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Liability of Liquor Vendors for Injuries to Intoxicated Persons, Kemock v. Mark II

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TORT LIABILITY

Liability of Liquor Vendors for Injuries to Intoxicated Persons

Kemock v. Mark II, 62 Ohio App. 2d 103, 404 N.E.2d 766 (1978)

IN AN OPINION anticipating, in part, the advent of the comparative negligence standard in Ohio, *Kemock v. Mark II*[1] extends common law liability to include liquor vendors who serve already intoxicated patrons who injure themselves and whose injury is the proximate result of continued alcohol consumption. Relying upon an earlier Ohio Supreme Court decision[2] and a California Supreme Court case,[3] the Court of Appeals of Ohio recognizes liability for vendor negligence which damages the drinker. The test for recovery is one not previously applied in cases of this sort in Ohio; one which measures liability by balancing degrees of each party's negligence, not unlike comparative negligence.[4]

Kemock recounts Timothy Woernley's last evening, the suit being brought on behalf of his estate. Woernley arrived at The Mark II lounge to drink, visit and to watch his former brother-in-law, Richard Samples, perform. He had not been drinking before his first round at the lounge, but once there he drank virtually continuously for two and one-half hours.

Samples, during a break, observed that plaintiff's-decedent had become intoxicated and brought him some coffee, noticing then that Woernley had been served a fresh drink. Because he felt Woernley was too drunk to drive, Samples took away his car keys and called Woernley's brother-in-law to come to The Mark II and drive Woernley home. Angered at seeing him in the lounge, Woernley attacked the brother-in-law and went "just out of his head."[5] Ultimately, Woernley "raised so much cain"[6] that Samples returned Woernley's car keys. Plaintiff's-decedent had had approximately twelve drinks in three hours when he squealed out of The Mark II parking lot.

On his way to his parents' house, Woernley was observed doing 61

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[1] 62 Ohio App. 2d 103, 404 N.E.2d 766 (1978).

[2] Mason v. Roberts, 33 Ohio St. 2d 29, 294 N.E.2d 884 (1973).

[3] Ewing v. Cloverleaf Bowl, 20 Cal. 3d 389, 572 P.2d 1155, 143 Cal. Rptr. 13 (1978).

[4] The court expressly rejects plaintiff's theory of comparative negligence, finding itself an inappropriate forum for a shift to such a standard. 62 Ohio App. 2d at 109-10, 404 N.E.2d at 771. The decision does, however, move beyond the theory that contributory negligence on the part of the plaintiff wholly bars recovery by presenting a degrees of negligence test. This approach weighs the negligence of each party and the one most negligent bears the entire burden of the plaintiff's damages. Under the current comparative negligence statute, damages are apportioned in relation to the amount of legal fault. Am. S.B. 165, 1980 Ohio Legis. Bull. 136 (Anderson) (to be codified at OHIO REV. CODE ANN. § 2315.19).

[5] 62 Ohio App. 2d at 106, 404 N.E.2d at 769.

[6] *Id.* at 107, 404 N.E.2d at 770.

m.p.h. in a 35 m.p.h. zone and was pursued by a police officer. Woernley attempted to elude the officer by accelerating his speed and making an illegal right turn through a red light. He crashed into a tree in the yard neighboring his parents' home and died at the hospital.

Plaintiff's complaint in this wrongful death action alleges that the defendant-corporation unlawfully sold alcohol to plaintiff's-decedent so that Woernley became intoxicated, and continued to serve him when ordinary care dictated otherwise. The trial court directed a verdict in favor of The Mark II finding that Woernley's behavior and voluntary intoxication constituted contributory negligence as a matter of law and, therefore, barred recovery.

The Ohio Civil Damage or Dram Shop Act[7] provides no relief for plaintiffs in similar positions. Recovery is limited to injuries accruing from actions of persons who are blacklisted by the Ohio Department of Liquor Control or who are known habitual drinkers. Under this statute, a bartender will be held strictly liable for illegal sales to those within this protected class. Woernley was neither blacklisted nor a habitual drunkard.

Plaintiffs do find support in the statutes regulating the sale of alcoholic beverages. In order to state a claim, they may rely on the statute forbidding continued sale to an intoxicated person.[8] Until 1973, however, a liquor vendor's civil liability was confined to the boundaries of the Dram Shop Act. *Ramon v. Spike*[9] illustrated this proposition. *Ramon* involved the statutory violation of sale of alcohol to a minor[10] who drank until intoxicated and then drove his car over a sidewalk injuring the plaintiff. Recovery was denied because the minor was not on the state's list.

More closely related factually to *Kemock,* in that the injury occurred to the drinker, but with the same result was *Christoff v. Gradsky.*[11] Here, plaintiff's-decedent, Louis Angoff, died of acute alcohol poisoning after

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[7] OHIO REV. CODE ANN. § 4399.01 (Page 1973) provides:
A husband, wife, child, parent, guardian, employer, or other person injured in person, property, or means of support by an intoxicated person, or in consequence of the intoxication, habitual or otherwise, of a person, after the issuance and during the existence of the order of the department of liquor control prohibiting the sale of intoxicating liquor as defined in section 4301.01 of the Revised Code to such person, has a right of action in his own name, severally or jointly, against any person selling or giving intoxicating liquors which cause such intoxication, in whole or in part, of such person.

[8] OHIO REV. CODE ANN. § 4301.22 (Page 1973) states:
Sales of beer and intoxicating liquor under all classes of permits and from state liquor stores are subject to the following restrictions, in addition to those imposed by the rules, regulations, or orders of the department of liquor control: . . . (B) No sales shall be made to an intoxicated person.

[9] 92 Ohio App. 49, 109 N.E.2d 327 (1951).

[10] OHIO REV. CODE ANN. § 4301.22(A) (Page 1973) states: "No beer shall be sold to any person under eighteen years of age; and no intoxicating liquor shall be sold to or handled by any person under twenty-one years of age. . . ."

[11] 140 N.E.2d 586 (C.P. Ohio 1956).

receiving drinks from a bartender while intoxicated. The trial court dismissed the case for failure to state a claim, following *Ramon,* because the suit alleged only negligence on the defendant's part and no violation of the Dram Shop Act.

Traditionally, recovery was limited to the parameters of Civil Damage Act legislation because at common law there existed no liquor vendor liability. "It was not a tort at common law to sell or give liquor to an 'able-bodied man.' "[12] The rationale was that the proximate cause of a drinker's injuries was the drinking and not the serving. *Robinson v. Stilgenbauer*[13] presented the first clue that Ohio courts were willing to reject this traditional reasoning. While the court was unable to do so because of the factual setting of the case, it did express a desire to move forward in the direction of extending liability.[14]

Mason v. Roberts[15] and *Taggart v. Bitzenhofer*[16] provided the opportunity for the court to do so. The analysis for both cases, decided the same day, is found in *Mason.* The opinion overturned *Ramon* and *Christoff* and clearly stated that the remedy for injuries to bar patrons or those injured by bar patrons extends beyond the Dram Shop Act. In doing so, the court first set out the two accepted exceptions to the old common law rule that only the drinker was liable for his consumption: (1) where a patron was so inebriated as to make it impossible for him to refuse more alcohol and the seller knew this, the question of the proximate cause of plaintiff's injury is for the jury; and, 2) where a vendor, by selling, violated a statute (*e.g.,* one prohibiting sale to an intoxicated person) making him negligent per se, the vendor could be held civilly liable.[17] To these the *Mason* court added a third possibility, one based in standard negligence principles. The court held that a bar owner owes the duty of reasonable care to his business invitees. Thus, any forseeable injury resulting to a patron or caused by a patron may result in liability on the part of the vendor when intoxication is a proximate cause of that injury.[18]

Unfortunately, the guidelines set by *Mason* are unclear. The case dealt

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[12] Megge v. United States, 344 F.2d 31, 32 (6th Cir. 1965).

[13] 14 Ohio St. 2d 165, 237 N.E.2d 136 (1968).

[14] The court stated:

> [W]e do not reach the question of law that we believed was involved at the time we allowed the motion to certify, *i.e.,* whether there may be in this state a cause of action against a liquor vendor for damages proximately resulting from his negligent sale of intoxicating beverages to a known habitual drunkard.

Id. at 167, 237 N.E.2d at 138.

[15] 33 Ohio St. 2d 29, 294 N.E.2d 884.

[16] 33 Ohio St. 2d 35, 294 N.E.2d 226 (1973).

[17] The statute itself imposes only the possibility of criminal sanctions. OHIO REV. CODE ANN. § 4301.22(B) (Page 1973).

[18] 33 Ohio St. 2d at 33-34, 294 N.E.2d at 888.

with the actions of one Robert Lee Rogers known by his bartender to be violent and disorderly when intoxicated. Roberts assaulted plaintiff's-decedent *outside* the bar in which he had been drinking. The court's syllabus, however, describes the bar owner's duty as being owed to "members of the public while they are in his place of business."[19]

Kemock is the first recorded Ohio case of liquor vendor liability to follow *Mason*. In choosing to extend liability to cover self-inflicted injuries sustained by intoxicated drinkers, the court admits that its decision expands the *Mason* rule but submits that *Mason* can be read to support the view that Ohio recognizes the common law liability of liquor vendors.[20] Their intent to move forward acknowledges the vacuum in this area of Ohio law.[21]

In finding that a cause of action exists, the *Kemock* court examines California law, that jurisdiction having run the gamut in this area. Of particular support is *Ewing v. Cloverleaf Bowl*,[22] that describes a case of acute alcohol poisoning which resulted in the death of a twenty-one year old man. An experienced bartender who was employed by the defendant served an obviously intoxicated, admittedly inexperienced drinker ten straight shots of 151 proof rum, as well as other drinks. The alcohol was set before Ewing continuously even when he was barely awake. Plaintiff's-decedent eventually slipped into unconsciousness and died with a fatal blood alcohol level of 0.47.[23] The California trial court dismissed the case at the close of the plaintiff's evidence based on the traditional theory that plaintiff's contributory negligence in drinking barred recovery. The Supreme Court of California reversed, acknowledging a cause of action and establishing the standard for liability followed by *Kemock*: that a jury may award damages if the drinker's negligence in drinking is outweighed by any willful misconduct or negligence on the part of the defendant or his agents.[24]

Kemock fully adopts the *Ewing* test.[25] If both drinker and vendor act negligently, or if both of the parties' actions typify willful or wanton mis-

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[19] *Id.* at 29, 294 N.E.2d at 885. For an expanded discussion of *Mason* as well as the history leading to this decision, *see* Comment, *Liquor Vendor Liability for Injuries Caused by Intoxicated Patrons—A Question of Policy*, 35 OHIO ST. L.J. 630 (1974) and Note, *Common Law Liability of the Liquor Vendor*, 18 CASE W. RES. L. REV. 251 (1966).

[20] 62 Ohio App. 2d at 117 n.10, 404 N.E.2d at 775 n.10.

[21] *Id.* at 112, 404 N.E.2d at 773.

[22] 20 Cal. 3d 389, 572 P.2d 1155, 143 Cal. Rptr. 13 (1978).

[23] 20 Cal. 3d at 394, 572 P.2d at 1156, 143 Cal. Rptr. at 15.

[24] *Id.* An earlier case, Vesely v. Sager, 5 Cal. 2d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971) had extended common law liability principles to suits concerning intoxicated drinkers. *Vesely* functioned for *Ewing* as *Mason* does for *Kemock*.

[25] The court states that such a step is "consistent with the spirit of Mason v. Roberts." A footnote in the decision points out the variance in approaches in the United States. 62 Ohio App. 2d at 117 n.10, 404 N.E.2d at 775 n.10.

conduct,[26] the court will allow no recovery. However, if the defendant is negligent and the plaintiff reasonable and prudent or if the defendant's acts amount to willful misconduct when the plaintiff is merely negligent, the plaintiff is entitled to compensation for his injuries.

A plaintiff seeking recovery must prove all elements of negligence: a duty of care on the part of the vendor,[27] and a breach of that duty which is the actual and proximate cause of plaintiff's injuries. Thus the burden falls on the plaintiff to show that the serving of alcohol to an intoxicated person or one believed to be intoxicated is the proximate cause of plaintiff's damage and that such injury was foreseeable by the defendant who either willfully ignored the danger or negligently failed to prevent it. The syllabus of the case succinctly presents the proposition as:

> Where a business establishment sells alcoholic beverages to one it knows or has reason to believe is intoxicated, and that person is killed as a proximate result of his intoxication, such establishment is liable in damages to the estate of the decedent, unless the deceased exhibited an absence of care on his own behalf which was equal to or greater than that of the defendant.[28]

In application, this proposition does not impose an increased chance of liability on bar owners. Rather than narrowly confining recovery to innocent, non-drinking plaintiffs who are injured by drinkers, *Kemock* simply interprets *Mason* broadly. The *Mason* syllabus defines a cause of action based on the failure to exercise reasonable care with regard to bar patrons.[29] If that duty exists, it exists at all times and a breach of that duty which results in injury to *either* patron *or* bystander opens the door for compensation from the liquor vendor. Thus, while *Kemock* is the first Ohio case to plainly state that a cause of action for self-inflicted injury exists, it merely further defines the duties established by *Mason*.

Further, the Ohio Dram Shop Act indirectly supports *Kemock* by indicating a legislative interest in protecting the family whose means of support is injured as the proximate result of intoxication. Clearly, the Act confines the actions it grants to families of blacklisted or habitual drinkers, but the intent to protect these drinkers, unable to protect themselves, is equally clear. *Kemock* proceeds in similar fashion by utilizing the common law.

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[26] The definition of wanton misconduct adopted in *Kemock* comes from Hawkins v. Ivy, 50 Ohio St. 2d 114, 363 N.E.2d 367 (1977) and may be stated as follows: failure to exercise due care "under circumstances in which there is a great probability that harm will result . . . ." *Id.*

[27] The duty of reasonable care to business invitees in a bar is established by *Mason*, see text *supra* at note 18.

[28] 62 Ohio App. 2d at 103, 404 N.E.2d at 767.

[29] 33 Ohio St. 2d at 29, N.E.2d at 885.

But when one considers that it dates from 1978[30] and precedes Ohio's comparative negligence statute,[31] *Kemock's* holding that contributory negligence does not bar recovery is seen as a significant departure from established Ohio law. The comparative negligence statute now supersedes the *Kemock* standard and truly increases chances of recovery. In suits against bar owners, plaintiffs will always allege negligence per se on the part of the liquor vendor in continuing service of alcoholic beverages to one who is intoxicated.[32] The plaintiff must prove: 1) that the negligence on the part of the defendant was greater than any negligence of plaintiff; and, 2) that the defendant knew or should have known that plaintiff was drunk and that to continue to serve him drinks created an unreasonable risk of harm to the plaintiff.

It is always foreseeable that alcohol consumption will lead to changed behavior. "[I]t is known that the ingestion of alcohol leads to aberrant behavior, the nature of which is largely unpredictable."[33] The question for the jury is "How foreseeable is the patron's injury given the state induced by drinking?" The damage must flow as the natural or probable result of intoxication. In cases of alcohol poisoning, no intervening action on the part of the plaintiff occurs; he simply drinks in full view of the vendor to his ultimate downfall. Situations in which the plaintiff acts while drunk and injures himself are more complex. A fact finder must locate the point at which the plaintiff's negligent actions fall short of any negligence on the part of the vendor. The point is easily described but difficult in application. Early cases in other jurisdictions have allowed recovery when the drinker died of exposure walking home from a bar,[34] drowned after falling in a river while drunk,[35] and died when hit by a train while on his way home.[36]

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[30] The decision was handed down in 1978 but the opinion was not published until 1980.

[31] The new OHIO REV. CODE ANN. § 2315.19A(1) provides:

> In negligence actions, the contributory negligence of a person does not bar the person or his legal representative from recovering damages that have directly and proximately resulted from the negligence of one or more other persons, if the contributory negligence of the person bringing the action was no greater than the combined negligence of all other persons from whom recovery is sought. However, any damages recoverable by the person bringing the action shall be diminished by an amount that is proportionately equal to his percentage of negligence. . . .

[32] *See e.g.*, Taggart v. Bitzenhofer, 35 Ohio App. 2d 23, 299 N.E.2d 901, (1972) (plaintiff claiming that he is one of the class of persons protected by that statute), *aff'd*, 33 Ohio St. 2d 35, 294 N.E.2d 226 (1973). Interpreting a similar Pennsylvania statute, the court in Schelin v. Goldberg, 188 Pa. Super. 341, 146 A.2d 648 (1958) stated that statutes forbidding the sale of liquor to intoxicated persons were "enacted to . . . protect specifically intoxicated persons from their inability to exercise self-protective care." *Id.* at 348, 146 A.2d at 652.

[33] Taggart v. Bitzenhofer, 35 Ohio App. 2d 23, 299 N.E.2d 901 (1972), *aff'd*, 33 Ohio St. 2d 35, 294 N.E.2d 226 (1973). *See generally*, Note, *New Common Law Dramshop Rule*, 9 CLEV.-MAR. L. REV. 302 (1960).

[34] Curran v. Percival, 21 Neb. 434, 32 N.W. 213 (1887).

[35] Boos v. State, 11 Ind. App. 257, 39 N.E. 197 (1894).

[36] Schroder v. Crawford, 94 Ill. 357 (1880). These and other cases allowed recovery under the dramshop acts but illustrate what may be viewed as foreseeable injury. For discussion on recovery under the civil damage acts see, Annot., 64 A.L.R. 2d 705 (1959).

The more plaintiff or forces unrelated to drinking participate in causing his injury, the less likely is his opportunity for compensation.

The case of Timothy Woernley involves these complexities. Woernley was able to drive and his doing so constituted negligence per se for driving while intoxicated.[37] His actions might be considered easily foreseeable, in that it is "common knowledge that great numbers of persons drive automobiles while intoxicated and that it is well within the realm of possibility that one illegally served with intoxicants might negligently drive an automobile and cause injury to persons or property."[38] One could find The Mark II liable for serving an intoxicated patron who drives away and injures himself given the theory that drunk driving is foreseeable.[39] While the question for the jury remains the same, that is, who is most negligent in the face of foreseeable risk, the factors that complicate the answer are potentially limitless.

CONCLUSION

The case of *Kemock v. Mark II* serves to expand liquor vendor liability in a direction consonant with decisions of the Ohio Supreme Court. *Kemock* allows recovery to patrons injured as a result of the continued service of liquor based on the theory that bartenders owe their clientele a duty of reasonable care and must protect them from foreseeable risks.

A determination of liability is a jury decision and must apply the standard of comparative negligence. Thus, an intoxicated patron may recover for an injury which he helped to bring about when the actions of the vendor in continuing to serve the drinker outweigh any negligence of the plaintiff.

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[37] OHIO REV. CODE ANN. § 4511.19 (Page 1973) states that "No person who is under the influence of alcohol . . . shall operate any vehicle . . . ."

[38] McKinney v. Foster, 341 Pa. 221, 225, 137 A.2d 502, 504 (1958).

[39] In fact, The Mark II was absolved of liability because the court found that Woernley's driving at excessive speeds and his attempt to elude the police officer who chased him indicated Woernley's ability to control the car. Thus, the court's conclusion was that the proximate cause of Woernley's death was his failure to observe traffic rules and not his intoxication.