feet to the roof of the hotel kitchen. His suit for personal injuries was based on the hotel's act in serving him liquor after he was visibly intoxicated. The Pennsylvania Supreme Court affirmed the judgment for the plaintiff, but noted that the defendant might have avoided liability by showing that the plaintiff was so intoxicated that the injury would have occurred without the incremental effect of later drinks furnished by the defendant. This defense appears to place a nearly

56. 106 N.H. 375, 211 A.2d 900 (1965).
57. 84 N.J. Super. 372, 202 A.2d 208 (1964).
58. 188 Pa. Super. 341, 146 A.2d 648 (1958).
59. 416 Pa. 265, 205 A.2d 873 (1965).

impossible burden on the defendant, and is unlikely to be of any practical value.

Another defense which might aid suppliers of alcohol in some situations is assumption of risk. In *Deeds v. United States,*[60] Sandra Deeds was a guest at a party given by the non-commissioned officers club at an Air Force base. She accepted a ride home with an intoxicated minor who ran his car off the road, injuring them both. Sandra brought suit under the Federal Tort Claims Act.[61] The Government defended the action on the ground that Deeds had knowingly assumed the risk by accepting a ride with a drunk.[62] The district court acknowledged the viability of the defense, but rejected it here because there was insufficient evidence that she knew the extent of the serviceman's intoxication. However, fact situations similar to this are fairly common in this area of tort law,[63] and the defense of assumption of risk could be of real benefit to defendants in many cases.

Thus, in some situations, suppliers of alcohol may offer contributory negligence or assumption of risk as defenses to a tort action. They might also argue that it was not their liquor that caused the plaintiff's injury. As courts extend liability to more defendants in more situations, it is reasonable to assume that courts will look for ways to limit liability, and these defenses will be more successful than in the past.

At the present time, however, the development in this area of tort law is decidedly pro-plaintiff, as more jurisdictions accept the concept of liability for persons who wrongfully furnish liquor to others. The most controversial issue in those jurisdictions which have recognized this tort is whether liability should extend to the social supplier of liquor as well as the commercial seller.

Most jurisdictions which have considered this question have answered it in the negative.[64] The reasons offered are varied, but the true rationale appears to be that holding the host of a party responsible for alcohol-

60. 306 F. Supp. 348 (D. Mont. 1969).

61. 28 U.S.C. § 1346(b).

62. The Government also contended that the emotional imbalance of the serviceman (who had been jilted by his girlfriend at the party) was a superseding cause relieving it of liability. The court rejected the argument under RESTATEMENT (SECOND) OF TORTS § 444 (1965): "An act done . . . in normal response to . . . emotional disturbance to which the actor's negligent conduct is a substantial factor . . . is not a superseding cause . . . ."

63. *See, e.g.,* Coulter v. Superior Court, 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978); Elder v. Fisher, 217 N.E.2d 847 (Ind. 1966); Pike v. George, 434 S.W.2d 626 (Ky. 1968); Mitchell v. Shoals, Inc., 19 N.Y.S.2d 338, 227 N.E.2d 21 (1967); Weiner v. Gamma Phi Chapter of Alpha Tau Omega Fraternity, 258 Or. 632, 485 P.2d 18 (1971).

64. The question has most often arisen under dramshop statutes. *See* Annot., 8 A.L.R.3d 1412 (1966). Manning v. Andy, 51 Pa. D. & C. 2d 324 (1970) and Halvorson v. Birchfield Boiler, Inc., 76 Wash. 2d 759, 458 P.2d 897 (1969) are cases holding no liability under the common law.

related injuries of his guests would lead to too many lawsuits.[65] Some courts have stated that, since the social supplier of alcohol does not benefit economically from his act, he should not suffer economically for it.[66] Others recognize that drinking is a social institution, and are reluctant to transform an act which most people consider a necessary part of hospitality into a tort.[67]

However, a few jurisdictions recognize common law liability of non-commercial suppliers of alcohol. A college fraternity was held liable for serving alcohol to a minor who assaulted the plaintiff in *Giardina v. Solomon.*[68] The court held that the policy of the statute making it illegal for "any person" to "furnish" alcohol to a minor[69] outweighed the danger of a possible increase in litigation due to extending liability to social purveyors. It should be noted that most statutes regulating the distribution of alcohol to minors and intoxicated persons are not restricted to commercial vendors.[70]

The same result was reached in *Weiner v. Gamma Phi Chapter of Alpha Tau Omega Fraternity*[71] and in a recent California case, *Coulter v. Superior Court of San Mateo County.*[72] In *Coulter,* the owners of an apartment complex held a party where alcohol was dispensed to potential residents. One of the persons served was Janice Williams, who was noticeably drunk. She attempted to drive the plaintiff home, but crashed into an embankment on the way. The plaintiff sued the owners of the apartment complex, alleging that they served Williams liquor in violation of the statute,[73] knowing that she would be driving home afterwards. The court held that the petition stated a valid claim. The risk to the public is equal, the court said, and just as foreseeable, whether or not the person dispensing the alcohol gets paid for it: "[I]t is small comfort to the widow whose husband has been killed in an accident involving an intoxicated driver to learn that the driver received the drinks from a hospitable social

65. Miller v. Owens-Illinois Glass Co., 48 Ill. App. 2d 412, 199 N.W.2d 300 (1964); Manning v. Andy, 51 Pa. D. & C. 2d 324 (1970).

66. *See* Halvorson v. Birchfield Boiler, Inc., 76 Wash. 2d 759, 458 P.2d 897 (1969).

67. Miller v. Owens-Illinois Glass Co., 48 Ill. App. 2d 412, 199 N.E.2d 300 (1964).

68. 360 F. Supp. 262 (M.D. Pa. 1973). The federal court assumed that the Pennsylvania Supreme Court, which has yet to consider the question, would hold social suppliers liable. The state supreme court will have the final say on this issue.

69. PA. STAT. ANN. tit. 47, § 4-493 (Purdon 1969).

70. *See, e.g.,* CAL. BUS. & PROF. CODE § 25602 (West 1974) ("every person"); RSMo § 311.310 (1978) ("any person whomsoever").

71. 258 Or. 632, 485 P.2d 18 (1971).

72. 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978).

73. *See* CAL. BUS. & PROF. CODE § 25602 (West 1974). "Every person who sells, [or] gives . . . any alcoholic beverage . . . to any obviously intoxicated person is guilty of a misdemeanor."

host rather than by purchase at a bar."[74] The court also addressed the role of alcohol as a social institution and concluded that the risks of injury to persons and property outweighed the importance of hospitality.[75]

It seems likely that more jurisdictions will be willing to extend liability to social purveyors in the future. This area of tort law is in a state of flux, and in many states the various questions raised by tort liability for purveyors of liquor have not yet been decided.

Missouri is such a jurisdiction. One of the earliest cases imposing liability on a vendor of alcohol is a Missouri decision, *Skinner v. Hughes.*[76] The defendant sold liquor to the plaintiff's slave, who became intoxicated and froze to death on the way home. The Missouri Supreme Court held the defendant liable. The precedential value of this case is extremely questionable, both because of its antiquity and because the action was apparently brought on the theory of trespass on a chattel.

The only other Missouri case even remotely in point is *Moore v. Riley,*[77] which was discussed previously in connection with negligence per se actions. This was not really a case of tort liability for supplying alcohol. The alleged wrongful act which was the basis of the action was allowing a minor to be on the premises of a tavern. There was no allegation that the minor was served liquor or was intoxicated,[78] and the law construed was a Kansas City ordinance,[79] not the state statute controlling the distribution of liquor.

In other words, tort liability for purveyors of alcohol is largely an open question in Missouri. However, some guidance can be gleaned from the decided cases. The Missouri decisions interpret liquor-control statutes restricting the availability of alcohol to minors to be for the protection of minors.[80] Under this view, an intoxicated minor who suffers injury (or his next of kin) should be able to maintain an action under present Missouri law against the supplier for his injuries. Whether liability would extend to other situations remains to be seen.

Considering the well-documented role of liquor in accidental and violent injuries, it is clear that supplying alcohol can be a dangerous act in some situations. Commercial suppliers, who know or have a duty to know the laws governing sales of alcohol, and who benefit economically from violations of the laws, should be economically responsible for resulting injuries.

---

74. 21 Cal. 3d at 153, 577 P.2d at 674, 145 Cal. Rptr. at 539.

75. "[W]e must surely balance any resulting moderation of hospitality with the serious hazard to the lives, limbs, and property of the public at large . . . ." *Id.* at 154, 577 P.2d at 675, 145 Cal. Rptr. at 540.

76. 13 Mo. 440 (1850).

77. 487 S.W.2d 555 (Mo. 1972).

78. *Id.* at 558.

79. KANSAS CITY, MO. CODE §§ 4.26, .94 (1967).

80. May Dept. Stores, Inc. v. Supervisor of Liquor Control, 530 S.W.2d 460 (Mo. App., D. St. L. 1975).

Whether social suppliers should be liable is a closer question. The reasoning of the California Supreme Court in *Coulter* is logically persuasive that such liability should exist. The risk and foreseeability of injury are equal regardless of whether the supplier is paid. At least in situations where a host actively encourages drinking by a minor or by an adult who is already obviously intoxicated, the social purveyor should be liable, especially where the host knows that his guest will be driving soon after drinking.

For those who are concerned about the possible injustice of extending liability to social hosts, the jury system may be a factor in limiting recovery. Many jurors would probably be reluctant to hold social hosts liable for acts which the jurors themselves engage in on a regular basis. The threat of tort liability may indeed discourage "hospitality" in the form of indiscriminate flow of alcohol at social gatherings. But in a nation where tens of thousands of people die each year as a direct result of alcohol consumption, this may well be an improvement.

STEVEN P. CALLAHAN