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Civil Liability for Furnishing Liquor in California

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California law concerning liability of a commercial supplier of alcoholic beverages has recently undergone a major change. The old rule of non-liability was abrogated by Vesely v. Sager *in which the court found a "duty" based on statutes which do not necessarily provide for civil liability. This comment attempts to analyze the impact of the case with respect to two related issues which remain unanswered. First, is there potential civil liability of a noncommercial supplier to injured third persons? Secondly, can either a commercial or noncommercial supplier of alcohol become civilly liable to the person served when he subsequently injures himself? Finally, the author proposes legislation to resolve these questions.*

Prior to 1971, California courts were unanimous in holding that a liquor vendor could not be held liable for injuries received by a third person as a result of the vendor serving an intoxicated patron. In 1971, the California Supreme Court abrogated this time-honored rule in the case of *Vesely v. Sager*,[1] and in so doing, prompted legislative action which sought to codify this decision.[2] The case and the attempted legislation have raised two significant issues which this comment will attempt to resolve:

First, can a noncommercial supplier of alcoholic beverages be subjected to civil liability as a result of his serving an intoxicated person who subsequently injuries a third person?

Secondly, can either a commercial or noncommercial supplier of alcoholic beverages be subjected to civil liability as a result of serving an intoxicated person who subsequently injures himself?

In order to address these issues the scope of this comment will include an analysis of the general law of nonliability prior to 1971, the impact of *Vesely v. Sager*, legislative reaction in Assembly Bill 1864, and possible judicial extension without a legislative mandate.

1. 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971).
2. A.B. 1864, 1972 Regular Session, §1.

PRE-1971 RULE OF NONLIABILITY

California court decisions finding no liability of a liquor supplier for serving an intoxicated person were based upon common law principles prevalent throughout the United States.[3] Although the issue was not presented in the case, dictum in *Lammers v. Pacific Electric Railway*[4] adopted the common law rule for California, which was continuously followed until *Vesely*. The *Lammers*' court stated, "[I]t has been uniformly held in the absence of a statute to the contrary that the sale of intoxicating liquor is not the proximate cause of injuries subsequently received by the purchaser because of his intoxication."[5] No reasoning or other analysis was given for the proposition, only the determination that this was the common law and it was binding on the courts until the legislature saw fit to change it. It was no surprise, therefore, that the first major California case presenting the issue of liability of a liquor supplier was disposed of by a statement that "the proximate cause is not the wrongful sale of liquor but the drinking of the liquor so purchased."[6]

Two additional California cases ruling upon liability of a liquor supplier, *Fleckner v. Dionne*[7] and *Cole v. Rush*,[8] also adopted the view that the *consumption* of intoxicating liquors, and not their sale, was the proximate cause of any injuries subsequently received. Again, this was an adoption of the common law rule without further discussion or justification.

The California-adopted common law rule of nonliability was also followed by other jurisdictions not having *statutory enactments to the contrary*.[9] In 1959, however, there was a deviation from this rule in two states that had not provided for statutory liability. The first of these cases, *Waynick v. Chicago's Last Department Store*,[10] arose from the following factual situation. Certain defendants, who were engaged in the business of selling intoxicating liquor in Illinois, sold such liquor to the owner and the driver of an automobile involved

3. *See* Tarwater v. Atlantic Co., Inc., 176 Tenn. 510, 144 S.W.2d 746 (1940); Hyba v. C.A. Horneman, Inc., 302 Ill. App. 143, 23 N.E.2d 564 (1939).
4. 186 Cal. 379, 199 P. 523 (1921).
5. *Id.* at 384, 199 P. at 525.
6. Hitson v. Dwyer, 61 Cal. App. 2d 803, 809, 143 P.2d 952, 955 (1943).
7. 94 Cal. App. 2d 246, 210 P.2d 530 (1949).
8. 45 Cal. 2d 345, 189 P.2d 450 (1955).
9. *See generally*, Annot., 75 A.L.R.2d 833 (1961); Annot., 130 A.L.R. 352 (1941); 45 AM. JUR. 2d, *Intoxicating Liquors* §553 *et seq.* (1969); 48 C.J.S., *Intoxicating Liquors* §430 (1947). Those states not having dram shop acts include: Alas., Ariz., Ark., Cal., Colo., Fla., Ga., Hawaii, Idaho, Ind., Kan., Ky., La., Md., Mass., Miss., Mo., Mont., Neb., N.H., N.J., N.M., Pa., S.C., S.D., Tenn., Tex., Utah, Va., W. Va.; see Comment, *Dram Shop Liability—A Judicial Response*, 57 CAL. L. REV. 995, 996 n.6 (1969).
10. 269 F.2d 322 (7th Cir. 1959).

in a collision with an automobile in which the plaintiffs were riding. It was alleged that the owner and the driver of the automobile were intoxicated and that the plaintiffs' injuries were sustained as a proximate result of the unlawful acts of the defendants in selling liquor to the automobile owner and driver while they were intoxicated. The court determined that due to the site of the accident Michigan common law was applicable, and that "under the facts appearing in the compplaint the tavern keepers are liable in tort for the damages and injuries sustained by the plaintiffs as a proximate result of the unlawful acts of the former."[11] The finding that the tavern keepers' acts were unlawful was based on an Illinois statute prohibiting the sale of alcoholic beverages to any intoxicated person.[12]

The *Waynick* decision was soon followed by *Rappaport v. Nichols*,[13] a New Jersey case wherein a minor was served intoxicating beverages in four named taverns. Upon leaving the last tavern while intoxicated, he negligently drove a motor vehicle and collided with the plaintiff's automobile, resulting in the death of its driver. The court recognized that the consumption of the alcoholic beverages superseded any possible liability of the tavern keeper at common law, but said, "Where a tavern keeper sells alcoholic beverages to a person who is visibly intoxicated or to a person whom he knows or should know from the circumstances to be a minor, he ought to recognize and foresee the unreasonable risk of harm to others through action of the intoxicated person or the minor."[14] Therefore, since the minor's conduct (causing an accident) was foreseeable, it did not supersede the defendants' unlawful and consequently negligent act of serving alcoholic beverages to a minor.

Waynick and *Rappaport* were the first major decisions in the area of alcoholic beverage liability which refused to adhere to the common law rule. It was not until 1971 that California followed this lead with *Vesely*.

VESELY V. SAGER

In the *Vesely* case, defendant Sager operated a mountain-top lodge and was engaged in the business of selling alcoholic beverages to the general public. Beginning about 10 p.m. on April 8, 1968, Sager

11. *Id.* at 326.
12. ILL. ANN. STAT. ch. 43, §131 (Smith-Hurd 1944). This statute is similar to CAL. BUS. & PROF. CODE §25602 which was used to establish a duty of care in Vesely v. Sager, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971). See text accompanying notes 16-24 *infra*.
13. 31 N.J. 188, 156 A.2d 1 (1959).
14. *Id.* at 201, 156 A.2d at 8.

served defendant O'Connell large quantities of alcoholic beverages. At the time Sager knew that the only route leaving the lodge was a very steep, winding, narrow mountain road. Nevertheless, Sager continued to serve O'Connell alcoholic drinks until 5:15 a.m. on April 9. After leaving the lodge, O'Connell drove down the road, veered into the opposite lane, and struck plaintiff's vehicle.[15]

The court began its opinion with a survey of prior California cases which had held that proximate cause was absent because it was the act of consuming and not the act of selling the liquor that had produced the injuries claimed.[16] Notice was then taken of *Waynick* and *Rappaport* which had found proximate cause under similar circumstances because the defendants' acts of selling were a substantial factor and the patron's intervening drunkenness was a foreseeable and normal risk created by the defendant.[17] The *Vesely* court specifically adopted this reasoning when it said that "an actor may be liable if his negligence is a substantial factor in causing an injury, and he is not relieved of liability because of the intervening act of a third person if such act was reasonably foreseeable at the time of his negligent conduct."[18] Under this principle of proximate cause the court then went on to find that "the consumption, resulting intoxication, and injury-producing conduct are foreseeable intervening causes . . . ."[19]

With the proximate cause problem finally laid to rest, the court focused on the question of duty. The court asked, "Did defendant Sager owe a duty of care to plaintiff or to a class of persons of which he is a member?"[20] In answering this question the court found that a duty of care and its attendant standard of conduct required of a reasonable man may be found in a legislative enactment which does not provide for civil liability. A presumption of negligence will arise from such statute if it was enacted to protect a class of persons of which the plaintiff is a member against the type of harm which the plaintiff suffered as a result of the violation of the statute. This presumption is codified in California Evidence Code Section 669(a) which provides:

> The failure of a person to exercise due care is presumed if: (1) He violated a statute, ordinance, or regulation of a public entity;

15. Vesely v. Sager, 5 Cal. 3d 153, 157-58, 486 P.2d 151, 154, 95 Cal. Rptr. 623, 626 (1971).

16. See Cole v. Rush, 45 Cal. 2d 345, 289 P.2d 450 (1955); Lammers v. Pacific Elec. Ry., 186 Cal. 379, 199 P. 523 (1921); 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 (1944).

17. Waynick v. Chicago's Last Dep't Store, 269 F.2d 323, 325-26 (7th Cir. 1959); Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1, 8-9 (1959).

18. 5 Cal. 3d at 163, 486 P.2d at 158, 95 Cal. Rptr. at 630.

19. *Id.* at 164, 486 P.2d at 159, 95 Cal. Rptr. at 631.

20. *Id.*

> (2) The violation proximately caused death or injury to a person or property; (3) The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and (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.

In *Vesely* the court found that a duty of care was established by California Business and Professions Code Section 25602 which provides:

> 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.

Additionally, the court stated that Section 25602 "was adopted for the purpose of protecting members of the general public from injuries to person and damage to property resulting from the excessive use of intoxicating liquor . . . ."[21] Secondly, the statute was intended to protect the safety of the people of California.[22] Thus Vesely's injuries resulted from an occurrence which the statute was designed to prevent, and he was within the class of persons for whose protection the statute was enacted.

Assembly Bill 1864, Section 1—A Response to Vesley

During the 1972 regular session of the California Legislature, Assembly Bill 1864 was introduced by Assemblyman William M. Ketchum to provide California with a Civil Damage Act. Section 1 of the bill was a broad attempt to codify the *Vesely* decision by making any person licensed under the Alcoholic Beverage Control Act liable for damages to either a patron or an innocent third person when certain conditions occur. The conditions were: (1) a sale of any alcoholic beverage in violation of Business and Professions Code Section 25602 when it is reasonably foreseeable that such person will drive a motor vehicle while still under the influence and in fact does drive a motor vehicle; and (2) while so driving a motor vehicle such person does any act forbidden by law or neglects any duty imposed by law which act or neglect proximately causes the death or bodily injury of such person or any other person.

The effect of the bill would have been to make a California liquor licensee civilly liable for injuries to a patron, third person, or property

21. 5 Cal. 3d at 165, 486 P.2d at 159, 95 Cal. Rptr. at 631.
22. *Id.*

as a result of an automobile accident caused by a patron who was served while intoxicated.

Although the bill was an attempt to codify *Vesely*, it differed from the supreme court's holding in several respects. At the outset of the *Vesely* opinion the court said, "Since neither issue is presented in the instant case, we do not decide whether a noncommercial furnisher of alcoholic beverages may be subject to civil liability under section 25602 or whether a person who is served alcoholic beverages in violation of the statute may recover for injuries suffered as a result of that violation."[23] Therefore, in *Vesely*, damages were awarded *only to a third person* for injuries received. The bill, however, would have allowed an award to the intoxicated patron who is himself injured as a result of being served while intoxicated. This extension is justified by a determination that the intoxicated person himself is a member of the public intended to be protected by the Alcoholic Beverage Control Act,[24] of which Section 25602 is a part. Additionally, the bill provided liability only for liquor licensees, and this language may have been found to preclude a judicial determination of whether common law negligence principles could be applied to a noncommercial supplier through the doctrine of "expressio unius est exclusio alterius."[25] Finally, there was no provision in the bill for liability of the liquor licensee resulting from means other than the use of a motor vehicle. *Vesely*, however, did not limit liability to injuries resulting from the use of a motor vehicle.[26] *Vesely* required only that the conduct of the patron resulting in injury be foreseeable.[27] It is arguable, however, that the limitation in the bill was an attempt to focus on the major problem resulting from the serving of liquor to intoxicated persons—the fact that roughly 35 per cent of all fatal accidents in California involve a drinking driver.[28]

Since those portions of the bill dealing with civil liability of liquor licensees did not pass, the present California law affecting the liability of a noncommercial supplier who furnishes alcohol in violation of Business and Professions Code Section 25602, or the liability of either the

23. 5 Cal. 3d at 157, 486 P.2d at 153, 95 Cal. Rptr. at 625.

24. CAL. BUS. & PROF. CODE §23000 *et seq.* Section 23001 provides that the Alcoholic Beverage Control Act is intended to protect the safety, welfare, health, peace, and morals of the people of California.

25. The mention of one thing implies the exclusion of another thing. Under this rule, the enumeration of liability of liquor licensees in A.B. 1864 would preclude the inclusion of other classes.

26. 5 Cal. 3d at 164, 486 P.2d at 158, 95 Cal. Rptr. at 631.

27. Although the decision talked in general terms of a duty established by CAL. BUS. & PROF. CODE §25602, the factual situation was limited to injuries resulting from a motor vehicle. See text accompanying note 15 *supra*.

28. CALIFORNIA DEP'T OF MOTOR VEHICLES, THE CALIFORNIA DRIVER FACT BOOK Report No. 29 (1970).

commercial or noncommercial supplier for serving an intoxicated person who subsequently injures himself, remains open to either judicial or legislative determination. In any case, though, Section 25602 seems relevant to the making of such a determination since it was utilized in both *Vesely* and Assembly Bill 1864.

NONCOMMERCIAL SUPPLIER'S LIABILITY

Business and Professions Code Section 25602 provides that *every person* who sells or *gives* any alcoholic beverage to an obviously intoxicated person is guilty of a misdemeanor. Therefore, it is arguable that a noncommercial supplier falls within the purview of Section 25602 and the rationale of *Vesely*. To determine whether there is a reasonable basis for such a finding, an analysis of decisions construing statutes similar to Section 25602 seems helpful. Focus will then be shifted towards finding liability of the noncommercial supplier through current judicial concepts not used in *Vesely*.

Traditionally, in those states having dram shop or civil damage acts which provide for the recovery from *any person* giving or selling intoxicating liquor, courts have not allowed suits against noncommercial suppliers. The general rule appears to be well established that such acts were not intended to, and do not, create a cause of action against one who gives another alcoholic beverages as a mere act of friendship or social courtesy without pecuniary gain.[29] Instead, the civil damage acts have been construed as providing a right of action only against those in the business of selling liquor.[30] Several reasons for this narrow construction of the dram shop-civil damage acts have been advanced.

The plaintiff in *Cruse v. Aden*[31] brought suit under a section of the Illinois Dram Shop Act[32] which provides a wife a right of action against *any person* who injures her means of support by giving or selling liquor to any other person. It was contended that the defendant was liable for damages when plaintiff's husband died in an accident brought about by liquor being gratuitously furnished to the husband by defendant. The court affirmed a judgment for the defendant and noted that the very title of the act indicated that its provisions were aimed at dram shops and those who were engaged in the liquor traffic.

Thereafter, in *Harris v. Hardesty*[33] an action was brought to recover

29. Annot., 8 A.L.R.3d 1412, 1413 (1966).
30. *Id.*
31. 127 Ill. 231, 20 N.E. 73 (1889).
32. ILL. ANN. STAT. ch. 43, §135 (Smith-Hurd 1944).
33. 111 Kan. 291, 207 P. 188 (1922).

damages for loss of support under a Kansas Dram Shop Act[34] employing the words "selling or giving" intoxicating liquors. The defendant's demurrer was sustained, the court saying that the term "giving" was used only to prohibit a subterfuge for sale and not to provide a cause of action against a noncommercial supplier.

Finally, in a 1970 Michigan case, *Behnke v. Pierson*,[35] an action was brought to recover for the wrongful death of a motorist whose automobile was struck by a car driven by defendants' employee who was returning from a company party at which alcoholic beverages were served. The court, in a *per curiam* decision, said that recovery for injury caused by an intoxicated person is exclusively statutory.[36] The dram shop statute made no provision for holding private individuals liable for furnishing intoxicants for social courtesy or hospitality reasons without pecuniary gain.[37]

In states not having dram shop acts the same result has been reached by different reasoning. In California prior to *Vesely* the courts had on at least one occasion dealt with the issue of a noncommercial supplier's alleged liability. In *Dwan v. Dixon*[38] the plaintiff was injured in an automobile accident after being served alcohol in the defendant's home. The court found that the *Fleckner* and *Cole* cases set forth the rule in California that the mere furnishing of alcoholic beverages, even to a person who is known to be intoxicated and is further known to be the driver of a motor vehicle, gives rise to no tort liability under California law.[39] The validity of this position is now in doubt, however, because such rationale was found unsound in *Vesely*.[40]

In an Arkansas case[41] the plaintiff sought to hold a commercial supplier liable under an Arkansas penal statute making it a misdemeanor for *any person* to sell or give away liquor to one who is intoxicated.[42] The court said that "[b]y its terms . . . [the statute] is equally applicable to a liquor dealer and to a host who serves cocktails in his own home."[43] For this reason the court refused to use the statute as establishing negligence per se and held the commercial supplier not liable because it was not prepared to impose liability on the social host.

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34. KAN. GEN. STAT. §5507 (1915), *repealed*, KAN. L. 1949, c. 242, §115.
35. 21 Mich. App. 219, 175 N.W.2d 303 (1970).
36. MICH. COMP. LAWS ANN. §436.22 (1967).
37. 21 Mich. App. at 221, 175 N.W.2d at 304.
38. 216 Cal. App. 2d 260, 30 Cal. Rptr. 749 (1963).
39. *Id.* at 264, 30 Cal. Rptr. at 751.
40. See text accompanying notes 16-22 *supra*.
41. Carr v. Turner, 238 Ark. 889, 385 S.W.2d 656 (1965).
42. ARK. STAT. ANN. §48-901 (1964). The provisions of this statute are similar to CAL. BUS. & PROF. CODE §25602.
43. 238 Ark. at 892, 385 S.W.2d at 658.

In Wisconsin, which has a limited dram shop act,[44] it has been held that the selling of liquor is too remote to be a proximate cause of an injury produced by a negligent act of a purchaser in those situations in which the dram shop act is not applicable.[45] Therefore, the Wisconsin Supreme Court has said,

> [E]xtending liability to the noncommercial vendor would result in great social pressure being applied to such individuals and require their policing the activities of friends and social guests. . . . [I]t is questionable just how much success an individual would have in playing out his role in the atmosphere of a private gathering. In addition, such restrictions encompass changes far beyond the framework of negligence law.[46]

These opinions reflected the law of all states, either with or without dram shop acts, until a few recent decisions have imposed liability on a noncommercial supplier. In *Brockett v. Kitchen Boyd Motor Co.*,[47] a March 1972 case, the issue of liability of a noncommercial supplier presented itself to California courts for the first time since *Vesely* had allowed recovery from a commercial supplier. The defendant, Kitchen Boyd Motor Company, held a Christmas party at which it served a minor employee large amounts of liquor. Defendant thereafter placed the minor in his automobile and directed him to drive the vehicle to his home. While the minor was driving home he struck the plaintiff's automobile causing injuries for which plaintiff sought to recover from the employer. The court said that "the *Vesely* decision charts the course to be followed in this state."[48] It then found that Section 25658 of the Business and Professions Code which provides a misdemeanor for *every person* who sells, furnishes, or gives any alcoholic beverage to a minor "was adopted and amended by the California Legislature, presumably because the legislative body believed that most minors are neither physically nor mentally equipped to handle the consumption of intoxicating liquors."[49] Therefore, "the impeccable logic of *Vesely* implies the conclusion that *any person*, whether he is in the business of dispensing alcoholic beverages or not,

44. WIS. STAT. ANN. §176.35 (1957). This section provides for liability of a commercial supplier for injuries or loss of support as a consequence of the intoxication of any minor or habitual drunkard if the commercial supplier has been notified or requested in writing pursuant to Section 176.28 to forbid the sale or giving away of intoxicating liquor to such minor or habitual drunkard. It should be noted that Section 176.28, prohibiting the sale of intoxicating beverages to specified persons on posting of written notice but without either notice or hearing prior to posting, has been declared unconstitutional on its face as violative of due process. Constantineau v. Grager, 302 F. Supp. 861 (E.D. Wis. 1969).

45. Seibel v. Leach, 233 Wis. 66, 288 N.W. 774, 775 (1939).

46. Garcia v. Hargrove, 46 Wis. 2d 724, 734, 176 N.W.2d 566, 570-71 (1970).

47. 24 Cal. App. 3d 87, 100 Cal. Rptr. 752 (1972).

48. *Id.* at 93, 100 Cal. Rptr. at 755-56.

49. *Id.* at 93, 100 Cal. Rptr. at 756.

who disregards the legislative mandate breaches a duty to anyone who is injured as a result of the minor's intoxication and for whose benefit the statute was enacted."[50]

In answer to public policy arguments against extending liability to the social host the court said,

> We do not reach the broad question as to whether a host at a social gathering is subject to liability under Business and Professions Code Section 25602, for injuries caused by intoxicated guests. Section 25658 is directed to a special class; it pertains to young people who because of their tender years and inexperience are unable to cope with the imbibing of alcoholic beverages.[51]

Later in 1972, two state supreme courts used dram shop acts to establish the liability of a noncommercial supplier which contrasts with the California courts' use of a penal statute to establish negligence per se in *Vesely* and *Brockett*. In *Williams v. Klemesrud*[52] the plaintiff, injured in a vehicle collision, brought an action for damages against defendant for giving liquor to the driver of the other colliding automobile. Defendant was not engaged in the liquor traffic, but had bought liquor for the driver who was under twenty-one years old. The court determined that where a dram shop act provides liability for *any person* who sells or gives away liquor to an intoxicated person, individuals who are not liquor licensees and permitees will be held liable.[53] However, the decision may no longer be a reflection of Iowa law. The Iowa Legislature had repealed that portion of the statute making reference to *any person* prior to the supreme court decision but after the case had arisen in trial court. Now liability appears to be limited to liquor licensees.

Two months after the Iowa decision, and without knowledge of its existence,[54] the Minnesota Supreme Court was faced with the following situation: Defendants Delmar Ross and Joel Owen Johnson purchased liquor for Delmar's nineteen-year-old brother, Rodney, which as the jury found resulted in Rodney's becoming intoxicated. The jury also found that Rodney's intoxication proximately caused his death when the car he was driving left the road. Action was brought on behalf of Rodney's infant son and by Rodney's parents.[55] The court, basing its decision on Minnesota statutes,[56] said that the legislature used the

50. *Id.*
51. *Id.* at 93-94, 100 Cal. Rptr. at 756.
52. 197 N.W.2d 614 (Iowa 1972).
53. *Id.* at 616.
54. Ross v. Ross, 200 N.W.2d 149, 153 n.8 (Minn. 1972).
55. *Id.* at 150.
56. MINN. STAT. ANN. §340.73 (misdemeanor to sell to intoxicated person), §340.79 (misdemeanor to serve minor), §340.95 (civil damage provision) (1972).

words *any person* without limiting application of the statute to liquor vendors.[57] The court stated, "[W]e are persuaded that the purpose of the act was to impose liability on every violator, whether or not he was engaged in the liquor business."[58] The court then went on to say that those who furnish liquor to others, even on social occasions, should "be held responsible for protecting innocent third persons from the potential dangers of indiscriminately furnishing such hospitality."[59]

The *Klemesrud* and *Ross* decisions did not find the fact that the individual who was furnished the alcohol was a minor to be significant. Therefore, although these decisions were based on the dram shop acts which California does not have, they do make the determination that equal treatment is available to commercial and noncommercial suppliers when the statute on which liability is based makes reference to *any person.*

Since the dram shop act is a different means of finding liability than that used in *Vesely*[60] and *Brockett,*[61] it must be determined if the *Klemesrud* and *Ross* decisions can be used as authority for finding liability of a noncommercial supplier serving adults in California.

A Minnesota court has construed its dram shop act as having the principal objective of imposing liability on persons for illegally serving intoxicating liquors.[62] This is the same conclusion reached by the California Supreme Court in *Vesely* based on application of Business and Professions Code Section 25602. As previously mentioned, the *Vesely* court found that Section 25602 establishes a duty of care, the violation of which is negligence per se. Section 25602 imposes criminal sanctions on every person who sells, furnishes, or gives any alcoholic beverage to an obviously intoxicated person. This would seem to allow California to follow the rationale of those cases holding that equal treatment is applicable to both commercial and noncommercial suppliers.

In addition, the *Vesely* court said,

> Our conclusion concerning the legislative purpose in adopting section 25602 is compelled by Business and Professions Code section 23001, which states that one of the purposes of the Alcoholic Beverage Control Act is to protect the safety of the people of this state.[63]

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57. 200 N.W.2d at 152-53.
58. *Id.* at 156.
59. *Id.* at 153.
60. Vesely v. Sager, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971).
61. Brockett v. Kitchen Boyd Motor Co., 24 Cal. App. 3d 87, 100 Cal. Rptr. 752 (1972).
62. Hartwig v. Loyal Order of Moose, 253 Minn. 377, 91 N.W.2d 794 (1958).
63. 5 Cal. 3d at 165, 486 P.2d at 159, 95 Cal. Rptr. at 631.

Therefore, the harm arising from intoxication through the aid of a noncommercial supplier is certainly no less than that resulting from the commercial supplier. The means differ, but the end result is the same.

The *Vesely* court further stated that if the plaintiff was within the class of persons for whose protection Section 25602 was enacted, if the injuries he suffered resulted from an occurrence that the statute was designed to prevent, if the defendant violated Section 25602, and if such violation proximately caused plaintiff's injuries, a presumption will arise that defendant was negligent.[64] It is arguable, therefore, that proof of such elements in the case of a noncommercial supplier will impose liability because Section 25602 makes no distinction beteen those who sell or furnish for profit and those who do not.

In addition to a finding of liability under Section 25602, liability may be found under ordinary principles of negligence or by analogy to the negligent entrustment doctrine. The Oregon Supreme Court used ordinary negligence principles to find liability of a noncommercial supplier in *Wiener v. Alpha Tau Omega Fraternity*.[65] The defendant fraternity held a party at which alcoholic beverages were served to its guests including one Blair, a minor. Blair was subsequently involved in a one-car accident in which the plaintiff, a passenger, was injured. It was alleged that the fraternity was negligent in knowingly serving a minor and allowing him to drive an automobile when the fraternity knew or should have known that there would be an unreasonable risk of harm resulting from its conduct. The court determined that due to its limited application, Oregon's Dram Shop Act[66] was not available to the plaintiff under the facts presented. The court also found that an Oregon penal statute[67] which states, "No person other than his parent or guardian shall give or otherwise make available any alcoholic liquor to a person under the age of 21 years," was not enacted for the purposes of protecting third persons from injury resulting from the conduct of inebriated minors or of imposing liability upon a person contributing to the minor's delinquency by furnishing him with alcohol.[68] Since both statutes were found inapplicable to the facts pre-

64. *Id.* at 165, 486 P.2d at 159-60, 95 Cal. Rptr. at 631-32.
65. 485 P.2d 18 (Ore. 1971).
66. ORE. REV. STAT. §30.730 (1971). "Any person who shall bargain, sell, exchange or give to any intoxicated person or any habitual drunkard spirituous, vinous, malt or intoxicating liquors shall be liable for all damages resulting in whole or in part therefrom, in an action brought by the *wife, husband, parent* or *child* of such intoxicated person or habitual drunkard. The act of any agent or employee shall be deemed the act of his principal or employer for the purposes of this section." (emphasis added).
67. ORE. REV. STAT. §471.410(c) (1972).
68. 485 P.2d at 21. *Cf.* Waynick v. Chicago's Last Dep't Store, 269 F.2d 322 (7th Cir. 1959); Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1 (1959).

sented, the court had to decide whether or not a cause of action existed at common law. The court recognized that under circumstances in which the host has reason to know that he is dealing with persons whose characteristics make it especially likely that they will do unreasonable things, the host will have a duty to deny his guests further access to alcohol.[69] In the instant case the fraternity knew that its guest was a minor who could be expected by virtue of his youth alone to behave in a dangerous fashion under the influence of alcohol.[70] Therefore, in Oregon a social host may be liable in negligence for serving a guest alcohol under circumstances in which the unreasonable conduct of the guest is foreseeable.[71]

A finding of liability by analogy to the negligent entrustment doctrine is also relevant. In 1949, Judge Dooling in a dissenting opinion in *Fleckner v. Dionne*[72] concluded, "[I]f it is negligence to entrust an automobile to an intoxicated person or to one addicted to intoxication why is it not negligence to furnish liquor to a person to the point of intoxication knowing that he is going to drive an automobile while in that condition?" As stated, the reasoning is based on decisions that find the entrustment of an automobile to an intoxicated person is a negligent act.[73] In addition, it has been said, "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 [a foreseeable,] unreasonable risk of injury to motorists and pedestrians . . . ."[74]

The analogy is not limited to the commercial supplier. In *Garcia v. Hargrove* Chief Justice Hallows in his dissenting opinion said:

> [T]he majority says if it is logical to hold the commercial dispenser liable, then there is no legitimate basis for not also holding the private dispenser liable; and since it is impractical to hold a private dispenser liable, we will not hold either. The necessity of drawing a line of demarcation is a straw-man argument, and I see no reason why such a distinction must be made. If a person loans his automobile to a minor incapable of driving or to an intoxicated person unable to drive or gives a loaded gun to a minor who is unable to use it safely, the law has no difficulty in finding liability. . . . We are still our brothers' keepers, and it would

69. 485 P.2d at 21.
70. *Id.*
71. *Id.* at 22.
72. 94 Cal. App. 2d 246, 253, 210 P.2d 530, 535 (1949).
73. See Brockett v. Kitchen Boyd Motor Co., 70 Cal. App. 2d 69, 70 Cal. Rptr. 136 (1968); Caccamo v. Swanston, 94 Cal. App. 957, 212 P.2d 248 (1949); Chaney v. Duncan, 194 Ark. 1076, 110 S.W.2d 21 (1937); Knight v. Gosselin, 124 Cal. App. 290, 12 P.2d 454 (1932).
74. Johnson, *Drunken Driving—The Civil Responsibility of the Purveyor of Intoxicating Liquor*, 37 IND. L.J. 317, 328 (1962).

> be a rare host at a social gathering who would knowingly give more liquor to an intoxicated friend when he knows his invitee must take care of himself on the highway and will potentially endanger other persons. Social justice and common sense require the social host to see within reason that his guests do not partake of too much of his generosity.[75]

The use of the negligent entrustment doctrine by Chief Justice Hallows is similar to the extension of the common law made in *Vesely*, that consumption, resulting intoxication, and injury-producing conduct are foreseeable intervening causes. The reasons for both findings, the presence of proximate cause and the extension of negligent entrustment, are at least partially based on the potential dangers created by the drinking driver.[76] Therefore, it is not unreasonable to consider liquor as a dangerous instrumentality, and such being the case, the application of negligent entrustment to the situation is a logical result.

Should the Intoxicated Consumer Recover?

Although the *Vesely* case did not decide whether the intoxicated consumer should recover for injuries sustained as a result of being served while intoxicated, the issue has been presented in two lower California courts in 1972. In *Carlisle v. Kanaywer*[77] liability was denied when defendants served the decedent while he was intoxicated and decedent thereafter became violently ill and died in the bar when he strangled upon inhaling his own vomit. The court held, "[I]f the concurrent negligence of the plaintiff is a proximate contributing cause of his injury, his own recovery is barred by his contributory negligence."[78] The court appeared to be unconvinced by its own reasoning, however, and then stated that in light of the supreme court's restraint in *Vesely* (declining to comment on the merits of whether one who is served while intoxicated may recover for his own injuries), "it hardly befits a lower court to expand the rule in this new and potentially dangerous field."[79]

Thereafter, in *Sargent v. Goldberg*[80] a customer of defendant's liquor store, allegedly approaching the state of drunkenness, made a purchase and then immediately entered a restaurant and met his death when his head struck the ground while he was being evicted by the

75. 46 Wis. 2d 724, 739-40, 176 N.W.2d 566, 573-74 (1970).
76. Secretary of H.E.W., First Special Report to the U.S. Congress on Alcohol and Health at 3 (Dec. 1971).
77. 24 Cal. App. 3d 587, 101 Cal. Rptr. 246 (1972).
78. *Id.* at 591, 101 Cal. Rptr. at 248.
79. *Id.* at 592, 101 Cal. Rptr. at 248.
80. 25 Cal. App. 3d 940, 102 Cal. Rptr. 300 (1972).

restaurant owner. The court rested its decision on the fact that decedent was only approaching a state of drunkenness and that there was no allegation that decedent was obviously intoxicated or a habitual or common drunkard or that the purchase (presumably from a package store) in any way contributed to the customer's death.[81] In dictum, however, the court approved the holding in *Carlisle* saying that even though not every intervening act breaks the chain of causation as to an injured third party, application of this rule does not sustain the right of the injured drinker himself to recover.[82]

In contrast to these decisions are several cases denying the use of contributory negligence as a defense. In *Schelin v. Goldberg,*[83] a Pennsylvania case, it was found that a statute making it unlawful to sell, furnish, or give away liquor to any person visibly intoxicated[84] was enacted to protect society generally, and specifically to protect intoxicated persons from their own inability to exercise self-protective care.[85] In *Soronen v. Olde Milford Inn*[86] the court used identical reasoning when decedent fell and struck his head while a patron in defendant's bar. Plaintiff's contention was that decedent's fall and death were the result of his having been served liquor by the bartender when decedent was in an actual and apparent state of intoxication. The court found,

> Intoxication is a state of impairment of one's mental and physical faculties due to overindulgence in alcoholic drink. A person in that condition is unable to exercise normal powers of judgment and prudence. He is a potential menace, not only to himself but to others. Common sense requires that a tavern keeper refuse to serve alcoholic drink to such a person. This common law principle is carried into our Alcoholic Beverage Control Act which, through implementing regulations, specifically prohibits a licensee from serving alcoholic drink to a person actually and apparently intoxicated. We conclude that plaintiff's complaint sets forth a justiciable cause of action.[87]

Finally, in *Vance v. United States*[88] the United States District Court for Alaska held that an Alaska statute[89] prohibiting the sale of liquor to intoxicated persons and minors was "intended to place the entire responsibility for resulting harm upon the violator, for it is virtually

81. *Id.* at 943-44, 102 Cal. Rptr. at 302.
82. *Id.*
83. 188 Pa. Super. 341, 146 A.2d 648 (1958).
84. PA. STAT. ANN. tit. 47, §4-493 (1969).
85. 188 Pa. Super. at 348, 146 A.2d at 652.
86. 84 N.J. Super. 372, 202 A.2d 208 (1964).
87. *Id.* at 375-76, 202 A.2d at 209-10.
88. 355 F. Supp. 756 (D. Alaska 1972).
89. ALASKA STAT. §04.15.020(a) (1962).

impossible for the statute to be violated without contributory negligence on the part of the plaintiff-consumer."[90]

California Business and Professions Code Section 25602 is similar to the Pennsylvania statute used in *Schelin*,[91] the New Jersey regulation used in *Soronen*,[92] and the Alaska statute used in *Vance*,[93] and it is reasonable to contend that it was also enacted to protect the intoxicated person from his own inability to refuse further drinks. Such being the case it is arguable that the use of contributory negligence to bar the patron's recovery is against public policy because the statute, in theory, was intended to protect against all injuries resulting from the illegal sale. The Restatement of Torts takes the position: "There are . . . exceptional statutes which are intended to place the entire responsibility for the harm which has occurred upon the defendant. A statute may be found to have that purpose particularly where it is enacted in order to protect a certain class of persons against their own inability to protect themselves."[94] Illustrative are child labor acts,[95] statutory prohibitions against the sale of firearms to minors,[96] and safety acts for the protection of workmen.[97] The analogy of the Restatement position is easily made to encompass California Business and Professions Code Section 25602. If it were expected that the patron could look after his own interests, it would have been made a misdemeanor to ask for a drink while intoxicated instead of, or in addition to, placing the responsibility on the supplier.[98]

CONCLUSION

The imposition of liability on the noncommercial supplier would seem to be presently available to the California courts under the application of California Business and Professions Code Section 25602 and Evidence Code Section 669 which codifies the presumption of negligence. However, "the standard formulated by a legislative body in

90. 355 F. Supp. at 759-60.
91. PA. STAT. ANN. tit. 47, §4-493 (1969).
92. Regulation 20, Rule 1. Adopted pursuant to N.J. STAT. ANN. §33:1-39 (1940).
93. ALASKA STAT. §04.15.020(a) (1962).
94. RESTATEMENT (SECOND) OF TORTS §483, comment c, at 539 (1965).
95. Pitzer v. M.D. Tomkies & Sons, 136 W. Va. 268, 67 S.E.2d 437 (1951).
96. Tamiami Gun Shop v. Klein, 109 So. 2d 189 (Fla. App. 1959), *aff'd*, 116 So. 2d 421 (Fla. 1959).
97. Koenig v. Patrick Constr. Corp., 298 N.Y. 313, 83 N.E.2d 133 (1948). See also Galvin v. Jennings, 289 F.2d 15 (3d Cir. 1961); W. PROSSER, THE LAW OF TORTS 201 (4th ed. 1971); Prosser, *Contributory Negligence as a Defense to Violation of a Statute*, 32 MINN. L. REV. 105, 118-23 (1947).
98. The legislature has prescribed criminal punishment for the minor who purchases alcoholic beverages. See CAL. BUS. & PROF. CODE §25658. However, the argument that this does not remove the minor from the class of persons to be protected is still appropriate due to the recognized protective attitude towards minors.

a police regulation or criminal statute becomes the standard to determine civil liability only because the court accepts it."[99] Such acceptance by the court will depend upon the public policy considerations that are involved in determining whether the noncommercial supplier should be held liable for a violation of Section 25602. Some of these considerations are: (1) the noncommercial supplier's effectiveness in policing the activities of guests; (2) the ability of the noncommercial supplier to insure himself against liability; and (3) the costs that the noncommercial supplier will incur as a result of an extension of liability. Although the answers to these questions are beyond the scope of this comment, the California Legislature should take affirmative action to resolve the ambiguity resulting from the use of the words *every person* in Section 25602. In the absence of such action by the legislature, courts will be free to resolve the problem by weighing the public policy arguments against the utility of holding the noncommercial supplier liable.

Additionally, a finding that contributory negligence is not available as a defense to the patron's recovery for his own injuries is easily made when the realities of the intoxicated person's ability to exercise self-protective care are considered. In California Penal Code Section 647, subsection (f), the legislature categorizes as "disorderly" a person who is in such a condition that he is unable to exercise care for his own safety. In a 1971 amendment to Section 647, subsection (ff), the legislature provided that a person arrested under subsection (f) "shall be taken to a facility, designated pursuant to section 5170 of the Welfare and Institutions Code, for the 72-hour treatment and evaluation of inebriates." This amendment is some evidence of the legislature's protective attitude toward intoxicated persons which could result in a finding that contributory negligence is not a valid defense to the patron's recovery.

Since Assembly Bill 1864 met a fatal end, the following proposed legislation is offered to resolve the questions left unanswered by *Vesely*:

> Any person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any person, when a reasonable man would believe such person to be either intoxicated or to be a minor, is civilly liable for any damages arising out of the death or bodily injury of such person or any other person and any property damage if the person to whom the alcoholic beverage was sold, furnished, or given does any act for-

99. Clinkscales v. Carver, 22 Cal. 2d 72, 73, 136 P.2d 777, 778 (1943).

> bidden by law or neglects any duty imposed by law which act or neglect proximately causes the death or bodily injury of such person or any other person or such property damage.

Although this proposal may meet the same fate as did Assembly Bill 1864, it should be remembered that the courts have the power to reach the same result, and indeed many have, through the application of current legal principles.

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