COMMENTS

COMMON LAW LIABILITY OF TAVERN OWNERS

Vesely v. Sager, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971)

Defendant Sager owned and operated a tavern in San Bernadino County, California. Sager knew that O'Connell, a customer, was becoming heavily intoxicated, yet he continued serving him drinks. This violated the California Alcoholic Beverage Control Act.[1] Sager knew the only access to the tavern was a narrow, winding, mountain road. When O'Connell drove his vehicle down the road, he crossed into the opposite lane of traffic and struck plaintiff's vehicle. Sager demurred to the complaint on the ground that the seller of alcoholic beverages is not liable for injuries resulting from the buyer's intoxication. The demurrer was sustained without leave to amend. The Supreme Court of California reversed, and *held*: that the seller of alcoholic beverages owes the general public a duty to protect it from "injuries to person and damage to property from the excessive use of intoxicating liquor."[2]

The common law did not impose liability on a tavern owner for furnishing alcoholic beverages to a customer who as a result of his intoxication either injured himself or a third person.[3] The consumption, not the sale, was the proximate cause of injury.[4] The courts have created exceptions to this rule. A tavern owner is liable for the death or injury of a customer who was induced to drink when his mental faculties were completely impaired by intoxication.[5] An innkeeper or restaurant owner had to protect his guests from injury caused by other guests.[6] In spite of the exceptions, the rule had harsh consequences; therefore, many states

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1. CAL. BUS. & PROF. CODE § 25602 (West 1954) provides:
   Sales to habitual drunkards. Every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverages to any habitual or common drunkard or to any obviously intoxicated person is guilty of a misdemeanor.

2. Vesely v. Sager, 5 Cal.3d 153, 165, 486 P.2d 151, 159, 95 Cal. Rptr. 623, 631 (1971).

3. Cruse v. Aden, 127 Ill. 231, 20 N.E. 73 (1889); Tarwater v. Atlantic Co., 176 Tenn. 510, 144 S.W.2d 746 (1940). *See also* H. BLACK, A TREATISE ON THE LAWS REGULATING THE MANUFACTURE AND SALE OF INTOXICATING LIQUORS § 281 (1892).

4. King v. Henkie, 80 Ala. 505 (1886); Nolan v. Morelli, 154 Conn. 432, 226 A.2d 383 (1967); Hall v. Budagher, 76 N.M. 591, 417 P.2d 71 (1966).

5. Pratt v. Daly, 55 Ariz. 535, 104 P.2d 147 (1940); Ibach v. Jackson, 148 Ore. 92, 35 P.2d 672 (1934); Swanson v. Ball, 67 S.D. 161, 290 N.W. 482 (1940); McCue v. Klein, 60 Tex. 168 (1883).

6. Reilly v. 180 Club, Inc., 14 N.J. Super. 420, 82 A.2d 210 (1951); Peck v. Gerber, 154 Ore. 126, 59 P.2d 675 (1936). *Cf.* Mastad v. Swedish Brethren, 83 Minn. 40, 85 N.W. 913 (1901). The basis for relief in this situation is independent and not related to the common law exceptions imposing liability on tavern owners. Its origin is the duty of the owner to protect his business invitees. *See also* Windorski v. Doyle, 219 Minn. 402, 18 N.W.2d 142 (1945).

tried to ease the burden of the common law by passing Dram Shop or Civil Damages Acts.[7]

In states without Dram Shop Acts, the courts have looked to the universal prohibitions against liquor sales to minors and intoxicated persons as a basis for liability.[8] Courts have refused to rely on these statutes for several reasons: the statute is either penal or regulatory,[9] the sale is not the proximate cause of injury,[10] or interference by the courts would constitute judicial legislation of Dram Shop Acts.[11] Courts using these statutes to create liability have attached various meanings to a violation. The statute may create a duty to the injured parties.[12] A violation of the statute may be evidence of negligence[13] or negligence per se.[14]

California has no Dram Shop Act and has consistently denied any kind of recovery from the liquor vendor.[15] The courts refused to apply § 25602 of the Business and Professions Code to constitute negligence per se[16] and considered it irrelevant because the consumption, not the sale, of alcoholic beverages was the proximate cause of any subsequent injury.[17] Moreover, it is argued the judiciary should not intervene so long as the state legislature's silence was an affirmation of existing policy.[18]

In order to reverse its ground and impose liability on the tavern owner, the California Supreme Court in *Vesely* had to alter the basic theory

7. States having Dram Shop Acts are listed in Comment, *Dram Shop Liability—A Judicial Response*, 57 CALIF. L. REV. 995, 996-97 n.6 (1969).

8. States having these prohibitory statutes are listed in Note, *Common Law Liability of the Liquor Vendor*, 18 W. RES. L. REV. 251, 262-63 nn. 58 & 59 (1966).

9. Collier v. Stamatis, 63 Ariz. 285, 162 P.2d 125 (1945); Hull v. Rund, 150 Colo. 425, 374 P.2d 351 (1962); Meade v. Freeman, 93 Idaho 389, 462 P.2d 54 (1969); Hamm v. Carson City Nugget, Inc., 85 Nev. 99, 450 P.2d 358, *cert. denied*, 396 U.S. 860 (1969).

10. Nolan v. Morelli, 154 Conn. 432, 226 A.2d 383 (1967); Cowman v. Hansen, 250 Iowa 358, 92 N.W.2d 682 (1958); Hall v. Budagher, 76 N.M. 591, 417 P.2d 71 (1966).

11. Carr v. Turner, 238 Ark. 889, 385 S.W.2d 656 (1965); Lee v. Peerless Ins. Co., 248 La. 982, 183 So. 2d 328 (1966); State ex rel. Joyce v. Hatfield, 197 Md. 249, 78 A.2d 754 (1951).

12. Waynick v. Chicago's Last Dep't Store, 269 F.2d 322 (7th Cir. 1959), *cert. denied*, 362 U.S. 903 (1960); Elder v. Fisher, 247 Ind. 598, 217 N.E.2d 847 (1966); Berkeley v. Park, 47 Misc.2d 381, 262 N.Y.S.2d 290 (Sup. Ct. 1965).

13. Adamian v. Three Sons, Inc., 353 Mass. 498, 233 N.E.2d 18 (1968); Ramsey v. Anctil, 106 N.H. 375, 211 A.2d 900 (1965); Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1 (1959).

14. Deeds v. United States, 306 F. Supp. 348 (D. Mont. 1969); Davis v. Shiappacossee, 155 So. 2d 365 (Fla. 1963); Majors v. Brodhead Hotel, 416 Pa. 265, 205 A.2d 873 (1965).

15. Cole v. Rush, 45 Cal.2d 345, 289 P.2d 450 (1955); Lammers v. Pacific Electric Ry. Co., 186 Cal. 379, 199 P. 523 (1921) (dictum); Fleckner v. Dionne, 94 Cal. App. 2d 246, 210 P.2d 530 (1949); Hitson v. Dwyer, 61 Cal. App. 2d 803, 143 P.2d 952 (1943).

16. Hitson v. Dwyer, 61 Cal. App. 2d 803, 143 P.2d 952 (1943).

17. *Id.*, *accord*, Fleckner v. Dionne, 94 Cal. App. 2d 246, 210 P.2d 530 (1949).

18. Cole v. Rush, 45 Cal.2d 345, 289 P.2d 450 (1955). The argument was strengthened because the legislature had made other changes in statutes governing the sale and use of intoxicating liquors.

underlying liability.[19] The violation of § 25602 was the mechanism for this change. A nonliability statute may define a duty[20] if the statute

19. Recently, the state's appellate courts have expressed discontent with the California position. In Fuller v. Standard Stations, Inc., 250 Cal. App. 2d 687, 58 Cal. Rptr. 792 (1967), a case denying the liability of a service station owner for the sale of gasoline to an intoxicated motorist, the court could not differentiate between the cases in which a dangerous instrumentality such as an automobile was entrusted to an intoxicated or incompetent person and the case of the tavern owner who served liquor to an intoxicated person knowing that the intoxicated person would go out and drive an automobile. For California cases holding the entrustor of a dangerous instrument to an intoxicated or incompetent person liable to a 3rd party *see, e.g.*, Johnson v. Casetta, 197 Cal. App. 2d 272, 17 Cal. Rptr. 81 (1961) (incompetent, inexperienced driver); Knight v. Gosselin, 124 Cal. App. 2d 290, 12 P.2d 454 (1932) (automobile entrusted to an intoxicated person). *See also* RESTATEMENT (SECOND) OF TORTS § 390 (1965). The results were conflicting, the incongruity based chiefly on historical grounds. Refusal to extend liability in the latter set of circumstances, the court said, constituted a "back-eddy running counter to the mainstream of modern tort doctrine," but its hands were tied by *stare decisis*, 250 Cal. App. 2d 687, 691, 58 Cal. Rptr, 792, 794 (1967). The court held that the recent line of cases favoring the creation of tavern owner liability to be the better rule. It was in this sense that the California position was anachronistic. *See* Waynick v. Chicago's Last Dep't Store, 269 F.2d 322 (7th Cir. 1959), *cert. denied*, 362 U.S. 903 (1960); Deeds v. United States, 306 F. Supp. 348 (D. Mont. 1969); Prevatt v. McClennan, 201 So. 2d 780 (Fla. Dist. Ct. App. 1967); Colligan v. Cousar, 38 Ill. App. 2d 392, 187 N.E.2d 292 (1963); Elder v. Fisher, 247 Ind. 598, 217 N.E.2d 847 (1966); Pike v. George, 434 S.W.2d 626 (Ky. 1968); Adamian v. Three Sons, Inc., 353 Mass. 498, 233 N.E.2d 18 (1968); Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1 (1959); Berkeley v. Park, 47 Misc.2d 381, 262 N.Y.S.2d 290 (Sup. Ct. 1965); Jardine v. Upper Darby Lodge No. 1973, Inc., 413 Pa. 626, 198 A.2d 550 (1964); Mitchell v. Ketner, 54 Tenn. App. 656, 393 S.W.2d 755 (1965); *cf.* Davis v. Shiappacossee, 155 So.2d 365 (Fla. 1963); Ramsey v. Anctil, 106 N.H. 375, 211 A.2d 900 (1965). Recent decisions, however, have not all favored the extension of liability. The contrary position is also well-represented. Carr v. Turner, 238 Ark. 889, 385 S.W.2d 656 (1965); Hull v. Rund, 150 Colo. 425, 374 P.2d 351 (1962); Meade v. Freeman, 93 Idaho 389, 462 P.2d 54 (1969); Cowman v. Hansen, 250 Iowa 358, 92 N.W.2d 682 (1958); Lee v. Peerless Ins. Co., 248 La. 982, 183 So. 2d 328 (1966); Hall v. Budagher Bar, 76 N.M. 591, 417, P.2d 71 (1966); Hamm v. Carson City Nugget, Inc., 85 Nev. 99, 450 P.2d 358 (1969); Garcia v. Hargrove, 46 Wis.2d 724, 176 N.W.2d 566 (1966); *cf.* Nolan v. Morelli, 154 Conn. 432, 226 A.2d 383 (1967).

In Brockett v. Kitchen Boyd Motor Co., 264 Cal. App. 2d 69, 70 Cal. Rptr. 136 (1968), a minor became intoxicated at his employer's Christmas party. The employer, aware that the youth was intoxicated, nevertheless helped the minor to his automobile so that he could drive home. The court held an action would lie against the employer under these circumstances. The relationship went beyond the mere furnishing of alcoholic beverages. The employer's affirmative conduct, leading the minor to his car, made him liable to other pedestrians and drivers.

20. The court had to face the problem whether or not it would defer to the legislature. In *Cole v. Rush* 45 Cal. 2d 345, 289 P.2d 450 (1955), the court held that this change in civil liability would have to come from the legislature. The recent trend in other jurisdictions, however, has weakened this argument. *See* cases cited in note 19 *supra*. The existence of other judicially-made changes in tort liability tends to diminish the persuasiveness of a policy of restraint. Gibson v. Gibson, 3 Cal.3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971) (liability of parent to child for negligence); Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961) (liability of hospital district for the negligence of employees). The court, also, reasoned that the legislature had recognized the right to intervene here by passing § 25602 of the Business and Professions Code and § 669 of the Evidence Code, text quoted in note 25 *infra*. in the light of *Cole* this argument is much less persuasive. Section 26502 was already on record and the presumption codified in § 669 was recognized judicially.

protects a class of persons which includes the plaintiff.[21] Other jurisdictions have used statutes similar to § 25602 to reach a similar result.[22] These statutes were enacted to protect the general public from injuries caused by intoxication.[23] In California, a violation of the statute creates a rebuttable presumption of negligence. The plaintiff must show that a public statute, regulation, or ordinance was violated; the violation caused injury or death; the harm resulted from an occurence which the statute, regulation, or ordinance was designed to prevent; and the person injured or killed was in the class of persons for whose sake the statute, regulation, or ordinance was adopted.[24]

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21. The court relied on Richards v. Stanley, 43 Cal.2d 60, 271 P.2d 23 (1954) (municipal ordinance making it illegal to leave keys in locked automobile), and Routh v. Quinn, 20 Cal.2d 488, 127 P.2d 1 (1942) (statute requiring accurate tax assessment). In neither case did the California court find the defendant liable.

22. *E.g.*, Waynick v. Chicago's Last Dep't Store, 269 F.2d 322 (7th Cir. 1959), *cert. denied*, 362 U.S. 903 (1960); Deeds v. United States, 306 F. Supp. 348 (D. Mont. 1969); Davis v. Shiappacossee, 155 So.2d 365 (Fla. 1963); Elder v. Fisher, 247 Ind. 598, 217 N.E.2d 847 (1966); Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1 (1959).

23. The purposes of the Alcoholic Beverage Control Act are stated in CAL. BUS. & PROF. CODE § 23001 (West 1954) which provides:

> Exercise of Police Powers; Purposes, Liberal Construction:
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> This division is an exercise of the police powers of the State for the protection of the safety, welfare, health, peace, and morals of the people of the State, to eliminate the evils of unlicensed and unlawful manufacture, selling and disposing of alcoholic beverages, and to promote temperance in the use and consumption of alcoholic beverages. It is hereby declared that the subject matter of this division involves in the highest degree the economic, social, and moral well-being and the safety of the State and all its people. All provisions of this division shall be liberally construed for the accomplishment of these purposes.

24. Alarid v. Vanier, 50 Cal.2d 617, 327 P.2d 897 (1958); Ornales v. Wigger, 35 Cal.2d 474, 218 P.2d 531 (1950); Satterlee v. Orange Glenn School Dist., 29 Cal.2d 581, 177 P.2d 279 (1947) (concurring opinion by Justice Traynor favoring a negligence per se approach). This presumption was codified by CAL. EVID. CODE § 669 (West Supp. 1971) which provides:

> Failure to exercise due care: Violation of statute, ordinance, or regulation: Death or injury to person or property: Rebuttal evidence
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> (a) The failure of a person to exercise due care is presumed if:
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> (1) He violated a statute, ordinance, or regulation of a public entity;
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> (2) The violation proximately caused death or injury to person or property;
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> (3) The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and
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> (4) The person suffering the death or injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.
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> (b) This presumption may be rebutted by proof that:
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> (1) The person violating the statute, ordinance, or regulation did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law; or
>
> (2) The person violating the statute, ordinance, or regulation was a child and exer-

In tavern-owner liability cases, proximate cause was a question of law and determinative of the outcome of the action.[25] Now, duty is the relevant question of law. A California appellate court opinion gives a good description of recent developments:

> Current judicial analysis considers the outer boundaries of negligence in terms of duty of care rather than proximate causation. The imposition of a duty of care and its extension to the expectable conduct of third persons is largely a question of law for the court. Where existence of a duty is brought into question, its affirmation rests in part upon social policy factors, in part upon an inquiry whether the actor's conduct involves a foreseeable risk to persons in the plaintiff's situation.[26]

Causation is thus a question of fact. The defendant's conduct must contribute substantially to the plaintiff's injury and outside forces may not intervene sufficiently to absolve the defendant. The old common law cases involving tavern owners show the importance of intervening forces. The balance has shifted. The consumption of alcoholic beverages, being a break in the chain of causation from sale to injury, does not necessarily relieve the defendant from liability. He is still liable so long as his conduct is a substantial factor in causing the injury and the intervening act of a third party was reasonably foreseeable at the time the negligent act occurred.[27] The questions of substantial contribution to the plaintiff's

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> cised the degree of care ordinarily exercised by persons of his maturity, intelligence, and capacity under similar circumstances, but the presumption may not be rebutted by such proof if the violation occurred in the course of an activity normally engaged in only by adults and requiring adult qualifications.

For the position of other states regarding the impact of a violation refer to the cases cited in notes 12, 13, and 14 *supra.*

25. Cole v. Rush, 45 Cal.2d 345, 289 P.2d 450 (1955); Fleckner v. Dionne, 94 Cal. App. 2d 246, 210 P.2d 530 (1949); Hitson v. Dwyer, 61 Cal. App. 2d 803, 143 P.2d 952 (1943). For a detailed analysis of the many meanings of proximate cause in California *see* W. Prosser, *Proximate Cause in California*, 38 CALIF. L. REV. 369 (1950).

26. Fuller v. Standard Stations, Inc., 250 Cal. App. 2d 687, 691, 58 Cal. Rptr. 792, 794 (1967). For an overview of the various social policy questions a court may consider in imposing a duty *see* L. Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014 (1928) and *The Duty Problem in Negligence Cases: II*, 29 COLUM. L. REV. 255 (1929).

27. Stewart v. Cox, 55 Cal.2d 857, 362 P.2d 345, 13 Cal. Rptr. 521 (1961); Austin v. Riverside Portland Cement Co., 44 Cal.2d 225, 282 P.2d 69 (1955); Benton v. Sloss, 38 Cal.2d 399, 240 P.2d 575 (1952); McEvoy v. American Pool Corp., 32 Cal.2d 295, 195 P.2d 783 (1948); Stasulat v. Pacific Gas & Elec. Co., 8 Cal.2d 631, 67 P.2d 678 (1937); Fuller v. Standard Stations, Inc., 250 Cal. App. 2d 687, 58 Cal. Rptr. 792 (1967); Ewart v. Southern California Gas. Co., 237 Cal. App.2d 163, 46 Cal. Rptr. 631 (1965). These cases show the general approval of RESTATEMENT OF TORTS §§ 442 through 453 (1934) which deal with superseding and intervening causes. Especially relevant here is § 447 which considers "Negligence of Intervening Acts." *See also* § 449.

injury and foreseeability of the harm are for the jury to determine.[28]

The policy adopted by the court reflects the growing concern for the danger caused by the drunken driver on the highways.[29] That people rely on the automobile for transportation is a reasonable assumption. A policy which could affect the highway casualty toll is welcome. The effects may be only marginal since alcohol is easily obtained; but any deterrent to the serving and furnishing of alcoholic beverages to potential motorists should be helpful.[30] Also, the conduct expected of a tavern owner is no different from that expected of him prior to this decision. Now he shares in making recompense for injuries for which he is responsible. All this should be to the advantage of the plaintiff who, prior to tavern owner liability, was limited to his defendant's financial resources and insurance coverage. With the addition of another culpable party, a better chance for complete recovery should follow.

The decision leaves two questions unanswered. First, the court refused to decide whether it would extend liability to non-commercial furnishers.[31] The language of § 25602 does not appear to preclude liability,[32] but the administrative problems created if a cause of action would lie in this situation could tend to discourage judicial action. A few jurisdictions which have looked at this question have chosen to defer to the legislative branch.[33] Secondly, the court did not consider whether the tavern owner would be liable for injuries suffered by the intoxicated person. Several jurisdictions have allowed the injured intoxicated person

28. Schwartz v. Helms Bakery Ltd., 67 Cal.2d 232, 430 P.2d 68, 60 Cal. Rtpr. 510 (1967); McEvoy v. American Pool Corp., 32 Cal.2d 295, 195 P.2d 783 (1948); Mosley v. Arden Farms Co., 26 Cal.2d 213, 157 P.2d 372 (1945); Fuller v. Standard Stations, Inc., 250 Cal. App.2d 687, 58 Cal. Rptr. 792 (1967). *See* Stewart v. Cox 55 Cal.2d 857, 362 P.2d 345, 13 Cal. Rtpr. 521 (1961).

29. *See* DEPARTMENT OF TRANSPORTATION, 1968 ALCOHOL AND HIGHWAY SAFETY REPORT, 90th Cong., 2d Sess. 1 (1968).

30. In *Vesely*, the court's opinion is not so narrow to exclude liability resulting from activities of an intoxicated person other than driving an automobile, but the major impact is in the highway safety area.

31. Vesely v. Sager, 5 Cal.3d 153, 157, 486 P.2d 151, 153, 95 Cal. Rptr. 623, 625 (1971).

32. *See* text of § 25602, *supra* note 1. The court also did not have to face whether a violation of CAL. BUS. & PROF. CODE § 25658 (West 1954), making it a misdemeanor to sell alcoholic beverages to minors, would give rise to a cause of action against the tavern owner. The similarity to § 25602 and that both are within the purview of § 23001 makes liability in this case probable too.

33. Carr v. Turner, 238 Ark. 889, 385 S.W.2d 656 (1965); Behnke v. Pierson, 21 Mich. App. 219, 175 N.W.2d 303 (1970) (recovery only from bonded liquor sellers as defined by a statute).

to recover,[34] but this creates another problem: the status of contributory negligence as a defense. If the court would at a later date extend tavern owner liability to the injured intoxicated person it would render the cause of action meaningless if at the same time it allowed contributory negligence as a defense.[35] *Restatement (Second) of Torts* § 483 allows contributory negligence as a defense to the violation of a statute except for statutes which place the entire responsibility for injuries on the defendant.[36] How the California court will interpret § 25602 is subject to conjecture.

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34. Davis v. Shiappacossee, 155 So. 2d 365 (Fla. 1963) (wrongful death of intoxicated minor); Ramsey v. Anctil, 106 N.H. 375, 211 A.2d 900 (1965). *Davis* which involved a minor is perhaps distinguishable from *Ramsey* which involved an adult who, after he became intoxicated, began to pound his fist on the table where he was sitting causing broken glass to become imbedded in his hand. The interest of society in protecting minors may be sufficient to give rise to a cause of action in the former case and not in the latter.

35. In Cole v. Rush, 45 Cal.2d 345, 289 P.2d 450 (1955), one of the court's reasons for denying liability was the plaintiff's negligent conduct, the excessive consumption of alcoholic beverages. To this extent *Cole* and Hitson v. Dwyer, 61 Cal. App.2d 803, 143 P.2d 952 (1943) are not overruled even though their value as precedent is greatly diminished.

36. Contributory negligence allowed as a defense: Deeds v. United States, 306 F. Supp. 348 (1969) (assumption of risk also); Ramsey v. Anctil, 106 N.H. 375, 211 A.2d 900 (1965); McNally v. Addis, 65 Misc.2d 204, 317 N.Y.S.2d 157 (Sup. Ct. 1970) (assumption of risk also); *contra*, Soronen v. Olde Milford Inn, 84 N.J. Super. 372, 202 A.2d 208 (1964). It may make some sense to allow contributory negligence as a defense in the third party situation but not in the situation where the intoxicated person is injured. In the former situation the injured party is supposedly competent and able to avoid derelict conduct on his part. In the latter case, this is not true. The intoxicated person no longer may be able to control his behavior. On the other hand, such a holding could be construed as an undeserved windfall to the motorist who happened to get drunk.