

TORTS—NEGLIGENCE—SERVICE STATION OPERATOR WHO SELLS GASOLINE TO RECOGNIZABLY INTOXICATED MOTORIST IS NOT LIABLE FOR INJURIES TO THIRD PERSONS CAUSED BY MOTORIST.
Fuller v. Standard Stations, Inc. (Cal. App. 1967).

Standard Stations, Inc., and Associated Oil Co., operators of separate service stations, both sold gasoline to Herschel Baker, knowing that he was intoxicated. Shortly thereafter Baker collided with the automobile in which plaintiff was a passenger, injuring the plaintiff and killing his father, mother, sister, and brother. Plaintiff sued Standard and Associated, alleging that they negligently supplied chattels to Baker, knowing that he would use them in a manner creating an unreasonable risk of bodily harm to others. The superior court sustained the general demurrers of Standard and Associated without leave to amend. On appeal to the Third District Court of Appeal, *held*, affirmed: A service station operator who sells gasoline to a recognizably intoxicated motorist who subsequently injures a third person is not liable for injuries to that person. *Fuller v. Standard Stations, Inc.*, 250 Adv. Cal. App. 793, 58 Cal. Rptr. 792 (1967), *petition for hearing denied*, June 28, 1967.

Plaintiff based his complaint upon the negligent entrustment doctrine as expressed in the *Restatement of Torts*: One who supplies a chattel for the use of another whom the supplier knows or has reason to know will likely use it in a manner creating unreasonable risk of harm is liable for the harm resulting.¹ This rule has been applied in cases involving the entrustment of automobiles to unlicensed minors,² incompetents,³ and drunkards⁴ or the entrustment of dangerous substances to children.⁵ Although donors and sellers are potential defendants according to the *Restatement* doctrine,⁶ the courts have been reluctant to find liability when title to the chattel passes.⁷

¹ RESTATEMENT (SECOND) OF TORTS § 390 (1965).

² See, e.g., *Shifflette v. Walk-up Drayage & Warehouse Co.*, 74 Cal. App. 2d 903, 169 P.2d 996 (1946); *Edwards v. Benedict*, 79 Ohio App. 134, 70 N.E.2d 471 (1946).

³ See, e.g., *McCalla v. Grosse*, 42 Cal. App. 2d 546, 109 P.2d 358 (1941); *Bensman v. Reed*, 299 Ill. App. 531, 20 N.E.2d 910 (1939); *Golembe v. Blumberg*, 262 App. Div. 759, 27 N.Y.S.2d 692 (1941).

⁴ See, e.g., *Krausnick v. Haegg Roofing Co.*, 236 Iowa 985, 20 N.W.2d 432 (1945); *Crowell v. Duncan*, 145 Va. 489, 134 S.E. 576 (1926); *Mitchell v. Churches*, 119 Wash. 547, 206 P. 6 (1922).

⁵ See, e.g., *Burbee v. McFarland*, 114 Conn. 56, 157 A. 538 (1931); *Krueger v. Knutson*, 261 Minn. 144, 111 N.W.2d 526 (1961); *Henningson v. Markowitz*, 132 Misc. 547, 230 N.Y.S. 313 (1928).

⁶ RESTATEMENT (SECOND) OF TORTS § 390, comment *a* at 315 (1965).

⁷ See, e.g., *Shipp v. Davis*, 25 Ala. App. 104, 141 So. 366 (1932); *Estes v. Gibson*,

California, however, appears to accept the *Restatement* application to lenders, donors, and vendors alike. In *Johnson v. Casetta*⁸ it was held that an automobile dealer and his salesman could be liable for injuries to third persons in an accident occurring two weeks after the title passed to the purchaser, providing the dealer and his salesman knew that the purchaser was an inexperienced, unlicensed, and incompetent driver.

Since defendants in the instant case supplied Baker with gasoline, knowing he would use it in a manner creating risk to others, defendants would seem to be liable according to the general principles of the negligent entrustment doctrine.

Although the district court recognized the broad principle of liability for negligent entrustment of chattels, it abstained from applying this principle to the facts of the case. The court reasoned that gasoline and liquor play parallel roles in contributing to an accident caused by a drunken motorist and since California cases unanimously declare that the tavernkeeper is not liable for selling liquor to an obviously intoxicated person,⁹ the gasoline seller likewise cannot be held liable.

In so concluding, the court felt bound by the rule set down in *Fleckner v. Dionne*,¹⁰ as approved in *Cole v. Rush*,¹¹ which declared as a matter of law that *consumption* rather than the sale of liquor is the proximate cause of injuries, and that the tavernkeeper is therefore not liable.

The *Fuller* court, in criticizing the tavernkeeper cases, found this approach remarkable since, "[s]uch declarations form a back-eddy running counter to the mainstream of modern tort doctrine. . . . Current judicial analysis considers the outer boundaries of negligence liability in terms of duty of care rather than proximate causation."¹² This allegedly antiquated process of adjudicating negligence led the court to conclude that controlling precedent "may be unreliable and ripe for disqualification . . ."¹³

257 S.W.2d 604 (Ky. 1953); *Bugle v. McMahon*, 265 App. Div. 830, 37 N.Y.S.2d 540 (1942). *Contra*, *Golembe v. Blumberg*, 262 App. Div. 759, 27 N.Y.S.2d 692 (1941).

⁸ 197 Cal. App. 2d 272, 17 Cal. Rptr. 81 (1961).

⁹ *Cole v. Rush*, 45 Cal. 2d 345, 289 P.2d 450 (1955); *Fleckner v. Dionne*, 94 Cal. App. 2d 246, 210 P.2d 530, *petition for hearing denied*, December 15, 1949; *Hitson v. Dwyer*, 61 Cal. App. 2d 803, 143 P.2d 952 (1943).

¹⁰ 94 Cal. App. 2d 246, 210 P.2d 530 (1949).

¹¹ 45 Cal. 2d 345, 289 P.2d 450 (1955).

¹² 250 Adv. Cal. App. at 797, 58 Cal. Rptr. at 794.

¹³ *Id.* at 800, 58 Cal. Rptr. at 796.

In leveling such criticism at the tavernkeeper decisions the *Fuller* court failed to recognize expressly that in many California cases, the term "proximate cause" includes not only questions of fact, but also questions of law, among which is duty.¹⁴ As Professor Prosser observes:

There is little analysis of the problem of duty in the courts. Frequently it is dealt with in terms of what is called "proximate cause," usually with resulting confusion. In such cases, the question of what is "proximate" and that of duty are fundamentally the same: whether the interests of the plaintiff are to be protected against the particular invasion by the defendant's conduct.¹⁵

Although the tavernkeeper decisions state that the sale of liquor is not the "proximate cause" of the injuries, it may be that the court really meant that there was *no duty* on the part of the tavernkeeper to protect third persons not on the premises from injuries at the hands of the intoxicated customer.

In the few decisions¹⁶ in which liability has been imposed upon the tavernkeeper without the legislative mandate of a Dramshop Act,¹⁷ the courts found a duty arising from statutes which prohibited the sale of liquor to certain persons, and the statutes were deemed to exist for the protection of the public in general.

California law prohibits the sale of liquor to any habitual or common drunkard or to any obviously intoxicated person.¹⁸ While the California tavernkeeper decisions recognize that the sale is unlawful,¹⁹ they have yet to state clearly whether the statute imposes a duty of care.

Assuming that the courts had imposed a duty on the tavernkeeper, there may be distinguishing factors which justify immunity for the gasoline seller. First, there is no statute forbidding the sale of gasoline to inebriates from which a tort duty can arise. Second, liquor and

¹⁴ Prosser, *Proximate Cause in California*, 38 CALIF. L. REV. 369 (1950).

¹⁵ W. PROSSER, *TORTS*, 333 (3d ed. 1964).

¹⁶ *Waynick v. Chicago's Last Dept. Store*, 269 F.2d 322 (1959); *Colligan v. Cousar*, 38 Ill. App. 2d 392, 187 N.E.2d 292 (1963); *Rappaport v. Nichols*, 31 N.J. 188, 156 A.2d 1 (1959); *Schelin v. Goldberg*, 188 Pa. Super. 341, 146 A.2d 648 (1958). *Contra*, *Hull v. Rund*, 150 Colo. 425, 374 P.2d 351 (1962) (statute prohibiting sale of liquor is penal only).

¹⁷ Various types of Dramshop or Civil Damage Acts provide for recovery, against one who furnishes liquor, for injury or damage: (1) by the intoxicated person; (2) in consequence of the intoxication of any person; (3) under either circumstance. *See* cases collected in Annot., 65 A.L.R.2d 923 (1959).

¹⁸ CAL. BUS. & PROF. CODE § 25602 (West 1964).

¹⁹ *E.g.*, 94 Cal. App. 2d at 250, 210 P.2d at 533.

gasoline play different roles in the chain of events. Liquor directly affects behavior and thereby fosters negligence. Gasoline is the link between a negligent actor and his instrument of destruction, but it does not affect behavior or directly cause injury. In terms of the social desirability of eliminating drunken driving it would be more effective to control the source of liquor than the source of gasoline.

Consider also the difference between gasoline and other chattels involved in negligent entrustment decisions. The chattels entrusted, whether automobiles,²⁰ boats,²¹ guns,²² ammunition,²³ or inflammable chemicals,²⁴ have all been instrumentalities causing direct harm. Gasoline, on the other hand, merely makes it *possible* for an accident to occur.

In *Toole v. Morris-Webb Motor Co.*²⁵ it was held that an automobile dealer who loaned license plates to a known inexperienced driver could be liable when the driver negligently injured a third person. Like the gasoline seller, the automobile dealer provided a chattel which made it possible for the car to be driven. In other cases dealing with license plates, however, the courts have said that there is no causal connection between the act of lending the plates and the injury.²⁶

With the exception of *Toole* and several tavernkeeper decisions,²⁷ no case was discovered where a court extended liability to a supplier of a chattel which created a necessary condition for the occurrence of an injury but which did not itself cause injury. Thus, if it is questionable that the sale of gasoline is a cause in fact, there would be no point in imposing a duty on the station operator not to sell.

If the sale of gasoline can be a cause of injury, there may exist few circumstances in which a jury would actually find it so. For example,

²⁰ Cases cited notes 2, 3 and 4 *supra*.

²¹ *Mikel v. Aaker*, 256 Minn. 500, 99 N.W.2d 76 (1959).

²² *Neff Lumber Co. v. First Nat'l Bk.*, 122 Ohio St. 302, 171 N.E. 327 (1930); *Henningson v. Markowitz*, 132 Misc. 547, 230 N.Y.S. 313 (1928); *Wassel v. Ludwig*, 92 Pa. Super. 341 (1928).

²³ *Anderson v. Settergren*, 100 Minn. 294, 111 N.W. 279 (1907); *Driesse v. Verblaauw*, 9 N.J. Misc. 173, 153 A. 388 (1931); *Mautino v. Piercedale Supply Co.*, 338 Pa. 435, 13 A.2d 51 (1940).

²⁴ *Clark v. Ticehurst*, 176 Kan. 544, 271 P.2d 295 (1954); *Krueger v. Knutson*, 261 Minn. 144, 111 N.W.2d 526 (1961).

²⁵ 180 So. 431 (La. 1938).

²⁶ *See, e.g., Fredericks v. Birkett L. Williams Co.*, 68 Ohio App. 217, 22 Ohio Op. 360, 40 N.E.2d 162 (1940); *Burke v. Auto Mart, Inc.*, 37 N.J. Super. 451, 117 A.2d 624 (1955); *Endres v. Mara Rickenbacher Co.*, 245 Mich. 5, 219 N.W. 719 (1928).

²⁷ Cases cited note 16 *supra*.

in the instant case the accident occurred a few moments after Baker left the second service station he visited that day.²⁸ Unless Baker's tank was nearly empty, the sale of gasoline by that station owner did not in any way add to the probability of the accident's occurring. Arguably then, the gasoline from the station previously visited could have been the cause of the accident. But under most circumstances the station would be one visited on an earlier day when the driver presumably would have been sober. In order for the jury to find that a particular sale provided the gasoline powering the automobile at the time of the accident, it would have to consider evidence of the number of gallons sold, speed, road conditions, and other factors which affect the mileage of a vehicle. The problems of evidence and proof might make a rule imposing duty on the gasoline seller unworkable and unenforceable.

In view of the distinguishing factors above, the result in *Fuller* should remain unassailable even if the tavernkeeper decisions are overruled.

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²⁸ Opening Brief for Appellant at 1.