

SB

115

COMMITTEE REPORT

HOUSE

FURTHER:

March 29, 1979

Date: _____

Mr. Speaker:

The Committee on JUDICIARY has had CSSB 115 (Rules)

"An Act relating to the civil liability of lawful providers of alcoholic beverages."

under consideration and (a majority of the committee) (the committee) reports it back with the following recommendations:

- do pass do not pass
- do pass with attached amendments(s)
- replace with CS for _____ same title
 new title
- and recommends _____
- AND attaches a "Letter of Intent" New Fiscal Note
- reports it back without recommendation
- referred to the _____ Committee

**MEMBERS SIGNING
DO PASS**

[Signature]

[Signature]

[Signature]

[Signature]

**MEMBERS HAVING
OTHER RECOMMENDATIONS:**

[Signature]

[Signature]

CHAIRMAN

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K-STATE CAPITOL
JUNEAU, ALASKA 99811

April 11, 1979

The Honorable Bill Ray
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Re: Dram Shop Liability Question
Our File J-66-569-79

Dear Senator Ray:

In a phone conversation earlier today, you indicated that our letter of April 2, 1979 did not completely answer your question regarding the effect of CSSB 115 (Rules) on third-person liability for injuries suffered as a result of that third person furnishing intoxicating liquor to another. You indicated that your question was whether enactment of CSSB 115 (Rules) would shield third persons from liability for injuries resulting from another's intoxication if the intoxicating liquor was furnished lawfully. For the reasons which follow, we believe it would provide such a shield.

Section 2 of CSSB 115 (Rules) would add a new section to the Alaska Statutes to read:

Section 09.65.097. LIMITATIONS ON THE CIVIL LIABILITY OF LAWFUL BEVERAGE PROVIDERS. A person who lawfully provides an alcoholic beverage to an individual may not be held civilly liable for injuries resulting from the intoxication of that individual.

This statute would codify the rule which seems to be rather universal: A third person who lawfully furnishes liquor is not liable for injuries resulting from the consumption of that liquor. This appears to be the rule even in states like California where a third person will be liable for such injuries if he unlawfully provides liquor.

We hope this answers your question. However, it is possible that it does not. It appears that there are two

April 11, 1979

possible sources for any confusion which remains: (1) Differences of opinion regarding the existing law of third-person liability in Alaska; and (?) differences of opinion regarding the effect of the language in CSSB 115 (Rules). We must point out that this is a developing area of law, and we cannot predict with absolute certainty what result our Court will reach under any given statutory enactment. However, we believe our Court would hold that the language of CSSB 115 (Rules), as it now appears, would shield third persons furnishing intoxicating liquor from liability for injuries suffered as a result of intoxication where the furnishing of that liquor was not in violation of existing law. We will work with you and/or other legislators in drafting appropriate language to accomplish whatever policy that the legislature determines is appropriate in this area if further amendment to SB 115 is desired.

In the meantime, we hope you find this of some assistance.

Sincerely,

AVRUM M. GROSS
ATTORNEY GENERAL

By:


G. Thomas Koester
Assistant Attorney General

GTK:dlm

cc: Senator Mike Colletta
Senator Patrick Rodey

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K-STATE CAPITOL
JUNEAU, ALASKA 99811

April 2, 1979

The Honorable Bill Ray
The Honorable Mike Colletta
Alaska State Legislature
Pouch V
Juneau, Alaska 99801

Re: Dram Shop Liability Question
Our File #J-66-569-79

Dear Senators Ray and Colletta:

You requested our opinion whether removal of the word "lawfully" from CSSB 115 (Rules) would shield a tavern keeper from liability for injuries resulting from the tavern keeper serving liquor to an intoxicated adult or a minor in violation of AS 04.15.020(a). For the reasons which follow, we believe removing the word "lawfully" from that measure would have the effect of shielding a tavern keeper from civil liability for injuries resulting from the tavern keeper serving an intoxicated individual or a minor in violation of the statute.

Section 2 of CSSB 115 (Rules) would add a new section to the Alaska Statutes to read:

Section 09.65.097. LIMITATIONS ON THE CIVIL LIABILITY OF LAWFULL BEVERAGE PROVIDERS. A person who lawfully provides an alcoholic beverage to an individual may not be held

civilly liable for injuries resulting from the intoxication of that individual.

This Statute would codify the general common law rule:

[I]t 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 if he does not drink it.

45 Am. Jr. 2d, INTOXICATING LIQUORS, §553 at pp. 852-853 (footnotes omitted).

However, some jurisdictions do afford a cause of action against a provider of liquor for injuries resulting from intoxication. This frequently is accomplished by legislative enactments known as "dram shop acts" which place statutory liability on the person selling or furnishing the liquor which caused the intoxication. 45 Am. Jur. 2d, INTOXICATING LIQUORS, §§561 et seq. Occasionally, liability has been found in the absence of a dram shop act "where the liquor was given or sold to a person who is in such a condition as to be deprived of his will-power or responsibility for his behavior, or to a habitual drunkard, or in violation of a prohibitory statute." 45 Am. Jr. 2d, INTOXICATING LIQUORS, §554 at page 853 (footnote omitted).

In Alaska, AS 04.15.020(a) prohibits furnishing intoxicating liquor to minors and to intoxicated persons. The Alaska Supreme Court has not ruled on the precise issue whether furnishing liquor to a minor or intoxicated person in violation of AS 04.15.020(a) gives a third person injured as a result of intoxication a cause of action against the person furnishing the liquor. However, there are strong indications that the court would hold that a violation of AS 04.15.020(a) gives an injured party such a cause of action against the provider of the liquor.

The Federal District Court for Alaska has held that under Alaska law, a violation of AS 04.15.020(a) is negligence per se, giving the injured party a cause of action against the tavern keeper. Vance v. United States, 355 F. Supp. 756 (D. Alaska 1973).*/

In Barton v. Lund, 563 P. 2d 875, 377 n.6 (Alaska 1977), a three-justice Alaska Supreme Court expressly refused to reach the issue of liability resulting from a violation of AS 04.15.020(a) in holding that such a violation would not support a cause of action against a liquor licensee under AS 04.15.180 who had no control over the actual operation of the tavern. The majority noted that the

*/ The Court in Vance did not discuss the pre-statehood case of Cherbonnier v. Rafalovich, 88 F. Supp. 900 (D. Alaska 1950), which reached an opposite result under the Territorial predecessor to AS 04.15.020(a).

Federal District Court had found such liability under Alaska law in Vance, supra, and that the California Supreme Court found such liability based on a violation of a criminal statute similar to AS 04.15.020(a), Vesely v. Sager, 46 P. 2d 151 (California 1971), and based purely on the common law without reliance on the statute. Bernhard v. Harrah's Club, 546 P. 2d 719 (California), Cert. denied, 429 U.S. 859 (1976).*/ The majority did cite Bachner v. Rich, 554 P. 2d 430 (Alaska 1976), and Farrell v. Baxter, 44 P. 2d 250 (Alaska 1971), cases not involving intoxicating liquor, in both of which the court held that a statute established a standard of care which, when violated, constituted negligence as a matter of law. Extending the holding of those cases to the intoxicating liquor situation would result in a finding of liability, the result reached by Federal District Court in Vance.

Justices Boochever and Rabinowitz, dissenting in Barton, not only appeared to approve the Federal District Court's holding in Vance but would have imposed vicarious

*/ In response to these cases, the California legislature amended Cal. Bus. & Prof. Code §25602 and Cal. Civ. Code §1714 to abrogate the results of those decisions in favor of the traditional common law rule holding that the consumption, not the furnishing, of intoxicating liquor is the proximate cause of injuries resulting from intoxication. Ch. 929, 1978 Cal. Adv. Legis. Serv. A copy of that enactment is attached for your information.

liability for violations of AS 04.15.020(a) on licensees under AS 04.15.180 who take no active part in the conduct of the tavern's business. They appeared to assume that a violation of AS 04.15.020(a) gives rise to a cause of action against the provider of liquor, the result reached in Vance.

Enactment of CSSB 115 (Rules), as it now reads, would not appear to change the law in Alaska (as it appears in the cited cases) one way or the other. It might raise a question regarding liability where liquor was furnished in a matter which was technically unlawful--e.g., liquor sold on election day in violation of AS 04.15.020(c) but lawfully sold in all other respects--but that question currently exists in the absence of such a statute. Enactment of CSSB 115 (Rules) with the word "lawfully" removed, however, would appear to absolve any provider of an alcoholic beverage from any liability for injuries resulting from the consumer's intoxication. This would be true regardless of whether the provider of the liquor violated AS 04.15.020(a) by furnishing the liquor to a minor or an intoxicated person or violated any other statute dealing with the furnishing of liquor. In other words, it would preclude the court from finding any provider of intoxicating liquor liable for injuries suffered as a result of intoxication, even when the liquor was fur-

Senators Ray & Colletta

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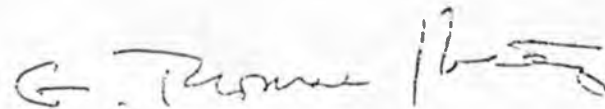
April 2, 1979

nished to an intoxicated person or a minor in violation of
AS 04.15.020(a).

Sincerely,

AVRUM M. GROSS
ATTORNEY GENERAL

By:



Thomas G. Koester
Assistant Attorney General

TGK:bwb

Enclosure

An act to amend Section 25602 of the Business and Professions Code, and to amend Section 1714 of the Civil Code, relating to proximate cause.

LEGISLATIVE COUNSEL'S DIGEST

SB 1645, Ayala. Alcoholic beverage liability: proximate cause.

The California courts have recently interpreted existing law as imposing civil liability upon persons who sell, furnish, give or cause to be given alcoholic beverages to an intoxicated person when such person inflicts injury upon a third party.

This bill would specifically prohibit the imposition of civil liability in such instance.

This bill would also state a legislative declaration that prior judicial interpretation shall be reinstated so that such civil liability to a third party is incurred solely by the intoxicated person. The bill would also provide specifically that no social host who furnishes alcoholic beverages to any person shall be held legally accountable for damages suffered by such person, or for injury to the person or property of, or death of, any third person, resulting from the consumption of such beverages.

The people of the State of California do enact as follows:

SECTION 1, Section 25602, of the Business and Professions Code is amended to read:

25602. (a) Every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any habitual or common drunkard or to any obvious, intoxicated person is guilty of a misdemeanor.

(b) No person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage pursuant to subdivision (a) of this section shall be civilly liable to any injured person or the estate of such person for injuries inflicted on that person as a result of

intoxication by the consumer of such alcoholic beverage.

(c) The Legislature hereby declares that this section shall be interpreted so that the holdings in cases such as *Vesely v. Sager* (5 Cal. 3d 153), *Bernhard v. Harrah's Club* (16 Cal. 3d 313) and *Coulter v. Superior Court* (_____ Cal. 3d _____) be abrogated in favor of prior judicial interpretation, finding the consumption of alcoholic beverages rather than the serving of alcoholic beverages as the proximate cause of injuries inflicted upon another by an intoxicated person.

SEC. 2. Section 1714 of the Civil Code is amended to read:

1714. (a) Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself. The extent of liability in such cases is defined by the Title on Compensatory Relief.

(b) It is the intent of the Legislature to abrogate the holdings in cases such as *Vesely v. Sager* (5 Cal. 3d 153), *Bernhard v. Harrah's Club* (16 Cal. 3d 313), and *Coulter v. Superior Court* (_____ Cal. 3d _____) and to reinstate the prior judicial interpretation of this section as it relates to proximate cause for injuries incurred as a result of furnishing alcoholic beverages to an intoxicated person, namely that the furnishing of alcoholic beverages is not the proximate cause of injuries resulting from intoxication, but rather the consumption of alcoholic beverages is the proximate cause of injuries inflicted upon another by an intoxicated person.

(c) No social host who furnishes alcoholic beverages to any person shall be held legally accountable for damages suffered by such person, or for injury to the person or property of, or death of, any third person resulting from the consumption of such beverages.

An act to amend Section 25602 of the Business and Professions Code, and to amend Section 1714 of the Civil Code, relating to proximate cause.

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To: Committee
From: Birch

BARTON v. LUND

Alaska 877

Cite as, Alaska, 563 P.2d 875

[1,2] We reach the same conclusion here. He hold that the responsibility which AS 04.10.180 casts upon liquor licensees is the responsibility to answer to the criminal sanctions imposed by AS 04.15.100 and to the administrative sanctions of the Alcoholic Beverage Control Board. The purpose of AS 04.10.180 is to prevent evasion of the liquor control statutes and regulations through the creation of hidden financial interests in liquor businesses unknown to the regulatory authorities or to the public. It helps insure that all persons with any financial interest in such businesses are answerable to the Alcoholic Beverage Control Board.⁵

[3] In *Robinson v. Walker*, 63 Ill.App.2d 204, 211 N.E.2d 488, 18 A.L.R.3d 1317 (1965), on facts similar to these an attempt was made to hold liable a trustee who held legal title to the land upon which the licensed premises stood, but had no other relation to the operation of the alcoholic beverage business within. Unlike the Alaska statutes, the Illinois statute was a "dram shop act" in the usual sense of that term, explicitly imposing civil liability upon "any person owning" licensed premises upon which liquor is served to a person who then in an intoxicated state injures person or property.⁶ The court construed the word "owning" in light of the purposes of the dram shop statute, and held that those pur-

5. The dissenting opinion correctly points out, citing section 287 of the Restatement (Second) of Torts, that the statutory criminal and administrative penalty provisions have no effect on the decision whether to impose liability for negligence. Instead, we look to considerations of public policy.

6. AS 04.15.020(a), set out in footnote 3. *supra*, unlike a "dram shop" act does not give a civil cause of action against a liquor-dispensing establishment to a person injured by an intoxicated person. AS 04.15.020(b) specifies suspension or revocation of the liquor license as an administrative sanction for furnishing liquor to an intoxicated person, and AS 04.15.100 makes it a misdemeanor punishable by fine or imprisonment.

We note that the United States District Court for Alaska has held that under Alaska law, violation of AS 04.15.020(a) is negligence per se. *Vance v. United States*, 355 F.Supp. 756

poses would not be furthered by imposing civil liability on a party who had no control over the liquor business.⁷

We are similarly persuaded that as a matter of policy civil liability should not be imposed vicariously on persons who do not have power to control the conduct alleged to be tortious. This is the general common law rule for vicarious liability, as we have noted. The Legislature's desire to prevent the creation of hidden financial interests in alcoholic beverage businesses, reflected in the enactment of AS 04.10.180, does not persuade us that we should depart from the general rule concerning civil liability. Our decision leaves criminal and administrative sanctions available to enforce the policy embodied in AS 04.10.180, but also furthers the belief of the legal system that it is unfair to hold a person civilly liable for that over which he has no control, and which he therefore has no opportunity to prevent.

The situation here is distinguishable from that in *Vance v. Estate of Myers*, 494 P.2d 816 (Alaska 1972). There we held that the administrator of an estate who operated decedent's bar business could be held liable, in his representative capacity, for torts committed by a bartender. The difference is that in *Vance* the administrator actively managed the business enterprise as an incident of which the tortious conduct occurred. In the case at bar appellees had no control

(D. Alaska 1973); see *Bachner v. Rich*, 554 P.2d 430 (Alaska 1976), *Ferrell v. Baxter*, 484 P.2d 250 (Alaska 1971). The Supreme Court of California has found "dram shop" liability based on a criminal statute similar to AS 04.15.020(a) (*Vesely v. Sager*, 5 Cal.3d 153, 95 Cal.Rptr. 623, 486 P.2d 151 (1971)), and based purely on the common law without reliance on the statute (*Bernhard v. Harrah's Club*, 16 Cal.3d 313, 128 Cal.Rptr. 215, 546 P.2d 719, 726-27, cert. denied, 429 U.S. 859, 97 S.Ct. 159, 50 L.Ed.2d 136 (1976)). *Contra e.g.*, *Cherbonnier v. Rafalovich*, 88 F.Supp. 909, 12 Alaska 634 (1950) (Alaska law). See generally Annot., 75 A.L.R.2d 633 (1961 & Supp.1975).

In view of our disposition of this case, we express no opinion on this question. *

7. Annot., 18 A.L.R.3d 1323 (1968), discusses a number of cases involving various factual circumstances from which this "control" rule can be generalized.