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TORTS—Injuries Arising From Negligence in Furnishing Liquor to Minors and Intoxicated Adults: New Tort Action in Wyoming. *McClellan v. Tottenhoff*, 666 P.2d 408 (Wyo. 1983).

On the evening of July 29, 1980, James Staatz, a 17-year-old minor, purchased a bottle of peppermint schnapps from the drive-in window at Tody's Liquors in Cheyenne.¹ Despite Staatz's youthful appearance, no attempt was made by the salesperson to determine his age.² Staatz left Tody's, drank the liquor in his car and became severely intoxicated. He subsequently drove his car over a viaduct and struck two oncoming vehicles in their own lane.³ One of the vehicles was operated by Chad McClellan who sustained fatal injuries in the accident.⁴

The plaintiffs, the administrator of Chad McClellan's estate and State Farm Mutual Automobile Insurance Company filed suit against Mary Jane Tottenhoff, owner of Tody's Liquors, and her employee, Michael Buffington, on the ground the defendants had negligently sold liquor to a minor and that the sale was a proximate cause of the accident which resulted in Chad McClellan's death.⁵ The defendants moved to dismiss the complaint arguing that it failed to state a claim upon which relief could be granted.⁶ The trial court granted defendants' motion to dismiss based on the Wyoming Supreme Court's 1971 decision in *Parsons v. Jow*⁷ in which the court had adopted the traditional common law rationale that consumption, and not the sale of liquor, is the proximate cause of a plaintiff's injury.⁸

On appeal, the Wyoming Supreme Court expressly overruled *Parsons v. Jow* and reversed the trial court's dismissal of the complaint.⁹ The court held that 1) a liquor vendor owes a duty to the general public to refrain from furnishing liquor to a minor and 2) the sale of liquor to a minor¹⁰ can be a proximate cause of injury to a third person.¹¹

This Note will begin with a brief discussion of the traditional common law rule of liquor purveyor non-liability and the modern trend of liquor purveyor liability. A synopsis of the Wyoming Supreme Court's analysis will follow. The Note will conclude with an examination of the legal principles set forth in *McClellan v. Tottenhoff*, with particular emphasis on the extent of potential liability for individuals who negligently furnish liquor in Wyoming.

BACKGROUND

Traditionally, a person who furnishes liquor to another who consumes that liquor is not liable either for injuries to the liquor consumer resulting

1. Brief for Appellant at 1, *McClellan v. Tottenhoff*, 666 P.2d 408 (Wyo. 1983).

2. *Id.*

3. *Id.*

4. *Id.* at 1-2.

5. *McClellan v. Tottenhoff*, 666 P.2d 408, 409 (Wyo. 1983), *reh'g denied*, July 19, 1983.

6. *Id.*

7. 480 P.2d 396 (Wyo. 1971).

8. *Id.* at 397.

9. 666 P.2d at 410.

10. *Id.* at 412.

11. *Id.* at 414.

from the consumer's voluntary intoxication or, in the absence of a statute,¹² to an innocent third party who is injured by the intoxicated liquor consumer.¹³ This rule is based upon the theory that the proximate cause of these injuries is the liquor consumption and not the furnishing of the liquor to an able bodied person.¹⁴ The traditional rule also bars civil actions against individuals who negligently furnish liquor to minors and intoxicated adults in violation of criminal statutes.¹⁵

The abrogation of the traditional rule of liquor purveyor non-liability began in 1959 with the establishment of a common law cause of action for injuries arising from the negligent sale of liquor.¹⁶ The seminal cases were *Waynick v. Chicago's Last Department Store*¹⁷ and the landmark case of *Rappaport v. Nichols*.¹⁸ Since these decisions, the modern trend has been to allow common law causes of actions against liquor purveyors for injuries to liquor consumers and innocent third parties caused by the liquor purveyors' negligence in furnishing alcoholic beverages.¹⁹

Wyoming was one of a majority of jurisdictions which refused to adopt the modern rule. Moreover, in the 1971 case of *Parsons v. Jow*²⁰ the supreme court expressly adopted the rule of liquor vendor non-liability. In *Parsons*, the defendant's employee allegedly sold intoxicating liquor to a minor driver whose subsequent intoxication resulted in injuries to the plaintiff-passenger.²¹ The Wyoming Supreme Court affirmed the trial court's dismissal of the complaint. Even though the court assumed that the defendant's unlawful sale of liquor to the minor driver was negligence,²² it nonetheless affirmed based on the common law rationale that the proximate cause of the plaintiff's injury was the minor's consumption and not the defendant's sale of the liquor.²³ The court held that since the legislature had not seen fit to change this common law rationale, the rule of non-liability was a bar to plaintiff's cause of action.²⁴

12. In response to the traditional common law rule, 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 a right of action to persons injured by an intoxicated person against the party who furnished the liquor. These statutes are commonly known as civil damage or dramshop acts. See 45 AM. JUR. 2d *Intoxicating Liquors* § 561 (1969).

13. 45 AM. JUR. 2d *Intoxicating Liquors* § 553 (1969).

14. *Id.*

15. 48A C.J.S. *Intoxicating Liquors* § 428 (1981).

16. For an overview of the development of the common law cause of action see *Liquor Vendor Liability For Injuries Caused By Intoxicated Patrons—A Question of Policy*, 35 OHIO ST. L. J. 630, 634-41 (1974) and *Felder v. Butler*, 292 Md. 174, 438 A.2d 494, 496-99 (1981).

17. 269 F.2d 322 (7th Cir. 1959).

18. 31 N.J. 188, 156 A.2d 1 (1959). The New Jersey Supreme Court's decision in *Rappaport* has clearly had the greatest impact on the development of the common law cause of action for negligence in furnishing liquor to minors and intoxicated adults. According to *Shepard's Atlantic Reporter Citations*, from 1959 to 1983, *Rappaport* had been cited in over 73 published cases in courts other than the New Jersey state courts.

19. See 48A C.J.S. *Intoxicating Liquors* § 428 (1981).

20. 480 P.2d 396 (Wyo. 1971).

21. *Id.* at 396.

22. *Id.* at 397.

23. *Id.*

24. *Id.* at 398.

MCCLELLAN V. TOTTENHOFF

In *McClellan v. Tottenhoff* the court expressly overruled *Parsons v. Jow*.²⁵ Justice C. Stuart Brown, speaking for the court, disagreed with the *Parsons* court's position that the creation of a cause of action against a liquor purveyor was solely within the province of the legislature. Brown relied in the court's earlier decision in *Choman v. Epperly*²⁶ and on section 8-1-101 of the Wyoming Statutes²⁷ to support the majority's position that because the rule of non-liability was created by the judiciary it could be abrogated by the judiciary.²⁸

Duty

After demonstrating its legal authority to modify the traditional common law rule, the court held that a liquor vendor owes a duty to exercise the degree of care required of a reasonable person in light of all the circumstances.²⁹ The court stated that the question of whether a duty exists is one of law and discussed several cases where the courts of other jurisdictions have recognized a common law cause of action against liquor vendors.³⁰ The court then adopted the view that a liquor vendor owes the same duty to the whole world as does any other person³¹ and agreed with other courts that there is no justification for excusing the licensed liquor vendor from that general duty.³²

After determining that a common law duty exists, the court recognized that duty may be based upon criminal statutes. The court determined that sections 12-5-301(a)(v) and 12-6-101(a) of the Wyoming Statutes were intended to protect the general public as well as minors.³³ Section 12-5-301(a)(v) of the Wyoming statutes provides:

(a) Upon approval of the licensing authority, a drive-in area adjacent or contiguous to the licensed room may be used by the holder of a retail liquor license for taking orders, making delivery of and receiving payment for alcoholic beverages under the following conditions:

(v) no order shall be received from nor delivery made to a minor or intoxicated person in the area.³⁴

25. 666 P.2d 408, 410 (Wyo. 1983).

26. 592 P.2d 714 (Wyo. 1979). In his dissenting opinion, Chief Justice Rooney, who authored the opinion in *Choman v. Epperly*, disagreed with the majority's reliance on the case as authority for declaring new common law. 666 P.2d at 418 (Rooney, C.J., dissenting). However, the court also relied upon *Collins v. Memorial Hospital of Sheridan County*, 521 P.2d 1339 (Wyo. 1974) as authority for declaring new common law.

27. Wyo. STAT. § 8-1-101 (1977) states in relevant parts:

The common law of England as modified by judicial decisions, so far as the same is of a general nature and not inapplicable . . . are the rule of decision in this state when not inconsistent thereof, and are considered as of full force until repealed by legislative authority.

28. 666 P.2d at 411. For a favorable review of *McClellan*, see 26 ATLA L. REP. 297, 297-99 (Sept. 1983).

29. 666 P.2d at 412.

30. *Id.* at 411-12.

31. *Id.* at 412.

32. *Id.* at 411.

33. *Id.* at 413.

34. Wyo. STAT. § 12-5-301(a) (v) (1977).

Section 12-6-101(a) of the Wyoming Statutes provides:

(a) Every person who sells, furnishes, gives or causes to be sold, furnished or given away any alcohol, liquor or malt beverage to any person under the age of nineteen (19), who is not his legal ward, medical patient, or member of his own immediate family, is guilty of a misdemeanor.³⁵

The Wyoming Supreme Court then held that the violation of either section 12-5-301(a)(v) or section 12-6-101(a) of the Wyoming Statutes "is evidence of negligence and may be considered by the trier of fact together with other circumstances in determining the issue of negligence."³⁶

Proximate Cause

The court's next step in establishing a common law cause of action against liquor vendors was to address the issue of proximate cause. The court held that the sale of liquor can be the proximate cause of the plaintiff's injuries. It specifically held that the test concerning proximate cause is whether "the vendor could foresee injury to a third person . . ." whether or not the specific injury was foreseen.³⁷ The court cited several Wyoming cases to support the legal principles that: 1) proximate cause means the accident or injury must be the natural and probable consequence of the act of negligence; 2) the same principles of proximate cause apply whether the negligence is a violation of a statutory duty or a common law duty; and 3) the question of whether proximate cause exists is one for the trier of fact, unless the evidence shows that reasonable persons could not disagree.³⁸

The defendants had argued, however, that even if the sale of liquor can be a proximate cause of the plaintiff's injuries, the act of becoming intoxicated is an independent intervening cause.³⁹ The court rejected the argument and held that a subsequent event does not relieve an earlier actor of liability if it was reasonably foreseen.⁴⁰ The court then considered the facts

35. WYO. STAT. § 12-6-101(a) (1977).

36. 666 P.2d at 414. The court based its determination that the violation of these statutes was evidence of negligence and not negligence per se upon its earlier holding in *Distad v. Cubin*, 633 P.2d 167 (Wyo. 1981). There the court held that the violation of a statute is not always negligence per se and the determination of which standard to adopt, in the absence of express statutory language, is within the sole discretion of the court. *Id.*

37. 666 P.2d at 414.

38. *Id.*

39. Brief for Appellee at 3-4, *McClellan v. Tottenhoff*, 666 P.2d 408 (Wyo. 1983). An intervening cause is one which comes into active operation *after* a defendant's negligent act or omission has occurred; and, ordinarily the defendant will be relieved of liability by an unforeseeable intervening cause. *Id.*

40. 666 P.2d at 413. The court agreed with the reasoning of the New Jersey Supreme Court in *Rappaport v. Nichols*, 81 N.J. 188, 156 A.2d 1 (1959) regarding proximate cause. The court cited with approval the following progressive language of *Rappaport* on the issue of proximate cause:

[A] tortfeasor is generally held answerable for the injuries which result in the ordinary course of events from his negligence and it is generally sufficient if his negligent conduct was a substantial factor in bringing about the injuries. [Citations.] The fact that there were also intervening causes which were foreseeable or were normal incidents of the risk created would not relieve the tortfeasor of liability. [Citations.] Ordinarily these questions of proximate and intervening cause are left to the jury for its factual determination. 156 A.2d at 9.

alleged in the complaint and stated that it was in no position to hold as a matter of law that the minor's intoxication could not have been foreseen or that there could not have been a direct proximate causal connection between defendants' unlawful conduct and the decedent's injuries.⁴¹ By citing 1977 Wyoming State Highway Department Statistics which showed that nearly one-fourth of the drivers involved in fatal accidents where alcohol was a contributing factor were under 21 years old,⁴² the court supported its conclusion that the defendants' unlawful conduct exposed the traveling public to a foreseeable risk of harm.⁴³

Social Policy

In support of the majority's decision to abrogate the common law rule of non-liability, Justice Brown identified two ways in which society is harmed by refusing to acknowledge a claim for relief against a liquor vendor. First, he stated that the rule of non-liability is an unjust doctrine which often limits a plaintiff's recovery because minors do not have the financial resources of an established business.⁴⁴ Second, because liquor licenses are seldom revoked there is no effective deterrent to keep liquor vendors from selling liquor to minors or intoxicated persons.⁴⁵ Justice Brown then concluded the majority's opinion by stating: "We note that several courts have bemoaned the fact that an injured third person had no cause of action, even though they have continued to defer to the legislature. We do not choose to stand by and wring our hands at the unfairness which we ourselves have created."⁴⁶

ANALYSIS

The Wyoming Supreme Court's holding in *McClellan v. Tottenhoff* is significant in several respects. First, it brings Wyoming in step with the modern trend of liquor purveyor liability and consequently affords injured individuals a common law right to seek relief.⁴⁷ Second, Wyoming is the 27th jurisdiction to judicially modify or completely abrogate the traditional common law rule of liquor purveyor non-liability.⁴⁸ Although several

41. 666 P.2d at 414.

42. *Id.* at 415.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. See ATLA. L. REP. 297, 297-99 (Sept. 1983).

48. Twenty-seven jurisdictions have judicially modified or abrogated the rule of non-liability (Arizona abrogated the rule after the Wyoming Supreme Court delivered *McClellan*): Alaska (*Nazareno v. Urie*, 638 P.2d 671 (1981)); Ariz., (*Ontiveros v. Borak*, ___ Ariz. ___, 667 P.2d 200 (1983)); Colo., (*Kerby v. The Flamingo Club, Inc.*, 35 Colo. App. 127, 532 P.2d 975 (1974)); Del., (*Taylor v. Ruiz*, 394 A.2d 765 (Super. Ct. 1978) and *Wright v. Moffitt*, 437 A.2d 554 (1981)); D.C. (*Marusa v. District of Columbia*, 484 F.2d 828 (D.C. Cir. 1973)); Fla., (*Davis v. Schiappacosse*, 155 So.2d 365 (1963)); Hawaii (*Ono v. Aplegate*, 62 Hawaii 131, 612 P.2d 533 (1980)); Idaho (*Algeria v. Payonk*, 101 Idaho 617, 619 P.2d 135 (1980)); Ind., (*Elder v. Fisher*, 247 Ind. 598, 217 N.E.2d 847 (1966)); Iowa (*Lewis v. State*, 256 N.W.2d 181 (1977)); Ky., (*Pike v. George*, 434 S.W.2d 626 (1968)); La., (*Chausse v. Southland Corp.*, 400 So.2d 1199 (App., 1st Cir., 1981)); Mass., (*Adamian v. Three Sons Inc.*, 353 Mass. 498, 233 N.E.2d 18 (1968)); Mich., (*Thaut v. Finley*, 50 Mich.App. 611, 213 N.W.2d 820 (1973)); Minn., (*Trail v. Christian*, 298 Minn. 101, 213 N.W.2d 618 (1973)); Miss., (*Munford, Inc. v. Peterson*, 368 So.2d 213 (1979)); Mo., (*Carver v. Schafer*, 647 S.W.2d 570 (Mo. App. 1983)); N.H., (*Ramsey v. Ancil*, 106 N.H.

jurisdictions continue to adhere to the traditional rule,⁴⁹ to the extent that the rule has been modified the modern rule of liquor purveyor liability is now the majority rule in the United States. Third, the progressive nature of the court's opinion places Wyoming among the leading jurisdictions in the development of the rule of liquor purveyor liability.

Duty Imposed By Statute

The supreme court determined that sections 12-5-301(a)(v) and 12-6-101(a) of the Wyoming Statutes were enacted to protect the general public as well as minors.⁵⁰ This finding is significant because in order for a plaintiff to maintain a cause of action based on the defendant's violation of a statute, the plaintiff must be a member of the class of persons intended to be protected by the statute.⁵¹ In *Distad v. Cubin*,⁵² the court adopted the four point test of section 286 of the Second Restatement of Torts to determine whether a statute could be used to define the standard of conduct of a reasonable person.⁵³ Although not expressly enumerated in *McClellan*, the four point test is implied in the court's holding that sections 12-5-301(a)(v) and 12-6-101(a) of the Wyoming Statutes establish a duty toward the general public. The four point test provides that a legislative enactment may be adopted by the court as the standard of conduct of a reasonable person if its purpose is found to be exclusively or in part 1) to protect the class of persons of which the plaintiff is a member, 2) to protect the plaintiff's interest which was invaded, 3) to protect the plaintiff's interest against the kind of harm which has resulted and 4) to protect the plaintiff's interest against the particular hazard from which the harm resulted.⁵⁴

A plaintiff who bases a claim for relief upon defendant's violation of one of the statutes construed by the supreme court should be prepared to

(*Carver v. Schafer*, 647 S.W.2d 570 (Mo. App. 1983)); N.H., (*Ramsey v. Anctil*, 106 N.H. 375, 211 A.2d 900 (1965)); N.J., (*Rappaport v. Nichols*, 31 N.J. 188, 156 A.2d 1 (1959)); N.M., (*Lopez v. Maez*, 651 P.2d 1269 (1982)); N.Y., (*Berkeley v. Park*, 47 Misc. 2d 381, 262 N.Y.S.2d 290 (1965)); N.C., (*Hutchens v. Hankins*, ___ N.C. App. ___, 303 S.E.2d 584 (1983)); Ore., (*Campbell v. Carpenter*, 279 Or. 237, 566 P.2d 893 (1977)); Pa., (*Jardine v. Upper Darby Lodge No. 1973, Inc.*, 413 Pa. 626, 198 A.2d 550 (1964)); S.D., (*Walz v. City of Hudson*, 327 N.W.2d 120 (1982)); Tenn., (*Mitchell v. Ketner*, 54 Tenn. App. 656, 393 S.W.2d 755 (1964) and *Brookins v. The Round Table Inc.*, 624 S.W.2d 547 (1981)); Wash., (*Halvorsen v. Birchfield Boiler, Inc.*, 76 Wash. 2d 759, 458 P.2d 897 (1969) and *Callan v. O'Neill*, 20 Wn. App. 32, 578 P.2d 890 (1978)).

49. The 10 jurisdictions which expressly adhere to the rule of non-liability are: Ala., (*Maples v. Chinese Palace, Inc.*, 389 So.2d 120 (1980)); Ark., (*Carr v. Turner*, 238 Ark. 889, 385 S.W.2d 656 (1965)); Conn., (*Nelson v. Steffens*, 170 Conn. 356, 365 A.2d 1174 (1976)); Ga., (*Keaton v. Kroger Co.*, 143 Ga. App. 23, 237 S.E.2d 443 (1977)); Ill., (*Ruth v. Benvenuti*, 114 Ill. App. 3d 546, 449 N.E.2d 209 (Ill. App. 3 Dist. 1983)); Md., (*Felder v. Butler*, 292 Md. 174, 438 A.2d 494 (1981)); Mont., (*Runge v. Watts*, 180 Mont. 91, 589 P.2d 145 (1979)); Neb., (*Holmes V. Circo*, 196 Neb. 496, 244 N.W.2d 65 (1976)); Nev., (*Yosco vitch v. Wasson*, ___ Nev. ___, 645 P.2d 975 (1982)); Wis., (*Olsen v. Copeland*, 90 Wis. 2d 483, 280 N.W.2d 178 (1979)).

50. 666 P.2d at 413.

51. PROSSER, *TORTS* § 36 (4th ed. 1971). Other jurisdictions which have construed similar statutes to impose a civil duty for the protection of the general public are: Alaska, Arizona, Delaware, District of Columbia, Hawaii, Idaho, Indiana, Iowa, Kentucky, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, New Hampshire, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, South Dakota, Tennessee, Washington. (See *supra* note 47 for the respective cases.)

52. 633 P.2d 167 (Wyo. 1981).

53. *Id.* at 175.

54. *Id.*

satisfy the four point test adopted in *Distad*. To the extent that the facts of a given case vary from those in *McClellan*, it will be more important for a plaintiff to satisfy the test, so that the trial court will allow the standard imposed by statute to define the element of duty. Satisfying the four point test will be important, for instance, in cases where the plaintiff is the minor to whom liquor was furnished (or the administrator of the minor's estate)⁵⁵ or when the plaintiff is injured by some other hazard than an intoxicated minor's operation of a motor vehicle on a public highway.

The Evidence of Negligence Standard

The court's determination that the violation of statute is evidence of negligence appears to be an attempt to moderate the impact of its otherwise sweeping opinion.⁵⁶ The effect of adopting the evidence of negligence standard is that it is left to the trier of fact to determine whether the defendant's violation of a statute is negligence.⁵⁷

A related issue not addressed by the court is whether one must know or should know that an individual to whom liquor is furnished is a minor in order to violate the statutes, or whether one who furnishes liquor to a minor violates the statutes as a matter of law. Section 12-6-101(e) of the Wyoming Statutes⁵⁸ provides a liquor licensee with an affirmative defense to any criminal prosecution or action for the suspension or revocation of his license when accused of selling liquor to a minor. The affirmative defense permits the liquor licensee to prove that he demanded, was shown, and acted in reasonable reliance upon, one of the prescribed documents of identification to determine the age and identity of the minor.

The Wyoming Supreme Court interpreted the reasonable reliance requirement of section 12-6-101(e)⁵⁹ of the Wyoming Statutes in the case of *Rancher Bar and Lounge v. State*.⁶⁰ In *Rancher* the court accepted the thesis that a liquor licensee is not strictly liable for selling liquor to a minor and is only required to exercise the degree of caution which would be shown

55. The following cases deal with the right of minors to whom liquor was furnished to recover as a protected class: *Brannigan v. Raybuck*, ___ Ariz. ___, 667 P.2d 213 (Ariz. 1983); *Morris v. Farley Enterprises, Inc.*, 661 P.2d 167 (Alaska 1983); *Davis v. Schiappacosse*, 155 So.2d 365 (Fla. 1963); *Pike v. George*, 434 S.W.2d 626 (Ky. 1968); *Brookins v. The Round Table*, 624 S.W.2d 547 (Tenn. 1981).

56. All jurisdictions which have established a duty based on statute (*see supra* note 50) have held that the violation of the statute is negligence *per se* except: Mass., (*Adamian v. Three Sons Inc.*, 353 Mass. 493, 233 N.E.2d 18 (1968)); N.H., (*Ramsey v. Ancil*, 106 N.H. 375, 211 A.2d 900 (1965)); N.J., (*Rappaport v. Nichols*, 31 N.J. 188, 156 A.2d 1 (1959)). These jurisdictions have held that violation of the statute is evidence of negligence.

57. PROSSER, TORTS § 36 (4th ed. 1971).

58. WYO. STAT. § 12-6-101(e) (1977) provides:

A motor vehicle driver's license, a registration certificate issued under the Federal Selective Service Act, an identification card issued to a member of the armed forces or an identification card issued by the department of revenue is *prima facie* evidence of the age and identity of a person. Proof that a licensee or his employee or agent demanded, was shown and acted in reasonable reliance upon the information contained in any one (1) of the above documents as identification is a defense to any criminal prosecution for the suspension or revocation of a license.

59. *Id.* The court actually interpreted WYO. STAT. § 12-33(b) (1957) which is identical to WYO. STAT. § 12-6-101(e) (1977).

60. 514 P.2d 634 (Wyo. 1973).

by a reasonable and prudent person in the same or similar circumstances.⁶¹ This reasoning would presumably apply in a civil action so that the jury would have to find that the defendant failed to exercise the degree of care of a reasonable and prudent person to find that the defendant violated one of the statutes by selling liquor to a person he should have known was a minor.⁶²

Under the evidence of negligence standard, the defendant's violation of a statute is usually only one factor considered by the jury in determining the issue of negligence. However, the court's reasoning in *Rancher* implies that the reasonable person standard is central to a finding that a defendant violated either section 12-5-301(a)(v) or section 12-6-101(a) of the Wyoming Statutes. Therefore, a determination that the defendant violated one of the statutes is implicitly a determination that the defendant failed to act as a reasonable person and should, in reality, be conclusive on the issue of negligence.

Finally, even if the evidence of negligence standard imposes a greater burden on the plaintiff than the negligence per se standard, the ability of a plaintiff to rely upon a standard which is clearly defined in a statute is significant. A successful showing by the plaintiff that the defendant breached the standard of care clearly established by statute is bound to have a more profound impact on the jury than an effort by the plaintiff to show that the defendant breached the nebulous common law standard of care of a reasonable person.

Common Law Duty

The most striking part of the Wyoming Supreme Court's decision in *McClellan v. Tottenhoff* is its holding that a liquor vendor owes a duty, independent of statute, to exercise the degree of care required of a reasonable person in light of all the circumstances.⁶³ Precisely how far reaching the court's holding will be with respect to the common law duty is not clear.⁶⁴ What is clear is that the court intended to impose the common law duty upon liquor vendors and not upon social hosts.⁶⁵ In its discussion and analysis of the common law duty, the court was careful to refer exclusively to liquor vendors (which presumably includes all *licensed* liquor vendors).⁶⁶

61. *Id.* at 635. WYO. STAT. § 12-6-101(e) (1977) presumably applies to provide an affirmative defense for violation of both WYO. STAT. § 12-6-101(a) (1977) and WYO. STAT. § 12-5-301(a) (v) (1977).

62. In a civil action the defendant would presumably also be permitted to argue that he was reasonable in relying upon the minor's physical appearance to determine that the minor was of age. If such a defense is raised, the jury should be allowed to determine whether the defendant exercised the degree of care of a reasonable person in relying upon the minor's physical appearance.

63. 666 P.2d at 412. Only the following ten jurisdictions have established a common law duty independent of a duty imposed by statute requiring individuals to refrain from furnishing liquor to minors and/or intoxicated adults: Alaska, Arizona, Idaho, Illinois, Indiana, Minnesota, Missouri, New Jersey, Oregon and Pennsylvania. (See *supra* note 47 for the respective cases).

64. The development of the case law in New Jersey is indicative of the potential impact of the common law duty imposed on individuals to refrain from negligently furnishing liquor. For a brief overview of the development of New Jersey case law see *Figuly v. Knoll*, 185 N.J. Super. 477, 449 A.2d 564, 564-65 (1982).

65. 666 P.2d at 409-12. However social host liability would be consistent with the court's construction of the Wyoming Statutes. See *infra* test accompanying note 86.

66. WYO. STAT. § 12-1-101(a) (viii) (1977) defines a licensed liquor vendor as follows:
"Licensee" means a person holding a:

Ultimately, the importance of imposing a duty upon liquor vendors to exercise reasonable care independent of statutes is that it will enable the district courts of Wyoming to adjudicate tort claims which do not arise from the violation of statute. This is appropriate because to limit the flexibility of the trial courts to adjudicate individual cases upon their own merits would unduly retard the development of the law in Wyoming regarding the negligent sale of liquor.

Proximate Cause

The critical element of the plaintiff's case will be persuading the trier of fact that the defendant's negligence in furnishing liquor was a proximate cause of plaintiff's injuries. The plaintiff will be required to show that his injury was a natural and probable consequence of defendant's negligence which was or should have been reasonably foreseen by the defendant and that but for the defendant's negligence the plaintiff would not have been injured.⁶⁷

The difficulty in proving that it is more likely than not that defendant's conduct was a proximate cause of the plaintiff's injury will depend upon the particular facts of each case. If the court's discussion in *McClellan* is indicative of the future treatment of tort actions for negligence in furnishing liquor, the strongest cases will be those involving injuries to members of the traveling public arising from the sale of liquor to minors.⁶⁸ Although the court's holding on the issue of proximate cause is broad enough to allow recovery in other factual situations,⁶⁹ to the extent the facts diverge from those in *McClellan*, the plaintiff's burden of proof,⁷⁰ especially on the element of proximate cause, will become heavier.

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- (A) Retail liquor license;
 - (B) Limited retail liquor license;
 - (C) Resort liquor license;
 - (D) County retail malt beverage permit;
 - (E) Malt beverage permit;
 - (F) Restaurant liquor license; or
 - (G) Catering permit.

The court's holding in *McClellan* should expose all "licensees" to liability for negligently selling liquor. Individuals who hold either a malt beverage permit or a catering permit may not be aware of this potential liability and should be so informed by the licensing authority. Unlicensed liquor vendors would presumably also be subject to liability for violating the common law duty. See WYO. STAT. § 12-1-101(a) (xvi) (1977) for the definition of "sell" or "sale".

67. PROSSER, TORTS § 41 (4th ed. 1971). See also *supra* note 40.

68. 666 P.2d at 415.

69. See *supra* text accompanying note 38.

70. The traditional four elements of a negligence cause of action can be particularized so that making out a prima facie case for negligence in furnishing alcohol would require a showing that: 1) the defendant furnished 2) alcoholic beverages 3) to an individual the defendant knew or should have known was a minor 4) in violation of a statute or under such circumstances that the reasonable person in the same or similar circumstances would have refrained from furnishing alcoholic beverages to the individual, 5) and the defendant could reasonably foresee that the individual would use or operate a dangerous instrumentality (i.e., a motor vehicle), 6) and the individual's mental or physical abilities became impaired as a result of the consumption of the alcoholic beverages furnished by the defendant 7) so that such impairment was a proximate cause of the injury to the plaintiff. (The above elements would also be essential to make out a prima facie case for negligence in furnishing liquor to an intoxicated person.) For a similar delineation of the elements needed to make out a prima facie case, see *Cimino v. Milford Keg, Inc.*, 385 Mass. 323, 431 N.E.2d 920, 926 n.9 (1982).

Liability For Selling Liquor to Intoxicated Persons

The court stated that it saw no difference between statutes which forbid the furnishing of liquor to intoxicated persons and those which forbid the furnishing of liquor to minors.⁷¹ "The idea behind both statutes is that these people [minors and intoxicated adults] are more likely to be unable to handle alcohol, that they need protection from themselves, and that society needs protection from them."⁷²

Section 12-5-301(a)(v) of the Wyoming Statutes not only prohibits a liquor vendor from selling liquor to a minor in a drive-in area but also prohibits its sale to an intoxicated person. There can be little doubt from the majority's reasoning and its construction of section 12-5-301(a)(v) that the general public is also intended to be protected from injuries resulting from the sale of liquor to intoxicated persons in a drive-in area. The decision in *McClellan* should therefore extend liquor liability to include the sale of liquor to minors and intoxicated persons when that sale is in violation of section 12-5-301(a)(v). This result is consistent with the principles articulated in *McClellan*, particularly on the issue of proximate cause.⁷³

Less clear, however, is whether the liquor vendor owes a common law duty to refrain from selling liquor to intoxicated persons. Close scrutiny of the court's holding leads to the conclusion that the liquor vendor does owe the general public such a duty. Although the court imposes the common law duty upon liquor vendors, and not social hosts, the court refrained from restricting its holding solely to the sale of liquor to minors.⁷⁴

It is difficult to see how the sale of liquor to an intoxicated person would expose the public to less of a foreseeable, unreasonable risk of harm than the sale of liquor to a minor who may not be intoxicated. Both classes of individuals are particularly vulnerable to the disabling effects of alcohol and both classes of individuals pose a serious and foreseeable threat of danger to the safety of others. To distinguish liquor vendor liability on the basis of whether the sale of liquor is to a minor or an intoxicated person would be inconsistent with the negligence principles articulated in *McClellan*,⁷⁵ and would diminish the deterrent effect of imposing civil liability upon liquor vendors.⁷⁶

A question still remains concerning the standard by which the trier of fact would decide whether a liquor vendor breached the duty imposed by statute or by common law in selling liquor to an intoxicated person. Does the person have to be obviously intoxicated or does the person have to be only legally presumed intoxicated⁷⁷ in order for the liquor vendor to be

71. 666 P.2d at 413.

72. *Id.*

73. See *supra* text accompanying note 38. It is certainly reasonably foreseeable that a minor or intoxicated person ordering and receiving liquor in a drive-in area will be operating a motor vehicle.

74. 666 P.2d at 413.

75. The court stated "[h]enceforth, cases involving vendors of liquor and injured third parties will be approached in the same manner as other negligence cases." *Id.* at 411.

76. See *supra* text accompanying note 45.

77. WYO. STAT. § 31-5-233(b) (iii) (1977) provides that if:
ten one-hundredths of one percent (0.10%) or more by weight of alcohol [is] in
the person's blood, it shall be presumed that the person was under the influence
of intoxicating liquor. . . .

negligent? In *Combined Insurance Company of America v. Sinclair*,⁷⁸ the Wyoming Supreme Court held that the statutory presumption of intoxication was not applicable to a civil action for damages.⁷⁹ Given the absence of any statutory provisions regarding the determination of intoxication for purposes of section 12-5-301(a)(v) and given the court's holdings in both *Sinclair* and *Rancher*, it is reasonable to conclude that the trier of fact would have to find that an individual was obviously intoxicated in order to determine that a liquor vendor was negligent in selling liquor to that individual.

The additional issue of whether a liquor vendor owes a duty to minors or intoxicated adults to refrain from selling them liquor for their own safety raises some difficult questions. Jurisdictions which have considered whether liquor vendors can be liable to liquor consumers for injuries caused by their own intoxication have reached opposite results.⁸⁰ Some cases appear to distinguish liability on whether the consumer was on the liquor vendor's premises at the time of the consumer's injury or death.⁸¹ Of course, of great significance is the extent of the consumer's own negligence,⁸² or whether the consumer is a member of a class intended to be protected by criminal statutes.⁸³

In light of the court's holding in *McClellan*,⁸⁴ the trier of fact should be allowed to consider whether a defendant exercised the degree of care required of a reasonable person under the circumstances. The liquor consumer's ability to recover will no doubt depend on the comparative negligence of the parties. Although the factual determinations may be difficult to make, a court should not prevent the issues of negligence and proximate cause from going to the jury by holding as a matter of law that a liquor vendor could not be liable to a minor or intoxicated liquor consumer.

Social Host Liability

If the sections of the Wyoming Statutes construed by the court establish a duty toward the general public, then it would appear that social hosts owe the general public the same duty of care not to serve alcoholic beverages to minors. Section 12-6-101(a) of the Wyoming Statutes states that "[e]very person who sells, furnishes, gives or causes to be sold, furnished or given away any alcoholic liquor [to a minor] . . . is guilty of a misdemeanor."⁸⁵ The legislature has expressly prohibited every person (with the exception of the minor's legal guardian, doctor, or immediate family)⁸⁶ from giving as well as selling alcoholic beverages to a minor. Since

78. 584 P.2d 1034 (Wyo. 1978).

79. *Id.* at 1047. See also 48 C.J.S. *Intoxicating Liquors* § 258 (1981).

80. For an overview of the law on this question see Annot., 98 A.L.R. 3d 123 (1980).

81. *Id.* See also Annot., 70 A.L.R.2d 628 (1960).

82. *Id.*

83. For a discussion of analogous torts where the plaintiff is a member of a protected class, see Note, *Common Law Liability of The Liquor Vendor*, 18 WESTERN RES. L. REV. 251, 270-74 (1966).

84. See *supra* text accompanying note 29.

85. WYO. STAT. § 12-6-101(a) (1977).

86. *Id.* Chief Justice Rooney argues in his dissenting opinion that the immunity granted to certain individuals is evidence that the statute was not intended to protect the general public. "The general public is not protected at all if the minor can legally receive the alcoholic liquor or malt beverage from his guardian or from a member of his immediate

the statute construed by the court makes no distinction between commercial and non-commercial liquor purveyors, the statute apparently imposes the same duty upon social hosts as liquor vendors to refrain from furnishing alcoholic liquor to minors for the protection of both minors and the general public. Breach of this duty should expose both liquor vendors and social hosts to civil liability.

Although there is considerable opposition to imposing civil liability upon social hosts,⁸⁷ social host liability was the result in the Indiana case of *Brittain v. Herron*⁸⁸ where the court construed an Indiana statute similar to section 12-6-101(a) of the Wyoming Statutes.⁸⁹ In *Brittain*, the defendant permitted her minor brother and his minor friend to consume alcoholic beverages she had in her home.⁹⁰ The defendant apparently knew or should have known that her brother was a minor and had driven to her home since he resided with their parents in a neighboring town.⁹¹ After consuming several drinks, the defendant's brother became intoxicated and drove his car into a pick-up truck, killing four persons.⁹²

The court held that under Indiana law the non-commercial supplier of liquor could be liable for negligence in violating the statute prohibiting the furnishing of alcoholic beverages to a minor.⁹³ The court cited the earlier Indiana decision of *Elder v. Fisher*⁹⁴ to support the proposition that the statute had been enacted to protect the general public.⁹⁵ Since the legislature had not seen fit to distinguish between a social provider and a

family. . . . Because certain classes of persons do not have a duty to refrain from furnishing such alcoholic liquor or malt beverages to minors, it cannot be said that the duty imposed on those not in such classes is one owed to the public." 666 P.2d at 416 (Rooney, C.J., dissenting).

87. Annot., 97 A.L.R. 3d 528, 574 (1980) presents cases where the liability of one gratuitously furnishing intoxicating liquors in violation of statute was held not supportable under the particular circumstances involved. See also DEMOULIN & WHITCOMB, *Social Host's Liability in Furnishing Alcoholic Beverages*, 27 FED'N INS. COUNS. QUARTERLY, 349 (1977) and Note, *Liability of Social Host For Furnishing Liquor*, 25 WAYNE L. REV. 975 (1979).

88. 159 Ind. App. 663, 309 N.E.2d 150 (1979). For a similar result see *Coulter v. Superior Court of San Mateo County*, 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978); *Linn v. Rand*, 140 N.J. Super. 212, 356 A.2d 15 (1976); *Brockett v. Kitchen Boyd Motor Company*, 24 Cal. App. 3d 87, 100 Cal. Rptr. 752 (1972); and Annot., 53 A.L.R. 3d 1285 (1973). (The California cases were subsequently reversed by the legislature and the rule of non-liability for liquor purveyors was re-instituted in California. See Annot., 97 A.L.R. 3d 528, 573 n.48 (1977)). See also GRAHAM, *Liability of the Social Host for Injuries Caused by the Negligent Acts of Intoxicated Guests*, 16 WILLAMETTE L. J. 561 (1980).

89. The statute construed by the Indiana court was IND. CODE ANN. § 12-6-10 (Burns 1956) which read in part:

12-6-10. Minors—Habitual drunkards—Houses of ill fame—Sales prohibited. No alcoholic beverages shall be sold, bartered, exchanged, given, provided or furnished to any person under the age of twenty-one [21] years. . . . Any person guilty of violating this paragraph shall be punished . . .

The Indiana statute has been redesignated IND. CODE ANN. § 7.1-5-7-8 (Burns 1978 & Supp. 1983). The Indiana legislature has evidently not seen fit to alter the liability of social hosts imposed by *Brittain v. Herron* because the statute has not been amended with the exception that the legislature has enacted a subsection exempting educational institutions from civil liability. See IND. CODE ANN. § 7.1-5-7-8(b) (Burns 1978 & Supp. 1983).

90. 159 Ind. App. 663, 309 N.E.2d 150, 152 (1974).

91. *Id.*

92. *Id.*

93. *Id.*

94. 247 Ind. 598, 217 N.E.2d 847 (1966).

95. 309 N.E.2d at 156.

liquor vendor in the criminal statute, the court reasoned that to distinguish civil liability on that basis was inequitable and illogical.⁹⁶

To distinguish liability on that basis in Wyoming would be inconsistent with the statutory construction set forth by the Wyoming Supreme Court in *McClellan*. If section 12-6-101(a) of the Wyoming Statutes is intended to protect the general public, then the violation of the statute by any person who is prohibited from furnishing liquor to a minor should expose that person to liability.

One can argue that social hosts do not derive economic benefit from furnishing liquor and therefore they should not be exposed to liability. However, the countervailing social policy weighs heavily against precluding social hosts from liability strictly upon an economic basis. First, one does not need to be in the business of selling liquor to reasonably foresee the risk of harm to which a minor and the general public are exposed when liquor is furnished to that minor. Second, an adult social host will most likely be in a better financial position than a minor to bear the plaintiff's loss. Third, the exposure of social hosts to potential liability will serve to deter the cavalier attitude that some adults have regarding the consequences of serving liquor to minors. Given the immunity granted to certain classes of people under section 12-6-101(a) of the Wyoming Statutes, and the limited application of the statute to the furnishing of liquor to minors (not intoxicated persons), the statute should remain unamended and should be construed to impose liability upon social hosts as well as liquor vendors who negligently furnish liquor to minors.

*Affirmative Defenses*⁹⁷

In most cases involving a defendant's negligence in furnishing intoxicating liquor, there will be two classes of plaintiffs: innocent members of the general public and liquor consumers (minors and adults) or their associates. The ability of the defendant to successfully raise affirmative defenses will depend upon to which of the two categories the plaintiff belongs. Absent some peculiar facts, it will be difficult if not impossible for a defendant to successfully argue that an innocent member of the general public was contributorily negligent. The best the defendant can do is to successfully rebut one or more of the elements of the plaintiff's prima facie case.⁹⁸ However, affirmative defenses are much more important when the plaintiff is a liquor consumer or his compatriot.⁹⁹

Although the defense of assumption of risk is limited to a form of contributory negligence in Wyoming,¹⁰⁰ the supreme court held in *Sherman v. Platte County*¹⁰¹ that the "obvious danger" rule was not abrogated by the comparative negligence statute and that there is no duty on the part of the defendant to remove or warn of a danger if it is an obvious danger or one

96. *Id.*

97. For an overview of some affirmative defenses, see Comment, *Negligence Actions Against Liquor Purveyors: Filling The Gap In South Dakota*, 23 S. D. L. REV. 227, 251-58 (1978).

98. See *supra* note 70.

99. Comment, *supra* note 97, at 258.

100. See *Brittain v. Booth*, 601 P.2d 532, 534 (Wyo. 1979).

101. 642 P.2d 787 (Wyo. 1982).

that is known to the plaintiff.¹⁰² The "obvious danger" rule, as applied by the court in *Sherman*, is analogous to *primary* assumption of risk¹⁰³ and is inconsistent with the purpose of the comparative negligence act because it is an absolute defense.¹⁰⁴

It is not entirely clear to which cases the "obvious danger" rule can be applied in Wyoming.¹⁰⁵ The rule has apparently been applied in cases involving collateral issues of master and servant law, plaintiff's status as trespasser, licensee, or invitee and governmental liability.¹⁰⁶ Whether the "obvious danger" rule can be applied as a defense in certain cases involving negligence in furnishing liquor is questionable, but as long as the rule is law in Wyoming, the possibility exists that the defense could be used to relieve a defendant of liability.

Affirmative defenses can be used by a defendant liquor purveyor to defend against an action by the liquor consumer or his associate in a number of situations. Depending upon the facts of a particular case, the defendant can show that the consumer was contributorily negligent in becoming intoxicated, or in knowingly operating a motor vehicle or in engaging in other activities with the defendant's guests or patrons while under the influence of alcohol. The "obvious danger" rule might also be involved when a consumer injures himself on the defendant's premises. Likewise a friend or associate of the liquor consumer can be found to be contributorily negligent by accepting a ride with the intoxicated consumer, encouraging the consumer's excessive drinking or otherwise engaging in activities with the intoxicated consumer when he knows or should know of the risks involved.¹⁰⁷

CONCLUSION

The development of Wyoming law based on the supreme court's decision in *McClellan v. Tottenhoff* is difficult to predict. What is easy to predict, however, is the political pressure the liquor lobby will bring to bear upon the Wyoming Legislature in an effort to minimize the potential impact of *McClellan*. What *McClellan* really represents is the recognition of the right of injured parties to seek compensation for their losses arising from a defendant's negligence in furnishing liquor to those who are unable to handle its effects, and the development of the law in this area is best left to the jury and the judiciary. To attempt to anticipate and limit the effect of *McClellan* by legislative enactment will only lead to unjust disparities in the application of the civil law.

102. *Id.* at 790.

103. For a discussion of the classes of assumption of risk, see PROSSER, TORTS § 68 (4th ed. 1971).

104. See Note, *Torts—Assumption of Risk and the Obvious Danger Rule. Primary or Secondary Assumption of Risk?* 18 LAND & WATER L. REV. 373, 376 (1983).

105. *Id.* at 377.

106. *Id.*

107. See generally 48A C.J.S. *Intoxicating Liquors* §§ 439-41 (1981) for a discussion of the judicial treatment given affirmative defenses.

The long range impact of *McClellan* will be its deterrent effect to keep liquor purveyors from furnishing liquor to minors and intoxicated adults. As Justice Brown correctly hypothesized, "perhaps the threat of civil liability or increased insurance premiums¹⁰⁸ will serve to make liquor vendors more careful."¹⁰⁹ There can be little doubt that liquor purveyors will exercise greater care to avoid the civil liability which was previously non-existent at common law.

OVIDE M. LAMONTAGNE

108. An indication of the impact of the court's decision in Wyoming was evident in a notice by the Cheyenne Independent Insurance Agents which appeared in the Wyoming Tribune-Eagle, July 17, 1983, at 28, cols. 3-5 as follows:

NOTICE—To all individuals/businesses engaged in the manufacturing, distributing, selling or serving of alcoholic beverages . . . May we recommend you contact your INDEPENDENT INSURANCE AGENT to determine whether you should purchase LIQUOR LEGAL LIABILITY COVERAGE, in view of the recent Wyoming Supreme Court Decision which overturned the 1971 precedent decision.

109. 666 P.2d at 415. See also *Bars Have a Responsibility, Victims of Drunks Say*, The Denver Post, Aug. 22, 1983, at 4-A. col. 1.