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NEGLIGENCE - FAILURE OF RESTAURANT PROPRIETOR TO PROTECT PATRON FOM INJURY

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NEGLIGENCE — FAILURE OF RESTAURANT PROPRIETOR TO PROTECT PATRON FOM INJURY — As a result of a fight between two men in defendant's restaurant, plaintiff suffered injuries. There is evidence that defendant knew of the violent temper of one of the combatants and that fights were liable to occur at any time in such a place where beer and alcoholic liquors were sold. *Held*, that there is sufficient evidence of negligence to take the case to the jury. *Peck v. Gerber*, (Ore. 1936) 59 P. (2d) 675.

It is a well settled rule that an owner or occupier of land has a duty to use due care to warn or protect invitees who are on the premises for his benefit.[1] The standard of care is always that required of an ordinarily prudent man, although the amount of care necessary in a particular situation may vary.[2]

[1] Moone v. Smith, 6 Ga. App. 649 at 651, 65 S. E. 712 (1909): "Here the plaintiff is . . . tempted to enter by the allurements of pleasure held out to him by the defendants. He enters, not only for the purpose of his own amusement, but to contribute to the profits of the defendants and to the success of their business. Surely he has a right to assume that the place is reasonably safe and that the proprietor will exercise reasonable care and diligence to protect him while he is peaceably and lawfully engaged therein. . . ."

[2] Curran v. Olson, 88 Minn. 307 at 308, 92 N. W. 1124 (1903), stating: "The defendants were bound to use reasonable care to protect their guests and patrons from injury at the hands of vicious or lawless persons whom they knowingly permitted

A person is an invitee where, for purposes connected with the business conducted on the premises, he enters any place of business, including a saloon, a restaurant, a place where food is served, or a place where soft drinks are sold.[3] The proprietor is not, of course, an insurer of the safety of business invitees. Some courts have felt that in the case of a common carrier or innkeeper the amount of care should be greater because of the implied warranty growing out of the relationship.[4] From whatever source the danger may arise, if it be known, or should have been known, care must be exercised to protect the patrons from that danger.[5] The duty extends to protection from the conduct of other patrons as well as from the physical defects of the premises.[6] That the injury is due to the acts of an independent third person does not remove defendant's responsibility where the very negligence alleged consists of exposing the injured party to the act causing the injury.[7] The duty involves warning the patrons or protecting them from the injury. He must use such means as should be reasonably provided because of the antecedent likelihood that third parties will misconduct

to be in and about their saloon." Quoted in Beilke v. Carroll, 51 Wash. 395 at 401, 98 P. 1119 (1909). See also, 20 R. C. L. 10, 25 (1918).

[3] Schmidt v. Bauer, 80 Cal. 565, 22 P. 256 (1889); Geoghegan v. G. Fox & Co., 104 Conn. 129, 132 A. 408 (1926); Drennan v. Grady, 167 Mass. 415, 45 N. E. 741 (1897); 45 C. J. 815 (1928); 5 THOMPSON, NEGLIGENCE, § 6674 (1905): "The invitation of the innkeeper implies the assurance that his premises may be entered and occupied with safety by the intending guest, and the law extends this duty to exercise ordinary care for the personal safety of guests to the maintenance of these conditions. . . ."

[4] Gurren v. Casperson, 147 Wash. 257 at 258, 265 P. 472 (1928): " 'The proprietor of any public house of entertainment may be answerable for the acts of one of his patrons as well as of his servant. He owes a duty to those who come to his place to protect them from insult or other annoyances or dangers.' 14 R. C. L. 508. . . .

"Many of the cases examined seem to indicate that the duty of the landlord to protect his guests from assault is absolute, and that he owes that same high degree of care to his guest that a common carrier owes to its patrons."

Rommel v. Schambacher, 120 Pa. 579 at 582, 11 A. 779, 6 Am. St. Rep. 732 (1887): "If, then, a railroad company is liable for the conduct of drunken men who may chance to board its cars, much more the tavern-keeper who not only permits drunken men about his premises, but furnishes liquor to make them drunk, and who is thus instrumental in fitting them for the accomplishment of just such an insane and brutal trick as that disclosed by the evidence of the case in hand."

Brannigen v. Harrington, 37 T. L. R. (K. B.) 349 at 350 (1921): "as to premises generally where an occupier agreed for reward that a person should have the right to enter and use them, the contract between the parties contained an implied warranty that they should be as safe as reasonable care and skill could make. . . . The only question here was whether that principle applied to a restaurant. One paid not merely for the food, but also for the accommodation. . . ."

[5] Exton v. Central Ry. of New Jersey, 62 N. J. L. 7, 42 A. 486 (1899).

[6] 14 R. C. L. 508 (1916): "He [proprietor] is guilty of negligence if he admits to his place, or permits to remain there as a guest, a person of known violent and disorderly propensities, who will probably assault or otherwise maltreat his guests; for the consequence of such negligence, he may be liable in damages. . . ."

[7] Director General of Railroads v. Garrett, 13 Va. 125, 108 S. E. 690 (1921). Kentucky Independent Oil Co. v. Schnitzler, 208 Ky. 507 at 514, 271 S. W. 570

themselves to the injury of his patrons.[8] Knowledge of the danger or discovery of it by the exercise of reasonable care is the basis of the responsibility.[9] The evidence of similar occurrences is competent as tending to show notice of the conditions.[10] In the application of this rule, patrons have been allowed recovery when injured by the scuffling of two hackmen, independent of defendant but on his property at the time; [11] when shoved by another patron, intoxicated, who had been engaging in a brawl with other customers in a pool room; [12] when injured by having a third person and servant of defendant, who was acting outside of his authority, pour alcohol over plaintiff's foot and light it; [13] when hit by a baseball from a game played in a park; [14] when injured by being struck in the eye with a glass, thrown by one of the defendant's intoxicated customers.[15] The plaintiff in the instant case suffered an injury caused by the defendant's failure to adequately protect him against the violence of another patron, when

(1925): "Does the fact that a second human actor, not acting in concert with a first human actor, intervenes with a tortious act which begins later in time to a tortious act of the first actor and which second act is the only force in active motion at the time of the damage, exonerate the first actor from liability? . . . the first will be liable if he foresaw or ought to have foreseen the commission of the second's tort. . . ."

[8] Chicago, T. H. & S. E. Ry. v. Fisher, 61 Ind. App. 10, 110 N. E. 240 (1915). 2 TORTS RESTATEMENT, § 348, comments (b) and (c) (1934): "[He] is not required to insure the safety of his patrons against the wrongful acts of third persons. . . . If, however, the possessor is not entitled to assume that a warning will be sufficient, he is required to use reasonable care to use such means of protection as are available or which he should in advance have provided because of the antecedent likelihood that third persons may misconduct themselves to the injury of his patrons. . . . [This may include] a duty to employ a reasonably sufficient number of servants to afford a reasonable protection."

[9] 2 TORTS RESTATEMENTS, § 348b (1934): "A . . . possessor of land who holds it out to the public for entry for his business purposes, is subject to liability to members of the public while upon the land for such a purpose for bodily harm caused to them by the accidental, negligent or intentionally harmful acts of third persons . . . if the possessor by exercise of reasonable care could have (a) discovered that such acts were being done or about to be done, and (b) protected the members of the public by controlling the conduct of the third persons. . . . [This] includes . . . fellow patrons. . . ."

[10] Indianapolis St. Ry. v. Dawson, 31 Ind. App. 605, 68 N. E. 909 (1903): "In order to determine whether appellant used due care, it was essential to show its knowledge or means of information relative to the conditions alleged to exist rendering it dangerous for appellee [plaintiff] to visit the park. The evidence of similar occurrences was competent as tending to show notice of the conditions." Toledo, St. L. & K. C. Ry. v. Millian, 2 Ind. App. 578, 28 N. E. 1019 (1891).

[11] Exton v. Central Ry. of New Jersey, 62 N. J. L. 7, 42 A. 486 (1899).

[12] Moone v. Smith, 6 Ga. App. 649, 65 S. E. 712 (1909).

[13] Rommel v. Schambacher, 120 Pa. 579, 11 A. 779 (1887).

[14] Blakely v. White Star Line, 154 Mich. 635 at 639, 118 N. W. 482 (1908): "the owner of the park is bound to protect its invited guests from unusual occurrences which may result in serious danger to its patrons, if he has the requisite notice or knowledge."

[15] McFayden v. White, 52 Scot. L. R. 329 (Ct. of Sess.) (1921); Molloy v. Coletti, 114 Misc. 177, 186 N. Y. S. 730 (1921).

the defendant had knowledge of previous disorder and that any place where liquor is sold is potentially disorderly. Although the duty of the invitor to use due care unquestionably has been extended to include activity of third persons on the premises, it is only recently that the courts have been willing to have it include danger from a human force unauthorized by the defendant which results in injury.[16]

[16] See Harper and Kime, "The Duty to Control the Conduct of Another," 43 YALE L. J. 886 (1934).