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PERSONS UNDER THE INFLUENCE of liquor or drugs are known to be irrational, uncoordinated, erratic and prone to conduct which give rise to injury. It is for this reason that recovery is allowed, under certain conditions, from the person furnishing the intoxicating liquor or drug, by the person injured by the user. One such liable person is the seller of intoxicating liquor who, by the Dram Shop Law, is made liable to persons who suffer injury to person or property or to means of support. The first such law in Ohio was passed on May 1, 1854, and was entitled, "An act to provide against the evils resulting from sale of intoxicating liquors in the State of Ohio."[1] There are today variations of the Dram Shop Law in Ohio and twenty-seven other states.[2]

At common law the intoxicated person is held to the same standard of conduct as that of a reasonable man.[3] If the intoxicated person breaches a duty of care and by his negligent conduct causes injury, as a proximate result of this conduct, which is reasonably foreseeable, he is liable.[4] The duty of care owed to an intoxicated person is that owed to a reasonable man.[5] Under the common law, therefore, recovery from the seller of intoxicating liquor by third parties injured by the acts of the intoxicated person has generally been barred because the proximate cause of the injury has been deemed to be the consumption of the liquor rather than the sale of the liquor.[6]

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1 67 Ohio Laws 102.

2 These states are Arkansas, Colorado, Connecticut, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Washington, West Virginia, Wisconsin. 48 C. J. S., Intoxicating Liquors, Sec. 431, pp. 717-718.

3 Powell v. Berry (1916) 145 Ga. 696, 89 S. E. 753, L. R. A. 1917 A. 306.

4 *Ibid.*

5 Little Rock & Electric Co. v. Billings (1909 C. C. A. 8) 173 F. 903, 31 L. R. A. N. S. 1031, 19 Ann. Cas. 1173.

6 Hilson v. Dwyer (1943) 61 Cal. App. 2d 803, 143 P. 2d 952; Noonan v. Gulick (1955) 19 Conn. Supp. 308, 112 A. 2d 892; Buntin v. Hutton (1917) 206 Ill. App. 194; Cavin v. Smith (1949) 228 Minn. 322, 37 N. W. 2d 368; Peter Anderson & Co. v. Diaz (1906) 77 Ark. 606, 92 S. W. 861; Lammers v. Pacific Electric R. Co. (1921) 186 Cal. 379, 199 P. 523.

Another bar has been the rule that the consumption of liquor is contributory negligence.[7] In spite of this rule preventing recovery, there have been several significant cases under the common law which have allowed recovery against the seller of intoxicating liquor on the basic theory of negligence. The opinions of these cases have tended to change the duty of care of the seller of intoxicating liquor[8] or remove the duty of care owed by the intoxicated person.[9] In these latter cases allowing recovery, the intoxicated person is viewed as other than a reasonable man. Of great significance is the concept that the intoxicated person lacks voluntary control over his conduct.

Generally, in the common law, recovery has been permitted to third persons, from the seller of habit forming drugs, for injury resulting from the act of the person under the influence of the drug.[10] Courts have generally found the use of drugs of a habit forming nature to be involuntary, and have assessed liability for the continued sale to a person known to be addicted.[11] There are cases holding contra which will be treated in this article.

Except for actions brought under the dram shop law, recovery against the seller is generally brought on the basis of wrongful death, loss of consortium, loss of services, or loss of support. Indeed, both in the common law and under the dram shop law relief has generally been accorded to the spouse or children of the person under the influence. The dram shop law has extended the classification of persons to employers and to persons receiving injury to person or property by the acts of the intoxicated person.

In addition to the seller there are two other groups of persons who have been held liable for injuries to innocent third persons by the acts of intoxicated persons. These groups are public carriers and innkeepers. The groups are included in order to distinguish the nature of liability arising from that of the

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[7] Schwartz v. Johnson (1926) 152 Tenn. 586, 280 S. W. 32, 47 A. L. R. 323; Covington v. Lee (1905), 28 Ky. L. Rep. 492, 89 S. W. 493, 2 L. R. A. N. S. 481.

[8] Rappaport v. Nichols (1959) 31 N. J. 188, 156 A. 2d 1, 75 A. L. R. 2d 821; Waynick v. Chicago's Last Dept. Store (1959 C. A. 7) 269 F. 2d 322.

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

[10] Hoard v. Peck (1867) 56 Barb (N. Y.) 202; Holleman v. Harward (1896) 119 N. C. 150, 25 S. E. 972, 975, 34 L. R. A. 803; Flandermeyer v. Cooper (1912) 85 Ohio St. 327, 98 N. E. 102, 40 L. R. A. N. S. 360.

[11] *Ibid.*

seller. Both these former groups are under a high duty of care to a passenger or patron as the case may be. Generally, their standard of care as to an intoxicated person is not increased over that owing to any other person. Negligence here generally results from the foreseeability of the imminence of injury from the apparent conduct of the person seen or known to be intoxicated. The standard breached is that of an ordinary person of reasonable intelligence. There have been cases where a bar owner has been found negligent not for the sale of intoxicating liquor but as the owner of the bar responsible for the safety of his patrons.

Liability of Carriers

Injury to an innocent third party may arise in the common carrier where a passenger is assaulted by an intoxicated fellow passenger. Although a carrier is not an insurer of the safety of a passenger, it must exercise the highest degree of care (higher than ordinary care) that is practicable under the circumstances of the particular case in order to prevent an assault by one passenger upon another.[12]

The degree of care and test in breach of duty appears to be the following: A common carrier is not liable for an assault by a stranger on a passenger, if it could not have anticipated and prevented the assault by the exercise of the proper degree of care and prudence.[13] A carrier will be held liable, however, for an assault on a passenger by a stranger, if it could have been anticipated and prevented by the exercise of reasonable care and diligence.[14]

The mere fact that a carrier admits an intoxicated person, with the knowledge that he is intoxicated, or fails to eject him after knowing that he is intoxicated, is insufficient to make the carrier liable where the intoxicated person attacks and injures a fellow passenger.[15] If, however, the carrier has sufficient

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[12] Willie Floyd v. City of Cleveland (1955) 99 Ohio App. 282, 56 Ohio Op. 21, 70 Ohio L. Abs. 563, 123 N. E. 2d 540; Paal v. Cleveland R. Co. (1918) 11 Ohio App. 462.

[13] Irwin v. Louisville & N. R. Co. (1909) 161 Ala. 489, 50 S. 62, 135 Am. St. Rep. 153, 18 Ann. Cas. 772; Beasley v. Hines (1920) 143 Ark. 54, 219 S. W. 757, 15 A. L. R. 864.

[14] Chicago & A. R. Co. v. Pillsbury (1887) 123 Ill. 9, 14 N. E. 22, 5 Am. St. Rep. 483; Dean v. St. Paul Union Depot Co. (1889) 41 Minn. 360, 43 N. W. 54, 5 L. R. A. 442, 16 Am. St. Rep. 703.

[15] Brown v. Chicago, R. I. & P. R. Co. (1905 C. C. A. 8) 139 F. 972, 2 L. R. A. N. S. 105, 3 Ann. Cas. 251; Lige v. Chicago, B. & Q. R. Co. (1915) 275 Mo. 249, 204 S. W. 508, L. R. A. 1918 F. 548.

opportunity to observe the conduct of the intoxicated person and such conduct provides sufficient evidence within the vision and hearing of the carrier so that the attack of the intoxicated person upon another passenger could have reasonably been anticipated from the antecedent conduct which was negligently permitted to continue, the carrier will be liable.[16]

Generally, the courts have held that it is a question for the jury whether a carrier's employees, in the exercise of that degree of care required by law, ought to have foreseen and prevented, from the circumstances of the cases, an assault by an intoxicated passenger who was upon the premises.[17]

Innkeepers, Restaurateur, Tavern Keepers

These groups are considered together because as a class of third persons incurring liability, they are generally treated similarly by the courts.

This group is treated here not as a seller of liquor but as a proprietor supervising, controlling and caring for the premises. It is not uncommon for a patron to receive injuries on the premises from acts of another intoxicated patron.

The prevailing rule is that innkeepers and similar proprietors are not insurers for the safety, quiet, and repose of their patrons.[18] Also, these proprietors do not owe the same duty of care owed by carriers to passengers. The obligation of innkeepers and other proprietors is the exercise of reasonable care for their safety.[19] There are statements, however, indicating that innkeepers are responsible for the exercise of a "high degree" of care to prevent injury to their guests.[20]

Innkeepers have been held liable for an injury to a guest from an assault by another guest or a third person.[21] Owners

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[16] Montgomery Traction Co. v. Whatley (1907) 152 Ala. 101, 44 S. 538, 126 Am. St. Rep. 17; Hillman v. Georgia R. & Bkg. Co. (1906) 126 Ga. 814, 56 S. E. 68, 8 Ann. Cas. 222.

[17] Jansen v. Minneapolis & St. L. R. Co. (1910) 112 Minn. 496, 128 N. W. 826, 32 L. R. A. N. S. 1206; Kline v. Milwaukee Electric R. & Light Co. (1911) 146 Wis. 134, 131 N. W. 427, Ann. Cas. 1912 C. 267.

[18] Weeks v. McNulty (1898) 101 Tenn. 495, 48 S. W. 809, 43 L. R. A. 185, 170 Am. St. Rep. 693; Montfort v. West Texas Hotel Co. (1938) (Tex. Civ. App.) 117 S. W. 2d 811.

[19] Clancy v. Barker (1904) 131 F. 161, 69 L. R. A. 653; Rahmel v. Lehndorff (1904) 142 Cal. 681, 76 P. 659, 65 L. R. A. 88, 100 Am. St. Rep. 154.

[20] Fortney v. Hotel Rancroft, Inc. (1955) 5 Ill. App. 2d 327, 125 N. E. 2d 544.

[21] Rommel v. Schambacker (1887) 120 Pa. 579, 11 A. 779, 6 Am. St. Rep. 732.

or operators of restaurants or similar places of business have frequently been held not liable to a patron injured as the result of an assault by another guest, or a fight between guests.[22] Under both circumstances the cases would indicate that determination of liability depends upon awareness of the proprietor of the threat of attack, ability to afford protection, and negligence or carelessness in the refusal of the proprietor to interfere and stop an attack which proximately resulted in injury to the patron.[23]

If the premises are saloons or other places serving intoxicating liquor, the courts generally interpret the exercise of reasonable care to be a relative term where the degree of care must be commensurate with the risk and injuries attending the activity being pursued.[24] It is said to be a subject of common knowledge that the consumption of a procession of drinks of intoxicating liquors produces a variety of reactions in the deportment of human beings, the development of which the tavern keeper should be reasonably alert to detect.[25] At times the duty of care is said to be that no injury to a patron occur by any want of care on the part of the tavern keeper's servants, extended even to seeing that reasonable care is exercised that guests are not injured by other guests.[26] Courts have expressly indicated their support of the view that the proprietor of a saloon or similar place has the duty to exercise reasonable care to protect patrons from injury by other patrons.[27]

Consortium, Loss of Support, Loss of Service

Consortium has been defined as the conjugal fellowship of husband and wife, and the right of each to the company, cooperation and aid of the other in every conjugal relation.[28]

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[22] Hughes v. Coniglio (1946) 147 Neb. 829, 25 N. W. 2d 405; Fred Harvey, Inc. v. Comegys (1921 Tex. Civ. App.) 233 S. W. 601; Weihert v. Piccione (1956) 273 Wis. 448, 78 N. W. 2d 757.

[23] Greco v. Sumner Tavern, Inc. (1955) 333 Mass. 144, 128 N. E. 2d 788; McFadden v. Bancroft Hotel Corp. (1943) 313 Mass. 56, 46 N. E. 2d 573; Priewe v. Bartz (1957) 249 Minn 488, 83 N. W. 2d 116, 70 A. L. R. 2d 621.

[24] Reilly v. 180 Club, Inc. (1951) 14 N. J. Super. 420, 82 A. 2d 210.

[25] *Ibid.*

[26] McKeon v. Manze (1916, Sup.) 157 N. Y. S. 613.

[27] Moon v. Conley (1918) 9 Ohio App. 16, 30 Ohio C. A. 14; Giamarito v. Zissen's White Horse Cafe (1937) 57 Ohio App. 517, 25 Ohio L. Abs. 657, 15 N. E. 2d 162; Thornton v. Goldfarb (1952, App.) 67 Ohio L. Abs. 232, 119 N. E. 2d 446.

[28] McKinnon v. Chenoweth (1945) 176 Or. 74, 155 P. 2d 944, 948.

The loss of consortium is a deprivation of the full society, affection, and assistance to which a spouse is entitled.[29]

Loss of services which legally belong to the plaintiff has been held to constitute an injury to property for which recovery may be had. The loss of services sustained by a parent in the wrongful death of a minor is the value of the services that such parent would be entitled to between the death and the majority of such minor.[30] The purpose of the law is to authorize suits for the recovery of damages for the death of minors caused by the wrongful acts and negligence of others.[31]

The word support, according to Webster, means maintenance, subsistence, or an income sufficient for the support of a family.[32] Support, as used in laws, making licensed saloon keepers liable on their bond for illegal sales to any person who shall sustain any injury or damage to his means of support on account of the use of such intoxicating liquors so sold, is necessarily a flexible term. It should not be limited to mean actual necessaries of life, or that one's means of support is only damaged, where such person is reduced to a state of dependency. Hence the loss of the services of a son, who contributed by his earnings to the expenses of his father's family, is a damage to the father's means of support, though the earnings of the father may be sufficient to keep the family from becoming dependent.[33]

Duties incident to the domestic establishment include duties a wife owes to the husband by reason of the relation existing between them. Although these are generally denominated "services," they also include care, comfort, companionship, society and fellowship, and such other matters as are included under the head of consortium. It is for the loss of these "services" that the common law grants to the husband a right of action.[34]

It is commonly recognized that one particular group of persons that is particularly harmed by the acts of intoxicated person or persons under the influence of habit forming drugs is the family of such persons. There is, both under the common

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29 Henley v. Rockett (1942) 243 Ala. 172, 8 S. 2d 852, 853.

30 Meeks v. Johnston (1923) 85 Fla. 248, 95 S. 670, 671.

31 Nolan v. Moore (1921) 81 Fla. 600, 88 S. 601, 606.

32 40 Words & Phrases 802.

33 Reath v. State (1896) 16 Ind. App. 146, 44 N. E. 808, 809.

34 Reeves v. Lutz (1914) 179 Mo. App. 61, 162 S. W. 280.

law and under the dram shop statutes, recognition of injury in loss of consortium, loss of services, and loss of support.

In an early case in Ohio[35] recovery for loss of support was sought and obtained by a widow under the first Liquor Control Act of Ohio, which read as follows: "That every wife, child, parent, guardian, employer or other person who shall be injured in person or property or means of support by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, such wife, child, parent, guardian, employer or other person shall have a right of action, in his or her own name, against any person, who shall by selling intoxicating liquors contrary to this act, have caused the intoxication of such person, for all damages actually sustained as well as exemplary damages." [36]

In another case[37] in Ohio a wife recovered under the common law for loss of consortium resulting from the sale of morphine to her husband, who prior to such sale was a cured morphine addict. The court cited authority to hold that the right of recovery was a common law right requiring no enabling statute.[38]

Generally at common law there is no right of recovery to the wife for loss of consortium of the husband.[39] A wife cannot recover damages on account of personal injuries to her husband where she sustains loss of support and of consortium and is compelled to care for him while sick.[40] A wife usually cannot recover for loss of consortium as a result of negligent injury to her husband although in recent years some states have allowed recovery.[41]

Where the former disabilities of the married woman have been removed the wife long has been allowed a right of action for loss of consortium in certain cases. Recovery has been allowed in cases in which there has occurred direct interference to consortium resulting from alienation or willful acts directed

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[35] Schneider v. Hosier (1871) 21 Ohio St. 98.

[36] "An act to provide against the evils resulting from sale of intoxicating liquors in the State of Ohio." S. & C. 1139, May 1, 1854.

[37] Flandermyer v. Cooper, *supra* note 10.

[38] Bigaouette v. Paulet (1883) 134 Mass. 123, 45 Am. Rep. 307.

[39] Kosciolak v. Portland R. Light & P. Co. (1916) 81 Or. 517, 160 P. 132.

[40] Emerson v. Taylor (1918 Md.) 104 A. 538.

[41] Knierim v. Izo (1961 Ill.) 174 N. E. 2d 157 (no recovery); Smith v. Nicholas Bldg. Co., *supra* note 34 (no recovery). Recovery allowed in Dini v. Naiditch (1960 Ill.) 170 N. E. 2d 881, citing Iowa, Mich., Ark., D. C.

against the husband. In the latter class there have been cases deemed to be a direct interference in the selling of intoxicants or drugs to the husband under the civil damages acts. The sale of liquor or drugs to the husband after due notice has been given to the seller has been held to involve the element of malice in direct interference with consortium.[42]

Wrongful Death

In actions for wrongful death, as in the case of actions for personal injuries generally,[43] it is essential to a recovery of damages that the wrongful act, the neglect, or the default of the defendant should have been the proximate cause of the injury and of the death resulting therefrom.[44]

Where a suicide is caused by the use of intoxicating liquors, it seems that an action will lie under a civil damage act against the person who sold the liquor, to recover damages for the loss of maintenance and support.[45] The cases on this point are somewhat conflicting but it seems that as a general rule the answer to the question whether there may be a recovery under a civil damage act for injury or damage remotely as well as proximately due to intoxication depends usually upon the phraseology of the statute.

The type of act most frequently found provides for recovery against the dealer for injury to person, property, or means of support, by an intoxicated person, or in consequence of the intoxication of any person. Where, under such a law, an action is brought for an injury inflicted by the affirmative act of an intoxicated person, and is therefore based on the clause "by an intoxicated person," the courts are practically unanimous in holding that it is not necessary that the intoxication be the proximate cause of the injury.[46] Where, on the other hand, an

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[42] Clark v. Hill (1897) 69 Mo. App. 541; Flandermeyer v. Cooper, *supra* note 10.

[43] Winona v. Botzet (1909 C. C. A. 8) 169 F. 321, 23 L. R. A. 204; Goodlander Mill Co. v. Standard Oil Co. (1894 C. C. A. 8) 63 F. 400, 27 L. R. A. 583.

[44] Larrissey v. Norwalk Truck Lines (1951) 155 Ohio St. 207; Avra v. Karshner (1929) 32 Ohio App. 492, 168 N. E. 237; 16 Am. Jur. 57 Sec. 77; Proximate Cause Annot: 23 A. L. R. 1271; 58 Am. St. Rep. 714; Ann. Cas. 1914 C. 1101.

[45] Lawson v. Eggleston (1898) 28 App. Div. 52, 52 N. Y. S. 181, affd. without op. 164 N. Y.; Garrigan v. Kennedy (1904) 19 S. D. 11, 101 N. W. 1081, 117 Am. St. Rep. 927, 8 Ann. Cas. 1125.

[46] Jack v. Prosperity Globe (1909) 147 Ill. App. 176; Whiteside v. O'Connors (1911) 162 Ill. App. 108; Neu v. McKechnie (1884) 95 N. Y. 632, 47 Am. Rep. 89.

action is based upon the clause giving a right of action for injuries "in consequence of" the intoxication, or its equivalent, it is held by some courts that there can be no recovery unless intoxication was the proximate cause of the injury.[47]

Habit Forming Drugs

The seller of drugs is under only an ordinary standard of care in the sale of drugs. The test of ordinary care, however, is that of the average druggist, and in the dispensing of drugs of a dangerous nature he must act with the highest degree of caution.[48] Due to the nature of drug dispensing, the doctrine of res ipsa loquitur often is applied. Under this doctrine the druggist is said to have the sole control of the drugs which he offers for sale, both harmful and harmless ones.

The relation of the druggist to the community is such that there is an obligation upon him to see that no harmful or poisonous drugs shall be delivered to a customer when a harmless one is asked for. Proof of inadvertence on the part of the druggist furnishes an inference sufficient to establish a prima facie case. It raises a presumption of negligence which entitles the customer to recover unless the presumption is rebutted.[49] Thus negligence is presumed and proof of facts establishes prima facie negligence, unless the presumption is rebutted, where it is alleged that a drug clerk by mistake sold and delivered an injurious drug to a customer instead of a harmless drug asked for, where the customer innocently swallowed the former in reliance and belief he was taking the latter, and was caused pain and suffering.[50]

In an interesting early Ohio case both intoxication and the taking of a drug were operative facts in a wrongful death action. The ruling in the case illustrates the distinction maintained as to the standard of conduct applied to the intoxicated man. Here a druggist sold strychnine to an intoxicated man at the request of the intoxicated man and neglected to put upon the package the label required by law, as a notice and warning of the contents. The purchaser, while still intoxicated, took the strychnine

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[47] Bestline v. Ney Bros. (1907) 134 Iowa 172, 111 N. W. 422, 13 L. R. A. N. S. 1158, 13 Ann. Cas. 196.

[48] Corona Coal Co. v. Sexton (1925) 21 Ala. App. 51, 105 S. 716, cert. den. 213 Ala. 554, 150 So. 718; Peters v. Johnson (Peters v. Jackson) (1902) 50 W. Va. 644, 41 S. E. 190, 57 L. R. A. 428, 88 Am. St. Rep. 909.

[49] Edelstein et al. Partners v. Cook (1923) 108 Ohio St. 346; 19 Corpus Juris 780.

[50] 19 Corpus Jur. 785; Knofel v. Atkins (1907) 40 Ind. App. 428, 81 N. E. 600; Butterfield v. Snellenburg (1911) 231 Pa. 88, 79 A. 980.

and died from the effect of it. The court held that the act of selling the poison and neglecting to label it were not, either the one or the other, the proximate cause of death. The proximate cause was the act of the man himself in taking the poison, for which the druggist is not responsible in damages.[51]

It has been held that at common law a husband has a right of action for loss of consortium and loss of services of his wife against a druggist who sells a habit forming drug to the wife knowing that she intends to satisfy her craving for the drug and that her husband has not consented to the sale.[52] A similar common law right is held to exist for the wife for the loss of consortium in some states where married women's acts have removed the disabilities of coverture.[53]

In one case a right of action was given to parents for loss of services of a minor child to whom large doses of heroin tablets were repeatedly sold by a pharmacist who had knowledge of the minor's addiction.[54] In the above cases it was held that the right existed both where the sale was made without the knowledge of the spouse bringing the action and where the spouse had knowledge and protested the sale. It was not a requirement that the sale be unlawful. Rather the criterion applied was that there was knowledge that the drug was of a habit forming nature and that the purpose of the sale was to satisfy the craving. In all cases there were findings that the continued use of the drug was ruinous to the health of the user.

In one case the duty breached by the druggist was found to be as follows: It seems to be a most reasonable proposition of law that whoever willfully joins with a married woman in doing an act which deprives her husband of her services and of her companionship is liable to the husband in damages for his conduct. The defendants owed to the plaintiff the legal duty not to sell opium to his wife in the form of large quantities of laudanum as a beverage, knowing that she was, by using them, destroying mind and body, and thereby causing loss to the husband.[55]

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[51] Ronker et al. v. St. John (1900) 11 Ohio C. Dec. 434.

[52] Hoard v. Peck (1867) 56 Barb (N. Y.) 202; Holleman v. Harward (1896) 119 N. C. 150, 25 S. E. 972, 34 L. R. A. 803, 56 Am. St. Rep. 672.

[53] Flandermeyer v. Cooper, *supra* note 10; Moberg v. Scott (1917) 38 S. D. 422, 161 N. W. 998, L. R. A. 1917 D. 732. See *supra* note 41.

[54] Tidd v. Skinner (1919) 225 N. Y. 422, 122 N. E. 247, 3 A. L. R. 1145 affg. (1916) 171 App. Div. 98, 156 N. Y. S. 885.

[55] Holleman v. Harward, *supra* note 52.

In another case the effect upon the person using the drug was described as follows:

"—no longer a free agent capable of controlling his own conduct, and capable of exercising an independent judgment in reference to the use of this drug, but, on the contrary, his intellect had become so weakened and infirm that his power of resisting his craving therefor was entirely destroyed, and he became merely the instrument or the conduit through which this treacherous poison was transferred from the druggist's hands into his own system." [56]

It would appear that in these cases the person buying the drug was not considered to be contributorily negligent. If the party bringing the action contributes in whole or in part to the development of the drug habit, it is likely that the rule applicable to the dram shop laws denying recovery, would apply.[57]

Common Law Dramshop Liability

Discussion in this section will deal with the liability of the seller arising under the common law, apart from the dram shop statutes.

Generally, the seller of intoxicating liquors is not answerable at common law to third parties as a result of injury or damage sustained by the latter as a result of the intoxication of the purchaser of the liquor.[58] The reason for the lack of common law basis for the action is given in one case as follows:

"The common law gave no remedy for injury or death following the mere sale of liquor to an ordinary man, either on the theory that it was a direct wrong, or on the ground that it was negligence which imposed a legal liability on the seller for damage resulting from the intoxication, the reasoning being that the drinking, not the selling, was the proximate cause of the injury." [59]

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[56] Flandermeyer v. Cooper, *supra* note 10.

[57] Forsberg v. Around Town Club (1942) 316 Ill. App. 661, 45 N. E. 2d 513; Morton v. Roth (1915) 189 Mich. 198, 155 N. W. 459.

[58] Collier v. Stametis (1945) 63 Ariz. 285, 162 P. 2d 125; Fleckner v. Dionne (1949) 94 Cal. App. 2d 246, 210 P. 2d 530; Howlett v. Doglio (1949) 402 Ill. 311, 83 N. E. 2d 708, 6 A. L. R. 2d 790; Cowman v. Hanson (1958) 250 Iowa 358, 92 N. W. 2d 682; Barboza v. Deces (1942) 311 Mass. 10, 40 N. E. 2d 10; Beck v. Groe (1955) 245 Minn. 28, 70 N. W. 2d 886, 52 A. L. R. 875.

[59] Hill v. Alexander (1944) 321 Ill. App. 406, 53 N. E. 2d 307.

Again, in another case the reasoning was given as follows:

"Apart from statute, the common law knows no right of action against a seller of intoxicating liquors, as such, for causing intoxication of the person whose negligent or wilful wrong has caused injury. Human beings, drunk or sober, are responsible for their own torts. The law apart from statute recognizes no relation of proximate cause between a sale of liquor and a tort committed by a buyer who has drunk the liquor." [60]

There have been a number of notable exceptions in which recovery was permitted to third persons for wilful violation by the seller, to one other than the purchaser of the liquor, which was proximate to the injury sustained by such third person. In one case the sale of the liquor was made unlawful by state statute. In this instance the sale was to a person already intoxicated, who continued his drinking and drove into another state where he fatally injured the third party. Under the common law of the latter state the unlawful sale gave a civil right of action in tort against the seller.[61]

In another case under similar circumstances a sale of intoxicating liquor was made to a person who was both a minor and intoxicated. This person injured a third person while driving. The court upheld the right of recovery of the third person against the seller on grounds of negligence under the common law as follows:

The seller should have foreseen the unreasonable risk of harm to others through the action of the intoxicated person. The court refused to rule that as a matter of law there could have been no causal relation between the selling and the injury.[62]

The cases are in conflict as to whether or not a recovery may be made under the wrongful death statute. Recovery has been allowed in some cases under circumstances in which there was a wanton disregard of the decedent who at the time was in no condition to observe ordinary care.[63] Recovery has been denied in fact situations indicating that the intoxicated person was

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[60] State to Use of Joyce v. Hatfield (1951) 197 Md. 249, 78 A. 2d 754.

[61] Waymek v. Chicago's Last Dept. Store, *supra* note 8.

[62] Rappaport v. Nichols, *supra* note 8.

[63] McCue v. Klein (1883) 60 Tex. 168, 48 Am. Rep. 260; Ibach v. Jackson (1934) 148 Or. 92, 35 P. 2d 672; Riden v. Grimm Bros. (1896) 97 Tenn. 220, 365 S. W. 1097, 35 L. R. A. 587.

not in such a state of helplessness as to be deprived of his will power or responsibility for his behavior.[64]

Dram Shop Statutes

Statutes commonly known as "Civil Damage Acts" or "Dram Shop Acts" have been passed in twenty-eight states, affording remedies unknown to the common law.

Typical of the statute generally referred to as a dram shop law is the Illinois statute, which reads as follows:

"Every husband, wife, child, parent, guardian, employer or other person, who shall be injured, in person or property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her own name, severally or jointly, against any person or persons who shall, by selling or giving alcoholic liquor, have caused the intoxication, in whole or in part, of such person." [65]

It will be seen that the statute imposes a liability upon the person furnishing liquor under the Illinois statute in either a sale or gift. This liability upon the furnisher is not one generally imposed upon him by the common law.[66] Because of the severity of the statute to the furnisher of liquor it is thought to be penal in character and therefore should be strictly construed.[67] Others believe that the better view is that it is remedial in character and should be construed so as to allow the full remedy accorded within the clear meaning of the statute.[68]

The statute provides for situations in which there is injury "by any intoxicated person" and also "in consequence of the intoxication" of any person. If the injury occurs as a result of the affirmative act of the intoxicated person, the courts are almost

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[64] Cole v. Rush (1955) 45 Cal. 2d 345, 289 P. 2d 450, 54 A. L. R. 2d 1137; Hoyt v. Tilton (1925) 81 N. H. 477, 128 A. 688; Bissell v. Starzinger (1900) 112 Iowa 266, 83 N. W. 1065; Bolen v. Still (1916) 123 Ark. 308, 185 S. W. 811.

[65] Ill. Rev. Stat. 1945, ch. 43 par. 135.

[66] Pierce v. Albanese (1925) 144 Conn. 241, 129 A. 2d 606; Thompson v. Wogan (1941) 309 Ill. App. 413, 33 N. E. 2d 151; Beck v. Groe, *supra* note 58; *Mead v. Stratton* (1882) 87 N. Y. 493, 41 Am. Rep. 386. See the Knievim case, *supra* note 41.

[67] Howlett v. Doglio (1949) 402 Ill. 311, 83 N. E. 2d 708, 6 A. L. R. 2d 120; Cruse v. Aden (1889) 127 Ill. 231, 20 N. E. 73, 3 L. R. A. 327.

[68] Economy Auto Ins. Co. v. Brown (1948) 334 Ill. App. 579, 79 N. E. 2d 854; Hahn v. Ortonville (1953) 238 Minn. 428, 57 N. W. 2d 254; Beck v. Groe, *supra* note 58.

unanimous in holding that intoxication needs not be the proximate cause of the injury.[69]

If the injury occurs "in consequence of, or by reason of, or on account of" the intoxication of the person, it has been held in some courts that there can be no recovery unless the intoxication was the proximate cause of the injury.[70] There is, however, authority to the contrary.[71] To illustrate the requirement of proximate causation, if recovery is sought for suicide resulting from intoxication, the court might require that the plaintiff demonstrate that the intoxication was the proximate cause of the injury.[72] There is authority that it is reversible error for a court not to recognize the distinction between the two theories.[73]

Under the dram shop law it becomes possible to obtain recovery from the liquor furnisher for injury to the intoxicated person from the wrongful act of a third person. This recovery was allowed in some cases in which it was shown that the third party was himself intoxicated by liquors furnished by the defendant.[74] On the other hand recovery has been denied generally in cases in which the third party was not intoxicated.[75]

The statute gives the right of action to any person; however, it specifically designates family members such as husband, wife, child, and parent. The need to afford a remedy to family members of the habitually intoxicated person has been recognized by the courts in language such as the following:

"During the middle of the last century it became apparent that great injury was often done to wives and children as a result of the sale of intoxicating liquor to those who would abuse its use, and in many states what was commonly denominated

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[69] Cox v. Hresky (1943) 318 Ill. App. 287, 47 N. E. 2d 728; Bistline v. Ney Bros., *supra* note 47; Currier v. McKee (1904) 99 Me. 364, 59 A. 422, 3 Ann. Cas. 57.

[70] Pierce v. Albanese, *supra* note 66; Schroeder v. Crawford (1880) 94 Ill. 357, 34 Am. Rep. 236; King v. Haley (1877) 86 Ill. 106, 29 Am. Rep. 14; Schmidt v. Mitchell (1876) 84 Ill. 195, 25 Am. Rep. 446; Schugart v. Egan (1876) 83 Ill. 56, 25 Am. Rep. 359.

[71] Anno: Ann. Cas. 1917 B. 536.

[72] Garrigan v. Kennedy, *supra* note 45.

[73] Cope v. Gepford (1945) 326 Ill. App. 171, 61 N. E. 2d 394.

[74] Horringths v. Troesch (1916) 201 Ill. App. 433; O'Connor v. Kathje (1939) 298 Ill. App. 489, 19 N. E. 2d 96; Cope v. Gepford, *supra* note 73. Brockway v. Patterson (1888) 72 Mich. 122, 40 N. W. 192, L. L. R. A. 708.

[75] Gage v. Harvey (1898) 66 Ark. 68, 48 S. W. 898, 43 L. R. A. 143; Shea v. Slezak (1956) 20 Conn. Supp. 181, 129 A. 2d 233; Danhoff v. Osborn (1957) 11 Ill. 2d 77, 142 N. E. 2d 20, 65 A. L. R. 2d 917; Sworsk v. Colman (1939) 204 Minn. 474, 283 N. W. 778.

civil damage acts were adopted. These acts, in substance, provided that if liquor was sold to a person under circumstances set forth in the act, specified parties injured thereby in person, property or lack of support might bring a suit against the vendor for damages." [76]

Generally, courts have interpreted the statute so that the rights of recovery among the persons specifically designated are confined to those related to the intoxicated person injured or related to the person injured by the intoxicated person.[77] Also recovery is permitted where a person is injured in property as a result of the acts of the intoxicated person.[78]

The employer is another person specifically designated as having a right of recovery. In an early Ohio case recovery was allowed for a contractor against a person who sold liquor to the contractor's hired hands who thereby became drunk and unable to work and who impeded others from working and hindered the progress of the job, whereby the contractor was injured in property and means of support.[79]

The word person has been interpreted to allow recovery by a township for damage to township property in at least one recent case.[80] It has not been interpreted to allow recovery by an insurance company in its own name for property damage.[81] However, recovery on a subrogation right has been permitted if the insurance company is subrogated to the right of a person who has a right in his own name under the statute.[82]

A recent case of first impression in a Federal District Court, deciding an action brought under the Minnesota Civil Damage Act, allowed recovery to both the employer of the intoxicated person and the insurance company of the employer, from a vendor making an illegal liquor sale to the intoxicated employee.

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

[77] Reisch v. Foster (1906) 125 Ill. App. 509; Minot v. Doherty (1909) 203 Mass. 37, 89 N. E. 183, 133 Am. St. Rep. 281; Fleming v. Gemein (1912) 168 Mich. 541, 134 N. W. 969, 39 L. R. A. N. S. 315.

[78] Kennedy v. Whitteker (1899) 81 Ill. App. 605; Flower v. Wikovsky (1888) 69 Mich. 371, 37 N. W. 364; Bertholf v. O'Reilly (1878) 74 N. Y. 509, 30 Am. Rep. 323; Woolheather v. Risley (1874) 38 Iowa 486; Mulford v. Clewell (1871) 21 Ohio St. 191.

[79] Duroy v. Blinn and Letcher (1860) 11 Ohio St. 331.

[80] Town of City of Champaign v. Overmeyer's (1958 Ill.) 152 N. E. 2d 752.

[81] Economy Auto Ins. Co. v. Brown, *supra* note 68.

[82] Dworak, For the Use of Allstate Ins. Co. v. Temple (1959) 17 Ill. 2d 181, 161 N. E. 2d 258.

The employer and its insurance company had made payments to parties injured as a result of an auto collision involving the intoxicated employee.[83]

In some states, including Ohio, the action against the seller is allowed only if the seller has received a prohibitory notice.[84] Another limitation upon recovery is a uniform rule that where an injured person contributes in whole or in part to the intoxication of his assailant he cannot recover under the dram shop law.[85]

A further limitation upon recovery is the requirement in some state statutes that the sale by the seller of intoxicating liquor be unlawful. In Ohio the pertinent portion of Sec. 4399.01 R. C. refers to prohibited sales of intoxicating liquor as defined in Secs. 4301.01 and 4301.22, which restrict sales to minors, intoxicated persons, and persons to whom sale cannot be made as determined by the Department of Liquor Conrol.

Conclusion

In the foregoing survey of the law relating to intoxication and to drug addiction, attention has been drawn to the rights or liabilities of third parties arising from the conduct of persons under the influence of liquor or drugs. An attempt has been made to indicate generally those persons on whom the law imposes a liability and those for whom a remedy has been provided. The discussion does not pretend to be exhaustive.

It would appear that, although the basic duty owed to an intoxicated person or person under the influence of a drug is that owed to an ordinary man, there is recognition of the fact that the conduct of these persons often results in injury to innocent third persons. There has been afforded under statutory law, and in some court rulings based on common law, a remedy to innocent persons against the seller of the drug or liquor or the person

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[83] Village of Brooten v. Cudahy Co. (1961 C. A. 8) 291 F. 2d 284.

[84] Remon v. Spike (1951 Ohio App.) 109 N. E. 2d 327; Christoff v. Gradsky (1956 Ohio C. P.) 140 N. E. 2d 586; Britton v. Samuels (1911) 143 Ky. 129, 136 S. W. 143, 34 L. R. A. N. S. 1036; Crist v. Kiltz (1939) 288 N. W. 175, 124 A. L. R. 1517.

[85] Forsberg v. Around Town Club, *supra* note 57; Morton v. Roth, *supra* note 57; Douglas v. Athens Market Corp. (1943) 320 Ill. App. 40, 49 N. E. 2d 834; Pearson v. Renfro (1943) 320 Ill. App. 202, 50 N. E. 2d 598; Kreps v. D'Agostine (1946) 329 Ill. App. 190, 67 N. E. 2d 416; Cavin v. Smith (1949) 228 Minn. 322, 37 N. W. 2d 368; Thomas v. Danby (1889) 74 Mich. 398, 41 N. W. 1088.

charged with a high duty of care for the safety of the person injured. There is underlying this remedy a recognition that the person under the influence of liquor or drug lacks (and is known to lack) control over his actions. There is, therefore, a realization that the negligence resulting in the injury is in the sale of the liquor or drug or in the foreseeability of injury arising from the obvious and apparent conduct of the person under the influence of liquor or drug.