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Torts—Tavernkeeper's Liability for Act of Guest

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means and purpose of destroying life,⁵³ (3) the harmless nature of defendant's conduct which produced no physical impact,⁵⁴ (4) whether defendant's conduct was intended to harm,⁵⁵ and (5) the presence of expert testimony.⁵⁶

Whether the determination is made in terms of proximate cause or foreseeable risk, and no matter which of the five factors above are considered by the courts, public policy and common sense would indicate that each case should be decided only after a complete hearing of the evidence. The *Orcutt* decision seems clearly in line with the trend of the times in delaying policy considerations until after a jury has found negligence.

HARTLEY PAUL

Tavernkeeper's Liability for Act of Guest. In *Miller v. Staton*,¹ the members of the Washington Supreme Court disagree on how properly to apply the general rule that a tavernkeeper "owes the duty to his guests to exercise reasonable care to protect them from injury at the hands of a fellow guest."²

At about ten o'clock New Year's Eve, 1957, the plaintiff and her husband went to the defendants' tavern in Omak, Washington. At 2:20 in the morning the plaintiff, while drinking beer at a table next to the dance area, was knocked to the floor and injured during a fight between two intoxicated patrons. Earlier in the evening two fights had been prevented by the defendants' employees.

The plaintiff alleged that the defendants were negligent in failing to provide sufficient policing to prevent the fight, and was awarded a \$25,743.37 verdict by the jury. The cause was reversed and remanded for prejudicial error in admitting testimony concerning policing practices of another establishment and certain irrelevant medical bills.³ However, a majority of the court held there was sufficient evidence in support of the plaintiff's allegations to attach liability for negligence. It is the latter point that results in a sharp disagreement between the majority and dissent. That the tavernkeepers' liability is to be based

⁵³ *Brown, Long, Arsnow.*

⁵⁴ *Stevens, Jones.*

⁵⁵ *Cauverien, Tate.*

⁵⁶ *Orcutt.*

¹ 158 Wash. Dec. 874, 365 P.2d 333 (1961).

² *Peck v. Gerber*, 154 Ore. 126, 54 P.2d 675 (1936); *Thomas v. Bruza*, 151 Cal. App.2d 150, 311 P.2d 128 (1957); *Fisher v. Robbins*, 78 Wyo. 50, 319 P.2d 116 (1957); 106 A.L.R. 1003; RESTATEMENT, TORTS § 348 (1934).

³ *Miller v. Staton*, 158 Wash. Dec. 874, 879, 365 P.2d 333, 336 (1961).

on negligence was not disputed. The positions differed as to what elements are necessary to support a finding of negligence.

In the majority opinion only one sentence is devoted to a statement of the tavernkeeper's duty and the court concludes that the jury could find the defendants negligent. A lengthy dissent states the duty of the tavernkeeper and asserts that the defendants could not have been negligent unless shown to have had notice of the "specific impending peril" at a time when there was an opportunity to prevent the injury.⁴ The circumstances under which tavernkeepers have been found negligent for failing to protect their guests from harm at the hands of a fellow guest have been dealt with in other jurisdictions with surprising uniformity in view of the strong language of the dissent.

Liability has been imposed for negligence where (a) the defendant has admitted to the premises, or harbored, guests of *known* violent or vicious propensities;⁵ or (b) the defendant failed to act reasonably to protect the plaintiff when the specific peril actually occurred, although the defendant had no actual or constructive knowledge of the impending danger.⁶ An "opportunity to prevent the battery" is inherent in either situation.⁷ Where notice of the danger exists only at a time when there is no such opportunity the defendant has acted reasonably, for there is nothing he reasonably could have done to prevent harm to his guest.

In an Oregon case, *Peck v. Gerber*,⁸ the plaintiff alleged that the defendant was negligent in admitting to his establishment a person the

⁴ *Id.* at 879, 365 P.2d at 340.

⁵ *McFadden v. Bancroft Hotel Corp.*, 313 Mass. 115, 46 N.E.2d 573 (1943); *Peck v. Gerber*, 154 Ore. 126, 54 P.2d 675 (1936); *Marstad v. Swedish Brethern*, 83 Minn. 40, 85 N.W. 913 (1901); *Curren v. Olson*, 88 Minn. 307, 92 N.W. 1124 (1903). *But see* *Peter Anderson & Co. v. Diaz*, 77 Ark. 606, 92 S.W. 861 (1906), which on the same facts as *Curren v. Olson* *supra*, comes to the opposite result. In both cases the defendant knowingly permitted a guest to pour alcohol on the foot of a sleeping patron and set it afire. The Arkansas court in denying recovery stated: "[T]he saloon keeper does not hold himself out to the public as the protector of those who may be patrons of his saloon. His business rather advertises him the other way." This statement has not been accepted by other courts.

⁶ *Accord*, *Hughes v. Coniglio*, 147 Neb. 811, 25 N.W. 2d 405 (1946). The defendant was held to have acted reasonably when the plaintiff was injured in a knife fight between two other patrons of the defendant's restaurant. The fight occurred without warning and the defendant had no notice of the participants' violent propensities. See *Kingen v. Wegant*, 148 Cal. App. 2d 656, 307 P.2d 369 (1957).

⁷ *Thomas v. Bruza*, 151 Cal. App. 2d 150, 311 P.2d 128 (1957). In *Fisher v. Robbins*, 78 Wyo. 50, 319 P.2d 116 (1957), one patron struck another patron on the head with a beer bottle and the plaintiff was injured by a piece of glass lodging in his eye. In reversing a judgment for the plaintiff the court stated at 319 P.2d 118: "Proof of defendant's actual or implied knowledge of impending danger to his invitees and that he had reasonable opportunity to avert it was indispensable to entitle plaintiff to a recovery." See *RESTATEMENT, TORTS* § 348 (1934).

⁸ 154 Ore. 126, 59 P.2d 675 (1936).

defendant knew to be of violent and disorderly propensities. The defendant stated to the plaintiff at the time of the injury that he was not surprised that the one who committed the battery would do such a thing. In rendering judgment for the plaintiff the court stressed that actual or constructive notice of the actor's violent propensities must be established. Where such notice does exist there is a clear opportunity to prevent harm to the plaintiff by refusing to allow that person to enjoy the premises with the other guests.⁹

In *Gurren v. Casperon*,¹⁰ the only analogous Washington case, a hotel was held liable for its negligence in failing to protect a guest from an assault after the guest had informed the defendant's employee of her fear of an assault by one Saunders who earlier had been ejected from her room. In the principal case both the majority and dissent assert they are following the *Peck* and *Gurren* decisions in arriving at the duty of the tavernkeeper. The dissent sets forth the proposition that as *Gurren* involved express notice of the specific impending peril, in Washington such notice is a condition precedent to a duty to protect guests from harm.¹¹ The majority apparently takes the view that *Gurren* does not limit what may constitute negligence but only is one example of conduct which constitutes negligence by an innkeeper toward his guest. This interpretation of *Gurren* seems most closely to follow the apparent conclusion of the earlier Washington court that whether the duty owed a guest by the innkeeper is absolute or one of ordinary care, on these facts the plaintiff was entitled to recover.¹²

Admitting that actual notice of the specific impending peril is not required, one may still find fault with the majority's summary handling of the negligence question. The plaintiff alleged that the defendants were negligent in failing to provide sufficient policing to prevent the fight when the defendants reasonably should have known that fights would occur on the premises.¹³ If such a risk was foreseeable at some time when the defendants could have provided sufficient policing, the

⁹ In *McFadden v. Bancroft Hotel Corp.*, 313 Mass. 115, 46 N.E.2d 573 (1943), the plaintiff recovered for injuries inflicted by a fellow guest who attacked him suddenly and without warning in the defendant hotel's bar. At least five "bouncers", hired to prevent fights, were present when the incident occurred. The guest who inflicted injury on the plaintiff was intoxicated and had been prevented by the "bouncer" from engaging in two near fights that same evening. In affirming the verdict the court stated at 46 N.E.2d 575: "The jury might have concluded that, in the performance of the duty resting upon the defendant, Cunningham should have been removed... some time before the assault was committed."

¹⁰ 147 Wash. 257, 265 Pac. 472 (1928).

¹¹ 158 Wash. Dec. 874, 885, 365 P.2d 333, 340 (1961).

¹² Noted 3 WASH. L. REV. 194 (1927-1928).

¹³ Brief of Respondent, p.4. 158 Wash. Dec. 874, 890, 365 P.2d 333, 342 (1961).

defendants would be negligent if a failure to do so was unreasonable, even though they had no notice of the violent propensities of any specific guest.

Even if the defendants were negligent in failing to provide adequate policing, liability would not necessarily attach. Negligence does not give rise to liability unless the risk resulting in harm was that risk which made the defendants' act or omission negligent.¹⁴ Only when those two risks are the same may it be said that the defendants' negligence was the proximate cause of the plaintiff's injury. The risks created by failure to have adequate policing would seem to be an inability to prevent a fight when its occurrence is obviously impending, or to stop a fight begun without warning within a reasonable time.

The facts of *Miller v. Stanton*¹⁵ would fall into the latter category. The plaintiff did not contend that the fight which resulted in harm to her could have been anticipated, nor did she show notice by the defendants' of the violent propensities of either participant. The plaintiff did not deny the defendants' assertion that the fight was the product of a "surge of jealousy"¹⁶ experienced by one intoxicated patron at the sight of his wife dancing with another. Without prior warning or threats that would call attention to his plan, the one attacked the other. Was the occurrence of *this* fight within the risk created by a failure to have adequate policing? A sudden affray without prior warning would seem not to be within the risk that reasonable policing would prevent, except that reasonable policing might have stopped the fight once it occurred before injury to the plaintiff resulted. Yet the majority states that "the jury was entitled to conclude that . . . the defendants knew or should have known a fight was *ensuing* in time to have stopped the fight thereby avoiding the resulting injuries sustained by the plaintiff."¹⁷ (Emphasis added.) On closer analysis there seems no way the defendants, or hired guards, could have known this fight was ensuing.

This same situation was presented in *Weihert v. Piccione*,¹⁸ in which the Wisconsin Supreme Court affirmed a nonsuit. The plaintiff had been injured in the defendant's establishment during a fracas between

¹⁴ If but for the defendants' negligence the damage suffered by the plaintiff would still have occurred, then "legal causation" is not satisfied. *Scobba v. Seattle*, 31 Wn.2d 685, 198 P.2d 805 (1948); *Viking Sprinkler Co. v. Pac. Ind. Co.*, 19 Wn.2d 294, 142 P.2d 394 (1943); *Highland v. Wilsonian Inv. Co.*, 171 Wash. 34, 17 P.2d 631 (1932). 38 AM. JUR. *Negligence* § 63 (1941).

¹⁵ 158 Wash. Dec. 874, 365 P.2d 333 (1961).

¹⁶ Brief for Appellant, pp. 30, 46.

¹⁷ 158 Wash. Dec. 874, 877, 365 P.2d 333, 335 (1961).

¹⁸ 273 Wis. 448, 78 N.W.2d 757 (1956).

two other guests, and alleged that his injuries were the result of failure by the defendant to provide necessary protection from assault and battery by other patrons. The Wisconsin court approved the statement of the lower court that failure to have provided "guards" or "bouncers" in the establishment was not actionable for "it cannot be assumed that they would have prevented the assault which occurred initially and without warning."¹⁹

Thus, in the absence of notice of the violent propensities of he who committed the assault, a sudden affray without prior warning would not seem to be the risk that reasonable policing would alleviate. This analysis is excluded by instruction No. 15²⁰ given by the trial court which reads: "[I]f you find from the evidence that defendants did not have a reasonably sufficient number of persons employed on and policing the premises you shall find them negligent and your verdict must be for the plaintiffs." No timely objection was made in the trial court and the supreme court ruled it could not be raised for the first time on appeal.

Another theory of negligence might have been argued by the plaintiff, even in absence of any showing of knowledge by the defendants of the vicious propensities of any specific patron: to impose liability through the device of a Washington statute making the furnishing of intoxicating liquor to one known to be intoxicated a misdemeanor.²¹ This criminal statute has never been made a basis for civil liability of a tavernkeeper in Washington for torts of an intoxicated patron. However in two jurisdictions it has been held that such a statute imposed a duty, the breach of which was held to be imprudent conduct and was the proximate cause of injury to a third party by the intoxicated patron.²² Both cases involved the liability of a tavernkeeper for injuries sustained in an automobile collision caused by the negligence of the intoxicated patron. It is clear that for such a theory to operate the statute must be construed to confer a private rather than merely a public benefit²³ and the act resulting in harm must have been a result of intoxication.

¹⁹ Note 18, *supra*, 78 N.W.2d at 762.

²⁰ *Miller v. Staton*, 158 Wash. Dec. 874, 879, 365 P.2d 333, 336 (1961).

²¹ RCW 66.44.230 applies to one that is an "... owner or manager of, or an employee in any drinking saloon, drinking celler or public dance hall or music hall where intoxicating liquors are sold or kept for sale." RCW 66.44.200 states: "No person shall sell any liquor to any person apparently under the influence of liquor."

²² *Rappaport v. Nichols*, 31 N.J. 188, 156 A.2d 1 (1959); *Waynick v. Chicago's Last Dep't Store*, 269 F.2d 322 (7th Cir. 1959).

²³ *Rappaport v. Nichols*, *supra* note 22, 156 A.2d at 8; *Waynick v. Chicago's Last Dep't Store*, *supra* note 22, at 325, where the court states that the Illinois criminal

Thus, if the plaintiff could prove that the affray was caused by the defendants' breach of statutory duty and the harm to the plaintiff was within the foreseeable risk created by the breach of that duty, recovery might have been had on this theory. There is an historical hurdle that must be overcome to fasten liability with such reasoning, in addition to finding a private benefit conferred by the criminal statute. At common law serving intoxicating liquor was not the proximate cause of injury resulting from intoxication.²⁴ Rather the voluntary drinking of the intoxicant was the legal cause of the risk resulting in eventual injury.²⁵ This common law immunity of the tavernkeeper has given rise to various dram-shop acts, imposing liability the tavernkeeper would otherwise escape. In the great majority of states today the mere sale of intoxicating liquor gives rise to no cause of action, even though the sale was in violation of some law other than an applicable dram-shop act.²⁶

A further point to be considered is that if the circumstances were such as to charge the defendants with knowledge that fights would probably occur, such a risk may have been as well obvious to the plaintiff in the conspicuous absence of police protection. In that case the defendants' failure to provide reasonable police protection might involve no breach of duty, and thus negate that possibility of negligence.²⁷ It is commonly said the guest has a right to rely upon the belief that the innkeeper or tavernkeeper will preserve order and protect the guest from injury.²⁸ When that reliance is no longer

statute "is for the protection of any members of the public who might be injured or damaged as a result of the drunkenness to which the particular sale of alcoholic liquor contributes."

²⁴ *E.g.*, *Cherbonnier v. Rufalovich*, 88 F. Supp. 900 (D. Alaska 1950); *Fleckner v. Dionne*, 94 Cal. App. 2d 946, 210 P.2d 530 (1949); *Hiltson v. Dwyer*, 61 Cal. App. 2d 803, 143 P.2d 952 (1944).

²⁵ *Ibid.*

²⁶ Wash. Sess. Laws 1905, ch.62, § 1, imposing civil liability on Washington Tavernkeepers, was repealed in 1955 by RCW 4.24.100. It may be argued that this repeal of the Washington "dram-shop" act is an expression of legislative intent to not confer a private benefit from the duty imposed by RCW 66.44.200 and RCW 66.44.230. Yet, the opposite conclusion was reached in *Rappaport v. Nichols*, 31 N.J. 188, 156 A.2d 1 (1959), where the New Jersey "dram-shop" act had also been repealed. Judge Rosellini, concurring in the principal case, implies such a result might be reached in Washington. In quoting from *Conolly v. Nicollet Hotel*, 259 Minn. 373, 382, 25 N.W.2d 657 at 665 he states: "It is the policy of the law, both statutory and decisional to protect the public from social consequences of intoxicating liquor. There is perhaps no field of business activity more hedged about with state and municipal laws and regulations designed to protect the public. When a person engaged in that business permits crowds to gather upon his premises for profit, he must recognize the risks which flow from the nature of the business." 158 Wash. Dec. 874, 883, 365 P.2d 333, 339 (1961).

²⁷ "... If the plaintiff consents to the risk, there is no duty to him, and hence no negligence." PROSSER, *TORTS* § 55 (2d ed. 1958).

²⁸ See instruction No. 11 given by the trial court and discussed by the majority opinion at 878, 365 P.2d at 336. *Peck v. Gerber*, 154 Ore. 126, 59 P.2d 675 (1936).

reasonable, and the guest has knowledge of the impending dangers, then the guest may be said to have assumed that risk if he voluntarily remains in proximity to the danger.²⁹

In *Reilly v. 180 Club, Inc.*,³⁰ the New Jersey court stated that where the plaintiff witnessed the bantering and needling that preceded the fight and did not choose to leave, the issue of assumption of risk was for the jury. A few cases attempt to incorporate assumption of risk if injury from the crowd is a normal incident to the service offered.³¹ This issue is not discussed in the court's opinion or the defendants' brief. It seems plausible that one who goes to a tavern on New Year's Eve and remains there for over four hours must appreciate and accept those risks flowing from an uncontrolled intoxicated crowd.

In summary, the majority opinion asserts that reasonableness is the measure of the tavernkeeper's duty; yet it is not precise enough in defining and analysing the elements of that term in the opinion of the dissent. Certainly notice of the risk, either actual or constructive, at a time when that risk may still be reasonably dealt with, is inherent in the concept of reasonable conduct and need not be a factor which further qualifies that concept. It is the finding that negligence was the legal cause in fact of the risk which resulted in harm to the plaintiff that must further qualify unreasonable conduct before such conduct may be the basis of liability.

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²⁹ PROSSER, TORTS § 55 (2nd ed. 1958).

³⁰ 14 N.J. Super. 420, 82 A.2d 210, 212 (1951).

³¹ See *Thurber v. Skouras Theatres Corp.* 112 N.J.S. 385, 170 Atl. 836 (1934). The plaintiff was denied recovery for injuries suffered when pushed down in a theatre aisle between shows by other patrons. The court stated that: "Patrons of places of amusement . . . assume the risk of the dangers normally attendant thereon. These are accepted as incident to the enjoyment of an acceptance of the service which they afford." *But see* *Thomas v. Studio Amusements*, 50 Cal. App. 2d 538, 123 P.2d 552 (1942).