Loyola of Los Angeles Law Review

Volume 5 | Number 2 Article 10

4-1-1972

Torts—Common Law Dramshop Liability

ing the contract in force so long as the parties receive the benefits of their respective bargains. The nature of the breach has thus been relegated to secondary importance.

It is apparent from the *MacFadden* decision that the vendee who willfully breaches his land sale contract with the vendor will be permitted the same remedies as the good faith defaulting vendee. He will have the right to seek restitution, compel specific performance, or procure reinstatement of the contract. *MacFadden* is unquestionably proper in view of the now fully recognized policy of California law to eschew forfeitures.

TORTS—COMMON LAW DRAMSHOP LIABILITY—LIQUOR VENDOR WHO ILLEGALLY SELLS INTOXICANTS IN CALIFORNIA TO A VISIBLY INTOXICATED PERSON IS LIABLE FOR THE INJURIOUS RESULTS OF SUCH SALES TO THIRD PERSONS—*Vesely v. Sager*, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971).

Defendant James G. O'Connell entered the Buckhorn Lodge, a roadhouse near the top of Mount Baldy in San Bernardino County, at about 10:00 p.m. O'Connell was served large quantities of alcoholic beverages by the owner, defendant William A. Sager, until early in the morning. Sager allegedly knew O'Connell was becoming excessively intoxicated and was incapable of exercising the same degree of volitional control over his consumption of intoxicants as the average reasonable person. He also allegedly knew that the only route leaving the Buckhorn Lodge was a very steep, winding, and narrow mountain road and that O'Connell was going to drive down that road. Upon leaving the lodge, O'Connell did in fact drive down the road, veer into the opposite lane and strike plaintiff Miles Vesley's vehicle. In an action to recover for personal injuries and property damage, Vesely named O'Connell, Sager, and Earl Dirks, the owner of the car driven by O'Connell, as defendants. The trial court sustained defendant Sager's demurrer without leave to amend and later dismissed the action on the ground that a seller of intoxicating liquors is not liable for injuries to third persons resulting from the intoxication of a buyer of the liquor.[1] On appeal, the California Supreme Court reversed. When a vendor

1. 5 Cal. 3d at 158, 485 P.2d at 154, 95 Cal. Rptr. at 626.

furnishes alcholic beverages to a customer in violation of Business and Professions Code section 25602[2] and each of the conditions set forth in Evidence Code section 669(a)[3] is met, it will be presumed that the vendor acted negligently.[4]

Prior to *Vesely*, California had consistently followed the common law doctrine that the supplying of alcohol to a customer is not the proximate cause of injuries inflicted by him on a third party.[5] This conception was based upon the premise that the consumption, and not sale, was the proximate cause of injuries.[6] In denouncing the common law rule, the *Vesely* court cited a substantial number of recent federal and state

---

2. 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. CAL. BUS. & PROF. CODE ANN. § 25602 (West 1964).

3. 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 the nature of which the statute, ordinance, or regulation was designed to prevent; and, (4) The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted. CAL. EVID. CODE § 669(a) (West 1968).

4. 5 Cal. 3d at 165, 486 P.2d at 159, 95 Cal. Rptr. at 631. Vesely's complaint also stated that defendant O'Connell drove the automobile with the consent, permission and knowledge of both Sager and the owner of the automobile, defendant Earl Dirks; that each defendant was the employee and agent of the other defendants; and that each of the defendants was at all times acting within the purpose and scope of said agency and employment. Sager moved to strike these allegations as sham, and in support thereof submitted his declaration wherein he stated that O'Connell and Dirks were not in his employment on the date of the accident and that he never had any ownership interest or any other interest in the automobile driven by O'Connell. The trial court granted Sager's motion to strike and entered an order dismissing the action. However, the supreme court in *Vesely* reversed on the basis of its prior decision in Pianka v. State of California, 46 Cal. 2d 208, 293 P.2d 458 (1956), holding that a non-statutory speaking motion should be treated as a motion for summary judgment. 5 Cal. 3d at 167-68, 486 P.2d at 161, 95 Cal. Rptr. at 635.

In treating Sager's motion to strike as a motion for summary judgment, the *Vesely* court held that

> [s]ummary judgment is proper only if the affidavits in support of the moving party would be sufficient to sustain a judgment in his favor and his opponent does not by affidavit show such facts as may be deemed by the judge hearing the motion sufficient to present a triable issue. *Id., quoting* Stationers Corp. v. Dunn & Bradstreet, Inc., 62 Cal. 2d 412, 417, 398 P.2d 785, 788, 42 Cal. Rptr. 449, 452 (1965).

Consequently, the court found that even though Vesely did not file a counter-affidavit or declaration, such failure did not relieve Sager of the burden of establishing the evidentiary facts of every element necessary to entitle him to a judgment. 5 Cal. 3d at 169-70, 486 P.2d at 162-63, 95 Cal. Rptr. at 634-35.

5. Cole v. Rush, 45 Cal. 2d 345, 289 P.2d 450 (1955); Lammers v. Pacific Elec. Ry., 186 Cal. 379, 199 P. 523 (1921); 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).

6. 5 Cal. 3d at 159, 486 P.2d at 155, 95 Cal. Rptr. at 627.

decisions holding that the sale of alcoholic beverages may be the proximate cause of such injuries.[7] Following the trend of these cases and noting that numerous California decisions have found the requisite proximate cause when negligent conduct was a material and substantial factor in bringing about an alleged injury,[8] the *Vesely* court found that:

> [A]n actor may be liable if his negligence is a substantial factor in causing an injury, and he is not relieved of liability because of the intervening act of a third person if such act was reasonably forseeable at the time of his negligent conduct.[9]

Consequently, the court determined that the furnishing of alcoholic beverages to an intoxicated person may be a proximate cause of injuries inflicted by that person upon a third individual: the consumption, resulting intoxication and injury-producing conduct can be foreseeable intervening causes.[10] The final decision on this issue, however, was left to the trial court on remand. Whether the furnisher or barkeeper should have foreseen the likelihood that his patron would either be injured or cause injury to others as a result of his intoxication thus remains a significant probative hurdle to an ultimate finding of liability.[11]

By juxtaposing Business and Professions Code section 25602 and Evidence Code section 669, the *Vesely* court found that defendant Sager owed a statutory duty of care to the plaintiff. Although section 25602 provides that persons who furnish or sell alcoholic beverages to any habitual or common drunkard, or to any obviously intoxicated person, are guilty of a misdemeanor, it does not provide for civil liability.[12] However, California has long recognized a presumption of negligence arising from the violation of a statute which was enacted to protect a class of persons, of which the plaintiff is a member, against the type of harm which the plaintiff suffered as a result of the violation of that statute.[13] A codification of this presumption may now

7. Cases cited 5 Cal. 3d at 161-62, 486 P.2d at 157, 95 Cal. Rptr. at 101.

8. Cases cited 5 Cal. 3d at 163, 486 P.2d at 158, 95 Cal. Rptr. at 630.

9. *Id.*

10. *Id.*

11. *Compare* Adamian v. Three Sons, Inc., 353 Mass. 498, 233 N.E.2d 18 (1968) (defendant vendor who maintained public parking facility should have foreseen that sale to intoxicated patron created risk for third person plaintiffs on highways), *with* Dimond v. Sacilotto, 353 Mass. 501, 233 N.E.2d 20 (1962) (defendant vendor who *did not* maintain a public parking facility should *not*, as a matter of law, have foreseen that sale to intoxicated patron created risk for third person plaintiffs on highways).

12. *See* note 2 *supra.*

13. 5 Cal. 3d at 164, 486 P.2d at 159, 95 Cal. Rptr. at 631, *citing* Alarid v.

be found in Evidence Code section 669.[14] Since Business and Professions Code section 23001 states one of the purposes of the Alcoholic Beverage Control Act to be the protection of the people of this state,[15] the court concluded that Business and Professions Code section 25602 was adopted for the purpose of protecting members of the general public from injuries to person and damage to property resulting from the excessive use of intoxicating liquor.[16] As such, if Vesely can prove (1) that Sager violated section 25602,[17] and the violation proximately caused his injuries, (2) that he was within the class of persons which section 25602 was enacted to protect, and (3) that the injuries he suffered resulted from an occurrence that the statute was designed to prevent, then Sager's furnishing of alcoholic beverages to O'Connell will be *presumed* negligent.[18]

Although defendant Sager contended that the question of civil liability for tavern keepers should be left to future legislative action,[19] the

---

Vanier, 50 Cal. 2d 617, 327 P.2d 897 (1958); Satterlee v. Orange Glenn School District, 29 Cal. 2d 581, 177 P.2d 279 (1947).

14. *See* note 3 *supra.*

15. This division is an exercise of the police powers of the State for the protection of the safety, welfare, health, peace, and morals of the peoples of the State, to eliminate the evils of unlicensed and unlawful manufacture, selling, and disposing of alcoholic beverages, and to promote temperance in the use and consumption of alcoholic beverages. It is hereby declared that the subject matter of this division involves in the highest degree the economic, social and moral well-being and safety of the State and of all of its people. All provisions of this division shall be liberally construed for the accomplishment of these purposes. CAL. BUS. & PROF. CODE ANN. § 23001 (West 1964).

Although there is no mention of it in the *Vesely* opinion, an analogy may be drawn between sections 25602 and 25658(a) of the Business and Professions Code. The latter section provides: "Every person who sells, furnishes, gives or causes to be sold, furnished or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor." Since the court found that section 25602 demonstrates a legislative intent to protect members of the general public, it is certain that section 25658 will also be deemed enacted for the protection of the general public from injuries to person and damage to properly resulting from the unlawful furnishing of liquor to minors. In fact, a recent court of appeals decision has just so held. Brockett v. Kitchen Boyd Motor Co., 24 Cal. App. 3d 87, — Cal. Rptr. — (1972). Out-of-state cases construing similar statutes also lend support for this interpretation. *See, e.g.*, Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1 (1959); McKinney v. Foster, 391 Pa. 221, 137 A.2d 502 (1958); Manning v. Vokas, 389 Pa. 136, 132 A.2d 198 (1957).

16. 5 Cal. 3d at 165, 486 P.2d at 159, 95 Cal. Rptr. at 631.

17. From previous interpretations of Business and Professions Code section 25602, it is clear that vendors of alcoholic beverages will not be liable without fault. People v. Johnson, 81 Cal. App. 2d 973, 975, 185 P.2d 105, 106 (App. 1947). *See* Lacabanne Properties, Inc. v. Dep't of Alcoholic Beverages Control, 261 Cal. App. 2d 181, 67 Cal. Rptr. 734 (1968).

18. 5 Cal. 3d at 165, 486 P.2d at 159, 95 Cal. Rptr. at 631.

19. There is a strong argument that legislative inaction indicates an intent not to

court found this assertion faulty in two respects. First, liability had been denied in the past solely because of the judicially created rule that the furnishing of alcoholic beverages is not the proximate cause of the injuries resulting from intoxication, and since this rule is patently unsound and totally inconsistent with the principles of proximate cause established in other areas of negligence law, there is no reason for its retention.[20] Second, the court felt the legislature had further expressed its intention in this area with the adoption of Evidence Code section 669.[21]

> To accept defendant's contentions and hold that plaintiff's complaint does not state a cause of action would be to thwart the legislative policies expressed in both statutes.[22]

The court expressly declined to decide whether a non-commercial furnisher of alcoholic beverages may be subject to civil liability for violation of section 25602.[23] However, even the most liberal interpretation given that section does not prohibit the imposition of such liability. The statute prescribes a misdeameanor for "*every person* who sells, furnishes, gives . . . any alcoholic beverages . . . to any obviously intoxicated person."[24] Nevertheless, it does not necessarily follow that California courts will extend the scope of section 25602 to non-commercial sellers. As Chief Justice Traynor once said in *Clinkscales v. Carver*:[25]

> The standard formulation by a legislative body in a police regulation or criminal statute becomes the standard to determine civil liability only because the court accepts it.[26]

---

impose a civil duty on tavern owners for violation of section 25602. In Cole v. Rush, 45 Cal. 2d 345, 355, 289 P.2d 450, 456 (1955), the California Supreme Court stated:

> The failure of the legislature to change the law in a particular respect when the subject is generally before it and changes in other respects are made is indicative of an intent to leave the law as it stands in aspects not amended.

Consequently, the court in *Cole* held that the legislative intent was to maintain the common law rule of non-liability of vendors to injured third parties. In other words, if the California Legislature had wished to impose civil liability on vendors they would have enacted dram shop statutes similar to those currently in force in twenty states. A listing of these states may be found in Comment, *Dram Shop Liability—A Judicial Response*, 57 CALIF. L. REV. 995, 996-97 n.6 (1969) [hereinafter cited as Comment].

20. 5 Cal. 3d at 166, 486 P.2d at 160, 95 Cal. Rptr. at 632.

21. *Id.* Significantly, section 669 was not in existence at the time of the decision in Cole v. Rush, 45 Cal. 2d 345, 289 P.2d 450 (1955). *See* note 19 *supra.*

22. 5 Cal. 3d at 167, 486 P.2d at 160, 95 Cal. Rptr. at 632.

23. *Id.* at 157, 486 P.2d at 153, 95 Cal. Rptr. at 625.

24. CAL. BUS. & PROF. CODE ANN. § 25602 (West 1964) (emphasis added).

25. 22 Cal. 2d 72, 136 P.2d 777 (1943).

26. *Id.* at 75, 136 P.2d at 778.

In effect, the courts act as the final arbiters of the civil scope of a penal statute.

Practical considerations certainly militate against the imposition of non-commercial civil liability under section 25602. There are tremendous social pressures against the policing of one's friends, and should these be overcome, it would be difficult for the private host to guage the level of intoxication of his guest;[27] also, non-commercial liability might open up the floodgates of litigation if a social drink with one's neighbor or friend was rendered a hazardous act.[28] Additionally, the ability to bear the economic loss occasioned by the imposition of civil liability suggests a distinction between the private party and the commercial vendor. The commercial seller would be able to spread the cost of injuries or insurance coverage over the large class of people who regularly indulge in alcoholic beverages. Even if the private person could purchase insurance to cover his liability, it would seem more equitable if the burden of liability fell only upon the business which sells the alcohol for a profit.[29] It is thus probable that a consideration of such "public policy factors" will lead California courts to conclude that the potential protection of people and property which might flow from an adoption of a statutory standard imposing civil liability on private suppliers would not justify the resulting curtailment of activity which the community judges to be socially desirable.[30]

The court in *Vesely* also made it clear that it was not deciding whether the person who is served alcoholic beverages in violation of

27. *See* Comment, *supra* note 19, at 1031.

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

29. *See* Comment, *supra* note 19, at 1030.

30. *But see* Brockett v. Kitchen Boyd Motor Co., 24 Cal. App. 3d 87, — Cal. Rptr. — (1972), wherein the court of appeals held that *any person* who knowingly supplies a *minor* with copious amounts of alcohol, with knowledge that the minor was going to drive a vehicle on the public highways, may be liable to injured third persons. The *Brockett* court stated, however, that its holding should not be extended beyond the particular facts of the case (employer-minor employee) and that its decision does not reach the broad question of hosts' liability at social gatherings.

In addition to the practical considerations cited in the text, the following policy factors have been balanced by the California courts in determining whether a defendant owed a duty of care to avoid creating risks to a particular class of plaintiffs:

> (1) The social utility of the activity out of which the injury arises, discounted by the risks involved in its conduct; (2) the workability of the rule of care, especially in terms of the parties' relative ability to adopt practical means of preventing injury; (3) the relative ability of the parties to bear the financial burden of injury and the availability of means by which loss may be shifted or spread; the prevention of future harm; and (5) the moral blame attached to the conduct of either party. Comment, *supra* note 19, at 1016 (footnote omitted).

the statute may recover for his own injuries suffered as a result of a violation of section 25602.[31] Future resolution of this issue will probably depend upon whether the vendor is allowed to plead contributory negligence as an affirmative defense.[32] In the *Restatement of Torts* it is recognized that when a defendant's negligence consists of the violation of a statute intended to protect a particular class of persons against their own ability to protect themselves, allowing the defense of contributory negligence would defeat the purpose of such a statute.[33] In *Hudson v. Craft*,[34] the California Supreme Court indicated that it favored this view. There, a plaintiff was injured while voluntarily participating in a prize fight conducted in violation of a statute prohibiting unregulated boxing matches. The court interpreted the statute as having been enacted for the protection of the participants notwithstanding that they had consented to the illegal act. Consequently, the court held the promoter liable for the injuries incurred.[35]

Since California courts have interpreted the purpose of Business and Professions Code section 25602 to protect members of the general public, it follows that an intoxicated patron, also a member of the general public, should be similarly protected.[36] Once intoxicated, the patron is usually not in any position to protect himself.[37] It would thus

31. 5 Cal. 2d at 157, 486 P.2d at 153, 95 Cal. Rptr. at 625.

32. The *Vesely* court determined that section 25602 was adopted for the purpose of protecting members of the general public. 5 Cal. 3d at 165, 486 P.2d at 159, 95 Cal. Rptr. at 631. The intoxicated patron is also a member of the class of people protected by section 25602. Consequently, if the vendor is going to escape liability for injuries to the intoxicated patron, he will have to plead an affirmative defense. *Cf* Alarid v. Vanier, 50 Cal. 2d 617, 327 P.2d 897 (1958).

33. RESTATEMENT (SECOND) OF TORTS § 483, comment c at 539 (1965).

34. 33 Cal. 2d 654, 204 P.2d 1 (1949).

35. *Id.* at 660-61, 204 P.2d at 4-5.

36. *See* note 32 *supra.*

37. The New Jersey Supreme Court in Soronen v. Olde Milford Inn, 46 N.J. 581, 218 A.2d 630 (1966), extended the vendor's liability to the injured patron. In so doing, the court noted:

> Since the patron has become a danger to himself and is in no position to exercise self-protective care, it is right and proper that the law view the responsibility as that of the tavern keeper alone. *Id.* at 588, 218 A.2d at 636.

This decision was followed in a later New Jersey case, Aliulis v. Tunnell Hill Corp., 114 N.J. Super. 205, 275 A.2d 751 (1971). There, the defendant tavern keeper was denied the defense of contributory negligence when the plaintiff voluntarily rode in an automobile knowing that the driver, a minor who had been served by defendant, was not fit to drive the car because of his intoxication. *Id.* at 207, 275 A.2d at 752. Similarly, the highest court in Pennsylvania also interpreted their statute as intending to protect all persons, whether innocent or not, when they are visibly intoxicated. Consequently, the tavern keeper was not entitled to the defense of contributory negligence. Majors v. Brodhead Hotel, 416 Pa. 265, 205 A.2d 873 (1965).

be illogical to contend that a vendor's duty of care imposed by section 25602 would, in effect, be dissolved upon the fortuitous circumstance that a patron, rather than a third party, was seriously injured as a consequence of the violation of 25602. Certainly, a plaintiff's status should not be determinative in deciding whether the defendant owes a duty of care.[38] Additionally, a vendor should not be allowed to plead contributory negligence as a defense, since this would render illusory and sham his duty of care to intoxicated patrons.[39]

Although the opinion in *Vesely* necessarily leaves some unanswered questions, the court has taken a significant step forward in designing California tort law to allocate the losses equitably among all parties at fault. Too many drunk driving accidents result from actions taken by at least two parties: the motorist who drives an automobile after becoming intoxicated, and the liquor vendor who sells alcohol to him even though the motorist is in an obviously intoxicated condition.[40] It is clearly more equitable that the loss be shared by the negligent vendor rather than that the innocent injured third party be compelled to risk the driver's possible lack of insurance coverage or inability to pay.[41] Since the vendor is capable of preventing liability by exercising due care,[42] perhaps *Vesely* will now serve as an effective deterrent to future injuries caused by the furnishing of liquor to obviously intoxicated persons.

38. *See* Rowland v. Christian, 69 Cal. 2d 108, 117-19, 443 P.2d 561, 70 Cal. Rptr. 97 (1962).

39. *See* cases cited note 36 *supra. Contra,* Carlisle v. Kanawyer, 24 Cal. App. 3d 587, — Cal. Rptr. — (1972) (an injured drinker can be barred by the defense of contributory negligence from recovering against the seller; *Vesely* is limited to innocent third party plaintiffs); *but cf.* Berg v. Harris, 170 N.W.2d 621 (Iowa 1969) (recognizing that a bartender may assert the defense of assumption of risk against a third party plaintiff injured while riding as a passenger with an intoxicated patron).

Early in its history the California Supreme Court had recognized the inebriate's right to an exercise of due care by the defendant. In denying the defense of contributory negligence based upon the plaintiff's intoxication, Justice Heydenfeldt wittingly observed: "A drunken man is as much entitled to a safe street, as a sober one, and much more in need of it." Robinson v. Pioche, 5 Cal. 460, 461 (1855).

40. The use of alcohol by drivers and pedestrians leads to some 25,000 deaths and 800,000 collisions in the United States each year. STUDY BY SECRETARY OF DEPT. OF TRANSP. TRANSMITTED TO HOUSE COMM. ON PUBLIC WORKS, 90th CONG., 2D SESS., 1968 ALCOHOL AND HIGHWAY SAFETY REPORT 1 (Comm. Print 1968).

41. The California Code of Civil Procedure provides that where a money judgment has been rendered jointly against two or more defendants in a tort action there shall be a right of contribution among them and that a *pro rata* share for each tortfeasor shall be determined by dividing the entire judgment equally among all of them. CAL. CODE CIV. PROC. §§ 875, 876 (West 1964).

42. *See* note 17 *supra.*