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Torts--Intentional--Wrongful Death by Liquor

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Supreme Court should have refrained from the exercise of its discretionary power in the present case. Upon an appeal from a conviction, the court would then be compelled to consider the admissibility of such evidence in a proceeding to which a state would be a party, thereby confronting the Court directly with the problem of federal-state relations.

Linza B. Inabnit

TORTS—INTENTIONAL—WRONGFUL DEATH BY LIQUOR—Administratrix of one whose death was caused by drinking a bottle of whiskey sued the vendor of the whiskey under the wrongful death statute.[1] The complaint alleged that defendant, while acting within the scope of his employment as a clerk of a co-defendant, a licensed retailer of packaged liquor, sold the deceased a quart of whiskey for the purpose of injuring him, knowing him to be intoxicated at the time;[2] that the defendant knew that the deceased had bet with another person that he, the deceased, could drink the quart of whiskey without stopping; that defendant knew that it was for the purpose of settling the bet that the deceased bought the whiskey and knew that he intended to drink all of it without stopping; that defendant should have known that the deceased could not safely be trusted with the whiskey but that he sold it to him anyway for the purpose of injuring him. The trial court dismissed the complaint on the ground that it did not state a claim on which relief could be granted.[3] *Held:* Reversed. The Court of Appeals held that the administratrix of one killed by drinking an excessive quantity of whiskey can maintain an action against the vendor who sold the whiskey to deceased for the purpose of injuring him. *Nally* v. *Blandford,* 291 S.W. 2d 832 (Ky. 1956).

The decision was based primarily on statements made in *Britton's Adm'r.* v. *Samuels.*[4] In that case the defendant, knowing plaintiff's intestate was an inebriate and intoxicated at the time, sold him whiskey

[1] Ky. Rev. Stat. 411.130 (hereinafter cited as K.R.S.)

[2] The sale of whiskey to a person actually or apparently intoxicated is a violation of K.R.S. 244.080. In Tate v. Borton, 272 S.W. 2d 333 (Ky. 1954) "intoxication" is defined as being under the influence of alcohol to such an extent that the physical and mental faculties are affected and the judgment impaired. This may be something less than "drunkenness" which the court said is excessive intoxication but does not necessarily mean stupefaction or helplessness.

[3] Kentucky Rules of Civil Procedure, 8.01. Of these rules Commissioner Stanley recently said:

> "But the simplification and liberality extend to the manner of stating a case and are not so great as to obviate the necessity of stating the elements of a cause of action or defense, as the case may be."

[4] 143 Ky. 129, 136 S.W. 143 (1911).
Johnson v. Coleman, 288 S.W. 2d 348, 349 (Ky. 1956).

in violation of local option laws. Plaintiff's intestate died from the effect of the whiskey. The court held that:

> The unlawful or wrongful act was the sale of the liquor, but death was produced, not by the sale, but by the drinking thereof by deceased. The proximate cause of the death, therefore, was not the wrongful or unlawful act complained of.[5]

But after thus stating the holding of that case, the court, by way of qualification, said that,

> . . . in the absence of an allegation that the sale was made for the purpose of injuring him, or with the knowledge that he intended to drink of it to such an extent as to produce injury or death, or that he had reasonable grounds to believe that deceased could not be safely trusted with the whiskey it cannot be charged that the act of making the sale to deceased was wrongful in the sense in which the word is used in the statute under consideration. . . .[6]

This was all that was said on the subject. No reasons were given for these qualifying remarks and no authorities were cited. But it was upon this dictum that the court relied in reaching the result in the principal case. Closer examination of the statement reveals that such was not the law, but that the principle and policy of the law are to the contrary.

The Wrongful Death Statute[7] makes available two theories of recovery, namely, negligence and intentional tort. It is settled that the representative's claim is subject to the same defenses which could have been asserted against deceased had he brought the action,[8] hence, it is clear that the first theory of recovery was not available to this plaintiff for the contributory negligence of deceased would bar recovery.[9]

The alternative theory, that defendant committed an intentional tort, was the one relied on by plaintiff. An elementary prerequisite to any tort liability is an injury to the party suing.[10] The word "injury"

[5] Id. at 129, 136 S.W. at 144 (1911).
[6] Ibid.
[7] Supra note 1.
[8] Apparently this is what the court meant when it said that the plaintiff has the "same cause of action the deceased would have." See Perry's Adm'r. v. Louisville & N. R. Co., 199 Ky. 396, 251 S.W. 202 (1932); Harralson v. Thomas, 269 S.W. 2d 276 (Ky. 1954); but see Louisville Ry. Co. v. Raymond's Adm'r., 135 Ky. 738, 123 S.W. 281 (1909), wherein the court points out that there are actually two causes of action, one, accruing at the time of the injury and which existed at common law, being made to survive by statute, and another, accruing at the time of the death and which did not exist at common law but was created by statute.
[9] Exposing oneself unreasonably to an obvious hazard is contributory negligence. Crouch v. Noland, 238 Ky. 575, 38 S.W. 2d 471 (1931). Contributory negligence is a complete bar in Kentucky to an action based on negligence. Norfolk & W. Ry. Co. v. Bailey, 307 Ky. 386, 211 S.W. 2d 154 (1948). An intoxicated person is held to the same degree of care as a sober person. Louisville & N. R. Co. v. Hyde, 239 S.W. 2d 936 (Ky. 1951).
[10] Restatement, Torts, Sec. 5.

is defined in terms of its legal consequences; that is, it denotes the invasion of a legally protected interest of another.[11] The question then is what legally protected interest of the deceased did the defendant invade?

There are two groups of cases which are of interest on this point. The first are those wherein the courts have consistently refused to protect persons from their own folly. Even in cases decided under the so-called "dramshop" or "civil damage" statutes[12] in force in other jurisdictions the courts hold that one who brings about his own intoxication does not have any cause of action against the one furnishing the liquor. *Buntin* v. *Hutton*[13] was such a case. It was there held that where the person suing voluntarily purchases liquor, or procures another to purchase it, neither the common law nor the dramshop act gives him a right of action against the person furnishing the liquor to recover damages for the harm suffered from drinking the whiskey. To hold otherwise would savor too much of letting a person benefit by his own wrongful act. Similarly, the Alabama court in *King* v. *Henkie*[14] held that where the defendant sold liquor illegally to one helplessly drunk at the time and whose death ensued almost immediately from his drinking of the whiskey, the cause of the death was the drinking of the whiskey and not the sale, and, hence, no right of action existed in favor of the personal representative. In the first of these two cases the court did not once refer to consent or contributory negligence, and in the second that court even went so far as to expressly state that their decision was independent of any question of contributory negligence. Obviously, if the courts had decided that there was a legal injury then the question of contributory negligence or consent could not have been thrust aside in this manner.

The second group of cases is very limited. It consists of two cases arising under circumstances somewhat similar to the principal case and in which the respective courts did find a legal injury. The interest which was recognized and protected was the interest that one, whose

[11] Id., Sec. 7.

[12] Ill. Rev. Stat., c. 43. Sec. 135. This statute provides in part that

> "Every person, who shall be injured, in person or property by an intoxicated person, shall have a right of action in his or her own name . . . 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. . . ."

In Danhof v. Osborne, 10 Ill. App. 2d 529, 135 N.E. 2d 492 at 502 (1956) the court applied the cases arising under the Dram Shop Act to this statute.

[13] 206 Ill. App. 194 (1917).

[14] 80 Ala. 505, 60 Am. Rep. 119 (1886). The court very ably discussses the question of causation in deaths resulting from excessive drinking of intoxicating liquor.

physical or mental faculties are impaired and whose resistance to force or persuasion is reduced or completely lacking, has in being free from inducement, persuasion, or coercion to do an act harmful to himself which he would not do if his faculties were not impaired. Thus, in *McCue* v. *Klein*[15] where the last of three pints of whiskey, consumed by deceased in quick succession, was actually administered to him by defendants, after deceased lost all self control and was helplessly drunk, the court held that the inducement and force thus directed against the deceased was an invasion of a legally protected interest and allowed deceased's representative to recover. In *Ibach* v. *Jackson*[16] the Oregon court held that the complaint stated a cause of action only after it was amended to include an allegation that the defendant forced the deceased to drink liquor and continued to do so after she lost her sense of volition and reason.

No case has been found holding that the sale of whiskey to an intoxicated person subjected the vendor to liability for any harm resulting to the purchaser who voluntarily drank it in excessive quantities. On the contrary, the courts have consistently held that the voluntary act of drinking the whiskey was the cause of any harm which resulted to the consumer. The only cases found wherein a person harmed by excessive indulgence in liquor has been given an action against the one furnishing the whiskey are *McCue* v. *Klein* and *Ibach* v. *Jackson*, supra. In neither of those cases was the sale sufficient to raise the liability. Those cases were based on the fact that the act of drinking was involuntary. It cannot be said that the act of the deceased in the present case was not voluntary. A voluntary act has been defined as "One that proceeds from one's own free will; done by one's choice, or one's own accord, unconstrained by external interference, force or influence and not prompted or suggested by another."[17]

In the principal case the allegations clearly indicate that the drinking of the whiskey was neither prompted nor suggested by the defendant. No act of interference, force or influence is alleged against the vendor either in soliciting the sale or the drinking. On the contrary the complaint alleges that the whiskey was bought for a purpose which the deceased had formed as a result of a bet. With this fixed purpose in mind and already committed to the plan to drink the whiskey without stopping, the deceased bought it. It is implicit in this set of facts that the deceased initiated the sale. The vendor sold the

[15] 60 Tex. 168, 48 Am. Rep. 260 (1883).
[16] 148 Ore. 92, 35 P. 2d 672 (1934).
[17] Brown v. McCulloch, 24 Tenn. App. 324, 144 S.W. 2d 1, 4 (1940), quoting 67 C.J. 274. See also Coker v. State, 199 Ga. 20, 33 S.E. 2d 171 (1945).

whiskey to him, but the purchase and the drinking were not in response to any purpose which the vendor had, however bad. Both acts were motivated by the purposes of the deceased; both acts were done in fulfillment of those purposes and both acts were voluntary acts of the deceased. The complaint alleges that the defendant sold the whiskey to the deceased for the purpose of injuring him, but it states additional facts clearly showing that neither the purchase nor the drinking of the whiskey was in response to that purpose.

The conclusion to which this leads is that the defendant in the present case invaded no interest of the deceased which the common law has previously seen fit to recognize and protect. The courts in other jurisdictions, when confronted with the question have dealt with it as such a drastic change in the existing common law that they have left the choice of policy to the legislatures. The legislatures, however, have not seen fit to extend protection to the purchaser or even to one whom he injures if the injured party contributed to the intoxication of the person injuring him.[18] They have restricted their protection to innocent third parties. Our legislature has not even gone this far, as was pointed out in the principal case. But the Court of Appeals of Kentucky chose to follow the dictum in the *Britton* case, completely overlooking, it would seem, that it is neither sound in principle nor just to permit a person to profit by his own voluntary drinking of an excessive quantity of whiskey. In holding as it did the court established a liability far exceeding even that of the dramshop or civil damage statutes.

In the case of *Britton's Adm'r.* v. *Samuels* the court in distinguishing that case from two previous ones, said:

> These are the only authorities in this State in which this question [what acts were covered by the wrongful death statute] has been raised. In each case the negligence or wrongful act which was made the basis of the suit was one committed *against the person* of

[18] People to Use of Lenand v. Linck, 71 Ill. App. 358, 359 (1877):
"The party complaining and seeking damage must be free from complicity in procuring the intoxication. Such appears to be the view of the courts of last resort in this State, Iowa, and Michigan, although in none of the reported cases were the facts the same as in this case. In each of those cases the complaining party was seeking damages for injuries caused by the intoxication of another. Reget v. Bell, 77 Ill. 593; Hays v. Waite, 36 Ill. App. 397; Engleken v. Helger, 43 Iowa 563; Rosecrants v. Shoemaker, 60 Mich. 4.
"In Iowa and Michigan, where the statutes giving a right of action to persons injured by reason of the intoxication of another are similar to ours, it is held that the wife cannot recover damages from a saloon keeper who has caused the intoxication of her husband, if she herself encouraged or requested the sale of the liquor to her husband. Such holdings were based upon the grounds that she was not an innocent injured party."

> deceased. In one case he was shot and in the other improperly treated. The case under consideration is analogous to neither. Here the wrongful act complained of was the violation of the liquor law. It was not the commission of any wrongful act *toward* the person of the deceased, or the neglect or failure to discharge any duty which the defendant owed him. (Italics supplied)[19]

It would seem that the same could be said of the defendants act in the present case since in both cases the act was an illegal sale of whiskey. In the absence of an allegation of some act which could be said to be directed against the person of the deceased or that the defendant used duress, deception, or arts of persuasion to induce the drinking of the liquor the complaint did not state a claim upon which relief could be granted by previously existing standards.

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TORTS—LANDOWNER'S LIABILITY TO TRESPASSING CHILDREN—Plaintiff, a two and one-half year old boy, sustained injuries when he was run over by a tank car after he had followed his dog into defendant railroad's switchyard. Plaintiff lived adjacent to the switchyard on a street which dead-ended at the yard. Approximately thirty-five to forty children lived on this street. There was no fence or barrier of any kind between it and the switchyard, but defendant had erected a no-trespassing sign at the end of the street and had three patrolmen on duty at all times who inspected the cars and chased children from the property when they saw them. Defendant had knowledge of both child and adult trespassers, but denied that these trespassers crossed the tracks. Plaintiff's evidence showed that in order to avoid going several blocks around the yard, pedestrians often used a path across the yards as a shortcut. The Circuit Court gave a directed verdict for the defendant. *Held:* Reversed. The court said that the case should have been submitted to the jury with an instruction which regarded the switchyard as an inherent peril to the young child, as a matter of law, and which allowed the jury to determine the issues of (1) whether the child's presence could have been anticipated, (2) whether defendant was negligent in failing to take reasonable precautions to prevent the child's entry, and (3) whether this negligence was the cause of the injury. *Mann* v. *Kentucky & Indiana Railroad Company,* 290 S.W. 2d 820 (Ky. 1955).[1]

[19] Supra note 5 at 132, 136 S.W. at 144.

[1] At the subsequent trial in Jefferson Circuit Court in November, 1956, the plaintiff was awarded $175,000 damages for the loss of his leg at the hip and arm at the shoulder.