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Torts - Tort Feasor Is Not Absolved because the One Injured Was Violating a Penal Law

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CASE COMMENTS

TORTS—TORT FEASOR IS NOT ABSOLVED BECAUSE THE ONE INJURED WAS VIOLATING A PENAL LAW—Every now and then the members of as reputedly "dry" a profession as the legal fraternity have something to smile about. Such a momentary lapse from the air of stiff austerity (assumed or otherwise) that the law throws about itself is offered by a cursory glance at the opinion of our High Court in *Harris v. Iacovetto* (...... Colo. ......, 1952-53 C. B. A. Adv. Sh. No. 4, p. 53).

Rex Harris was an employee of Sam Iacovetto, who was an ardent pursuer of the fruits of his fellow men's weakness for the unpredictable awards of the age old sporting devices, cards and dice. In short, Sam ran a gambling table, and Rex was one of his operators. The tactical headquarters for the enterprise was Artesia, Colorado. The scene of operations was a bar in Vernal, Utah.

The suit arose out of an automobile accident occurring between Artesia and Vernal as the two parties were returning home after an evening's work at the mutually satisfying venture. The employer was driving when the car suddenly went out of control and eventually lodged on its side against a fence next to the highway after turning over.

Harris brought suit in the district court of Moffat County, basing his claim to damages on Iacovetto's simple negligence. The plaintiff attempted to avoid the burden of proving intent to harm or wilful and wanton misconduct on the part of the defendant as our guest statute requires [1] by alleging that he was a passenger for hire.

Defendant moved for a dismissal at the conclusion of plaintiff's case on the theory that plaintiff was a guest, or, if not a guest, then a passenger for hire who was barred from recovering because the employment was pursuant to an illegal contract for gambling. The trial court thereupon granted the motion and dismissed the case, the reason seeming to be that if plaintiff was in fact a passenger for hire, then the relationship was based on an illegal enterprise and plaintiff would consequently be precluded from recovering.

The trial court was reversed upon appeal, something which should have come as no great shock to most.

The defense interposed by the defendant, and the trial court's ruling thereon illustrate the facility with which tort law can be confused with contract law by some. The law of negligence is predicated upon the theory that some act, or the failure to act when such action is the duty imposed by law, must contribute

[1] '35 C. S. A., c. 16, sec. 371.

proximately to the invasion of an interest of another before the actor will be answerable. Inherent in this is the fundamental principle that the injured person's claim for damages will not survive if his own actions (or inactions) are the proximate cause of his injuries. Hence the doctrines of contributory negligence and last clear chance arise. To prevent a party from recovering for injuries based upon the negligence of another solely because he was indulging in an illegal act at the time without regard as to whether such illegal undertaking contributed proximately to his injuries is to disregard completely numerous authorities.[2]

189, 258 P. 1094; City of Pueblo v. Smith, 3 Colo. App. 386, 33 P. 685; Arnold v. Owens, 78 F. 2d 495; 38 Am. Jur., sec. 213, p. 899.

It would be inconceivable that our Supreme Court could have held otherwise than it did when it stated (p. 54):

> Plaintiff should not be denied relief if the illegal factor contended for by the defendant, and sustained by the court, had no causal connection with the injury of which complaint is made.

The sometimes arbitrary maxims of "public policy" can become a dangerous impediment to the cause of justice in the hands of well-meaning but unforseeing courts. Let's keep such maxims out of the law of proximate cause unless better reasons than the ones entertained in this case are found.

KENNETH R. WHITING.

[2] Martin v. Carruthers, 69 Colo. 464, 195 P. 105; Arps v. Denver, 82 Colo.

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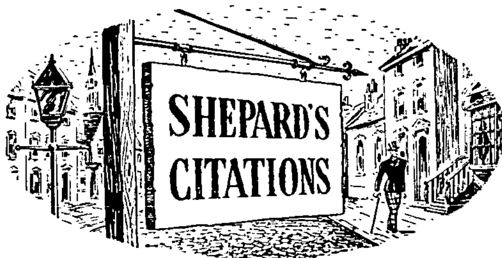

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