

September 1972

Negligence--Intoxicating Liquors--Vendor's Liability for Damages by Intoxicated Patrons

Roger A. Wolfe

West Virginia University College of Law

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Torts Commons](#)

Recommended Citation

Roger A. Wolfe, *Negligence--Intoxicating Liquors--Vendor's Liability for Damages by Intoxicated Patrons*, 74 W. Va. L. Rev. (1972).
Available at: <https://researchrepository.wvu.edu/wvlr/vol74/iss4/11>

This Case Comment is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.

misdemeanor. This is contrary to the established principal that an indictment as accessory before the fact will not support a conviction of the principal offense. This inconsistency accentuates the difficulty caused by retention of the pleading distinction between accessory before the fact and principal. As early as 1916, maintaining accessory before the fact as a separate substantive offense was recognized as an undesirable fiction whose only purpose was to abrogate common law procedural difficulties.³³ However, West Virginia retains this distinction even though it provides for equal punishment³⁴ and has abolished the common law technicality that the principal must be tried and convicted prior to the trial of the accessory before the fact to the same crime.³⁵ Legislative enactment to permit indictment and trial of accessories before the facts as principals should be forthcoming, as further recognition of the common law distinction will only continue to confuse and frustrate the criminal system of justice in West Virginia.

Charles C. Wehner

Negligence—Intoxicating Liquors—Vendor's Liability for Damages by Intoxicated Patrons

Plaintiff was injured when the car he was driving collided with one driven by defendant O'Connell. Alleging that O'Connell was intoxicated as a result of being served alcoholic beverages in defendant Sager's tavern, plaintiff brought a common-law action for negligence against O'Connell, Sager, and the owner of the car O'Connell was driving. The sale to O'Connell by Sager had been in violation of a statute prohibiting sale of alcoholic beverages to any intoxicated person. The trial court sustained defendant Sager's demurrer without leave to amend and dismissed the complaint against him. *Held*, reversed by the California Supreme Court. The plaintiff had brought himself within that class of persons for whose protection the statute was designed. The harm occasioned plaintiff was the type contemplated by the statute thereby fastening liability on the tavern owner, Sager. *Vesely v. Sager*, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971).

³³ *Karakutza v. State*, 163 Wis. 293, 156 N.W. 965 (1916).

³⁴ W. VA. CODE ch. 61, art. 11, § 6 (Michie 1966).

³⁵ W. VA. CODE ch. 61, art. 11, § 7 (Michie 1966).

The problem of the liability of a vendor of alcoholic beverages has been one for both legislative and judicial inquiry. The legislative approach to the vendor's potential liability has usually been manifested in legislation attaching civil liability to vendors for violation of criminal statutes dealing with the sale of alcoholic beverages.¹ Some jurisdictions, however, impose liability regardless of any criminal statutory violations.² These latter acts are known as civil damage laws, or, as they are commonly referred to, "dram shop acts".³

Basically, dram shop acts are designed to protect certain classes of persons from injuries resulting from the conduct of an intoxicated person by imposing a form of strict liability on the vendor of the intoxicant.⁴ However, the dram shop acts have suffered from certain restrictions imposed by legislative enactment, for example, amount of recovery⁵ and time in which to bring suit.⁶

On the other hand, the judicial point of view has been to deny a cause of action against the vendor in favor of either the patron or an injured third party.⁷ The common law rule as generally stated was that it was the consumption, not the furnishing of liquor, that was the proximate cause of injury.⁸ This rule is illustrated by the maxim: the sale of liquor to an able-bodied man is not negligence.⁹

¹ E.g., ALA. CODE tit. 7, § 121 (1958). For sales made contrary to the provisions of laws regulating such sales, the statute gives a cause of action to every wife, child, parent or other person for all damages actually sustained in consequence of such illegal sale of liquor against the one who sold, gave or otherwise disposed of the beverage. The statute also allows for exemplary damages.

² E.g., ORE. REV. STAT. § 30.730 (1969). Without regard to the legality of the sale, the statute makes any person who sells, bargains or gives intoxicating liquors to an habitual drunk or intoxicated person liable for all damages to the wife, husband, parent or child of the habitual drunkard or intoxicated person.

³ *Pierce v. Albanese*, 144 Conn. 241, 129 A.2d 606 (1957).

⁴ *Dram Shop Liability—A Judicial Response*, 57 CALIF. L. REV. 995, 996 (1969).

⁵ E.g., DEL. CODE ANN. tit. 4 § 716 (1953) (\$500.00 maximum for all recoveries).

⁶ E.g., CONN. GEN. STAT. ANN. § 30-102 (Supp. 1971) (one year).

⁷ *Collier v. Stamatis*, 62 Ariz. 285, 162 P.2d 125 (1945); *Howlett v. Doglio*, 402 Ill. 311, 83 N.E.2d 708 (1949); *State ex rel Joyce v. Hatfield*, 197 Md. 249, 78 A.2d 754 (1951); *Seibel v. Leach*, 233 Wis. 66, 288 N.W. 774 (1939).

⁸ *Hitson v. Dwyer*, 61 Cal. App. 2d 803, 809, 142 P.2d 952, 955 (1943); *Nolan v. Morelli*, 154 Conn. 432, 436, 226 A.2d 383, 386 (1967); *Tarwater v. Atlantic Co.*, 176 Tenn. 510, 513, 144 S.W.2d 746, 747 (1940).

⁹ *Manthei v. Heimerdinger*, 332 Ill. App. 335, 352 75 N.E.2d 132, 140 (1947).

This maxim received nearly uniform application absent a dram shop act.¹⁰

Recently, however, a "substantial number if not a majority"¹¹ of cases have imposed liability on the vendor by applying basic rules of negligence. Beginning with two important decisions in 1959, *Waynick v. Chicago's Last Department Store*,¹² and *Rappaport v. Nichols*,¹³ the cases in those jurisdictions in which the issue has been adjudicated appear to indicate a movement in favor of allowing recovery against the vendor. In those states which have addressed the issue on negligence principles, only a few presently maintain the old common law position.¹⁴ Since *Waynick* in 1959, ten states,¹⁵ including California in the principal case, have adopted what has been referred to as the "new common law" rule.¹⁶ Additionally, New York and Illinois, both states with dram shop acts, have indicated that in the absence of such statutes they too would impose liability on the principles of negligence.¹⁷ Adding the ten states following the new common law rule to those twenty states¹⁸ that possess dram shop

¹⁰ 5 Cal. 3d 153, —, 486 P.2d 151, 155, 95 Cal. Rptr. 623, 627 (1971).

¹¹ *Id.* at —, 486 P.2d at 157, 95 Cal. Rptr. at 629.

¹² 269 F.2d 322 (7th Cir. 1959). In *Waynick*, an intoxicated Illinois motorist injured a Michigan motorist in Michigan. Although both Illinois and Michigan possessed dram shop acts, the court determined that neither would apply extraterritorially and instead imposed liability on the vendor on the basis of common law negligence.

¹³ 31 N. J. 188, 156 A.2d 1 (1959). In *Rappaport*, plaintiff's decedent was killed in a collision involving a minor who had been served intoxicating beverages in violation of a statute at defendant's establishment. The court allowed recovery based on common law negligence principles.

¹⁴ *Carr v. Turner*, 385 S.W.2d 656 (Ark. 1965); *Hull v. Rund*, 150 Colo. 425, 374 P.2d 351 (1962); *Meade v. Freeman*, 93 Idaho 389, 462 P.2d 54 (1969); *Lee v. Peerless Ins. Co.*, 248 La. 982, 183 So. 2d 328 (1966); *Hall v. Budagher Bar*, 76 N.M. 591, 417 P.2d 71 (1966).

¹⁵ *Vesely v. Sager*, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971); *Davis v. Shiappacossee*, 155 So. 2d 365 (Fla. 1963); *Elder v. Fischer*, 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); *Deeds v. United States*, 306 F. Supp. 348 (D. Mont. 1969); *Ramsey v. Anttil*, 106 N.H. 375, 211 A.2d 900 (1965); *Rappaport v. Nichols*, 31 N.J. 188, 156 A.2d 1 (1959); *Jardine v. Upper Darby Lodge No. 1973*, 413 Pa. 626, 198 A.2d 550 (1964); *Mitchell v. Ketner*, 54 Tenn. App. 656, 393 S.W.2d 755 (1965).

¹⁶ 9 *Clev.-Mar. L. Rev.* 302 (1960). In a case comment on *Waynick*, the court's decision was referred to as the "new common law rule" in that it was the first major case in abrogation of the old common law approach.

¹⁷ *Colligan v. Comsar*, 38 Ill. App. 2d 392, 187 N.E.2d 292 (1963); *Berkeley v. Park*, 47 Misc. 2d 381, 262 N.Y.S.2d 290 (Sup. Ct. Ostego County 1965).

¹⁸ ALA. CODE tit. 7, §§ 120-21 (1958); CONN. GEN. STAT. ANN. § 30-102 (Supp. 1969); DEL. CODE ANN. tit. 4, §§ 715-16 (1953); ILL. ANN. STAT. ch. 43, §§ 135-36 (Smith-Hurd Supp. 1969); IOWA CODE ANN. § 129.2 (1954);

acts, it is evident that a majority of jurisdictions impose liability in some form on the vendor of intoxicants for damages caused by his patrons.

Characteristic of the new common law approach to liability is a re-evaluation of the concept of proximate cause. The cases that established the old common law rule consistently based their decision on lack of proximate cause. Nevertheless, most of those opinions offered little explanation as to the rationale by which the courts reached their conclusions.¹⁹ Although an analysis in terms of proximate cause typically involves considerations of foreseeability, intervening cause, and cause-in-fact, a less ambiguous approach in cases dealing with a statutory standard of conduct might be to predicate liability primarily on breach of duty.²⁰

It is to this end that the court in *Vesely* formulated the main issue stating, "[T]he . . . question . . . is not one of proximate cause, but rather one of duty: . . . Did defendant Sager owe a duty of care to plaintiff or to a class of persons of which he is a member?"²¹ The court in *Sager* avoided the perplexing proximate cause approach to liability and instead utilized a statutory standard of conduct. By coupling the liquor statute involving the illegal sale²² and the one defining the purpose of the Alcohol Beverage Control Act²³ with a statute codifying a presumption of negligence arising from a violation

ME. REV. STAT. ANN. tit. 17, § 2002 (1964); MICH. COMP. LAWS § 436.22 (1948); MINN. STAT. ANN. § 340.95 (1953); NEV. REV. STAT. § 202.070 (1967); N.Y. GEN. OBLIGATIONS LAW § 11-101 (McKinney Supp. 1964); N.C. GEN. STAT. § 14-332 (1953); N.D. CENT. CODE § 5-01-06 (Supp. 1969); OHIO REV. CODE §§ 439.04-.05 (Page 1953); OKLA. STAT. tit. 37, § 121 (1951); ORE. REV. STAT. § 30.730 (1969); R. I. GEN. LAWS ANN. § 3-11-1-2 (1956); VT. STAT. ANN. tit. 7, § 501 (1957); WASH. REV. CODE § 71.08.080 (1961); WIS. STAT. ANN. § 176.35 (1957); WYO. STAT. ANN. § 12-34 (1957).

¹⁹ *Hitson v. Dwyer*, 61 Cal. App. 2d 803, 143 P.2d 952 (1943); *Belding v. Johnson*, 86 Ga. 177, 11 L.R.A. 53 (1890); *Tarwater v. Atlantic Co.*, 176 Tenn. 510, 144 S.W.2d 746 (1940). In all of these cases the courts failed to rely on an analysis of the elements of proximate cause and merely quoted precedent to deny a cause of action.

²⁰ See L. GREEN, *THE LITIGATION PROCESS IN TORT LAW* 388 (1965), where he suggested that the courts dispense with the proximate cause concept altogether and approach the problem as one of duty.

²¹ *Vesely v. Sager*, 5 Cal. 3d 153, —, 486 P.2d 151, 159, 95 Cal. Rptr. 623, 631 (1971).

²² CAL. BUS. & PROF. CODE § 25602 (Deering 1960); "Every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any habitual or common drunkard or to any obviously intoxicated person is guilty of a misdemeanor."

²³ CAL. BUS. & PROF. CODE § 23001 (Deering 1960), which provides for the exercise of police power to promote the safety of the people.

of a statute,²⁴ the court was able to make out a clear case for the plaintiff.²⁵ With deference to the old common law rule, however, the court was careful to refute the proximate cause argument in the context of analyzing *Waynick* and *Rappaport*. Discussing the opinion in *Rappaport* it stated: "Finally, the court [in *Rappaport*] rejected the defendants' contention that their conduct, if negligent, was not the proximate cause of the injuries suffered.²⁶ As to defendant's assertions that abrogation of the vendor's immunity is better left to the legislature, the court concluded that the legislature had sufficiently expressed its intentions in the enactment of the liquor statutes²⁷ and the evidence statute.²⁸ Furthermore, the decision would expressly avoid the areas of possible recovery against a non-commercial supplier or in favor of an injured patron.²⁹

The question arises as to the present law in West Virginia. The answer is that the precise issue has never been adjudicated in this state.³⁰ Obviously, with the recently enacted liquor by the drink law,³¹ the great number of highway deaths attributable to drinking,³² and the course taken by the majority of jurisdictions in imposing some form of liability, successful litigation in this area is a definite possibility.

²⁴ CAL. EVID. CODE § 669 (Deering Supp. 1971):

The failure of a person to exercise due care is presumed if: (1) He violated a statute, ordinance, or regulation of a public entity; (2) the violation proximately caused death or injury to person or property; (3) the death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and (4) the person suffering the death or injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.

²⁵ In essence what the court did was to establish the standard of conduct with CAL. BUS. & PROF. CODE § 25602 (Deering 1960), to place the injured party within the scope of that section with CAL. BUS. & PROF. CODE § 23001 (Deering 1960), and to suggest the breach of duty with CAL. EVID. CODE § 669 (Deering Supp. 1971).

²⁶ *Vesely v. Sager*, 5 Cal. 3d 153, —, 486 P.2d 151, 158, 95 Cal. Rptr. 623, 630 (1971).

²⁷ CAL. BUS. & PROF. CODE § 25602 (Deering 1960); CAL. BUS. & PROF. CODE § 23001 (Deering 1960).

²⁸ CAL. EVID. CODE § 669 (Deering Supp. 1971).

²⁹ *Vesely v. Sager*, 5 Cal. 3d 153, —, 486 P.2d 151, 153, 95 Cal. Rptr. 623, 625 (1971).

³⁰ Hawaii, Mississippi, South Carolina, Texas, Utah, and Virginia have also not litigated the issue of a tavern owner's liability.

³¹ W. VA. CODE ch. 60, art. 7, § 3 (Michie Supp. 1971), which provides for the licensing of private clubs in West Virginia.

³² A recent national survey showed that the use of alcohol contributes to some 25,000 deaths and 800,000 collisions in the United States each year. STAFF OF HOUSE COMM. ON PUBLIC WORKS, 90th CONG. 2d SESS., ALCOHOL AND HIGHWAY SAFETY REPORT, (Comm. Print 1968).

Although the West Virginia court applies different principles of negligence, perhaps, than the California court applied in *Vesely*,³³ the basis of liability in this state is not completely unlike that in some others that have adopted the new rule. In West Virginia negligence is the breach of a duty on the part of one person to exercise care to protect another against injury.³⁴ In New Jersey where *Rappaport* was decided the court has applied this same definition.³⁵ Additionally, West Virginia, like most jurisdictions, requires that the injury be the proximate result of the breach of duty in order to establish liability.³⁶ The rule that has been applied in this state is that the injury must be the natural and probable consequence of the negligence.³⁷ Pennsylvania, where *Jardine v. Upper Darby Lodge No. 1973*,³⁸ was decided, has invoked this same standard.³⁹

The duty, of course, refers to the relationship between the parties and may be created by rules, statutes or judicial decisions requiring the exercise of care by one party to protect another from harm.⁴⁰ Most of the jurisdictions following the new common law have relied upon the violation of a liquor sales statute to establish the duty.⁴¹ In West Virginia as in California⁴² and Indiana⁴³ the violation of a statutory duty is prima facie negligence, *i.e.*, such violation gives rise to a rebuttable presumption of negligence.⁴⁴ The legislature of West Virginia has provided a mechanism for establishing negligence

³³ See text accompanying note 21 which indicates that the California court based liability on a breach of duty and for all practical purposes dismissed the proximate cause approach.

³⁴ *Uthermohlen v. Bogg's Run Co.*, 50 W. Va. 457, 459, 40 S.E. 410, 411 (1901).

³⁵ *Stanley Co. of America v. Hercules Powder Co.* 16 N.J. 295, 315, 108 A.2d 616, 626 (1954).

³⁶ *Hartley v. Crede*, 140 W. Va. 133, 82 S.E.2d 672 (1954).

³⁷ *Anderson v. Baltimore & Ohio R.R. Co.*, 74 W. Va. 17, 19, 81 S.E. 579, 580 (1914).

³⁸ 413 Pa. 626, 198 A.2d 550 (1964). The court formulated a duty independent of statute.

³⁹ *Roach v. Kelly*, 194 Pa. 24, 31, 44 A. 1090, 1091 (1899).

⁴⁰ W. PROSSER, *TORTS* § 53 (4th ed. 1971).

⁴¹ *Jardine v. Upper Darby Lodge No. 1973*, 413 Pa. 626, 198 A.2d 550 (1964) is the only observed instance in which the duty was not established with the aid of a liquor sale statute.

⁴² CAL. EVID. CODE § 669 (Deering Supp. 1971).

⁴³ *Northern Indiana Transit v. Burk*, 228 Ind. 162, 89 N.E.2d 905 (1950), where the court held that a violation of a statute prohibiting angle parking constituted prima facie negligence on the part of the violator.

⁴⁴ *Tarr v. Keller Lumber & Construction Co.*, 106 W. Va. 99, 102, 144 S.E. 881, 882 (1928).

by enacting statutes which make the sale of liquor to an intoxicated person or a minor⁴⁵ a misdemeanor.⁴⁶ Although it is necessary that the injured party bring himself and his injury within the class of persons and injuries the statute encompasses, the statute delineating the purpose of the Alcohol Beverage Control Act should satisfy these requirements.⁴⁷ It would appear then that an allegation that a sale of liquor to an inebriate who subsequently causes injury to a third party as a result of his intoxicated condition would yield a prima facie case of negligence against the vendor in West Virginia.

Some support for this position may be gained from an inspection of the cases decided under the old West Virginia dram shop act.⁴⁸ In *Mayer v. Forbe*, for example, after holding the imposition of exemplary damages under the statute constitutional, the court continued:⁴⁹

That the spirit and manifest intention of the law is good, can not be denied; and if it could be made to effect the object of its originators it would confer upon society a boon of inestimable value; and, even though it should only succeed in diminishing to a limited extent the widespread sorrow, poverty and misery inflicted on the helpless and innocent by the wretched slaves of a depraved and vicious appetite, its enactment will not have been in vain.

Although the act was repealed, its intent remains manifest in the statutes rendering a sale to an intoxicated person a misdemeanor.⁵⁰ It can certainly be argued that the act was repealed not because of a re-appraisal of the interests the act was designed to protect,⁵¹ but

⁴⁵ "Alcoholic Beverages shall not be sold to a person who is: (1) Less than twenty-one years of age; (2) An habitual drunkard; (3) Intoxicated; (4) Addicted to the use of narcotic drugs; (5) Mentally incompetent." W. VA. CODE ch. 60, art. 3, § 22 (Michie 1966).

⁴⁶ It is a misdemeanor to "[s]ell alcoholic liquors to a person specified in section twenty-two, article three (60-3-22) of this chapter." W. VA. CODE ch. 60, art. 6, § 8 (Michie 1966).

⁴⁷ The purpose of the Alcohol Beverage Control Act is to "assure the greatest degree of personal freedom that is consistent with the health, safety, and good morals of the people of the State." W. VA. CODE ch. 60, art. 1, § 1 (Michie 1966). (emphasis supplied).

⁴⁸ Acts of the 11th W. Va. Leg. ch. 99, Reg. Sess. (1872-73) [hereinafter cited as Acts]; Acts ch. 107, Reg. Sess. (1877); Acts ch. 29, Reg. Sess. (1887); Acts ch. 3, Ex. Sess. (1904).

⁴⁹ 40 W. Va. 246, 266, 22 S.E. 58, 66 (1895).

⁵⁰ W. VA. CODE ch. 60, art. 3, § 22 (Michie 1966); W. VA. CODE ch. 60, art. 6, § 8 (Michie 1966).

⁵¹ The West Virginia dram shop act provided basically for recovery of all damages including exemplary damages suffered by any wife, husband, child, parent or guardian against the vendor or landlord of the premises who knowingly made illicit sales. Acts ch. 99, Reg. Sess. (1872-73).

rather in response to the inequity of subjecting the vendor to strict liability, a drawback that would not be evident in applying traditional principles of negligence, such as the qualification of foreseeability.

The fact that the liquor stores in West Virginia are state owned and operated might presuppose a reluctance on the court's part to subject the doctrine of sovereign immunity to further attack. Whatever the value of that venerable doctrine, the government's immunity from civil liability is no longer as exclusive as it once was on either the federal, state or local levels. Even so, governments are certainly able to invoke the doctrine on their own accord, and the judiciary could leave the sovereign powers to their own defenses in light of the ease with which distinctions can be drawn between the liquor store suppliers and the tavern owner suppliers.

There can be little doubt that the enormous loss of life and property in this country due to alcoholism demands remedy. True, it is incumbent upon the legislative and executive branches of the government to propound solutions. More strict enforcement of existing laws and the creation of treatment programs for alcoholics would be a step in the right direction. But it seems inconsistent that the judiciary, with its peculiar capacity to provide both a deterrence to alcoholic abuse and a more just distribution of the loss, should choose to disregard the risk-producing activities of the commercial supplier. Although certainly not the first jurisdiction to adopt this new common law rule, the California court in *Vesely* dispersed the old rule with such alacrity that little doubt remains as to the general future course of the law in the area.

Roger A. Wolfe

Real Property—Covenant of General Warranty— Novel Definition of Constructive Eviction in West Virginia

In 1960, defendant Hines conveyed by deed 145 acres of raw timber land in Webster County to plaintiff Brewster. The deed contained a covenant of general warranty of title.¹ Besides the initial

¹ W. VA. CODE ch. 36, art. 4 § 2 (Michie 1966) provides: A covenant by a grantor in a deed, 'that he will warrant generally the property hereby conveyed,' or a covenant of like import, or the use of the words 'with general warranty' in a deed, shall have the same effect as if the grantor had covenanted that he, his heirs and personal representatives will forever warrant and defend the said property unto the grantee, his heirs, personal representatives and assigns, against the claims and demands of all persons whomsoever.