

1988

Larry Horton v. The Royal Order of the Sun and Concept Clubs : Brief of Appellee

Utah Supreme Court

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Kathryn Schuler Denhom; Attorney for Plaintiff.

Lee Anne Walker; Virginia Curtis Lee; Shawn E. Draney; Snow Christensen and Martineau; Attorney for Defendant.

Recommended Citation

Brief of Appellee, *Horton v. The Royal Order of the Sun and Concept Clubs*, No. 880490.00 (Utah Supreme Court, 1988).
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DOCKET NO. **880490**

BRIEF

IN THE SUPREME COURT
OF THE STATE OF UTAH

LARRY HORTON,)	
)	
Plaintiff/Appellant)	
)	
v.)	
)	
THE ROYAL ORDER OF THE SUN,)	Case No. 880490
a Utah non-profit corporation)	
and STUDEBAKER'S, a Utah non-)	Priority: 14(b)
profit corporation,)	
)	THIRD DISTRICT COURT
Defendants/Appellees)	Case No. C 87-7579

BRIEF OF APPELLEE THE ROYAL ORDER OF THE SUN
APPEAL FROM THE JUDGMENT AND ORDER
OF THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY
HONORABLE DAVID S. YOUNG, JUDGE

LEE ANNE WALKER
Attorney for Defendant
The Royal Order of the Sun
65 West Century Park Plaza
Salt Lake City, Utah 84115
(801) 486-8331

VIRGINIA CURTIS LEE
Attorney on Appeal for Defendant
The Royal Order of the Sun
1458 Princeton Avenue
Salt Lake City, Utah 84105-1923
(801) 583-0625

SHAWN E. DRANEY
SNOW CHRISTENSEN & MARTINEAU
Attorneys for Defendant
Studebaker's
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
(801) 521-9000

KATHRYN SCHULER DENHOLM
Attorney for Plaintiff/Appellant
263 East 2100 South
Salt Lake City, Utah 84115
(801) 484-0091

FILED

OCT 1 1990

Clerk, Supreme Court, Utah

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
JURISDICTION STATEMENT	1
NATURE OF THE PROCEEDINGS	1
STATEMENT OF THE ISSUES	2
DETERMINATIVE STATUTES AND RULES	2
STATEMENT OF THE CASE	2
<u>A. Nature of the Case</u>	2
<u>B. Course of Proceedings</u>	2
<u>C. Disposition in the Lower Court</u>	3
<u>D. Statement of Relevant Facts</u>	3
SUMMARY OF THE ARGUMENT	4
ARGUMENT	
POINT I: HORTON'S COMPLAINT WAS LEGALLY INSUFFICIENT TO STATE A CAUSE OF ACTION AGAINST STUDEBAKER'S AND THE SUN.	6
POINT II: AS A MATTER OF LAW, A VOLUNTARILY INTOXICATED ADULT HAS NO CAUSE OF ACTION AGAINST A DRAMSHOP FURNISHING ANY ALCOHOLIC BEVERAGE	9
<u>A. The Utah Legislature Has Created No Statutory Remedy Altering The Common Law Rule That One Injured As The Result Of His Own Voluntary Intoxication Has No Cause Of Action Against A Provider Of Alcohol</u>	9

<u>B. When It Enacted Section 32A-12-9.</u> <u>U.C.A. (1986), The Legislature Had</u> <u>No Specific Intent To Provide A</u> <u>Right Of Action Against A Dramshop</u> <u>To An Intoxicated Adult Injured As</u> <u>The Result Of His Own Voluntary</u> <u>Inebriation</u>	19
CONCLUSION	23
ADDENDUM	

TABLE OF AUTHORITIES

Cases

<u>Allisen v. American Legion Post No. 134,</u> 763 P.2d 806 (Utah 1988)	12
<u>Beach v. University of Utah,</u> 726 P.2d 413 (Utah 1986)	15, 16
<u>Brinkerhoff v. Forsyth,</u> 779 P.2d 685 (Utah 1989)	15
<u>Cuevas v. Royal D'Iberville Hotel,</u> 498 So. 2d 346 (Miss. 1986)	22
<u>Golding v. Ashley Cent. Irr. Co.,</u> 793 P.2d 897 (Utah 1990)	7
<u>Hall v. Warren,</u> 632 P.2d 848 (Utah 1981)	19, 21
<u>Heiner v. S. J. Groves & Sons Co.,</u> 790 P.2d 107 (Utah App. 1990)	7
<u>Jorgenson v. Issa,</u> 739 P.2d 80 (Utah App. 1987)	19
<u>Kindt v. Kauffman,</u> 57 Cal. App. 3d 845, 129 Cal. Rptr. 603 (1976)	24
<u>Knapstad v. Smith's Management Corp.,</u> 774 P.2d 1 (Utah App. 1989)	21
<u>Lowe v. Sorenson,</u> 779 P.2d 668 (Utah 1989)	6, 7
<u>Miller v. City of Portland a.k.a</u> <u>City of Portland v. Alhadeff,</u> 288 Or. 271, 604 P.2d 1261 (1980)	16, 17, 20
<u>Mounteer v. Utah Power & Light Co.,</u> 773 P.2d 405 (Utah App. 1989)	7
<u>Sager v. McClenden,</u> 650 P.2d 1002 (Or. App. 1982)	17, 18

Tovar v. Lee, Civil No. 84-1540 (10th Cir. 1984)	23, 24
---	--------

Statutes and Rules

Rule 12(b), U.R.C.P.	6
Section 32-11-1, Utah Code Ann. (1981) (repealed 1985).	11, 12
Section 32A-12-9, Utah Code Ann. (1986).	21, 22, 23
Section 32A-12-13.3, Utah Code Ann. (1986)	22
Section 32A-14-1, Utah Code Ann. (1986)	8, 9

Authorities

64 A.L.R. 3d 882, <u>Proof of Causation of Intoxication as a Prerequisite to Recovery under Civil Damage Act</u>	8, 9
45 Am. Jur. 2d <u>Intoxicating Liquors</u> § 553, pp. 852-853	10
45 Am. Jur. 2d <u>Intoxicating Liquors</u> § 561, p. 859	10, 11
45 Am. Jur. 2d <u>Intoxicating Liquors</u> § 580, pp. 871-872	11
1987 Utah L. Rev. 304, <u>Utah Dram Shop Act Amendments</u>	13, 14

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)	THIRD DISTRICT COURT
Defendants/Appellees)	Case No. C 87-7579

BRIEF OF APPELLEE THE ROYAL ORDER OF THE SUN

JURISDICTION STATEMENT

The Utah Supreme Court has appellate jurisdiction over this case pursuant to Section 78-2-2(3)(j), Utah Code Ann. (1988), "orders, judgments, and decrees of any court of record over which the Court of Appeals does not have original appellate jurisdiction."

NATURE OF THE PROCEEDINGS

This is an appeal from the Order of Dismissal with Prejudice and upon the Merits entered November 16, 1988 in the Third District Court, Salt Lake County dismissing Appellant Horton's action against Appellees Studebaker's and the Royal

Order of the Sun ("Sun") for injuries Horton suffered as the result of Horton's voluntary intoxication.

STATEMENT OF THE ISSUES

The sole issue presented in this appeal is whether an intoxicated adult has a cause of action against a provider of alcohol for injuries the intoxicated adult suffers as the result of the intoxicated adult's voluntary intoxication.

DETERMINATIVE STATUTES AND RULES

The following Rules and statutes, cited in this Brief, are determinative of the issue on appeal:

Rule 12(b)(6), U.R.C.P.

Section 32A-12-9, U.C.A. (as amended effective March 17, 1986)

Section 32A-12-13.3 (1986)

Section 32A-14-1 (as amended effective March 17, 1986)

STATEMENT OF THE CASE

A. Nature of the Case

This is an action for personal injuries brought by a voluntarily intoxicated adult against providers of alcoholic beverages.

B. Course of Proceedings

On November 19, 1987, Plaintiff/Appellant Larry Horton ("Horton") filed a complaint against providers of alcoholic

beverages, Defendants/Appellees, Studebaker's and The Royal Order of The Sun ("Sun"), for personal injuries Horton suffered while voluntarily intoxicated. (R. 02-08)

The Sun filed an Answer and Counterclaim. (R. 07-08)
Horton filed a Reply to the Sun's Counterclaim. (R. 09)

On October 13, 1988, Studebaker's filed a Motion to Dismiss Horton's action pursuant to Rule 12(b)(6), U.R.C.P., asserting that an intoxicated person has no common law or statutory claim against a dramshop for injuries caused by his intoxication. The Sun joined in Studebaker's Motion to Dismiss. (R. 11-26)

On November 7, 1988, the Motions to Dismiss came on for hearing. (R. 37, 47)

On November 16, 1988, the district court entered its Order of Dismissal with Prejudice and upon the Merits dismissing Horton's complaint. (R. 38-39) On December 14, 1988, Horton filed his Notice of Appeal. (R. 42)

C. Disposition in the Lower Court

Pursuant to Minute Entry dated November 7, 1988, the district court, by Order entered November 16, 1988, dismissed Horton's Complaint with prejudice and upon the merits. (R. 38-39)

D. Statement of Relevant Facts

For the purpose of appellate review only, the following facts may be assumed to be true:

1. The Sun and Studebaker's are each non-profit corporations located in Salt Lake County, Utah. (R. 02, 1)

2. On May 21, 1987, Horton, as a patron, consumed numerous alcoholic beverages at Studebaker's. (R. 02, 2)

3. Horton became extremely intoxicated. (R. 02, 3)

4. Studebaker's employees continued to serve Horton, despite his extreme and obvious intoxication. (R. 02, 4)

5. Horton left Studebaker's and went to the Sun. (R. 02, 5)

6. The employees of the Sun continued to serve Horton alcoholic beverages despite his obvious and extreme intoxication. (R. 02, 6)

7. Horton passed out and fell, striking his head. (R. 02, 7)

8. Horton is permanently disabled, has incurred substantial medical expenses, and has suffered a loss of income and mental anguish. (R. 02, s 8, 9, 10 and 11)

SUMMARY OF THE ARGUMENT

Even if the factual assertions in Horton's Complaint were correct, which Studebaker's and the Sun admit only for

purposes of this appeal, those assertions provided no legal basis for recovery. In Utah, there is no statutory or common-law cause of action against a dram shop by an adult injured as a result of his own voluntary intoxication.

The Utah Dram Shop Act, which is contrary to the common law, provides a cause of action against a dram shop "for injuries in person, property, or means of support to any **third person**, or to the spouse, child, or parent of that **third person**, resulting from the intoxication of another person **caused by** the dram shop. The Utah Dram Shop Act has been amended three times since its enactment in 1985. However, the legislature has never seen fit to provide a cause of action to an adult injured as a result of his voluntary intoxication, despite a pointed observation by this Court in a 1986 case.

Horton does not come within the class of persons sought to be protected under Title 32A, chapter 12 of the Utah Code, which provides for criminal enforcement of Utah's liquor laws. Furthermore, those criminal provisions were not directed toward preventing the type of harm Horton suffered as the result of the "state of extreme intoxication" he "achieved."

This Court should affirm the lower court's Order of Dismissal with Prejudice and on the merits.

ARGUMENT

POINT I.

HORTON'S COMPLAINT WAS LEGALLY INSUFFICIENT TO STATE ANY CAUSE OF ACTION AGAINST STUDEBAKER'S AND THE SUN.

Rule 12(b)(6) Utah Rules of Civil Procedure provides:

Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted, . . .

In Lowe v. Sorenson Research Co., Inc., 779 P. 2d 668, 669 (Utah 1989), this Court set forth the standard of review in an appeal from the grant of a motion to dismiss under Utah Rule of Civil Procedure 12(b)(6). Justice Zimmerman wrote:

Because this is an appeal from the grant of a motion to dismiss under Utah Rule of Civil Procedure 12(b)(6), we will review only the facts alleged in the complaint. In determining whether the trial court properly granted the motion, we accept the factual allegations in the complaint as true and consider them and all reasonable inferences to be drawn therefrom in a light most favorable to the plaintiff. E.G., Arrow Indus. Inc. v. Zions First Nat'l Bank, 767 P.2d 935, 936 (Utah 1988); Penrod v. Nu Creation Creme, Inc., 669 P.2d 873, 875 (Utah 1983). We will affirm the dismissal only if it is apparent that as a matter of law, the plaintiff could not recover under the facts alleged. See Arrow Indus., Inc. v. Zions

First Nat'l Bank, 767 P.2d at 936; Barrus v. Wilkinson, 16 Utah 2d 204, 205, 398 P.2d 207, 208 (1965); Utah R. Civ. P. 12(b)(6). Because we are considering only the legal sufficiency of the complaint, we give the trial court's ruling no deference and review it under a correctness standard. See Atlas Corp. v. Clovis Nat'l Bank, 737 P.2d 225, 229 (Utah 1987); Kimball v. Campbell, 699 P.2d 714, 716 (Utah 1985).

See also, Golding v. Ashley Cent. Irr. Co., 793 P.2d 897, 898 (Utah 1990); Heiner v. S. J. Groves & Sons Co., 790 P.2d 107, 109-110 (Utah App. 1990); and Mounteer v. Utah Power & Light Co., 773 P.2d 405, 406 (Utah App. 1989).

The following facts are alleged in the complaint: On May 21, 1987, Horton was a patron at Studebaker's. Horton consumed numerous alcoholic beverages there and became extremely intoxicated. Studebaker's employees continued to serve Horton, despite his extreme and obvious intoxication.

Horton then left Studebaker's and went to the Sun. The Sun's employees continued to serve Horton alcoholic beverages despite his obvious and extreme intoxication. While at the Sun, Horton passed out and fell, striking his head.

Horton is permanently disabled, has incurred substantial medical expenses, and has suffered a loss of income and mental anguish.

According to Horton's own allegations, he was injured when he fell as the result of the "state of extreme intoxication"

he "achieved." Horton alleged no facts supporting an inference that he suffered injury at the hands of any patron, employee or agent of Studebaker's or the Sun. Horton did not allege that Studebaker's or the Sun caused the "state of extreme intoxication" he "achieved."

Proof of causation of intoxication is a prerequisite to recovery under the dramshop act. 64 A.L.R.3d Proof of Causation of Intoxication As A Prerequisite To Recovery Under Civil Damage Act 882. Section 32A-14-1, Utah Code Ann. (1986) provided in pertinent part:

(1) Any person who directly gives, sells, or otherwise provides liquor, or at a location allowing consumption on the premises, any alcoholic beverage, to a person:

(a) who is under the age of 21 years or

(b) who is apparently under the influence of intoxicating alcoholic beverages or products or drugs or

(c) whom the person furnishing the alcoholic beverage knew or should have known from the circumstances was under the influence of intoxicating alcoholic beverages or products or drugs or

(d) who is a known interdicted person,

and by those actions causes the intoxication of that person, is liable for injuries in

person, property, or means of support to any third person, or to the spouse, child, or parent of that third person, resulting from the intoxication. An employer is liable for the actions of its employees in violation of this chapter.

(2) A person who suffers an injury under Subsection (1) has a cause of action against the person who provided the liquor or other alcoholic beverage in violation of Subsection (1).

The allegations in Horton's Complaint were legally insufficient under this statute and under the common law to state a cause of action against either Studebaker's or the Sun or both. To survive a motion to dismiss, a complaint must allege facts that add up to a claim. Horton's complaint failed. The district court correctly concluded as a matter of law that Horton failed to state a claim against Studebaker's and the Sun.

POINT II.

AS A MATTER OF LAW, A VOLUNTARILY
INTOXICATED ADULT HAS NO CAUSE OF
ACTION AGAINST A DRAMSHOP
FURNISHING ANY ALCOHOLIC BEVERAGE.

A. The Utah Legislature Has Created No Statutory Remedy Altering The Common Law Rule That One Injured As The Result Of His Own Voluntary Intoxication Has No Cause Of Action Against A Provider Of Alcohol.

At common law it is not a tort to either sell or give intoxicating liquor to ordinary able-bodied men, and it has been frequently held that in the absence of statute, there can be no cause of action against one furnishing liquor in favor of those

injured by the intoxication of the person so furnished. The reason usually given for this rule is that the drinking of the liquor, not the furnishing of it, is the proximate cause of the injury. The rule is based on the obvious fact that one cannot become intoxicated by reason of liquor furnished him if he does not drink it. 45 Am. Jur. 2d Intoxicating Liquors § 553, pp. 852-853.

To supply the defect of the common law, which affords practically nothing in the way of remedies for injury or damage caused by intoxication, the legislatures of many states have enacted statutes giving, generally, a right of action to persons injured in person, property, or means of support, by an intoxicated person, or in consequence of the intoxication of any person, against the person selling or furnishing the liquor which caused the intoxication, in whole or in part. These statutes, commonly known as "civil damage acts" or "dramshop acts," afford remedies unknown to the common law. The remedies created by the statutes are not in any sense common-law negligence actions. New, separate, and distinct rights of action are conferred. Ibid., § 561, p. 859.

One thing that must be constantly borne in mind when considering such acts is that the right and remedy created by them are exclusive; no right of action exists except as expressly

given by the statutes, and the remedy prescribed cannot be enlarged except by further legislative enactment. Id.

There is authority to the effect that the purchaser is not within the contemplation of a statute giving a remedy to every spouse, child, parent, "or other person." Moreover, in an **analogy** to the doctrine of contributory negligence, it has been generally held that the liquor furnisher is not liable to a plaintiff who himself contributed to the intoxication in consequence of which he received injuries. Ibid., § 580, p. 871.

The Utah Legislature first imposed statutory liability on liquor providers in the Utah Dram Shop act of 1981 ("1981 Act"). The legislature amended the Act in 1985 and again in 1986. The Act applies to vendors and apparently also to social hosts serving intoxicating beverages to guests.

The 1981 Act, Utah Code Ann. § 32-11-1 (Supp. 1981) (repealed 1985), provided in pertinent part:

(1) Any person who gives, sells, or otherwise provides intoxicating liquor to another contrary to subsection 16-6-13.1(8)(d), subsection 32-1-36.5(1)(1), section 32-7-14, or subsection 32-7-24(b) or (c), and thereby causes the intoxication of the other person, is liable for injuries in person, property, or means of support to any third person, or the spouse, child, or parent of that third person, resulting from the intoxication.

(2) A person who suffers an injury referred to in subsection (1) of this section, shall have a cause of action against the intoxicated person and the person who provided the intoxicating liquor in violation of subsection (1) above, or either of them.

Utah Code Ann. § 16-6-13.1(8)(d) (Supp. 1983) (repealed 1985) prohibited social clubs with state liquor stores on the premises from selling liquor or wine to minors, persons actually, apparently, or obviously drunk, any known habitual drunkards, and any known interdicted persons. Utah Code Ann. § 32-1-36.5(1)(1) (Supp. 1969) (repealed 1985) prohibited restaurants with state liquor stores on their premises from selling liquor or wine to minors, persons actually, apparently, or obviously drunk, any known habitual drunkards, and any known interdicted persons. Utah Code Ann. § 32-7-14 (1974) (repealed 1985) forbade the sale or supply of alcoholic beverages to persons under or apparently under the influence of liquor. Utah Code Ann. § 32-7-24 (1974) (repealed 1985) prohibited (b) the consumption of liquor by a person apparently under the influence of liquor on the premises of an owner, tenant, or occupant and (c) the giving of liquor to a person apparently under the influence of liquor. See also Allisen v. American Legion Post No. 134, 763 P.2d 806 (Utah 1988).

The 1986 Amendments to the Utah Dram Shop Act ("Amendments") substantially altered the liability imposed on providers of intoxicating beverages. The 1986 Amendments rectified several problems that existed with the prior version of the Act. The significant changes include (1) a narrower definition of the specific conduct on which liability may be based, (2) a limitation on the amount of damages available under the Dram Shop cause of action, and (3) an extension of liability to certain providers of beer. Utah Dram Shop Act Amendments, 1987 Utah L. Rev. 304-305.

At common law, a person suffering injury as a consequence of another's intoxication had little remedy against the provider of the intoxicating beverage. The common law viewed the actual consumption of the beverage, not the provision of the beverage, as the proximate cause of a person's intoxication and any injury resulting from that intoxication. Because the provision of the beverage could not be the proximate cause of another person's intoxication, providers of intoxicating beverages owed no duty of care to the public at large or to the actual consumer of the beverage. Ibid., 305.

Dram Shop acts are contrary to the common law and impose a statutory duty on providers of intoxicating beverages by holding them liable for the consequences of the consumer's

intoxication. The acts generally provide a remedy against the provider for personal injury or damage to property interests resulting from the conduct of an intoxicated consumer or otherwise resulting from the intoxication. Ibid., 306.

The 1986 Amendments specifically address each of the problems discussed above. The Amendments largely eliminate the potential problem of liability without causation by narrowly defining the conduct on which Dram Shop liability may be based. The specific acts that trigger Dram Shop liability are now expressly defined in the Act **without reference to minor regulatory provisions** appearing elsewhere in the Code. Dram Shop liability is now imposed on any person who provides liquor to anyone (1) under twenty-one years of age, (2) apparently under the influence of intoxicants, (3) whom the server knew or should have known from the circumstances was intoxicated, or (4) who is a known interdicted person. Ibid., 307-308.

The fact that § 32A-14-1, Utah Code Ann. (1986), continued the 1981 Act's purpose to limit dramshop liability to **third persons only** further supports the trial court's determination here. Certainly, between the time section 32-11-2 was enacted in 1981 and its repeal and reenactment as section 32A-14-2 in 1985, the legislature had considerable time to review the effect and import of such language and make any intended

modifications. Cf., Brinkerhoff v. Forsyth, 779 P.2d 685, 116 U.A.R. 23 (Utah 1989).

The Legislature's purpose to limit dramshop liability to **third persons only** is further illustrated in the 1989 and 1990 amendments to the Utah Dram Shop Act (**Addendum "A"**). Those amendments continue to limit liability to **third persons only**, despite this Court's pointed observation in Beach v. University of Utah, 726 P.2d 413 (Utah 1986), regarding recovery by the intoxicated person from the provider. In footnote 3 in Beach, Justice Zimmerman wrote:

3. There is no claim here that the University furnished alcohol to Beach. It is uncertain whether such a fact would have made any difference in this case. Utah law prohibits the furnishing of alcohol to a minor. U.C.A., 1953, § 32A-12-8 (1986 ed.). We have held that such a statutory violation can be used to prove negligence on the part of the vendor in an action brought by **one injured by the intoxicated minor**. Yost v. Utah, 640 P.2d 1044 (Utah 1981); see also Rees v. Albertson's, Inc., 587 P.2d 130 (Utah 1978) (intoxicated minor is entitled to have a determination made as to the seller's misconduct in providing him with beer in action for contribution). Dictum in Yost suggests, however, that Utah recognizes no **common law right of action against a provider of alcohol based upon the fact that the alcohol was furnished in violation of the law**. 640 P.2d at 1046. If this dictum is accurate, any liability premised directly on the illegal furnishing of alcohol would have to arise from a statutory provision. The Utah Dramshop Act, initially enacted in 1981 and repealed and reenacted in 1985, provides

that one who "gives, sells, or otherwise provides liquor" to a person under twenty-one who becomes intoxicated as a result and who injures another because of the intoxication is liable to third parties for damages. U.C.A., 1953, § 32A-14-1 (1986 ed.); see 1981 Utah Laws ch. 152. The Dramshop Act allows third parties to recover from those improperly providing liquor, but does not allow the intoxicated person to recover from the provider. Therefore, one injured as a result of his or her own voluntary but unlawful intoxication would appear to be without remedy against the provider of the alcohol, either under the Dramshop Act or under common law. Cf. Miller v. City of Portland, 288 Or. 271, 279, 604 P.2d 1261, 1264-65 (1980).

726 P.2d at 417.

The principle enunciated earlier in this Brief that the remedy provided by a dram shop act cannot be enlarged except by further legislative enactment is highlighted by the history of Miller v. City of Portland, 288 Or. 271, 604 P.2d 1261 (1980), cited by Justice Zimmerman in Beach, supra.

In Miller, also known as City of Portland v. Alhadeff, the Oregon Supreme Court held, inter alia:

This court has never previously recognized a common law cause of action in favor of a person who suffers injury resulting from his or her own consumption of alcohol. Nor have most other courts. Because it would be contrary to apparent legislative policy, we also consider it inappropriate to create a common law cause of action for physical injury to minors caused by their illegal purchase of alcoholic liquor.

604 P.2d at 1265.

Before Miller was argued and submitted on October 1, 1979, the Oregon legislature repealed its original dram shop act and replaced it with new legislation effective July 25, 1979. The original dram shop act, O.R.S. 30.730, had provided:

Any person who shall bargain, sell, exchange or give to any intoxicated person or habitual drunkard spirituous, vinous, malt or intoxicating liquors shall be liable for all damage 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 employe shall be deemed the act of his principal or employer for the purposes of this section.

The replacement legislation, O.R.S. 30.950 provides:

No licensee or permittee is liable for damages incurred or caused by intoxicated patrons off the licensee's or permittee's business premises unless the licensee or permittee has served or provided the patron alcoholic beverages when such patron was visibly intoxicated.

In Sager v. McClenden, 650 P.2d 1002, 1003-1004 (Or. App. 1982), a wrongful death action brought by the wife of a man who died as the result of a fall while intoxicated, the Oregon Court of Appeals held:

We read the italicized language [in O.R.S. 30.950] to mean exactly what it says, namely, that licensees or permittees are liable both for damages "incurred" by intoxicated persons as well as damages

"caused by" intoxicated persons. The dissenting opinion in construing the above section appears either to overlook or disregard the word "incurred." Furthermore, the above analysis is consistent with earlier dictum by this court of this same statutory language in Johnson v. Paige, 47 Or.App. 1177, 1180 n. 2, 615 P.2d 1185 (1980), a case brought before the 1979 repeal of the Dram Shop Act involving a claim by plaintiff for injuries due to her own intoxication. In Johnson we said:

"We note that H.B. 3152, Section 2, 1979, ORS 30.955, effective July 25, 1979, provides:

"'No private host is liable for damages incurred or caused by an intoxicated social guest unless the private host has served or provided alcoholic beverages to a social guest when such guest was visibly intoxicated.'

"The provisions of ORS 30.955, however, do not apply retroactively to the instant cause of action which accrued on October 15, 1976. This statute reaffirms our conclusion that liability is now imposed where none previously existed." (Emphasis added.)

In summary, there is absolutely nothing to suggest that the Utah Legislature has created a statutory remedy altering the common law rule that one injured as the result of his own voluntary intoxication has no cause of action against a provider of alcohol. The lower court correctly dismissed Horton's

Complaint with prejudice and on the merits. This honorable Court should affirm the lower court's dismissal.

B. When It Enacted Section 32A-12-9, U.C.A. (1986), The Legislature Had No Specific Intent To Provide A Right Of Action Against A Dramshop To An Intoxicated Adult Injured As The Result of His Own Voluntary Inebriation.

As a general rule, violation of a standard of safety set by a statute or ordinance is prima facie evidence of negligence. Hall v. Warren, 632 P.2d 848, 850 (Utah 1981). There, Justice Stewart observed in a footnote:

This Court at an early date held that violation of a statute or ordinance whose purpose is to protect life, limb or property constituted negligence per se. Smith v. Mine & Smelter Supply Co., 32 Utah 21, 88 P. 683 (1907).

But the rule has undergone an evolution. Subsequent to Smith, the per se rule was modified to apply only in cases involving dangerous instrumentalities. White v. Shipley, 48 Utah 496, 160 P. 441 (1916). Since the case before us does not concern a dangerous instrumentality, the prima facie, rather than negligence per se rule is applicable.

Id. Cf., Jorgenson v. Issa, 139 P.2d 80 (Utah App. 1987), a vehicular accident case in which negligence per se was discussed.

However, criminal or regulatory statutes are frequently enacted to cover situations in which no common law right of action has ever been established by courts. One of the most usual situations concerns injuries incurred by a person who has

been given and has used alcohol. The statutes may have express provisions for a tort right of action. When such statutes exact, courts must, of course, comply. Miller v. City of Portland, 604 P.2d 1261, 1264-1265 (Or. 1980).

On the other hand, regulatory and criminal statutes most often contain no express provision for a right of action and, where courts have established no common law rights under the circumstances governed by the statutes, a different kind of problem is posed from the negligence per se situation. Id.

In such cases, courts attempt to determine legislative intent as to civil liability from whatever sources are available to them; and, if determinable, courts follow that intent. The most usual sources of information are the language of the statute itself including the title and preamble, as well as the legislative history. If these sources fail to disclose legislative intent, courts usually come to the conclusion that the problem was not contemplated by the legislature and that it had no specific intent. In such a state of affairs, courts must still make a decision and they then attempt to ascertain how the legislature would have dealt with the situation had it considered the problem. This is usually done by looking at the policy giving birth to the statute and determining whether a civil tort action is needed to carry out that policy. Id.

Title 32A, Chapter 12 deals with criminal enforcement of Utah's liquor laws. Civil tort action is not necessary to carry out that policy of criminal enforcement, except such action as provided by the Utah Dram Shop Act to third persons.

There is nothing in Chapter 12 to indicate that the Legislature contemplated civil liability of an association or corporation that provided alcohol to an intoxicated person who injured himself while inebriated. There is nothing in Chapter 12 to indicate that the legislature had a specific intent to protect an intoxicated person from himself.

To invoke the rule that violation of a statute is prima facie evidence of negligence, a party must show (1) the existence of the statute or ordinance, (2) that the statute or ordinance was intended to protect the class of persons which includes the party, (3) that the protection is directed toward the type of harm which has in fact occurred as a result of the violation, and (4) that the violation of the ordinance or statute as a proximate cause of the injury complained of. Hall v. Warren, 632 P.2d at 850. See also, Knapstad v. Smith's Management Corp., 774 P.2d 1, 2 (Utah App. 1989).

In his Brief of Appellant only, Horton shows the existence of Section 32A-12-9 (1986). Horton asserts on page 20 of his Brief of Appellant:

. . . Since our state legislature enacted Utah Code Ann. section (sic) 32A-12-9 (1986) concerning the sale or supply of alcoholic beverages or products to a drunken person, one would assume that there was legislative intention to address the issue of supplying alcohol to intoxicated persons. This then would indicate that this statute, not the Dramshop Act, would control the instant case and that our legislature has recognized the intoxicated party and established duties as regards that party.

This circular reasoning fails to show that requirements (2) and (3) have been met, even if they had been alleged in Horton's Complaint, which they were not. Furthermore, an adult individual who voluntarily consumes intoxicants and then, by reason of his inebriated condition, injures himself is excluded from the class protected by a statute prohibiting the sale of alcoholic beverages to a visibly intoxicated person. Cuevas v. Royal D'Iberville Hotel, 498 So.2d 346 (Miss. 1986).

Horton fails to allege in his Complaint the criminal violation of Section 32A-12-9 (1986) by either Studebaker's or the Sun. Horton fails to allege that any such violation was a proximate cause of his alleged injuries.

Section 32A-12-13.3, Utah Code Ann. (1986) provides:

No person may purchase any alcoholic beverage or product when he is under the influence of intoxicating alcoholic beverages, products, or drugs.

According to Horton's intoxicating reasoning, from the existence of this criminal statute one could assume that the legislature has recognized the intoxicated party's right to sue himself for violating his established duties to himself. Such a conclusion is as ludicrous as Horton's conclusion that criminal Section 32A-12-9 (1986) gives him a cause of action against a dramshop for injuries he suffered as the result of the "state of extreme intoxication" he "achieved."

The lower court correctly determined that Horton's Complaint stated no statutory or common-law cause of action against Studebaker's or the Sun for the alleged injuries Horton suffered as the result of his own voluntary intoxication. This Court should affirm the lower court's Order of Dismissal with Prejudice and on the Merits.

CONCLUSION

The Utah legislature's decision to preclude recovery by the intoxicated is certainly supported by strong public policy:

A rule of liability here could have no other possible effect upon patrons than to encourage them to excessive liquor consumption at taverns. Forthwith upon the announcement of a rule of law which permits a drunken patron to recover damages for his own injuries from the tavern keeper, patrons who have heretofore felt concern for their own safety should they become overly intoxicated will relax their personal efforts, for three readily apparent reasons. First, because they will assume that the bartenders will

exercise greater care on their behalf; **second**, because they very naturally will feel that if they are hurt they will be compensated for such hurt; and **third**, because we . . . will in effect have encouraged their over indulgence, by pampering their delinquency. It cannot be otherwise. The already tragic statistics which so horribly describe the slaughter of innocent persons by drunk drivers will immediately increase, to society's further disadvantage.

Tovar v. Lee, Civil No. 84-1540 at 4-5 (10th Cir. 1984) (quoting Kindt v. Kauffman, 57 Cal. App. 3d 845, 129 Cal. Rptr. 603, 611-12 (1976)).

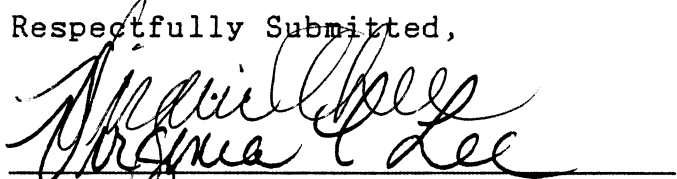
Horton states no facts in his Complaint setting forth a claim under either the Utah Dram Shop Act or the common law. Horton was injured as a result of the "State of extreme intoxication" he "achieved."

If the Legislature sees fit to encourage alcoholic overindulgence by rewarding the foolishly intoxicated with a cause of action against dram shops for injuries sustained as a result of voluntary inebriation, that is the Legislature's business. Until and unless that happens, this Court must hold that in Utah there is no cause of action against a dram shop for injuries suffered as a result of an adult's own voluntary intoxication.

This Court should affirm the lower court's Order of Dismissal with Prejudice and on the merits.

DATED this 30th day of September, 1990.

Respectfully Submitted,



VIRGINIA CURTIS LEE

Attorney on Appeal for Appellee
The Royal Order of the Sun

CERTIFICATE OF SERVICE

Hand delivered a true and correct copy of the foregoing
document this 1st day of October, 1990, to:

Kathryn S. Denholm
Attorney for Plaintiff/Appellant
263 East 2100 South
Salt Lake City, Utah 84115

Shawn E. Draney
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Defendant/Appellee Studebaker's
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145



(a) who is a known interdicted person, and by those actions causes the intoxication of that person, is liable for injuries in person, property, or means of support to any third person, or to the spouse, child, or parent of that third person, resulting from the intoxication. An employer is liable for the actions of its employees in violation of this chapter.

(2) A person who suffers an injury under Subsection (1) has a cause of action against the person who provided the liquor or other alcoholic beverage in violation of Subsection (1).

(3) If a person having rights or liabilities under this chapter dies, the rights or liabilities provided by this chapter survive to or against that person's estate.

(4) The total amount of damages that may be awarded to any person pursuant to a cause of action under this chapter which arises after the effective date of this subsection is limited to \$100,000 and the aggregate amount which may be awarded to all persons injured as a result of one occurrence is limited to \$300,000.

(5) An action based upon a cause of action under this chapter which arises after the effective date of this subsection shall be commenced within two years after the date of the injury.

(6) Nothing in this chapter precludes any cause of action or additional recovery against the person causing the injury.

(7) (a) A sanction or termination of employment may not be imposed upon any employee of any restaurant, club, or any other facility serving alcoholic beverages as a result of the employee having exercised the employee's independent judgment to refuse to sell alcoholic beverages to any person the employee considers to meet one or more of the conditions described in Subsection (1).

(b) Any employer who terminates an employee or imposes sanctions on the employee contrary to this section is considered to have discriminated against that employee and is subject to the conditions and penalties set forth in Chapter 35, Title 34, the Utah Antidiscriminatory Act.

History: C. 1953, 32A-14-1, enacted by L. 1985, ch. 175, § 1; 1986, ch. 177, § 3; 1989, ch. 240, § 1.

Amendment Notes. — The 1989 amendment, effective April 24, 1989, added Subsection (7) and made minor stylistic changes.

COLLATERAL REFERENCES

A.L.R. — Intoxicating liquors: employer's liability for furnishing or permitting liquor on social occasion, 51 A.L.R.4th 1048.

Social host's liability for injuries incurred by

third parties as a result of intoxicated guest's negligence, 62 A.L.R.4th 16.

Passenger's liability to vehicular accident victim for harm caused by intoxicated motor vehicle driver, 64 A.L.R.4th 272.

32A-14-2. Immunity of state, state agencies and employees, and political subdivisions.

COLLATERAL REFERENCES

CRIMINAL PROCEDURE

Section
32A-13-2. Arrests.

32A-13-2. Arrests [Effective July 1, 1990].

Except as otherwise provided in this chapter, all arrests of persons for any violation of this title are in accordance with Chapter 7, Title 77, Utah Code of Criminal Procedure, and Rules 6 and 7, Utah Rules of Criminal Procedure. All summons in lieu of warrants of arrest are in accordance with Rule 6, Utah Rules of Criminal Procedure.

History: C. 1953, 32A-13-2, enacted by L. 1985, ch. 175, § 1; 1989, ch. 187, § 1.

Amended effective July 1, 1990. — Laws 1989, ch. 187, § 1 amends this section effective July 1, 1990. See amendment note below.

Amendment Notes. — The 1989 amendment, effective July 1, 1990, substituted references to the Rules of Criminal Procedure for references to Chapter 35 of Title 77.

CHAPTER 14

DRAMSHOP LIABILITY

Section
32A-14-1. Liability for injuries resulting from illegal sale or other distribution of alcoholic beverages — Injured person's cause of action against persons who provided alcoholic beverage — Survival of action — Limi-

tation on damages — Statute of limitations — Employee may not be disciplined or fired for refusing to serve alcoholic beverage to minor or intoxicated or interdicted person.

32A-14-1. Liability for injuries resulting from illegal sale or other distribution of alcoholic beverages — Injured person's cause of action against persons who provided alcoholic beverage — Survival of action — Limitation on damages — Statute of limitations — Employee may not be disciplined or fired for refusing to serve alcoholic beverage to minor or intoxicated or interdicted person.

(1) Any person who directly gives, sells, or otherwise provides liquor, or at a location allowing consumption on the premises, any alcoholic beverage, to a person:

- (a) who is under the age of 21 years, or
- (b) who is apparently under the influence of intoxicating alcoholic beverages or products or drugs, or
- (c) whom the person furnishing the alcoholic beverage knew or should have known from the circumstances was under the influence of intoxicat-