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Tort Law - Common Law Dram Shop Acts: Negligence Per Se - Munford, Inc. v. Peterson

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TORT LAW—COMMON LAW DRAM SHOP ACTS: NEGLIGENCE PER SE—*Munford, Inc. v. Peterson*, 368 So. 2d 213 (Miss. 1979).

On May 29, 1975 Scott Peterson and four other minors were involved in an automobile accident in Harrison County, Mississippi, in which Peterson was killed. Evidence disclosed that the group had purchased beer at a convenience store on three separate occasions during the evening. No request was made for verification of the minors' ages by a store employee. The parents and brothers of the deceased brought suit against Munford, Inc., the owner and operator of the Majik Mart convenience store for the wrongful death of Peterson. The jury in the lower court entered a verdict in favor of the Petersons and assessed damages at $100,000. The Mississippi Supreme Court held[1] that Munford's actions in selling the beer to the minors amounted to negligence per se under section 67-3-53(b) of the Mississippi Code Annotated.[2] The court, however, reversed and remanded the lower court's decision based upon a jury instruction[3] which precluded a determination of the decedent's possible contributory negligence. The court deemed the instruction prejudicial and found that it constituted reversible error.[4]

THE DEVELOPMENT OF ALCOHOL SALE LIABILITY

At common law a vendor of intoxicating liquors was not liable to a person injured by one to whom the liquor had been sold. Courts construed the consumption of the alcohol as the proximate cause of the accident and found the sale of the intoxicant as too remote.[5]

State legislatures, however, responding to the mechanization of society, the need for public safety, and the desire to control unbridled sale of alcohol adopted so-called Dram Shop Acts.[6] These acts attach

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[1]Munford, Inc. v. Peterson, 368 So. 2d 213 (Miss. 1979).

[2]MISS. CODE ANN. § 67-3-53(b) (Supp. 1978) which provides:

> In addition to any act declared to be unlawful by this chapter, or by sections 27-71-301 to 27-71-347, Mississippi Code of 1972, and sections 67-3-17, 67-3-27, 67-3-29, and 67-3-57, it shall be unlawful for the holder of a permit authorizing the sale of beer or wine at retail:
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> (b) To sell, give, or furnish any beer or wine to any person visibly or noticeably intoxicated, or to any insane person, or to any habitual drunkard, or to any person under the age of eighteen (18) years.

[3]368 So. 2d at 218. The instruction read: "The court instructs the jury that as a matter of law in this case, the plaintiff's decedent was not negligent, nor at fault, nor to blame for his death; and cannot be charged with any negligence or fault." *Id.*

[4]*Id.* at 218-19.

[5]Hamm v. Carson City Nugget, Inc., 85 Nev. 99, 450 P.2d 358 (1969).

[6]For a list of those states which have legislatively enacted Dram Shop Acts *see* 12 Am. Jur. Trials 733-35 (1966).

civil liability to vendors of intoxicating liquors for damages caused by their overindulgent customers.[7]

In some states where the legislature has failed to adopt dram shop legislation, courts have established judicial liability for those who sell intoxicants in violation of state statutes regulating its sale. The New Jersey Supreme Court appears to have begun the erosion of the common law nonliability by holding that a vendor who sells alcoholic beverages to a minor should foresee the risk of harm the transaction creates, not only to the minor, but to members of the traveling public as well.[8] The court, in determining foreseeability, gave great consideration to the fact that the minor was traveling in a dangerous instrument, an automobile.[9]

Florida, which has no Dram Shop Act, has tackled the problem of imposing civil liability on alcohol vendors in several judicial decisions. In *Davis v. Shiappacossee*,[10] a drive-in alcohol vendor sold twenty-four cans of beer and a half pint of whiskey to three minors who subsequently were involved in an automobile accident in which one of the group was killed. The court found the vendor civilly liable. The court reasoned that it was within the realm of foreseeability that a minor in an automobile to whom liquor was sold may later be involved in an accident.[11] The court based its decision on the doctrine of negligence per se since a Florida statute forbidding the sale of alcoholic beverages to a minor was violated.[12]

The Florida court, however, fourteen years later, in 1977, refused to extend this reasoning beyond the limits in *Davis*. In *Bryant v. Jax Liquors*,[13] a minor not involved in the sale, was injured at a high school initiation proceeding as a result of consumption of intoxicants. The court held this to be beyond the foreseeability of the vendor and too remote to extend liability.[14] The court's decision in *Davis* was further limited in 1978 by *United Services Automobile Association v. Butler*.[15] In that case a minor was killed in an automobile accident after being served alcoholic beverages at a party. The Florida court reasoned that common law liability could not be extended to a social host, but must be restricted to those transactions framed in a commercial setting.[16]

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[7]*See* Roberts v. Casey, 4 Conn. Cir. Ct. 89, 225 A.2d 839 (1966); Iszler v. Jorda, 80 N.W.2d 665 (1957), Annot. 64 A.L.R.2d 696 (1959); Hartwig v. Loyal Order of Moose, 253 Minn. 347, 91 N.W.2d 794 (1958), Annot., 75 A.L.R.2d 459 (1961).

[8]Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1 (1959).

[9]*Id.* at 6, 8.

[10]155 So. 2d 365 (Fla. 1963).

[11]*Id.* at 367.

[12]*Id.*

[13]352 So. 2d 542 (Fla. App. 1977).

[14]*Id.* at 544.

[15]359 So. 2d 498 (Fla. App. 1978).

[16]*Id.* at 500.

A number of state courts have refused to extend civil liability to vendors of intoxicating liquors. The Arkansas high court through *Carr v. Turner*[17] in 1965 expressed the opinion that such an action was entirely within the sphere of legislative control and not subject to judicial interpretation.[18] Nebraska, similarly, in a 1976 decision, *Holmes v. Circo*,[19] refused to recognize liability for the vendor in actions involving accidents that are alcohol related. The court passed over the controversy by claiming, likewise, that the power to create liability was vested in the legislature and not in the judiciary.[20] Nevada, which has statutory law prescribing civil liability for one who sells alcohol to a minor, refused to extend the liability to a vendor who sells to one visibly intoxicated.[21] The court, while recognizing that valid arguments exist for both sides, reasoned that if it had been within the foreseeability of the legislature to extend liability to such cases, the legislature would have done so.[22]

Even in those states where Dram Shop Acts have been adopted by state legislatures, problems have arisen as is illustrated in *Waynick v. Chicago's Last Department Store*.[23] In *Waynick* an automobile accident occurred in Michigan that was the result of consumption of liquor purchased in Illinois.[24] Both states had enacted Dram Shop Acts, but the Illinois act did not extend liability outside of its state boundary.[25] The court applied the doctrine of negligence per se to hold the vendor liable under Michigan common law which was deemed to control.[26] The court determined that the seller had breached his duty of care to those other than the consumer and was liable for the damages and injuries caused as a result.[27]

THE MISSISSIPPI STATUTE AND COURT INTERPRETATION

Following the repeal of Prohibition, the Mississippi Legislature in 1934 adopted a series of laws legalizing and governing the sale of alcoholic beverages.[28] The primary purpose of these statutes was to promote the public health of the state's citizenry. The Mississippi Supreme Court in its opinion in *Alexander v. Graves*[29] gave this interpretation to the legislative motive saying:

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[17]238 Ark. 889, 385 S.W.2d 656 (1965).
[18]*Id.* at 658.
[19]196 Neb. 496, 244 N.W.2d 65 (1976).
[20]*Id.* at 70.
[21]Hamm v. Carson City Nugget, Inc., 85 Nev. 99, 450 P.2d 358 (1969).
[22]*Id.* at 360.
[23]269 F.2d 322 (7th Cir. 1959), *cert. denied* 362 U.S. 903 (1960).
[24]*Id.* at 324.
[25]*Id.*
[26]*Id.* at 325.
[27]*Id.*
[28]Miss. Laws of 1934, c. 171.
[29]178 Miss. 583, 173 So. 417 (1937).

> The Legislature was departing from the policy of total prohibition to a limited sale of intoxicating liquors. They were aware of the history of legislation in reference to the sale and possession of intoxicating liquors dating back many years. It was recognized that there might be portions of the territory within the county where the sale of beer and wine might be hurtful to morals and to the safety of the community. . . . They were not dealing with a subject entirely harmless within itself. They knew that such liquors when drunk to excess produced intoxication. . . . They knew this to be an age in which the machine is much used—almost universally used in transporting people from point to point; and they knew that intoxicating liquors impaired both vision and judgment in the operation of such machines.
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> . . . .
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> Surely, it is as important that the safety and security of the homes of the smaller towns and rural sections shall also be matters for legislative consideration, and we think that the Legislature had in mind the securing of the peace and safety of communities wherein the necessity for regulations to that end exist in the judgment of the board of supervisors.[30]

In 1944 the legislature added a provision,[31] which is presently in force, making it unlawful "to sell, give, or furnish any beer or wine to any person visibly or noticeably intoxicated, or to any insane person, or to any habitual drunkard, or to any person under the age of eighteen years."[32] The court examined this code provision as a basis for its decision in *Ellard v. State*,[33] a criminal case. The facts showed that the defendant had given beer to a minor but an actual sale was not involved.[34] The court construed the statute to mean that a court can find a defendant guilty on only one charge, "selling, giving, or furnishing beer to a minor," if the counts are plead conjunctively.[35]

The statute was further interpreted in *State v. Labella*[36] in which the defendant was convicted for selling beer to a minor. The court held that in order to be convicted of selling intoxicating liquor in violation of the statute, it is not necessary that the defendant actually be present at the time of the offense; thus the sale or dispersal may be the action of an employee or servant.[37] This interpretation expanded criminal liability to owners of establishments in the business of dispensing alcoholic beverages irrespective of whether the owners were actually present at the illicit transaction.

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[30] *Id.* at 594-96, 173 So. at 420-21.
[31] MISS. CODE ANN. § 10223(1)(b) (Supp. 1944).
[32] MISS. CODE ANN. § 67-3-53(b) (1972).
[33] 248 Miss. 313, 158 So. 2d 690 (1963).
[34] *Id.* at 318, 158 So. 2d at 691.
[35] *Id.* at 317-18, 158 So. 2d 691.
[36] 232 So. 2d 354 (Miss. 1970).
[37] *Id.* at 355-56.

ANALYSIS BY THE COURT

In *Munford* the court attached civil liability to a vendor of alcoholic beverages involved in an illegal sale, and thus appears to have opened up a new area of liability, but the court buried this determination deep within its opinion. The court recognized the existence of this expanded liability, but reversed the lower court's holding on a prejudicial jury instruction. This treatment results in a final holding that is far from clear. In its decision, the court seemingly recognized the need for the modernization of the proximate cause doctrine from the common law dictates of consumption and towards the sale in alcohol related cases. In the words of Judge Hallows, Chief Justice of the Wisconsin Supreme Court, in his dissent in *Garcia v. Hargrove*,[38] the basis for the common law beliefs has been "sadly eroded by the shift from comingling alcohol and horses to comingling alcohol and horsepower."[39]

The crux of the court's holding in *Munford* apparently is that violation of the statute constitutes negligence per se and by violating the law, a proprietor of an establishment involved in the sale of alcoholic beverages passes into the realm of liability to those injured as a direct result of the sale.[40] It is the vendor's duty to conform his business behavior so as not to violate the statute.[41] This seems to be a common sense holding. The whole chain of events involved in alcohol-related accidents begins with the sale.[42] The court has reasoned that if a vendor of liquors utilizes due care to see that only authorized persons purchase his products, he has violated no law and as such cannot be held accountable for his customers' subsequent actions. It was readily apparent in *Munford* that the boys were minors. The evidence as well revealed that the sister of one of the group had refused to allow her brother to return with the minors to the store to purchase additional beer because they were visibly intoxicated.[43] Coupling this with the fact that the youths were engaged in the driving of an automobile, the foreseeability of potential harm becomes more apparent.[44]

The court's decision, however, leaves unresolved several issues. For instance, is the extension of civil liability limited only to those sales involving minors or did the court intend to include those other groups enumerated in the statute?[45] The apparent answer is that

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[38]176 N.W.2d 566 (Wis. 1970).

[39]*Id.* at 572.

[40]368 So. 2d at 217.

[41]*Id.* at 218.

[42]*Id.* at 216.

[43]*Id.* at 218.

[44]*Id.* at 217 (quoting from Alexander v. Graves, 278 Miss. 583, 594-95, 173 So. 417, 420 (1937)).

[45]MISS. CODE ANN. § 67-3-53(b) (Supp. 1978).

future holdings will extend liability for the benefit of habitual drunkards, insane persons, and those noticeably or visibly intoxicated, as well as for minors. The legislature sought to protect these groups by enacting restrictive sanctions upon the sale and distribution of alcoholic beverages to them. The judiciary must recognize the protection afforded these special classes in order to further the legislative purpose behind the statute.

Another unresolved question is how may a vendor of alcoholic beverages safeguard himself against liability for sales to a minor. The court states that the method used in determining a minor's age is left to be determined by the vendor.[46] Although the common custom is to require some sort of identification such as a driver's license from the prospective customer, the devious ease of falsification makes this procedure unreliable. Can liability be extended to the vendor who mistakenly sells alcohol to a minor upon belief that he is of majority age? These are questions the court must resolve in future cases in order to clarify the imposition of civil liability to vendors of intoxicating liquors in violation of statute.

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[46]*See* note 36, *supra*.