Drunken Driving-The Civil Responsibility of the Purveyor of Intoxicating Liquor

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Our society has become a motorized one. Nearly seventy-four million motor vehicles are now registered to crowd the nation's highways, and over two million new vehicles are added each year. An improperly handled motor vehicle is a deadly weapon, a weapon to which the general public is exposed. Among the causes of improper driving intoxication must claim near pre-eminence. Consequently, as the civil remedies embraced within the folds of tort law, and particularly those doctrines which constitute the tort of negligence, expand to provide recovery in an ever-increasing variety of situations, it seems to follow that the courts would carefully examine the conduct of a purveyor who sells intoxicating liquors to a customer who is known to the purveyor to be predisposed to the misuse of alcohol, i.e., unusually likely to become intoxicated and to exercise poor judgment in the operation of a motor vehicle while under the influence of the beverage. Under general principles of negligence, is it not foreseeable that dangerous consequences may attend the sale of liquor to prospective motorists who are disqualified by age, capacity or condition from exercising discretion in drinking?

The Common Law Rule. It is generally accepted that the common law affords no cause of action against the purveyor of intoxicating beverages for wrongs against a third person committed by the consumer of such beverages. Frequently, the general rule is so phrased as to require

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2. Id. The estimated current motor vehicle registration represents a gain of 3.3% over the 71,497,000 motor vehicles registered in 1959. The average gain in registrations during the period 1954-59 was over 4% per year.
the consumer to be an "able-bodied man." Thus if the consumer was intoxicated at the time of the sale and was, in addition, an habitual drunkard, which propensity was known to the purveyor, perhaps because of one or more warnings not to sell to this consumer, recovery may be allowed under an exception to the general rule. The theory, sometimes analogized to sales of habit-forming drugs to known addicts, is that the consumer lacks the capacity to resist excess. Logically one might expect a similar exception to the general rule in the case of sales to persons who, although not habitual drunkards, were obviously intoxicated at the time of the sale. However, the cases are not in agreement.

Again logic might have been expected to have created an exception in the case of sales to mental incompetents, but the decisions do not support such an extension. The logical extension of the rule to a consumer who is predisposed to the misuse of alcohol by reason of minority seems not to be recognized by those courts which have passed upon the matter.

As a final exception to the apparent common law denial of liability, reference should be made to consortium recovery. Of course, the compensable injury here is not to the drinker but to his wife. The decisions either imply that the wife's right of action for loss of consortium is contingent upon the creation of an actionable cause in her husband, or that an independent cause of action arises in her if harm is caused to the husband, regardless of the existence or absence of any cause of action in the husband.
Considered against the background of the many decisions confidently denying that liability should ever exist against the purveyor of intoxicating liquors for the drunken antics of his customer, however predisposed to its misuse that customer may have been, two recent decisions stand out in bold relief. In *Rappaport v. Nichols*, the owner of an automobile sued, among others, the owners of four taverns which sold a minor intoxicating beverages with knowledge of his minority and intoxicated condition. The theory of the action was the common law liability of the purveyor and, defendant's motion for summary judgment having been granted by the trial court, the issue on appeal was whether a cause of action could be stated under the common law. The court admitted that most courts would reject such an action under the common law because of an absence of proximate cause between the sale and the injury, but was emboldened by the observation that such proximate cause was frequently found to exist when similar cases were decided under state civil damage statutes. After reference to decisions involving "dangerous instrumentalities," the New Jersey Supreme Court phrased the issue as a question of whether a reasonable person would recognize the sale of intoxicating beverages to a drunk or to a minor as constituting an unreasonable risk of injury to others. The fact that New Jersey had a statute forbidding the sale of liquor to minors suggested to the court a legislative recognition that such sales did pose an unreasonable risk. The Court held that the plaintiff had stated a cause of action and remanded the suit for trial.

*Waynick v. Chicago's Last Department Store* was a diversity action filed in Illinois against, among others, the owners of three liquor stores for damages arising out of an automobile accident caused by the drunken driving of an adult who had become intoxicated through the consumption of beverages sold to him and another by the defendants. The appeal was taken from the granting of defendants' motion for judgment on the pleadings. The Court of Appeals first decided that neither the Illinois nor the Michigan Dram Shop Acts were applicable and that any action would have to be based on the Michigan common law. It then seized upon the implied exception under the common law rule in the case of sales to intoxicated persons. An Illinois statute made the sale of intoxicating beverages to intoxicated persons illegal and the court concluded that this statute was clearly the basis of a duty of care owed to the Michigan plaintiffs. The purveyors were held liable for injuries resulting from the drunken driving of their customer to persons who were injured by

15. 269 F.2d 322 (7th Cir. 1959).
such driving. These two decisions have not been ignored by leading textual authorities.

Also to be noted is Schelin v. Goldberg, which affirmed recovery under common law principles by the person to whom the liquor was wrongfully served for injuries he received in the hands of an offended fellow patron while intoxicated. The court held that the sale of liquor to plaintiff after he had become intoxicated proximately caused his offensive behavior and the resultant assault. In Taylor v. Wright, a widow was able to recover for sales of intoxicating liquor to her husband, drunk and a drunkard, when such sales were proscribed by statute. The court specifically affirmed the finding of proximate cause.

The Rappaport and Waynick decisions are significant in that they constitute a re-evaluation of the common law rule denying purveyor's liability at a time when such a re-evaluation seems particularly appropriate. Why is it that while the scope of civil liability in most areas of the law appears to be expanding, the horrendous results wrought by a drunk, a child or an incompetent ensconced behind the wheel of a powerful automobile are not properly held attributable to the party who provided such a person with liquor while cognizant that this person evinced some special indicia of irresponsibility? What is the reason a liquor purveyor is not civilly responsible for the drunken antics of those of his customers he knew to be predisposed to the misuse of alcohol?

Civil Damage Acts. It is submitted that the popularity of the temperance movement and the resulting “Dram Shop Acts” inhibited the growth of a common law liability upon the purveyor. Presupposing that intoxication created rather than indicated evil, many states adopted civil damage provisions in the middle and late nineteenth century as part of their respective “Dram Shop Acts.” These provisions were based upon strict liability, negligence or fault ordinarily being unnecessary for recovery. Causes of action were created for injuries inflicted “by an intoxicated person” and for injuries inflicted “in consequence of intoxication”

16. The crucial problem of proximate cause was resolved by judicial fiat. A dissent by Justice Knoch objected to the majorities' position that an intoxicated man was not an "able-bodied man.


19. Note that the actionable wrong lay in continued sales of liquor to one (by then) predisposed to its misuse for injuries proximately caused thereby. This is not the basis of liability discussed in the cases cited in note 11 supra.

20. 126 Pa. 617, 17 Atl. 677 (1889).


tion. Under "inflicted by an intoxicated person" statutes, of course, proof that the sale of intoxicants was the proximate cause of the injury would be unnecessary. But under "in consequence of intoxication" statutes the cases are not in agreement. Further, there is no general agreement even among the latter statutes as to whether the sales of liquor need be illegal, although it appears that under the statutes of most jurisdictions such a finding is necessary.

Early state regulation of the liquor trade was halting and in effective. The one powerful sanction restraining excess was the imposition of civil liability by statute as a condition to the privilege of engaging in the business of selling intoxicants. The collapse of temperance as a crusade, however, has stripped civil damage legislation of powerful support during a period in which the jural notion of liability based on proved fault has supplanted absolute liability, i.e., liability which need not be proved in a particular case because it is based upon irrebuttable presumption. In addition, modern legislation tends to regulate the general area of intoxicating liquors in far greater particularity, with comprehensive liquor control acts implemented by state liquor boards and alcoholic beverage commissions which not only regulate but also police to a degree apparently undreamed of by the standards of the nineteenth century. Accordingly, civil damage legislation appears to be waning. At this writing a majority of states are without any such legislation.

The emergence of civil damage legislation during the nineteenth cen-

23. 30 AM. JUR. Intoxicating Liquors § 525 (1958).
24. 48 C.J.S. Intoxicating Liquors § 442 (1947); 30 AM. JUR. Intoxicating Liquors §§541-42 (1958). Indiana has decisions under its civil damage act which require the sale of intoxicants to be the "proximate cause" of the drunken misfeasance of the patrons; Muckle v. Givens, 115 Ind. 286, 17 N.E. 598, 601 (1888); Wall v. State ex rel. Kendall, 10 Ind. App. 530, 38 N.E. 190, 191 (1894); Boos v. State ex rel. Sliney, 11 Ind. App. 257, 39 N.E. 197, 198 (1894); Dunlap v. Wagner, 85 Ind. 529 (1892) and decisions which impose no such requirement; Homire v. Halfman, 156 Ind. 470, 60 N.E. 154, 155 (1900); McCarty v. State ex rel. Boone, 162 Ind. 218, 70 N.E. 131, 133 (1904).
25. 48 C.J.S. Intoxicating Liquors § 434 (1947). An intoxicated customer was essential to the offense. Ordinarily sales to an intoxicated person were illegal. Query the sales that made him intoxicated.
26. Civil damage provisions have recently been repealed in Massachusetts, see Barboza v. Decas, 311 Mass. 10, 40 N.E.2d 10 (1942); and Pennsylvania, see Schelin v. Goldberg, 188 Pa. Super. 341, 146 A.2d 648 (1958).
27. Civil damage acts currently exist in the following jurisdictions: ALA. CODE tit. 7, §§ 121, 122 (1958); CONN. GEN. STAT. REV. § 30-120 (Supp. 1959); DEL. CODE ANN. tit. 4 ch.7, §§ 715, 716 (1953); ILL. REV. STAT. ch.43, §§ 135, 136 (Supp. 1959); IOWA CODE §§ 129.1 and 129.2 (1949); ME. REV. STAT. ANN. ch.61, § 95 (1954); MICH. STAT. ANN. § 18.993 (Supp. 1958); MINN. STAT. ANN. § 340.95 (1957); NEV. REV. STAT. § 202.070 (1959); N.Y. CIV. RIGHTS § 16 (1948); N.C. GEN. STAT. § 14-332 (1953); N.D. REV. CODE §§ 5-01 and 5-21 (1943); OHIO REV. CODE §§ 4399.01, 4399.05, 4399.07 and 4399.08 (1954); OKLA. STAT. ANN. tit. 37, § 121 (1951); OR. REV. STAT. § 30.730 (Repl. 1959); R.I. GEN. LAWS ANN. §§ 3-11-1 and 3-11-2 (1956); WY. STAT. ANN. ch.17, § 501 (1959); WASH. REV. CODE § 71.08.080 (1959); WIS. STAT. § 176.35 (1957); WYO. COMP. STAT. ANN. § 12-34 (1957). Query, S.D. CODE § 5.0208 (1959).
tury helps to explain the absence of a common law remedy in favor of an injured third person against the purveyor of intoxicants for the drunken actions of the purveyor's customer. As long as such legislation was popular, recourse to the common law was unnecessary. But this does not explain nor justify the continued absence of such a cause of action under the common law today in those jurisdictions which once had, but have since repealed, such legislation. Further, it appears that other jurisdictions labor under present uncertainty either as to the scope of their particular statute or even as to its existence.28

28. The problems created by the substitution of a comprehensive liquor control act for an antiquated statute or series of statutes imposing only partial regulation in the area of intoxicating liquors is illustrated by the present status of Indiana's civil damage act. The basic act was created as § 20 in Chapter 13 of the Acts of the Indiana General Assembly for 1875, Spec. Sess. Thereafter Chapter 127 of the Acts of 1895 superimposed further regulation in the area of intoxicating liquors, including § 9 1/2 thereof which was directed specifically at the sale of intoxicating liquors by drugstores. Section 1 of Chapter 293 of the Acts of 1907 elaborated the regulation of sales by taverns, but specifically excepted sales by any druggist or pharmacist licensed as such by the state board of pharmacy. Section 2 of Chapter 293 authorized sales by druggists or pharmacists for medical, industrial or scientific purposes. Note that Chapter 16 of the Acts of 1907, which amended § 12 of the 1875 Act, also provided considerable regulation as to sales by druggists.

Query whether the existence of the Acts of 1895 and 1907, which carefully separated druggists from other purveyors of liquor, impliedly repealed § 20, the civil damage provision of the Acts of 1875 as to druggists? The Legislature had identified them as a separate class and had imposed a separate regulatory scheme upon them. Arguably, the regulation found in the Acts of 1895 and 1907 was intended as comprehensive, ergo as exclusive. But this argument cuts two ways. If the Legislature under Chapter 13 of the Acts of 1877 imposed civil damage liability upon "every person who shall sell ... any intoxicating liquors in violation of ... this act," and the Legislature thereafter evinced an intention to regulate druggists separately (see Chapter 51 of the Acts of 1877; Chapter 37, § 191 of the Acts of 1881; Chapter 169, § 580 of the Acts of 1905, in addition to the Acts of 1895 and 1907, mentioned above), then the subsequent implied repeal of civil damage liability under Chapter 119 of the Acts of 1911, an act which specifically provided, in § 28 thereof, that it did not apply to "any druggist or pharmacist licensed as such," should not be construed as implicitly repealing the civil liability provision as to sales by druggists.

As to the continued existence of § 20 respecting general liability, viz., sales by purveyors other than druggists; it must be observed that Chapter 119 of the Acts of 1911, although not comprehensive, did provide a system for licensing and regulating saloons and did specifically preserve those earlier statutes, the continued existence of which would serve to supplement its own coverage. Thus, for example, sales to minors, although not forbidden by the Act of 1911, had been proscribed under the Act of 1895 and this act was specifically preserved in 1911. Since the Act of 1875, and with it § 20, the civil damage provision, was not specifically preserved, the implication is strong that it was impliedly repealed by the Act of 1911.

Reference is made to Drury v. Krogman, both as reported in 70 Ind. App. 607, and as contained in 120 N.E. 620 (1918). As reported in the Northeastern Reporter, the Appellate Court held that § 20 had been repealed by implication by the Acts of 1911 since both statutes dealt primarily with the licensing and regulation of saloons. But the official Indiana Appellate Reporter shows the court to have avoided this issue. After referring to this section, the court quoted it at length and concluded by saying, on page 613:

Appellee earnestly insists that said § 20 was repealed by the act of March 4, 1911, entitled "An Act Concerning Intoxicating Liquors." Acts 1911 p. 244, ch. 119, § 8323d et seq. Burns 1914. In support of that contention appellee cites
Having established the need for a common law action against the liquor purveyor for the drunken antics of a customer whom the purveyor should have known was particularly unreliable, and having suggested an explanation respecting the dearth of present remedy, it now remains to re-examine the common law in order to ascertain whether it is indeed true, as is so often confidently assumed,\textsuperscript{20} that no action can be stated thereunder.

**Proximate Cause: The Common Law Rule Re-examined.** The greatest barrier to recovery under the common law against a liquor purveyor for the actions of his customer is certainly the matter of proximate cause. The common law has consistently regarded the proximate cause of the ultimate injury to be the drinking rather than the sale of liquor.\textsuperscript{20} In fact, as previously observed,\textsuperscript{21} many courts look for a “proximate” causal relationship even when the action arises under a civil damage statute. Traditional notions of justice, grounded evidently in the ethic of individual responsibility, saw each customer of the purveyor as a free and responsible agent, hence accountable for any excesses he committed. Whatever the negligence of the purveyor in providing the intoxicant, its consumption by the customer constituted an intervening act and a superseding cause.

If the standard rationale is that the drinking or those acts of carelessness which attend subsequent intoxication constitute a superseding cause insulating the purveyor from liability, may not a satisfactory answer be suggested by *Restatement of Torts*?\textsuperscript{32} The intervening act, itself negligent, need not be a superseding cause if its occurrence would be foreseeable to the person whose conduct is subject to inquiry. Thus the leaving of a dynamite cap in an abandoned truck where it was discovered by a child proximately caused injury to another child when the cap exploded after being thrown into a fire by a friend of the discovering child;\textsuperscript{33} the sale of ammunition to a fifteen-year-old child was the proximate cause

\textsuperscript{29} Authorities cited note 5 supra.
\textsuperscript{30} Authorities cited note 5 supra. However, this view is under attack. See the dissenting opinions in Fleckner v. Dionne, 94 Cal. App. 246, 210 P.2d 530 (1949); and Cole v. Rush, 45 Cal.2d 345, 289 P.2d 450 (1955).
\textsuperscript{31} See note 24 supra.
\textsuperscript{32} *RESTATEMENT, TORTS* § 447 (1934).
\textsuperscript{33} Luhman v. Hoover, 100 F.2d 127 (6th Cir. 1938).
of a shooting even though a gun was only thereafter obtained from another person;\textsuperscript{34} the sale of an air rifle to a fifteen-year-old boy could be the proximate cause of a shooting when the gun was thereafter loaned to a second boy who actually fired the shot;\textsuperscript{35} the sale and delivery by a wholesaler to a retailer of a torpedo toy proximately caused injury to a child when thrown at him by the retailer's twelve-year-old son\textsuperscript{36} and the failure of a motorist to remove his keys from the ignition of his parked car, as required by law, could be the proximate cause of a collision when the car was thereafter stolen and driven into plaintiff's parked car.\textsuperscript{37}

A defendant may reasonably be required to guard against a foreseeable intervening cause whether\textsuperscript{38} or not\textsuperscript{39} this cause is itself negligent. The degree of precaution required varies with the apparent reliability of the person dealt with. If that person bears some particular indicia of unreliability such as insanity,\textsuperscript{40} intoxication,\textsuperscript{41} or minority,\textsuperscript{42} greater precautions are chargeable against a reasonable man. If it is negligence to give a gun,\textsuperscript{34} an automobile,\textsuperscript{44} or dynamite caps\textsuperscript{45} to a child because of his mi-

\textsuperscript{34} Mautino v. Piercedale Supply Co., 338 Pa. 435, 13 A.2d 51 (1940).


\textsuperscript{37} Ney v. Yellow Cab, 348 Ill. App. 161, 108 N.E.2d 508 (1952); 21 Ill. 2d 74, 117 N.E.2d 74 (1954). Of course this restriction of the principle of superseding cause to non-forseeable intervening acts has also been denied. See Kiste v. Red Cab, 122 Ind. App. 597, 106 N.E.2d 395 (1952); Sullivan v. Griffin, 318 Mass. 359, 61 N.E.2d 330 (1945) (keys in open car subsequently stolen); Central Flying Service v. Crigger, 215 Ark. 400, 221 S.W.2d 45 (1949) (action by parents of deceased airplane passenger against lessor of airplane for its rental to notoriously reckless pilot); Wannebo v. Gates, 227 Minn. 194, 34 N.W.2d 695 (1948) (keys in ignition); Sarraco v. Lyttle, 11 N.J. Super. 254, 78 A.2d 288 (1951) (keys in ignition). For a review of this issue with regard to unattended automobiles, see Annot., 31 A.L.R.2d 633 (1957), Annot., 158 A.L.R. 1374 (1945) and Annot., 26 A.L.R. 912 (1923); with regard to explosives injuring children, see Annot., 10 A.L.R.2d 22 (1950), with particular reference to § 11, beginning on page 49, which discusses the issue of proximate cause and concludes that ordinarily the carelessness of the child does not constitute an intervening cause.

\textsuperscript{38} Owensboro Undertaking & Livery Ass'n v. Henderson, 273 Ky. 112, 115 S.W.2d 563 (1938); Tolbert v. Jackson, 99 F.2d 513 (5th Cir. 1938); Ment v. Breeze Corp., 4 N.J. 428, 73 A.2d 183 (1950); Mitchell v. Churches, 119 Wash. 547, 206 Pac. 6 (1922); Rounds v. Phillips, 166 Md. 151, 170 Atl. 532 (1934), 168 Md. 120, 177 Atl. 174 (1935); RESTATEMENT, TORTS § 302, comment (1) and illustrations 15, 16, 18, 19 and 20.

\textsuperscript{39} Long v. Crystal Refrigerator Co., 134 Neb. 44, 277 N.W. 830 (1938).

\textsuperscript{40} Paulen v. Shinnick, 291 Mich. 288, 289 N.W. 162 (1939) (sufferer from dementia praecox leaped from third floor window).

\textsuperscript{41} Owensboro Undertaking & Livery Ass'n v. Henderson, 273 Ky. 112, 115 S.W.2d 563 (1938) (automobile rented to intoxicated person); Tolbert v. Jackson, 99 F.2d 513 (5th Cir. 1938).

\textsuperscript{42} Binford v. Johnston, 82 Ind. 426 (1882) (ten and twelve-year-olds left pistol where six-year-old could take and fire it); Paschka v. Carsten, 231 Iowa 1185, 3 N.W.2d 542 (1942) (six-year-old ran against moving car). See generally Annot., 30 A.L.R.2d 5 (1953) for a duty of a motorist approaching a place where children are gathered.

\textsuperscript{43} Binford v. Johnston, supra note 41; Meers v. McDowell, 110 Ky. 926, 62 S.W. 1013 (1901).

\textsuperscript{44} Hopkins v. Droppers, supra note 41; Meers v. McDowell, 110 Ky. 926, 62 S.W. 1013 (1901).

\textsuperscript{45} Hopkins v. Droppers, supra note 41; Meers v. McDowell, 110 Ky. 926, 62 S.W. 1013 (1901).
DRUNKEN DRIVING

nority, the same should be true with regard to alcohol.

Is it essential in order to predicate liability for the drunken driving of a liquor purveyor's customer upon the sale of liquor by the purveyor that this person knew or could reasonably be held to know that his customer intended to drink, then drive? The foreseeability of an unreasonable risk of danger is essential to negligence, but all sources of danger created by the actor need not be foreseeable at the time of the negligent act. It has been suggested that most customers, at least of taverns, arrive and plan to depart by automobile, hence knowledge of this probability could reasonably be imputed to the purveyor. Even if such knowledge were not specifically found, it is certainly generally recognized that driving an automobile requires skill such as to render hazardous its attempt by the intoxicated, and that driving is a normal incident to our society. Accordingly it is suggested that, considering the purveyor's customer only as a typical member of our society, the possibility of his electing to drive after having drunk is not one so unlikely and unforeseeable, as, perforce, to fall beyond the pale of liability.

The Ambit of the Purveyor's Duty of Care. Since modern tort law places the responsibility for foreseeable intervening acts with the person who should have foreseen such acts when considering his own conduct, and since the liquor purveyor may fairly be held to knowledge that those of his customers who are predisposed to improper drinking by age, condition or capacity may well drive while intoxicated, it is suggested that the purveyor owes a duty of care respecting his sales to such potential drunken drivers to all who may come into contact with such persons. The Restatement of Torts so defines the reasonable man's duty of care

impugned by the subsequent opinion in 191 Wis. 334, 210 N.W. 684 (1926), since the latter depended upon an issue of fact.

45. See note 33 supra.
48. The reference to foreseeability within the context of proximate cause invites at least passing reference to the "risk theory" of liability. Proximate cause is the legal limitation placed upon responsibility for the consequences of one's acts and is based upon considerations of social policy. The omnibus doctrine of proximate cause was rejected by Justice Cardozo in Palsgraf v. Long Island R. Co., 248 N.Y. 339, 162 N.E. 99 (1928), in favor of the "risk theory." Cardozo argued that since foreseeability defined both the elements of duty and of proximate cause the latter could be disregarded entirely as an element of negligence. Under Cardozo's formulation the test remains that of determining whether the defendant's conduct created an unreasonable risk as to the plaintiff. But the risk reasonably to be perceived delimits the duty of care owed and, as such, the resultant liability. By comparison, the traditional doctrine held that a duty of care, once found to exist at all, was owed to the world. Surely most persons injured by drunken drivers are just those most dangerously exposed, whether as passengers, other motorists or pedestrians, hence foreseeable plaintiffs within the rule of the Palsgraf case. This rule has subsequently been adopted by the Restatement, Torts § 281(b), comment c. on clause (b).
that liability is predicated against one who creates an unreasonable risk because of the expectable action of a third person,\textsuperscript{49} and against one who supplies a chattel, knowing that it is likely to be misused by the person supplied because of some special characteristic causing unreliability.\textsuperscript{50}

\begin{quote}
49. \textit{Restatement, Torts} § 302 (1934), provides in part as follows:
\begin{quote}
A negligent act may be one which:
\begin{quote}
(b) creates a situation which involves an unreasonable risk to another because of the expectable action of \ldots a third person \ldots .
\end{quote}
\end{quote}
Consider the following examples:
\begin{quote}
A leaves an automobile in a business district without locking the ignition. A is ordinarily entitled to assume that no one will start the car. B leaves his car in such condition in front of a public school just before recess. B may be required to expect that some of the children will tamper with the car and set it in motion. A entrusts his automobile to his son, a boy of ten, who to his knowledge is a reckless driver. A is liable to B whom A's son runs down by careless driving in violation of the highway act. A and B have agreed to take a party of young people to a road house in A's car and have stocked the car with contraband liquor. There had been similar excursions before on which both A and B had frequently become intoxicated. A, finding himself unable to make the trip, lends his car to B. B becomes intoxicated at the road house and in consequence drives the car negligently on his return therefrom. In so doing, he harms C. A is liable to C. These examples appear as illustrations 6, 7, 18 and 19 in support of § 302. Consider also comment i, urged in support of § 302:
\begin{quote}
Action of human beings. Whether the actor as a reasonable man is entitled to expect that human beings will exercise the amount of attention, foresight and skill which persons of their class customarily exercise in similar conditions depends upon a variety of factors. If the actor knows or should know that the safety of the situation which he has created depends upon the actions of a particular person or a particular class of persons, he is required to take into account their peculiar characteristics or inattention, carelessness or lawlessness if he knows or should know thereof.
\end{quote}
50. \textit{Restatement, Torts} §§ 308 and 390 (1934) impose liability on one who supplies a chattel with knowledge that it is likely to be misused by the person supplied because of some special characteristic of that person. A lends his car to B whom he knows to be intoxicated. B's intoxicated condition leads him to cause harm to C. A is liable to C. \textit{Restatement, Torts} § 308, illustration 2 (1934). A gives a loaded gun to B, a feeble-minded girl of ten, to be carried by her to C. While B is carrying the gun she tampers with the trigger and discharges it, harming C. A is liable to C. \textit{Restatement, Torts} § 390, illustration 1. See also comment c (1934).
\begin{quote}
A, who makes a business of letting out boats for hire, lets his boat to B and C, who are obviously so intoxicated as to make it likely that they will mismanage the boat so as to capsize it or to collide with other boats. B and C by their drunken mismanagement collide with the boat of D, upsetting both boats. B, C and D are drowned. A is liable to the estates of B, C and D under the death statute, although the estates of B and C may also be liable for the death of D. \textit{Id.}, illustration 6. As an application of these sections consider \textit{Ind. Ann. Stat.} § 47-2904 (Burns 1942), imposing negligence liability by statute for the furnishing of a motor vehicle to an unlicensed person under 18 years of age. The Indiana Legislature recognized this classification as particularly dangerous and has constructively imputed such an awareness to those who would loan members of the group an instrument as dangerous as an automobile. Additionally, this statute has been held to be the basis for civil liability under the doctrine of negligence \textit{per se}. Smith v. Thomas, 126 Ind. App. 59, 130 N.E.2d 85 (1955).
\end{quote}
\end{quote}
Of course, the duty of care will admit of other definitions. In both Rappaport and Waynick, the two decisions most clearly allowing recovery under the common law, a state criminal statute was used as the basis for a duty of care owed by the purveyor of liquor to the public at large. Statutory prohibitions respecting the sale of alcoholic beverages to minors, drunkards and intoxicated persons are customary among the states of this Union. Violations of such statutes are crimes, generally misdemeanors, and criminal sanctions are provided. But can their violation also constitute negligence per se, i.e., serve as the basis for civil as well as criminal liability?

If specified conduct is prohibited by the legislature because the risks generated justify a legislative declaration as to their unreasonableness, why not employ this declaration as a standard of conduct in civil cases? The issue is whether the statute was intended for the protection of such persons as are commonly injured by drunken drivers from the dangerous actions of such persons. On this question a conflict of authority obtains. If the statute forbids sales to an intoxicated person the relationship is most easily seen; untoward acts threatening the general public are certainly more likely when liquor is sold to a person who is intoxicated than when sold to one who is not. Based upon the laws of probability, the same may be said of sales to habitual drunkards. Some doubt may be appropriate as to whether the prohibition of such sales to minors is intended to protect the general public from the dangerous actions of the minor or, alternatively, to protect the minor's own health, physical or mental, from the deleterious effects of alcohol on a person not yet fully developed. It is suggested, however, that whatever harm alcohol may do to the body of a pre-puberty child, statutes forbidding alcohol to phys-

51. See note 14 supra.
52. See note 15 supra.
53. Sales to minors and to habitual drunkards are prohibited in Indiana under Ind. Ann. Stat. § 12-610 (Burns 1956); sales to intoxicated persons are prohibited under Ind. Ann. Stat. § 12-615 (Burns 1956).
54. Smith v. Thomas, 126 Ind. App. 59, 130 N.E.2d 85 (1955), (Ind. Ann. Stat. § 47-2904 (Burns 1942), which imposed financial responsibility for the loan of a motor vehicle to certain unlicensed minors, was held applicable as a standard of negligence); Martin v. Herzog, 228 N.Y. 164, 126 N.E. 814 (1920); Larkins v. Kohlmyer, 229 Ind. 391, 98 N.E.2d 896 (1951); Restatement, Torts § 286. See Thayer, Public Wrong and Private Action, 27 Harv. L. Rev. 317 (1914) for the classic statement of this doctrine.
56. Note that the sales in Rappaport were to a drunk minor although the court there carefully stated its holding so that sales to either a minor or to a drunk would appear to suffice, i.e., to constitute "imprudent conduct." Hence the decision amounts only to dicta on this crucial issue.
ically mature persons who have not yet attained their legal majority are concerned primarily with public safety. As such, a statutory prohibition against the sale of liquor to minors, and a fortiori as to such sales to drunks or drunkards, should be available as a standard by which to evaluate the conduct of a purveyor. 57

**Analogous Authority.** Granting that one who sells intoxicating beverages to persons disqualified by age, capacity or condition is in a position to create myriad situations dangerous to the general public, and granting also that the use of a motor vehicle by such disqualified persons affords them an unprecedented opportunity to come into contact with, and to make their mark upon, a general public which would like only to avoid them under such circumstances, compensation from the purveyor for damage sustained through the drunken driving of such disqualified customers is consistent with the basic principles structuring the law of negligence. Certainly the doctrines of proximate cause and of risk should not, per se, preclude recovery. Placing intoxicating liquor in the possession of a child, a drunk or an idiot knowing that this person intends to drink and drive is to create an unreasonable risk of injury to motorists and pedestrians which is foreseeable from the point of view of the purveyor at the time he is considering whether or not to make the sale. The doctrinal support of the *Restatement of Torts* has already been indicated, but analogous decisional law is also extant.

A cause of action was stated when it was alleged that damage was caused because a minor was given possession of a dangerous instrumentality; 58 because a drunk was given possession of an automobile; 59 be-

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57. In fact compliance with all criminal statutes may well be regarded as necessary yet not sufficient. If criminal standards are minimal, conduct may not transgress them yet offend society sufficiently to justify compensatory damages in tort. Grand Trunk Ry. Co. v. Ives, 144 U.S. 408, 684 (1892); Curtis v. Perry, 171 Wash. 542, 18 P.2d 840, 843 (1933); Morris, *The Role of Criminal Statutes in Negligence Actions*, 49 Colum. L. Rev. 21 (1949).


59. Deck v. Sherlock, 162 Neb. 86, 75 N.W.2d 99 (1956) (automobile); Mitchell v. Churches, 119 Wash. 547, 206 Pac. 6 (1922) (automobile); V. L. Nicholson Const. Co. v. Lane, 177 Tenn. 440, 150 S.W.2d 1069 (1941) (automobile); Fleckner v. Dionne, 94 Cal. App. 246, 210 P.2d 530 (1949) (dissenting opinion; see the authorities cited on this point on page 535 of the opinion); Owensboro Undertaking & Livery Ass'n v. Henderson, 273 Ky. 112, 115 S.W.2d 563 (1938) (automobile); Tolbert v. Jackson, 99 F.2d 513
cause a person whose capabilities were unknown was given, or allowed to
take, possession of a dangerous instrumentality;\textsuperscript{60} because intoxicating
liquor was given to a known inebriate;\textsuperscript{61} and because intoxicating liquor
was given to a person who was already intoxicated.\textsuperscript{62} It follows from
these authorities that one who provides liquor, a commodity recognized
by men as likely to bring out erratic tendencies, to a person recognized by
the law as tending towards erratic responses, creates an unreasonable risk
of injury.

Conclusion. It is submitted that there is, today, no reason not his-
torical in nature why the law should distinguish in terms of liability be-
tween the placing of a firearm, an automobile and liquor in the hands of
a child, a drunk, a drunkard or an idiot. Even in forums where stare
decisis is sacrosanct, recovery under the common law can be justified
within the terms of the traditional formulation of the rule itself since
the rule only denies a cause of action for damage caused by the drunken-
ness of an “able-bodied man.” This rule does not seek to cover those
instances in which the drinker is not an “able-bodied man” but a boy, a
drunk, a drunkard or a mental incompetent. Such consumers, disqualified
by age, condition or capacity, are exceptions to the rule and should be so
regarded.

It may be suggested that the recognition of a general cause of action
against purveyors of liquor for the untoward actions of their customers
is to make insurers of the purveyors. Is it fair to hold such persons re-
ponsible for every act thereafter performed by the customer? Perhaps
it is tenuous to expect the purveyor to anticipate that his customer will
commit a crime of violence while intoxicated,\textsuperscript{63} but it is far less difficult
to anticipate that while drunk he will become careless and may negli-
gently, although unintentionally, injure someone. The liability advocated
is civil only and sounds in negligence. Note, however, that it is not every
negligent injury by a drunk that is to be charged against the purveyor,
but only those in which some harm was foreseeable as particularly likely

\textsuperscript{60} Ney v. Yellow Cab, 348 Ill. App. 161, 108 N.E.2d 508 (1952) (keys left in igni-
tion of parked automobile); Ross v. Hartman, 139 F.2d 14 (D.C. Cir. 1943) (keys

\textsuperscript{61} Pratt v. Daly, 55 Ariz. 535, 104 P.2d 147 (1940); Swanson v. Ball, 67 S.D.
161, 290 N.W. 482 (1940).

\textsuperscript{62} Nally v. Blandford, 291 S.W.2d 832 (Ky. 1956); McCue v. Klien, 60 Tex. 168,

\textsuperscript{63} Waller’s Adm’t v. Collingsworth, 144 Ky. 3, 137 S.W. 766 (1911) (homicide
by drunk minor); Swinfin v. Lowry, 37 Minn. 345, 34 N.W. 22 (1887) (assault by
drunk minor); Barboza v. Decas, 311 Mass. 10, 40 N.E.2d 10 (1942) (assault by drunk
minor).
to occur because of the known irresponsibility of the drinker. It is more likely that injury will attend the consumption of alcoholic beverages by an infant, one already drunk, or one of unsound mind than is the case with an “able-bodied man,” and it is only in such special situations, viz., sales to those predisposed to misuse, that civil responsibility for the resulting drunken driving should obtain.

In point of fact, however, the argument concerning insurance does suggest a practical consideration. The retailing of intoxicating liquor is a carefully regulated industry. Customarily these retailers will make at least minimal showings respecting financial responsibility and will insure against personal liability judgments. The cost of the insurance is a business expense which may be conveniently passed on to the retail public. Contrast the present situation in which the plaintiff, perhaps grievously injured, may look only to the liquor purveyor’s customer for his recovery. The customer may not carry insurance and he may be, in effect, judgment proof. Of course, this argument seems less persuasive when the “purveyor” becomes a friendly individual who has given liquor to his young, drunk or incompetent friend. But, if such an individual can be liable for providing such a friend with a car or a gun, why not for providing him with liquor? The result, equally, should be actionable.

It has been suggested\(^\text{64}\) that the absence of civil damage legislation is tantamount to the clear mandate of the legislature that it does not want the purveyor of liquor to be liable for the drunken driving of his customer. The conclusion does not, however, follow from the premise. The legislature may well manifest its intent that no absolute liability obtain respecting sales of intoxicants when it fails to adopt civil damage legislation, but it is submitted that the legislature evinces no such mandate respecting liability under principles of negligence. Specific legislation should be no more necessary to make negligent the sale of liquor to particular groups disqualified by age, condition or capacity than it is with regard to any other conduct which a reasonable man, similarly situated, would recognize as creating an unreasonable risk of injury.

The judiciary should disenthrall itself of the presupposition that drinking is evil per se. This presupposition, whether or not true, is certainly not the whole truth. An intoxicated state, once recognized as a result rather than a cause of evil, cries out for redress against those who were most directly involved in the creation of the condition, viz., the immediate supplier, as well as the drinker. Such a view is germinating\(^\text{65}\) and is...

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65. Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1 (1959); Waynick v. Chicago’s Last Department Store, 269 F.2d 322 (7th Cir. 1959); Schelin v. Goldberg, 188 Pa. Super. 341, 146 A.2d 628 (1958); BLASHFIELD, Cyclopedia of Automobile Law & Prac-
The strength of the common law lies in its capacity to adapt itself to ever-changing circumstances. Although traditionally hesitant to change, it should not fail to do so when a hoary doctrine loses its *raison d'etre*. Under generally accepted principles of negligence, the civil liability of the liquor purveyor for the drunken driving of those of his customers whom he knew to belong to groups disqualified by age, condition or capacity from the consumption of liquor should be a question of fact in each case.

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67. Consider, for example, the hallowed doctrine of sovereign immunity and its gradual erosion by the common law.
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