

Torts--Dram Shop Act--Statutory Coverage Does Not Preclude Common-Law Negligence Action (Berkeley v. Park, 47 Misc. 2d 381 (Sup. Ct. 1965))

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overruling the *Palko* determination that only a part of the double jeopardy provision—that which is fundamental—is applicable to the states. Since the states do not now enjoy *carte blanche* with respect to reprosecution for the offense originally charged, it seems likely that the Supreme Court will only extend the prohibition to include reprosecution for a higher offense, where the defendant has been convicted of, and successfully appeals the lesser offense included in the indictment.



TORTS—DRAM SHOP ACT—STATUTORY COVERAGE DOES NOT PRECLUDE COMMON-LAW NEGLIGENCE ACTION.—Plaintiffs brought an action against a tavern owner for wrongful death and personal injuries on the ground that he had negligently served liquor to two intoxicated men who thereafter caused an automobile collision resulting in the alleged injuries and deaths. In denying defendant's motion to dismiss the negligence cause of action, the New York Supreme Court *held* that an action under the Dram Shop Act was not the exclusive remedy—that recovery for common-law negligence was also available. *Berkeley v. Park*, 47 Misc. 2d 381, 262 N.Y.S.2d 290 (Sup. Ct. 1965).

At common law, the sale of liquor to an intoxicated person was not considered the proximate cause of any injury inflicted by the purchaser.¹ Thus, while the intoxicated person remained liable for any injury he caused to others, the act of the vendor in selling liquor to him was not actionable by the injured third party,² unless the injury took place on the vendor's premises.³ When such liability attached, the seller's act was considered a willful breach of his duty to use reasonable care in policing the premises, which breach was the proximate cause of the injury.⁴

To afford a remedy against vendors for the acts of intoxicated persons to whom they had served liquor, about one-half of the states, including New York, passed so-called Civil Damage Acts, better known as Dram Shop Acts.⁵ These statutes arose out of the temperance movement of the 1870's. The purpose of these laws was to suppress the sale of intoxicating liquor by making persons who sold it liable for damages which resulted from the ensuing intoxication.⁶ A plaintiff, thereunder, was not required

¹ *Belding v. Johnson*, 86 Ga. 177, 12 S.E. 304 (1890).

² *Seibel v. Leach*, 233 Wis. 66, 288 N.W. 774 (1939).

³ *Tyrrell v. Quigley*, 186 Misc. 972, 60 N.Y.S.2d 821 (Sup. Ct. 1946).

⁴ *Ibid.*

⁵ *Ogilvie, History and Appraisal of the Illinois Dram Shop Act*, 1958 U. ILL. L.F. 175, 180 n. 30.

⁶ *Mead v. Stratton*, 87 N.Y. 493 (1882).

to show foreseeability on the part of the tavern owner,⁷ nor that the sale complained of was the proximate cause of the injuries.⁸ A plaintiff had to establish only that defendant-vendor had sold the liquor, that intoxication had resulted from its use, and that some causal relation existed between the act of serving the liquor and the plaintiff's injury.⁹

New York State enacted its first Dram Shop Act in 1873.¹⁰ While this original act held the vendor liable for *any* sale of liquor resulting in injury to third parties, today an *unlawful* sale is required.¹¹ Therefore, the Dram Shop Act should be read together with Section 65 of the Alcoholic Beverage Control Law¹² which makes it unlawful to serve liquor to anyone actually or apparently intoxicated.

Recovery under the Dram Shop Act is not based on negligence, but is founded solely on the willful violation of a statutory prohibition.¹³ The courts have unanimously held that the legislature intended to change the common-law rule which required that the act be the proximate cause of the injury, by allowing recovery against those who, in furnishing liquor, have only remotely produced the injuries.¹⁴ The vendor is "bound by the law to exercise judgment and discretion in making his sales, and if he fails in this respect he becomes liable for consequences."¹⁵

The courts have not determined that the Dram Shop Acts have *completely displaced* the common law in this field. While there has been no recovery *in negligence* for injuries inflicted off the premises (where the statute has been the exclusive remedy), nonetheless, recovery has been allowed, both in negligence and under the Dram Shop Acts, for injuries occurring *on* the premises.¹⁶

In the principal case, the Court concluded that the New York Dram Shop Act contained nothing which excluded an action in common-law negligence. To the argument that "the statute which creates the right of recovery is the exclusive source and boundary of the liability and the remedy,"¹⁷ the Court replied that this

⁷ 18 ALBANY L.J. 424, 425 (1878).

⁸ Bertholf v. O'Reilly, 74 N.Y. 509, 524 (1878).

⁹ *Id.* at 513.

¹⁰ N.Y. Sess. Laws 1873, ch. 646, § 1.

¹¹ N.Y. GEN. OBL. LAW § 11-101.

¹² Moyer v. Lo Jim Cafe, Inc., 19 App. Div. 2d 523, 240 N.Y.S.2d 277 (1st Dep't 1963).

¹³ Playford v. Perich, 2 Misc. 2d 170, 174, 152 N.Y.S.2d 201, 204 (Sup. Ct. 1956).

¹⁴ Bertholf v. O'Reilly, *supra* note 8.

¹⁵ Baker v. Pope, 2 Hun 556, 557 (N.Y. Sup. Ct. 1874).

¹⁶ See Tyrrell v. Quigley, *supra* note 3; Kinney v. 1809 Forest Ave. Corp., 7 Misc. 2d 261, 165 N.Y.S.2d 149 (Sup. Ct. 1957).

¹⁷ Dowling v. Stephan, 206 Misc. 518, 520, 133 N.Y.S.2d 667, 671 (Sup. Ct. 1954).

merely limits recovery under the statute to those instances specifically defined.

The absence of a remedy under common law was not significant, because the threat to public safety presented by sales of liquor to intoxicated persons was not great at that time. Contrasting the relative infrequency of drunken-driving accidents in the horse-and-buggy era of the statute's inception with the modern dangers posed by high-speed travel on congested highways, the Court concluded that the time had come to view the problem in a new perspective. The Court reasoned that, while formerly no duty was imposed upon the innkeeper because of the relative unlikelihood of an intoxicated person becoming a threat to public safety, today such a duty does exist. Furthermore, the existence of this present-day duty might well be founded on foreseeability and proximate cause. In supporting its conclusion, the Court noted the development of this view in other jurisdictions,¹⁸ which have already recognized this problem and have determined that modern conditions require adaptation of common-law precepts in this area.

The primary significance of the *Berkeley* decision is that it offers the prospect of greater recoveries by injured third persons. Under the Dram Shop Act, anyone injured by the acts of the intoxicated person is entitled to recover actual as well as exemplary damages.¹⁹ In the event that an injured third person dies, however, recovery under this statute is limited to remuneration for those injuries suffered by the decedent for which he would have had a cause of action had he survived; it is not measured by the loss to the decedent's beneficiaries.²⁰ Thus, the statute provides that the cause of action survives the deceased third party, but does not allow a wrongful death action.²¹

Permitting the plaintiff an action under the common law in addition to his remedy under the Dram Shop Act can, under certain circumstances, afford an injured party a more extensive remedy. For example, the administrator or executor of a deceased's estate, in addition to a survival action under the Dram Shop Act, may also bring a wrongful death action.²² The recovery in the survival action inures

¹⁸ See, e.g., *Waynick v. Last Dep't Store*, 269 F.2d 322 (7th Cir. 1959), cert. denied, 362 U.S. 903 (1960); *Rappaport v. Nichols*, 31 N.J. 188, 156 A.2d 1 (1959).

¹⁹ N.Y. GEN. OBL. LAW § 11-101.

²⁰ *Hammell v. Mannshardt*, 248 App. Div. 624, 288 N.Y. Supp. 215 (2d Dep't 1936).

²¹ *Bator v. Barry*, 282 App. Div. 324, 122 N.Y.S.2d 604 (4th Dep't 1953).

²² A wrongful death action is a purely statutory remedy, which allows plaintiff recovery upon proof that defendant's wrongful act was the proximate cause of the death. *Salsedo v. Palmer*, 278 Fed. 92 (2d Cir. 1921). Since, in an action under the Dram Shop Act, and prior thereto, the burden of showing proximate cause could not usually be met, a wrongful death action generally did not lie.

to the estate, and is limited to damages for injuries sustained by the deceased.²³ However, recovery in the wrongful death action goes to the next of kin of the deceased, and they are compensated for the loss they sustained because of his death.²⁴

While interest is not included in an award under the Dram Shop Act,²⁵ it is a part of the judgment in a wrongful death action and is computed from the time of the death until the rendering of the award.²⁶ Furthermore, under the Dram Shop Act, where the injured third party dies, the amount recovered in the action which survives him can be reached by creditors. In a wrongful death action, since recovery is for the sole benefit of the beneficiaries, creditors of the decedent cannot reach such sums.²⁷

Another question related to the extension of the right to an action in common-law negligence is that of territoriality. The Dram Shop Acts do not apply extraterritorially; that is to say, where the injury occurred in a state other than where the intoxicated person was served the liquor, the third party has not been allowed a statutory recovery.²⁸ However, under the *Berkeley* decision, it would seem that the common law of the state where the accident occurred would be applicable, and a remedy might thus be available. In extraterritorial cases, absence of remedy under the Dram Shop Act has been considered a factor in allowing recovery in common-law negligence.²⁹

Insurance coverage is another element that may influence the courts. The standard liability policy carried by tavern owners does not cover damages resulting from statutory violations. Thus, if a judgment is obtained under the Dram Shop Act against a tavern owner, his insurance policy would be valueless. However, if the cause of action were in negligence, and if the judgment were obtained against a tavern owner who carried liability insurance, the insurer would be liable for the payment of the award. This was the motivation for bringing the action in the instant case in negligence as well as under the Dram Shop Act.

A possible explanation for the lack of common-law litigation in this area is that plaintiffs have been content with the limited form of recovery available under the statute. Furthermore, the obstacle of proximate cause was never overcome. Before the decision in the instant case the tavern owner was never considered to be

²³ N.Y. DECED. EST. LAW § 119.

²⁴ N.Y. DECED. EST. LAW § 132.

²⁵ *Dowling v. Stephan*, 206 Misc. 518, 133 N.Y.S.2d 667 (Sup. Ct. 1954).

²⁶ N.Y. DECED. EST. LAW § 132.

²⁷ *In re Slaney's Estate*, 34 Misc. 2d 742, 228 N.Y.S.2d 850 (Surr. Ct. 1962).

²⁸ *Supra* note 17.

²⁹ *Waynick v. Last Dep't Store*, *supra* note 18.

under a duty to the third person who might be injured by an intoxicated person whom he had served. However, the fact that such a duty was once unrecognized does not import that there can never be a duty. "The principle that the danger must be imminent does not change, but the things subject to the principle do change. They are whatever the needs of life in a developed civilization require them to be."⁸⁰

⁸⁰ MacPherson v. Buick Motor Co., 217 N.Y. 382, 391, 111 N.E. 1050, 1053 (1916).