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Torts, Insurance & Compensation Law Section Journal

A publication of the Torts, Insurance & Compensation Law Section
of the New York State Bar Association

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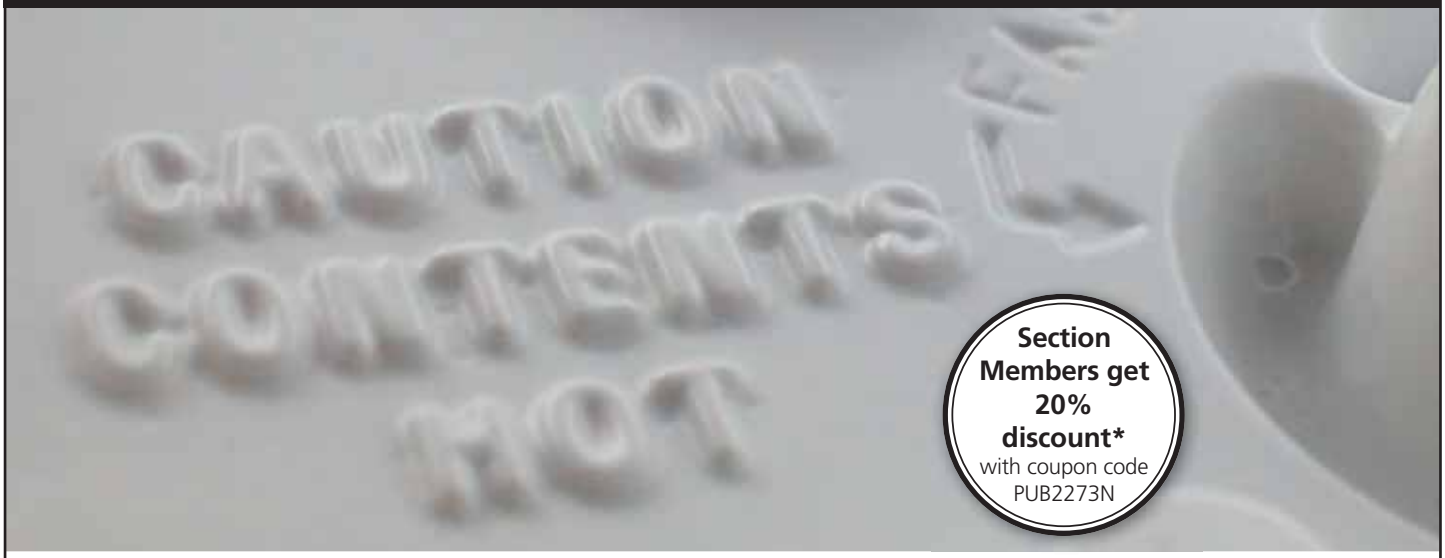

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A View from the Chair

Membership in our Section is truly worthy, but not all members take advantage of the many benefits the TICL Section provides through its many volunteers.

Certainly, the *TICL Journal* is regarded by many as the keystone of membership in the TICL Section, as it is replete with articles which are relevant to our professional lives. That journal is but one of the tangible benefits produced by the leaders of the Section. Other benefits include the TICL e-newsletter as well as the *Construction & Surety Law Newsletter*. Less tangible, but no less important, is the work done by the leaders. Within the Section are the Workers' Compensation Law Division and the Construction and Surety Law Division. We have 21 procedural and substantive committees. We do a lot of good work.

The work that is done for your benefit is done by volunteers. Your colleagues take time out of their busy professional and family lives to bring these benefits to you. Certainly, the paid staff at the State Bar is invaluable in providing support to the Section, and without those individuals the Section could not perform, but the leaders of this Section, the officers, the district representatives, the Committee and Division chairs and the members of these groups, are all volunteers.

Why do we volunteer? Multiple studies have been performed to answer the question as to why people volunteer. As you might imagine a multitude of reasons have been cited, some altruistic and some egoistic: being recognized, growing personally, giving something back, helping others, making a difference, connecting with the community, developing new skills, meeting new people, exploring new areas of interest, strengthening the resume, becoming an insider to name a few. See http://volunteermaine.org/blog/why-do-people-volunteer by Bob Moore.

In a 1996 study the authors identified six categories of motivation or psychological functions that may be met by volunteering: 1. Values: People may volunteer to express or act on values important to the self (e.g., altruism); 2. Understanding: People may volunteer to increase their knowledge of the world and develop and practice particular skills; 3. Enhancement: People may volunteer to engage in psychological development and to enhance their self-esteem; 4. Career: People may volunteer to gain experiences that will benefit their careers; 5. Social: People may volunteer to fit in and to associate with social groups they value; 6. Protective: People may volunteer to help themselves cope with inner anxieties and conflicts. Clary, E. Gil., Mark Snyder & Arthur A. Stukas (1996) "Volunteers' Motivations: Findings from a National Survey" *Nonprofit and Voluntary Sector Quarterly*, 25(4), pp. 485-505.

My association with the TICL Section began probably 25 years ago because I thought it would be helpful to my career. I wanted to be associated with those in the métier who care about the profession, who care about being current with the law and technology. I wanted to be associated with these leaders, and I hoped that some of that aura would radiate in my direction! What I did not expect was that I would derive such personal satisfaction from the camaraderie among the people I have met, the people who showed up.

Consider this then a call to action. Volunteer! Increase your network of resources statewide. Be a leader. Derive the psychological benefits of being a volunteer. Feel good about yourself. Set an example for your children. Show up!

Look at the TICL website to see the variety of committees and opportunities there are for you to serve others, and as a result of serving others, you will serve yourself.

Robert Coughlin

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Travel Law: Liability for Rental Car Accidents Abroad

By Thomas A. Dickerson

Who is responsible for rental car accidents abroad and to what extent may U.S. rental car companies be held liable for the negligence and misconduct of their foreign licensees [*Travel Law* §§ 3.04[1],[2]]?

Liability and Relationships

A U.S. rental car company may market its services to U.S. citizens traveling abroad. Those services may, however, be provided by foreign rental car companies over which there may be no jurisdiction, and assuming jurisdiction, the U.S. forum selected may be inconvenient and whose liability for travel accidents may be problematic in that it is governed by foreign law not necessarily as sympathetic as U.S. law may be [see *Sadkin v. Avis Rent A Car System, Inc*. (fatal rental car accident; court applied Bahamian law notwithstanding that it did not recognize strict products liability or breach of warranty claims asserted on behalf of the decedents)].

It is important, therefore, to understand the nature of the relationship between the U.S. company and the foreign rental car provider in order to determine liability. For example, the U.S. company may be a sales representative of several foreign entities [see *Maggio v. Maggiore* (The Maggiore International Rent-A-Car-System is a loose association of independent foreign rental operators [*Travel Law* § 3.04[1][a], fn 8]); may own a minority interest of a foreign rental car company [see *Bank v. Rebold* ("In or about 1970 Avis expressed an interest in making an investment ($500,000)…in early 1973 Avis and D'Ieteren (a Belgium company) formed Locadif (which operates a rental car business) entirely independent of Avis")]; may be the sole owner the foreign rental car company [see *Anders v. Puerto Rican Cars, Inc*. (rental car accident in Virgin Islands; "Puerto Rican Cars is a wholly-owned subsidiary of Hertz International Limited which in turn is a wholly-owned subsidiary of the Hertz Corporation"); *Banks v. International Rental and Leasing Corp.* (rental car accident in Virgin Islands); *Harvey v. Sav-U-Car Rental and Hertz Corporation d/b/a/ Preferred Rentals* (accident in Virgin Islands involving two rental cars)], or the foreign rental car company may be a licensee [see *King v. Car Rentals, Inc.* (rental car accident in Quebec; Car Rentals, Inc., a New Jersey corporation operates "as a licensee of the defendant Avis Rent A Car… a Delaware corporation"); *Ashkenazi v. Hertz Rent A Car* ("accident in Acapulco, Mexico in a vehicle rented from a Mexican company, Alquiladora de Vehiculos Automotores, S.A….a licensee of Hertz International Corporation")].

Renting the Brand

Regardless of the nature of the relationship between the U.S. company and a foreign rental car company, U.S. consumers are encouraged to rely upon the famous trade of the U.S. company. In *Maggio v. Maggiore* the foreign car companies agreed to identify themselves as part of the Maggiore International Rent-A-Car System in telephone directories, forms, contracts, advertising, signs, logos and uniforms featuring the Maggiore insignia. In *Bank v. Rebold* the consumer was induced to believe that Avis was the only entity responsible for the provision of the contracted for rental car ["the plaintiff knew only Avis"]. Consumers often decide to purchase travel services delivered by foreign companies by relying on the assumed reliability and integrity of a well-known U.S. company's trade name. It is Marketing 101 that whether the name be "Hertz," "Avis" or "Budget" consumers may attribute certain positive qualities to well-known brand names. This reliance upon well-known trade names may serve as a basis of liability.

Types of Accidents Abroad

Rental car users may sustain physical injuries including death [see *Durham v. County of Maui* (allegations that "the subject vehicle and its occupant restraint system were defectively designed"); *Chung v. Chrysler Corporation* (students killed in rental car crash in Mexico); *Miller v. Thrifty Rent-A-Car System, Inc*. (death after "she suffered injuries during a car accident in South Africa")], serious physical injuries [see *Amieriro v. Charlies Car Rental, Inc*. (head-on collision in rental car in Puerto Rico); *Anders v. Puerto Rican Cars, Inc.* (allegations that "driver's side seat belt…disengaged and both the front air bags failed to employ")], minor physical injuries [see *Poe v. Budget Rent A Car System, Inc.* (rental car accident in Virgin Island "when the brakes on a [rental] car…[allegedly] failed")] and assaults and shootings [see *Shurben v. Dollar Rent-A-Car* (British tourists accosted and shot by Miami criminals while driving rental car)].

Apparent Authority

In *Fogel v. Hertz International Ltd* the travelers rented a car from Hertz allegedly after watching TV ads stating the "[b]y day, Hertz is offering low rental rates" and "[r]enting from Hertz also gets you terrific rates at 3,300 fine European hotels." The Hertz ads also offered a Hertz "800" number for details and information. The rental car was delivered in Rome, Italy. The personnel stationed at the Hertz store were in Hertz uniforms with the Hertz logo and the invoice had the Hertz logo with Hertz Italiana [the Italian company that actually owned the rental car provider] in much smaller print. The travelers had an accident in the rental car in Italy and after returning to the U.S. sued Hertz. The court held that Hertz may be liable for the tortious misconduct of the foreign provider, Hertz Italiana, under several theories including apparent authority, estoppel and reliance [see also *Kirkaldy v. Hertz Corporation* (rental car accident; triable issue as to whether Hertz "clothed the car rental agency with apparent authority"): compare: *Ashkenazi v. Hertz Rent A Car* ("plaintiff does not contend that (Mexican rental car company) was negligent in causing

the accident…the plaintiff's reliance on the doctrine of apparent agency to hold the (U.S. licensor) liable in this case is misplaced"); *Travelja v. Maieliano Tours* (rental car accident on tour; no advertising to support estoppel claims; vouchers identified foreign rental provider as independent contractor); *Miller v. Thrifty Rent-A-Car System, Inc.* (rental car accident in South Africa; "Her family rented the car from a Thrifty Rent-A-Car, Inc…franchise in South Africa operated by a company call SAFY Trust…Thrifty overseas the operations of its licensees to insure proper compliance with trade dress and branding"; Court finds that franchisor not vicariously liable under Florida, Oklahoma or South African law)]. As far as vicarious liability is concerned it should be noted that the Graves Amendment [49 U.S.C. § 30106] has been held by several courts to preempt State laws making rental car companies vicariously liable for injuries sustained in a rental car [see *Palacios v. Aris, Inc.*; *Vanguard Car Rental USA v. Drouin*].

Duty to Warn of Dangerous Environments

In *Shurben v. Dollar Rent-A-Car* British tourists were accosted and shot by Miami criminals while driving a rental car. It was alleged that "Dollar had a duty to warn Shurben of foreseeable criminal conduct…Based on the knowledge it had on hand, Dollar should have realized that criminals were targeting tourist car renters in certain areas of Miami and that a reasonable rental company in possession of those facts would understand that its customers would be exposed to unreasonable risk of harm if not warned." And in Blum, *Alamo Set To Appeal Wrongful Death Suit* (Travel Weekly (May 22, 2000)) it was noted that "Alamo said it continues to believe it holds no responsibility in the shooting death of Tosca Dieperink, who was traveling with her husband and three children in the Miami neighborhood known as Liberty City. The jury decided that Alamo had wrongfully failed to warn of the existence of a high-crime area in Miami where a number of Alamo clients had previously been robbed." The jury verdict was affirmed in *Alamo Rent-A-Car, Inc. v. Dieperink*, 826 So. 2d 368 (2002)]. For a discussion of duties of travel sellers and suppliers to warn of dangers in the destination environment see *Travel Law: Duty To Warn Of Dangerous Environments: The Case Of The Chinese Tick* (ETN) January 29, 2014).

Negligent Entrustment

While on vacation the traveler may be injured in an accident involving a rental car driven by another person. If it can be shown that the driver was incompetent, intoxicated or otherwise unfit and that the rental car company knew or should have known of the driver's unfitness, then a cause of action against the rental car company may be premised upon the negligent entrustment of a rental car [see *Palacios v. Aris, Inc.* ("the Court concludes that plaintiff has raised genuine issues of material fact as to whether the license was valid, whether *Aris* was negligent in failing to determine whether the purported Israeli license was valid on its face and whether given the lack of a photograph, the license presented belonged to the person who was seeking to rent the vehicle"); *Drinkall v. Used Car Rentals* (rental car company liable for renting vehicle to unlicensed driver; failure to discover unlicenced status); *Sierra v. Steward Ventures, Inc*. ("In Arizona…rental car companies may not entrust a motor vehicle to a person they know, or should know, is incapable of driving safely…However, this standard of care does not require rental car companies to screen customers for detection of possible impairment"); *Osborn v. Hertz Corp*. ("Under the theory of 'negligent entrustment' liability is imposed on vehicle owner…because of his [or her] own independent negligence and not the negligence of the driver.")].

Forum Changes and Choice of Law

Many rental car cases involving travel accidents abroad raise issues of jurisdiction, choice of law and whether the U.S. court selected to hear the traveler's case is convenient [*forum non conveniens*], subjects previously discussed in earlier articles. For example, a lawsuit may be dismissed because the court has no jurisdiction over the foreign rental car company [see *Kirkaldy v. Hertz Corp*. (no jurisdiction over Maryland rental car company)] or the court finds that it would be more efficient (location of witnesses and evidence and availability of adequate alternative forum) to have the case heard in the country in which the accident occurred [see *Kermisch v. Avis Rent A Car System, Inc.* (Rumania not adequate alternative forum; motion to dismiss on *forum non conveniens* grounds denied); *Sadkin v. Avis Rent A Car System, Inc.* (*forum non conveniens* motion denied)]. Another frequently litigated issue is which law should apply [see *King v. Car Rentals, Inc.* (accident in Quebec; New Jersey law applied to recovery of non-economic damages); *Harvey v. Sav-U-Car Rental* (analysis of various causes of action under law of the Virgin Islands); *Miller v. Thrifty Rent-A-Car System, Inc.* (franchisor not liable under Florida, Oklahoma or South African law)].

Conclusion

Travelers need to take reasonable precautions when renting cars to be used overseas, including obtaining appropriate insurance to cover any accidents that may occur [see Spano, "When Renting Cars Abroad, It's Renter Beware," *New York Times* Travel Section (August 31, 2010); 2012 Credit Card Auto Rental Insurance Study, www.cardhub.com/edu/rental-car-insurance-credit-card-study ("roughly 20% of consumers always purchase supplemental insurance coverage (PAI) when renting a car…In this study, we will address what type of rental car insurance coverage consumers automatically receive through their credit cards.")].

Justice Dickerson been writing about travel law for 38 years including his annually updated law books, *Travel Law, Law Journal Press* (2014) and *Litigating International Torts in U.S. Courts*, Thomson Reuters WestLaw (2014), and over 300 legal articles, many of which are available at www.nycourts.gov/courts/9jd/taxcertatd.shtml.

Travel Law: Flight Delays: Stop Making the Passengers Pay: U.S. DOT Should Adopt EU 261

By Thomas A. Dickerson

Are airlines liable for flight delays during domestic and international air transportation? Three different legal systems [U.S. (tariffs and contract of carriage, *Travel Law* §§ 2.04, 2.06[1]), EU (European Union Regulation No. 261/2004 (EU 261) and Montreal Convention (Article 19, *Travel Law* § 2A.04[3])] will be compared in terms of what, if any, compensation is made available to those unhappy travelers whose flights are delayed. Unfortunately for U.S. citizens, the EU ranks first in consumer protection, followed by the Montreal Convention while the U.S. system comes in last with, in effect, no form of mandatory passenger compensation for flight delays with the exception of airline oversales [14 CFR Part 250]. This explains why in several recent flight delay cases [see, e.g., *Giannopoulos v. Iberia* (2014)(discussed below)] passengers suffering injuries because of flight delays have encouraged the courts to look to EU 261 instead of the U.S. tariff system as authority for proper flight delay compensation.

What Is a Flight Delay?

A flight delay is any deviation from the contracted for departure and return times. A flight delay, which may involve the complete cancellation of a flight [see *Flaster/Greenberg P.C. v. Brendan Airways* (flight for 19 lawyers and staff cancelled allegedly resulting is loss of $50,000 in lost revenue); *In re Nigeria Charter Flights Contract Litigation* (cancelled charter flights)], may be caused by mechanical malfunctions [see *Feuer v. Value Vacations* (48-hour delay due to engine malfunction; disclaimer void)], bad weather [see *Vick v. National Airlines, Inc*. (bad weather no defense to aborted vacation), misconnections and schedule changes [see *Robinson v. American Airlines* (passenger misses flight because airline advances departure time by 10 minutes), strikes, false imprisonment and wrongful detention [see *Hudgins v. Southwest Airlines* (bounty hunters arrested and prosecuted for carrying guns on board commercial aircraft after being given permission to do so; jury awarded compensatory damages of $500,000 and $4 million in punitive damages), refusals to board, including racial and ethnic profiling and discrimination [*Travel Law* § 2.06[6]], overbooking [see below], failure to adequately screen security risks [see *Delta Airlines v. Cook* (passenger claims damages because airline allowed unruly passenger on board aircraft which was diverted to later remove unruly passenger)], medical emergencies and civil disorder [see *Jamil v. Kuwait Airways* (four-day delay because of coup in Pakistan)].

Who Pays for Flight Delays?

Not long ago the answer to "Who pays?" was that the passenger paid since being delayed was to be expected when flying on commercial aircraft. For example, in 1992 a court held in *Chendrimada v. Air India* that the passengers were forced to stay on a delayed aircraft for 11½ hours but there was no breach contract for the delivery of timely air transportation since flight schedules and timetables did not constitute a warranty or guarantee of punctuality.

U.S. Tariffs and the Contract of Carriage

The former Civil Aeronautics Board (CAB) and later the Department of Transportation (DOT) both pre- and post-Airline Deregulation Act (ADA) have allowed U.S. domestic airlines to file tariffs limiting their liability for schedule changes, flight delays and seat position. These terms should appear, at least, in summary form in the passenger's airline ticket or contract of carriage. The Courts have generally enforced these tariffs including provisions disclaiming liability for schedule changes [see *Hanni v. American Airlines* (9½ hours confined in aircraft on runway; tariff stating that "'Schedules are subject to change without notice. American is not responsible or liable for failure to make a connection or to operate any flight according to schedule'" enforced)], limiting damages [see *Hanni*, *supra* (tariff stating that "'Under no circumstances shall American be liable for any special, incidental or consequential damages'" enforced)], promising "best" available information [see *Hanni*, *supra* (tariff stating that "'American Airlines…will provide customer at the airport or onboard an (delayed) aircraft with timely and frequent updates'" may have been violated by allegedly "supplying false and misleading information" concerning the duration of the delay) and failing to provide food, water, and restroom facilities [see *Hanni*, supra (even though American may have violated one tariff provision by failing to provide food, water, restroom facilities during delay the court held that no damages were recoverable because of another tariff which disclaimed liability "for any special, incidental or consequential damages")]. Airlines may, however, voluntarily provide compensation and/or services such as food and hotel accommodations as set forth in their respective tariff filings.

Enhanced Passenger Protection Rules

As a result of the efforts of angry passengers who suffered many hours confined in delayed aircraft waiting on tarmacs during severe winter storms [see *Hanni*, supra]

the DOT on April 25, 2011 enacted *Part 259-Enhanced Protections For Airline Passengers* "requiring air carriers to adopt contingency plans for lengthy tarmac delays and to publish those plans on their web sites; by requiring air carriers to respond to consumer problems; by deeming continued delays on a flight that is chronically late to be unfair and deceptive; requiring air carriers to publish information on flight delays on their web sites; and by requiring air carriers to adopt customer service plans." Passengers must be given an opportunity to deplane "from an aircraft that is at the gate or another disembarkation area with door open." And domestic air carriers must acknowledge "a complaint [within 30 days of receipt] and [within] 60 days…provide a passenger with a substantive response" [*Travel Law* §§ 2.02[9][a], 2.06[7]].

No Private Right of Action and No Compensation

While helpful in setting forth DOT policy, no private right of enforcement was created nor was any passenger compensation mandated for flight delays notwithstanding the demands of consumer organizations [see, e.g., 74 F.R. 68988-68990 (Dec. 30, 2009) ("Flyerrights.org supports requiring carriers to incorporate their contingency plans into their contracts of carriage in order to provide passengers an avenue for redress for breach of contract"] [see also *Weiss v. El Al Israel Airlines* (no private right of action under *Oversales* regulation)]. Instead, the DOT decided to rely solely on enforcement actions and the imposition of stiff penalties [see *DOT Press Release 87-13* (October 25, 2013) (United Airlines fined $1.1 million for lengthy tarmac delays)].

Denied Boarding Compensation Increased

Airlines are permitted to deliberately sell more seats than are actually available on a given aircraft since it permits passengers to make reservations without any penalty should they cancel and allows air carriers to fill empty seats [*Travel Law §* 2.06[5]]. However, airlines must comply with the requirements of the DOT's *Oversales* rule [14 CFR Part 250]. The 2011 Enhanced Passenger Protection Rules also expanded the scope of the DOT's existing *Oversales* rule by (1) "increas[ing] the minimum denied boarding compensation (DBC) limits to $650/$1,300 or 200%/400% of the one-way fare, whichever is smaller," (2) "implement[ing] an automatic inflation adjuster for minimum DBC limits every 2 years," (3) "DBC must be offered to 'zero fare ticket' holders (frequent flyer award tickets)," (4) "requires that a carrier verbally offer cash/check DBC if the carrier verbally offers a travel voucher as DBC to passengers who are involuntarily bumped" and (5) "requires that a carrier inform passengers solicited to volunteer for denied boarding about all material restrictions on the use of transportation vouchers offered in lieu of cash."

Montreal Convention Article 19

For flight delays that occur during "international air transportation" between the 105 countries that are signatories to the Montreal Convention, Article 19 of the Convention provides "The carrier is liable for damage occasioned by delay in the carriage by air of passengers… the carrier shall not be liable…if it proves that it…took all measures that could reasonably be required to avoid the damage or that it was impossible for it…to take such measures." There has been much litigation over whether the delay was material [see *Paradis v. Ghana Airways Limited* (passenger "did not afford the airline an opportunity to perform its remaining obligations" before booking alternative flight)] or caused the injury being alleged [see *Onwuteaka v. Northwest Airlines* (passengers remaining on delayed aircraft for three hours not a claim under Montreal Convention) and whether the air carrier took all necessary measures to avoid the delay [see *Obuzor v. Sabena Belgium World Airlines* (5-day delay due to fog; all necessary measures taken to avoid delay)]. The Montreal Convention may [see *Paradis*, *supra*] or may not apply to "bumping" or "non-performance" [see *In Re Nigerian Charter Flights Contract Litigation* (non-performance claims not covered by Montreal Convention], *Kamanou-Gouse v. Swiss International Airlines* ("The Montreal Convention preempts all state law claims that fall within its scope… Here, plaintiff alleges non-performance of the contract rather than delay")]. Presently, Article 19 provides a maximum of 4,694 SDRs, or about $7,200, in flight delay compensation with this limitation removed if the passenger can prove that the airline's conduct was "done with intent to cause damage or recklessly and with knowledge that damage would result." This may be difficult to prove [see *Shah v. Pan American*] but not impossible.

EU 261

In several recent cases the courts have addressed the issue of whether European Union Regulation No. 261/2004 (EU 261) [see *Regulation 261/2004* and *Sturgeon v. Condor* (C-402/07) ("passengers are now entitled to the compensation as set out in Article 8 (EU 261) for any delay in excess of three hours providing the air carrier cannot raise a defense of 'extraordinary circumstances'… (as for the) definition of 'extraordinary circumstances,' technical faults within an aircraft should not be included" (Wikipedia) (last visited 3/12/2014)] which requires airlines to compensate airline passengers for certain delayed and cancelled flights departing from or arriving at airports in the European Union can be enforced outside of the EU. In *Giannopoulos v. Iberia* the passengers purchased two roundtrip tickets on American Airline's website for transportation from Dallas to Italy. American electronic ticket reflected "their travel itinerary and the terms and conditions governing their transportation" which relied on a tariff that provided that "Damages occasioned by delay are subject to the terms (of) the Montreal Conven-

tion… They include foreseeable compensatory damages by a passenger and do not include mental injury damages." American had an interlining or code sharing agreement with Iberia which was to provide return air transportation from Rome to Madrid, which was delayed five hours causing the passengers to miss their flight to Madrid. Iberia's contract of carriage incorporated the "procedures for compensation described in (EU 261)."

In the subsequent lawsuit the passengers sought to enforce EU 261 as it appeared in Iberia's contract of carriage. Relying on the interlining or code sharing agreement the Court found that American's contract of carriage governed. In a related decision the same Court held that "EU 261 does not create a cause of action in U.S. courts" and "even if the European Commission intended that U.S. Courts be permitted to enforce its provisions—which the Court has held it did not—the Court would dismiss Plaintiffs' claim" because it is impliedly preempted by the Airline Deregulation Act (see also *Lozano v. United Continental Holdings* (EU 261 not intended to be enforced outside the EU"); *Volodarsky v. Delta Air Lines* (EU 261 does not provide a private right of action in U.S. courts); compare *Polinovsky v. Deutsche Lufthansa* ("plaintiffs have a right to proceed in this court despite the existence of an alternative enforcement mechanism under the EU")].

Conclusion

Air carriers governed by the EU and the Montreal Convention have come a long way in providing appropriate compensation for passengers who suffer damages from delayed air transportation. Such is not the case with the U.S. Notwithstanding enactment of the *Part 259-Enhanced Protections For Airline Passengers* and an occasional stiff penalty, U.S. passengers [with the exception of airline oversales] may not be compensated for flight delay damages since the DOT's tariff system allows airlines to disclaim and/or limit their liability. Travelers are well advised to read an air carrier's filed tariff to determine what, if anything, may be offered to delayed passengers.

Of course, the U.S. is not alone in this regard since other countries are still trying to develop appropriate remedial and compensation procedures [see, e.g., Li, *Flight Delay Compensation Standards In China*, 10 US-China Law Review 68 (2013); *Lack of compensation standard frustrates Chinese airline passengers*, www.wantchinatime.com (9/15/2013)].

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Travel Law: Stop Blaming the Passengers: Eradicate Norovirus Now

By Thomas A. Dickerson

Who is responsible for the contraction of disease while on vacation when a single traveler is infected [see Dickerson, *Travel Law: Duty to warn of dangerous environments—the case of the Chinese tick* (ETN)]. We shall examine disease outbreaks, typically, at hotels/resorts and on cruise ships which often affect hundreds of travelers. Who is responsible and what can be done to prevent future outbreaks?

Hotels/Resorts

There have been reported incidents of hotel guest sickness arising from tainted food [see *Howard v. Kerzner International Limited* (consumption of "fish with ciguatoxin at a restaurant in the Bahamas"); *Averitt v. Southland Motor Inn of Oklahoma* (food poisoning; violation of health codes; failure to warn guests of ingestion of shigella; punitive damages awarded)], contaminated water [see *Klein v. Marriott International, Inc.* (guest ill from contaminated water served at Bermuda hotel); *Amsellem v. Host Marriott Corp.*; ("hundreds of other people became ill after drinking the water"); *Joachim v. Crater Lake Lodge, Inc.* (contraction of "Crater Lake crud" from contaminated water)], carbon monoxide poisoning [see *Anson v. Star Brite Inn Motel* (guests allegedly "overcome by carbon monoxide that leaked into their rooms and suffered varying degrees of harm," complaint dismissed); *Expert: Chinese tourists died of carbon monoxide poisoning*, www.eturbonews.com (12/16/2013)], insecticide spraying [see *Gass v. Marriott Hotel Services, Inc.* (guests alleged that defendants "allowed dangerous chemicals to be sprayed inside their hotel room while it was still occupied"; complaint dismissed)], black mold (see *Ramsay v. Och-Ziff Capital Management Group* (guests alleged "they were exposed to black mold and suffered personal injuries; motion to dismiss strict liability claim denied)], MRSA [see *Frederick v. InterContinental Hotels Group* (guest allegedly contracted MRSA in hotel; complaint dismissed)], smallpox [see *Gilbert v. Hoffman* (contraction of smallpox at hotel; misrepresentations regarding safety)], ant poison [see *Johnson v. Wyndham Hotels and Resorts* (daughter of guest "drinks" ant poison from a tube of pesticide left on the night stand")] and possibly norovirus [see *Intestinal Virus Outbreak Shuts Down Mohonk Mountain House Resort In Catskills*, CBS News (February 7, 2014) ("An iconic mountain resort in the Catskills was temporarily shut down Friday, after an illness there left hundreds of people sick…The resort said it was working with the New York State Health Department, which confirmed to CBS 2 News the situation was consistent with norovirus"); *More Taiwanese tourists test positive for norovirus after trip to South Korea*, www.eturbonews.clom (1/7/2014)].

Legionnaires' Disease

And, of course, let's not forget the frightening Legionnaires' Disease as discussed in *Licari v. Best Western International, Inc.*, a recent case involving a hotel in Utah ("The Licaris allege that, during their stay, Ms. Licari was exposed to bacteria that caused her to contract Legionnaires' disease…" Legionnarires' disease is caused by a waterborne bacterium and results in a number of symptoms, including pneumonia. The disease acquired its name after an outbreak among American Legion convention-goers who were staying at a hotel in Philadelphia in 1976…the disease caused illness in 221 individuals, with thirty-four deaths…The plaintiffs claim that due to the Paradise Inn's failure to properly maintain its potable water distribution system, colonies of legionella bacteria were able to form in unsafe levels…A subsequent investigation by the CDC (and other agencies) determined that five cases of Legionnaires' disease occurred between June 2009 and December 2009 in patients whose only commonly shared trait was that they all stayed at the Paradise Inn…The Licaris may present a jury with evidence that Best Western should be held liable…under a theory of apparent authority"); see also *Boyle v. Starwood Hotels & Resorts* (guest alleges contraction of Legionnaires' disease at a hotel located in United Arab Emirates; *forum non conveniens* motion granted); *Braucher v. Swagat Group* (guest alleges contraction of Legionnaires' disease; doctrine of *res ipsa loquitur* not applied); *Sudbeck v. Sunstone Hotel Properties* (guest exposed to Legionnaires' disease; "a reasonable trier of fact could find that Sunstone had itself established the requisite standard of care and in failing to follow its own (standard) had not exercised due care")].

Cruise Ships

In addition to hotels, the contraction of Legionnaires' disease has been reported on cruise ships allegedly caused by defective spa pool filters [see *In re Horizon Cruises Litigation* (motion to strike demand for punitive damages denied); *Freeman v. Celebrity Cruise, Inc*. (cruise passenger claims physical illnesses and emotional distress after learning of exposure to Legionnaires' disease; class certification granted); *Celebrity Cruises, Inc. v. Essef Corp.* (Jury award of damages of $190 million to cruise line against manufacturer of water filter; modifies and remitted for retrial on lost profits); *Hague v. Celebrity Cruises, Inc.* (passenger who suffered from Legionnaires' disease awarded

compensatory damages)]. In addition bacterial enteritis may have been contracted by a passenger [see *Bird v. Celebrity Cruise Line, Inc.* (passenger "rushed to the emergency room several days after (cruise ended)…claims that she was diagnosed with bacterial enteritis, a disease she allegedly contracted as a result of poisoning from food")].

Norovirus

As noted in Peterson, *Leading Passengers to Water, New York Times* (September 28, 2003) "The norvirus, as the Norwalk virus has been renamed, has been making unwelcome headlines in the cruise industry for a decade or more, most recently when the Regal Princess…tied up in New York early this month with 301 of 1,529 passengers and 45 of a crew of 679 stricken with the illness. The virus is so closely associated with cruise ships that it has come to be called the cruising sickness…cruise ships are an ideal vessel for spreading the virus, said Dave Forney chief of CDC's Vessel Sanitation Program…' You have 3,400 passengers in a relatively confined space for 10 days at a time, so if you have someone who throws up in an elevator or has an accident in a restroom, the risk becomes actually quite high for many people."

CDC Norovirus Response

The U.S. Centers for Disease Control and Prevention (CDC) must be recognized for its ongoing efforts to protect travelers from, among other things, unsanitary cruise ships [see http://wwwnc.cdc.gov/travel/page/cruiseship]. While the CDC's passenger recommendations regarding norovirus are seemingly helpful, e.g., "The best way to prevent illness is frequent handwashing with soap and water. Wash your hands before eating and after using the bathroom, changing diapers, or touching things that other people have touched, such as stair railings; it is also a good idea to avoid touching your face," such "hands-on" suggestions shift blame to the passengers and do not solve the problem.

Hand Washing May Not Be Enough

First, they haven't worked to stop the repeated outbreak of norovirus as the CDC's own data indicates [see "Outbreak Updates for International Cruise Ships" on CDC website]; see also Bakalar, *Why Norovirus Crops Up in Cruises*, *New York Times* (2/11/2014) ("By the time the Explorer of the Seas docked in Bayonne, N.J., late last month, more than 600 passengers and crew members were sick to their stomachs; the Caribbean Princess arrived in Houston the same day after an outbreak sickened at least 192 people onboard. Over the past five years, an average of about 14 cruise ships a year have had outbreaks of diarrheal illness and the culprit is almost always norovirus, as it was on these two ships.").

Blaming the Passengers

Second, the CDC should not be satisfied with blaming the passengers [Bakalar, supra ("Jan Vinje, head of the National Calivirus Laboratory at the (CDC), said… The cause is not necessarily cruise line maintenance … The problem…is passengers. 'If Grandma is sick when she gets on, she's going on the cruise anyway'"] and should do whatever it takes to "encourage" cruiselines to thoroughly clean their ships before and during each cruise [see Bakalar, *supra* ("Dr. Philip C. Carling, a clinical professor of medicine at Boston University, said that regardless of the origin, once onboard, the illness spreads widely. He says the reason is failure to clean restrooms properly. In a study published in Clinical Infectious Diseases in 2009, he marked toilet seats, flush handles and other objects in restrooms on cruise ships with an easily removed substance, visible only under ultraviolet lights. Then examiners returned the next day to see if the substance had been wiped away. Only 37 percent of the 8,344 objects marked were cleaned daily. On three ships that had baby-changing tables, none were cleaned at all during the three-year study period…'Of course they've been doing a good job with food'…But they're not doing any routine examination of cleaning processes'. The C.D.C. does inspect ships but not every changing table or bathroom even. 'We inspect some bathrooms, and we don't inspect for norovirus' said Bernadette Burden, an agency spokeswoman.")].

Insufficient Disincentives

Third, the consequences for cruise lines when their passengers suffer from a norovirus outbreak may be insufficient to encourage the development of serious (and perhaps costly) cleaning processes. Typically, a cruise line may offer stricken passengers some compensation and/or a substantial discount on a future cruise and/or the cruise ship may appear on the CDC's list of norovirus Outbreaks. However, these disincentives may be meaningless given the increasing public demand for cruising. It may, simply, be more cost effective for cruise lines to just go with the "flow" instead of implementing measures to eradicate norovirus disease.

Conclusion

The CDC and cruise lines need to allocate the resources necessary to stamp out norovirus now by developing rigorously enforced cleaning processes.

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Travel Law: Liability for Unfavorable Travel Reviews: The TripAdvisor.com Case

By Thomas A. Dickerson

This article discusses the potential liability of Internet websites such as TripAdvisor.com that may post unfavorable travel reviews of hotels and other suppliers.

Traditional Sources of Information

There was a time not long ago when consumers interested in taking a vacation would consult their local retail travel agent and/or purchase a guide book featuring a particular destination and its hotels, restaurants and local sites of interest. The information provided the curious traveler may or may not have been accurate and was often self serving. As I noted in *Travel Law,* "Hotel ratings are virtually meaningless. Nevertheless travelers rely upon these self-descriptions as if they were accurate evaluations of the true nature of the hotel. (In addition) Most countries have their own independent rating system for hotels (making it impossible to compare hotels as between countries)." Further, whether superlatives such as "first class," "special," "luxurious" and "best in the world" have any practical or legal meaning depends upon whether a court finds them to be "actionable" [See, e.g., *Vallery v. Bermuda Star Line, Inc*. (terms such as "first class," "beautiful" and "exquisite" regarding cruise ship were misleading and deceptive and "transcended the bounds of a statement of opinion and reached the level of false representations and pretenses when the brochure assigned qualities in the stateroom in issue which it did not possess")] or mere "puffing" [see e.g., *Viches v. MLT, Inc.* (brochure promising "worry free" vacation is "mere puffing" and no guarantee of no harm); *Simon v. Cunard Line Limited* (QEII described as "greatest ship in the world" is mere puffing and not actionable].

The Online Revolution

The Internet has not only added a host of Online Travel Sellers stimulating the development of new marketing models [e.g., Priceline, Travelzoo, Hotwire, Tingo, Guestmob and Site59's 'last-minute-air-plus-land-packages'] but an ever increasing number of specialized travel websites such as Farecast.com, Farecompare.com, Google.com, Kayak.com, Hipmonk.com, Vayable.com, TheSuitest.com, and Tripshare.com which help the traveler obtain accurate information, do comparison shopping and obtain the best price. And lastly, traveler-generated reviews are now posted on Internet websites. As noted in the *New York Times* [Christiansen, *Travel Trends and the Year Ahead*, January 7, 2014], "A study conducted by eMarketer suggested that nearly two-thirds of all travelers today research online before they book. Even 10 years ago that was probably in the single digits."

TripAdvisor.com

As stated by the Court in *Seaton v. TripAdvisor, LLC*, 2012 WL 3637394 (E.D. Tenn. 2012), *aff'd*, 728 F. 3d 592 (6th Cir. 2013) "TripAdvisor, LLC…does business throughout the United States and worldwide by means of an Internet website located at www.TripAdvisor.com (and provides) travel research information, including reviews, reports, opinions, surveys…regarding hotels, resorts, restaurants and other similar businesses of interest to persons traveling or making travel plans worldwide. (TripAdvisor) advertises that it adheres to certain rules and regulations of fairness in its ratings and reports concerning the hotels and restaurants it surveys. Its website proclaims that…TripAdvisor provides "the world's most trusted travel advice"…Visitors to TripAdvisor's website use its forums to exchange information relating to travel issues. TripAdvisor users are further encouraged to post comments and reviews and to answer surveys regarding hotels, resorts, restaurants and other such places of interest."

The Dirtiest Hotels List

"TripAdvisor also creates and publishes on its website various lists, reports and rankings (including) the 'Dirtiest Hotels' list created, published and distributed annually by TripAdvisor from 2006 to 2011 (and features) a list of ten hotels, ranked from one through ten with number 'one' designated as the 'dirtiest hotel.' When compiling its 'Dirtiest Hotels' list, TripAdvisor relies solely on customer reviews; it does not inquire about, investigate or consider any hotels except those receiving comments or reviews on the TripAdvisor website" (*id.*)

The 2010 Dirtiest Hotels List

In 2010 the *New York Times* noted the language used in TripAdvisor reviews in describing some British hotels including "Cradle of Filth: The Worst, Worst, Worst Hotel in the World," "Slept in my clothes" and "Made me think of my own grave.""Those are just a few excepts from reader-generated reviews of various hotels in Britain, culled from the '2010 Dirtiest Hotels' list published recently by Tripadvisor.com… Tripadvisor says it has reviews from more than 450,000 hotels around the world" [Sharkey, "A List No Hotel Wants To Be On," *New York Times*, Business Section (February 8, 2010)].

2011 Dirtiest Hotels List

It is not surprising that a hotel receiving an unfavorable review would sue TripAdvisor alleging defamation. Such was the case after TripAdvisor published its "'2011 Dirtiest Hotels' list report[ing] that (Hotel X) was 'the dirtiest hotel in America'…

The survey was published via TripAdvisor's website and several media entities…The list incorporated a photograph and a quote from TripAdvisor users about each of the ten hotels, as well as a link to hotel's page on TripAdvisor's website. The user quote for (Hotel X) was "There was dirt at least ½" thick in the bathtub which was filled with lots of dark hair.' The photograph for (Hotel X) was a ripped bedspread" (*id*.).

The Lawsuit

The "sole proprietor" of Hotel X brought suit in Tennessee Circuit Court and the action was removed to the United States District Court, Eastern District of Tennessee. The original complaint alleged that TripAdvisor was "liable for 'maliciously and wrongfully contriving, designing and intending to cause respected customers to lose confidence in (Hotel X) (and causing) great injury and irreparable damage to and to destroy (Hotel X's) business and reputation by false and misleading means…(Hotel X) further alleges that (TripAdvisor) 'defam[ed] the (Hotel X's) business with unsubstantiated rumors and grossly distorted ratings and misleading statements to be used by consumers'…'used a rating system which is flawed and inconsistent and distorts actual performance and perspective'…and 'acted recklessly and with disregard to (Hotel X's) right to carry out its business…'" (*id*).

The Decision: Rhetorical Hyperbole

In reviewing the *Seaton* trial court's dismissal of Hotel X's complaint, the 6th Circuit Court of Appeals (728 F.3d 592 (2013)) noted that 'In the present case, Seaton's claim for defamation turns on whether TripAdvisor's '2011 Dirtiest Hotels' list is capable of being understood as defamatory. Although the (U.S.) Supreme Court has refused to give blanket First Amendment protection for opinions, its precedents make clear that the First Amendment does protect 'statements that cannot be interpreted as stating actual facts about an individual'." In agreeing with the trial court the Court of Appeals held that 'Seaton failed to state a plausible claim for defamation because TripAdvisor's '2011 Dirtiest Hotels' list cannot reasonably be interpreted as stating, as an assertion of fact, that (Hotel X) is the dirtiest hotel in America. We reach this conclusion for two reasons. First, TripAdvisor's use of 'dirtiest' amounts to rhetorical hyperbole. Second, the general tenor to the '2011 Dirtiest Hotels' list undermines any impression that TripAdvisor was seriously maintaining that (Hotel X) is, in fact, the dirtiest hotel in America. For these reasons, TripAdvisor's placement of (Hotel X) on the '2011 Dirtiest Hotels' list constitutes nonactionable opinion."

Conclusion

It is a brave new world of available travel information on the Internet and traveler reviews are, clearly, here to stay.

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A "Duty to Mitigate"? Civil Claims Against Liquor Establishments for Sexual Assaults Under Existing Premises Liability Law

By Nicholas B. Adell

American society must contend with the endemic problem of rape. Conservative statistics suggest that one in ten American women will be forcibly raped in her lifetime. An additional eight percent of all women have been assaulted while under the influence of alcohol or drugs and unable to give consent.[1] These formidable numbers are exacerbated by the fact that 85 to 95 percent of assaults are not reported to law enforcement.[2] Many victims who do seek police assistance often feel they've been raped twice: once by the perpetrator and again while being cross-examined.[3] Criminal law's high burden of proof and the defendant's constitutional right to cross-examination deter many rape victims from coming forward.[4] Accordingly, tort law presents novel routes for victims to pursue, particularly in assigning liability beyond the assailant.[5]

Tort law remedies private wrongs by trying to place a particular victim in the position she would have been in had the harm not occurred, deters future conduct by a similar class of negligent or intentional perpetrators, and apportions liability among various actors in a manner best serving societal interests. Tort does not act as a substitute for criminal proceedings nor for wider social deliberations about how to best ameliorate the offense and cultural conditions fostering rape. However, it can provide a vehicle for imposing a responsibility on culpable parties to trigger eventual legislative action.

This article argues for imposing liability on establishments serving liquor under a premises liability theory when a victim has been sexually assaulted as a result of a tavern's failure to provide an adequate level of care under a business's duty to its invitees. It further suggests the creation of an affirmative duty to mitigate such sexual assaults through various preventative measures founded on a "reasonably foreseeable" standard of premises liability.

There is a strong relationship between sexual violence and alcohol in our culture. A study of American men who had committed rapes revealed that 80.8% of the men reported raping women who were incapacitated because of drugs or alcohol.[6] Bars and nightclubs are necessarily public places. Both women and men gather to drink, and (occasionally) over-indulge, negating any possibility of consent in a sexual scenario. The assaults that follow are inexorably linked to a bar's service of liquor to its patrons. A bar owes a duty of care to all its customers. That duty extends to ensuring the safety and security of those drinking while in and after they leave the bar, provided such potential harms are foreseeable. Because of these twin obligations, bars can effectively be held liable for assaults that occur as a result of their proximate negligence.

Progressive organizations are addressing this exposure in a positive manner, advocating for deterrent steps alleviating a woman's exposure to potentially dangerous situations in and around taverns.[7] This effectively serves the purposes of both tort law and society at large; liquor establishments will be forced to devise heightened security measures and attempt to mitigate sexual assaults arising out of the consumption of alcohol, which—when carried out successfully—will insulate those same establishments from greater liability in the long-run.

Holding Bars Liable for Proximate Sexual Assaults Under a Premises Liability Theory

Tort law has long acknowledged a duty on behalf of businesses to shield their invitees from harm. This duty requires taking reasonable measures to prevent foreseeable harms.[8] [9] The Restatement (Second) of Torts § 344 (1965) defines the scope of liability affixed on landowners:

> A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to (a) *discover* that such acts are being done or are likely to be done, or (b) give a *warning adequate* to enable the visitors to avoid the harm, or otherwise to protect them against it.[10]

Many courts seeking to pen an appropriate field of accountability have analyzed Comment *f* to § 344:

> [The] possessor is not an insurer of the visitor's safety…He may, however, know or have reason to know…that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual. If the place or character of his business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection.[11]

These generalized Restatement provisions—a duty to investigate reasonable potential harms and a duty to inform and protect based on a likelihood of conduct taking into account the totality of the relevant circumstances—have been further tailored into four approaches endorsed by various courts. The first, somewhat obsolete, is known as the *imminent harm* rule.[12] Under this theory, a landowner owes no duty unless he is aware of specific, imminent danger to his patrons. A second approach is a *prior incidents* test. Evidence of prior crimes on or near the premises is needed to establish a duty between owner and patron. Factors for this test follow a holistic negligence standard: Frequency, recency, and similarity of previous crimes are taken into account. These conservative tests reflect an unwillingness to, in the Restatement's words, make a landlord "the insurer of a visitor's safety."[13]

In a 2011 case, *Bass v. Gopal,* the Supreme Court of South Carolina criticized this limited scope of duty. Their logic loosely paraphrased Jackson Browne: "Don't think it won't happen just because it hasn't happened yet." The court reasoned it was inequitable to give a landowner "one free assault before he can be held liable for criminal acts which occur on its property." Such a policy means the first victim always loses. Reasonable accidents can be anticipated even if they have not yet occurred.[14] Thus, many courts have been willing to adopt a broader "totality of the circumstances" analysis. Under this test, courts widely examine the closeness of the connection between the injury and the defendant's conduct, the moral blame attached to the defendant's conduct, the policy of preventing future harm, and the prevalence and availability of insurance.[15] The nature, condition, and location of the land *alongside* prior similar incidents are taken into account.[16]

However, the totality test is by design quite wide-reaching. A goal of tort is to fairly allocate resources; the totality test can lead to landowners taking expensive and ineffective steps to insure their premises with marginal impacts on an invitee's safety. Thus, California, Louisiana, and Tennessee have adopted a "balancing" test that evaluates the foreseeability of the harm against the duty imposed.[17] As Judge Richard Posner wrote in a case involving a rape in a hotel: "…The hotel should increase its expenditures on security until the last dollar buys a dollar in reduced expected crime costs…to the hotel's guests."[18] Balancing the totality of the circumstances to determine the foreseeability of a crime with the appropriate reasonable security measures that ought to be taken forms the basis for assigning liability in sexual assault scenarios which occur within bars.

The Illinois Appellate Court examined the extent of reasonably foreseeable actions in *Loomis v. Granny's Rocker Night Club*. In *Loomis,* a bar ran Wednesday night "fanny contests," drawing a "rowdy crowd." A fight broke out in the bar following words exchanged between two men. The court held that "evidence was presented that the altercation was reasonably foreseeable by Granny's Rocker and that defendant could have prevented it or could have at least interfered in the altercation prior to Loomis sustaining the injuries to his ear."[19] A Supreme Court of Texas case involving a closing-time fight between parties who had been threatening each other for at least ninety minutes, resulting in an injury to a third party, also found that the bar was under a duty to take actions to make the condition of the premises reasonably safe.[20] Additionally, the Supreme Court of North Dakota imposed liability under similar circumstances—albeit without any provocative warning signs—for a barroom assault.[21]

Sexual assaults are as—if not more—serious as violent physical altercations. They, like fights, are naturally associated with a condition that bars and nightclubs promulgate—serving alcohol in a crowded space. Based on the enumerated factors inherent to the "balancing" approach, particularly the magnitude of the harm to be prevented, bars are conceivably liable for sexual assaults which happen on their premises. Accordingly, an analysis based on the "character of the business" itself speaks to the conclusion that there is an intrinsic possibility that a woman may be sexually assaulted while out at a bar. The first victim need not lose out so that potential future plaintiffs may recover. Judge Posner's contention that security expenses should be commensurate with reduced expected crime costs to patrons provides the appropriate scope of a bar's duty to mitigate against sexual assaults. However, an analysis of the harm falters without factoring in the many consequential results bars take indirect responsibility for.

Cases assigning liability after subjecting the facts at hand to a balancing test consistently emphasize the importance of the "character of the business" coupled with an inquiry into whether a "reason to know" such a violent crime might reasonably be perpetrated on the premises.[22] A Tennessee case, *McClung v. Delta Square Ltd. Partnership,* involved a woman who was abducted from a parking lot and later raped and murdered. The woman's husband brought an action against the owners and operators of the lot for negligently failing to provide adequate security. The court held that the burden of installing surveillance cameras, improved lighting, and posting signs may be both cost-effective and greatly reduce the risk to customers. Given the magnitude of the harm associated with abduction, such measures should reasonably have been undertaken.[23] It reasoned that "the merchant is in the best position to know the extent of crime on the premises and is better equipped than customers to take measures to thwart it and to distribute the costs."[24] A whole line of "parking lot" cases have consistently affirmed the principle that criminal events occurring on a lot, leading to further criminal conduct, are not superseding causes abating liability when the landowner is on reasonable notice of the inherent dangers within the situation.[25]

Similarly, liability for sexual assaults occurring off bar premises can be imposed. Liability has been found in instances where a party injured by an intoxicated driver brings an action against the bar in which the driver was drinking. In one Illinois case, two men who brought their

own alcohol to a strip club were subsequently ejected from after one became visibly intoxicated and was vomiting in the restroom. The two then got into an accident, killing three.

Even though the club did not serve alcohol to the men, a duty was established. Through selling the men ice, glasses, and mixers, and a valet attendant's pulling their car around and opening the door, the court reasoned that it was proximately reasonable to infer that the two would drive drunk and cause a risk to others. The club assumed a duty once it threw the men out; merely ejecting trouble-makers from the premises does not abate a duty, and in this instance, actually created one.[26] Thus, a "duty to protect" patrons and innocent third-parties does not end at the door; bars must keep in mind the logical actions of such persons after they leave the premises as well.

This rationale is analogous to a Nebraska case where a bartender told two quarreling patrons to "take it outside." The two fought, and one of the patrons brought an action against the bar for trying to escape liability by kicking the two out and failing to prevent a foreseeable altercation.[27] The defendant claimed that the subsequent fight was an intervening cause as a matter of law. The court disagreed, citing a New Jersey parking lot case:

> The doctrine that an intervening act cuts off a tortfeasor's liability comes into play only when the intervening cause is not foreseeable. Foreseeability that affects proximate cause relates to the question of whether the specific act or omission of the defendant was such that the ultimate injury to the plaintiff reasonably flowed from the defendant's alleged breach of duty.[28]

Thus, actions which are "reasonably foreseeable within the scope of the risk occasioned by the defendant's negligence cannot supersede that negligence."[29] Neither court makes mention of an on-off premises distinction. Accordingly, the test for determining liability for criminal actions regardless of where they occur is foreseeability subject to a balancing assessment incorporating a cost-benefit security analysis taking into account the nature and context of the establishment.

Imposing a Duty to Mitigate Sexual Assaults Under Existing Premises Liability Law

Case law forms a framework for civil negligence suits against liquor establishments based upon a failure to take reasonable precautions to prevent foreseeable felonious behavior. Judge Posner's theory of balancing harms with prudent preventative security measures stipulating safety methods proportionate to the harm at hand serves a resource-allocative function protecting bars and patrons alike.

A "light hand" duty already imposes a responsibility on a bartender not to over-serve his customers. Certain other obligations in line with premises accountability stemming from a failure to protect female customers ought to be implemented. *A "zero tolerance" policy on groping and unwanted advances, banning repeat "problem customers," framing a training program fostering awareness for bar employees, and generally securing a location with added personnel and structural improvements form the basis for a more robust duty to female customers, in turn insulating the establishment from large-scale legal culpability.*

In 2003, the federal government enacted the Illicit Drug Anti-Proliferation Act. The Act imposed accountability on anyone knowingly owning, renting, or maintaining a place for the distribution of such a controlled substance (in this instance, the popular "club drug" ecstasy as well as GHB: the "date rape" drug).[30] The law helped to foster a more serious approach to combating the presence of drugs on the part of club owners.[31] "Prosecutors now have discretion to prosecute legitimate rave promoters for the personal, casual drug use of their patrons."[32] Such a policy deters reckless conduct on behalf of club owners and furthers public safety. It generates an incentive to diminish drug use and distribution by stopping the buck at the very first on-premises sale.

Analogies can be drawn and comparable obligations imposed with regard to combating pervasive antagonistic sexual conduct within bars. Similar to lax drug enforcement, a lack of intervention fosters the impression that casually aggressive sexual behavior is acceptable.[33] Knowing that such behavior—backside gropes on the dance floor, unwanted physical impositions at the bar—creates a more permissive environment; bars ought to take proactive steps to limit their tolerance of it. Doing so would protect women *and* lessen the probability of further proximately liable assaults.[34] A "zero tolerance" policy is a straightforward and enforceable message that doesn't contradict the fun and rambunctious elements of a bar. Such policies could be both explicit and implicit, in writing and imposed by physical action. They reinforce the message that certain currently tolerated behaviors are put on notice, fashioning new social norms stigmatizing petty yet unnerving conduct. Accordingly, by preemptively addressing actions often indicative of potentially more serious consequential crimes, bars can compellingly alter an often-hostile climate to female patrons.[35]

A 2002 study of admitted rapists found that 63.3% acknowledged committing multiple rapes, at an average of 5.8 each.[36] This shocking statistic further bolsters the theory that a bar can be an inherently dangerous place to a woman. Consequently, "problem customers" whose past behavior highlights a pattern of malicious acts must be closely scrutinized and barred when necessary.[37] Banning customers shown to have acted inappropriately more than once comports with a zero-tolerance policy on aggressive sexual behavior. Such repeat aggressors "cruise" for victims, preying on inebriated women: research confirms that "the fact that [aggressors] tend to go for drunken women suggests they know their overtures are unwanted:

a tipsy target can't protect herself as effectively as a sober one."[38] These slick operators undermine the holistic safety of all patrons and are a scourge on both the rapport and economic health of a bar. One habitual lurker can give an entire establishment an underserved reputation for seediness, deterring potential patrons.

Integral to these duties is having a properly trained staff capable of spotting potential issues. In Boston and Washington, programs training bar staff to recognize and deter inappropriate sexual aggression have begun to gain traction.[39] These programs emphasize the value of vigilant staff; the Boston Area Rape Crisis Center (BARCC) implores owners to reinforce that "patron safety and well-being" trumps generating sales.[40] BARCC suggests that owners encourage staff to keep patrons safe as part of overall good service: highlighting Dram Shop liability and the right of refusal. It further argues that owners should post signs in bathrooms and other corridors letting patrons know that management is willing to help in an uncomfortable situation, giving the name of a Manager-on-Duty. Finally, while monitoring individual patrons' drinks may be impractical, BARCC nonetheless recommends posting signs and giving patrons verbal reminders to watch their beverages.[41] These steps provide assistance to potential victims by providing "safety, empowerment, empathy, and knowledge."[42]

Underpinning the establishment of duties to implement a zero-tolerance policy, ban repeat offenders, and train staff is the legal imperative for implementing adequate security measures. Taking relatively easy steps such as installing high-wattage lighting in bathroom corridors, posting notice of the potential danger of sexual assaults in prominent areas, providing easy access to local taxi companies, and regular staff sweeps of back areas are low-cost safety practices that significantly heighten awareness of a lurking problem. A prudent cost-benefit analysis bears out the simple reality that nearly all reasonable methods protect rather than expose property owners to unnecessary expense. As one commentator has noted: "Social and commercial providers of alcohol should expect their burden of responsibility to continue to increase as more lawsuits are filed and the public becomes more aware of dollar longnecks and $35 million dollars in damages."[43] Owners have an obligation to physically secure their premises through hiring security and training staff to spot malicious behavior as well as installing lighting, cameras, and signage to mitigate against a permissive climate of sexually antagonistic conduct.

Why Hold Bars Liable in the First Place?

These obligations appear on their face to miss the true offender of sexual aggression: the perpetrator himself. Yet the offender is often impervious to criminal liability; only 8% of rapes result in a criminal prosecution. Few victims still are willing to bring a personal civil action against their assailant.[44] While tort law presents a lower burden of proof, few victims are comforted by the lesser anonymity provided by a civil action, the length of the action itself, and the limited verdicts imposed upon low-income perpetrators.[45] Obtaining a personal debt from an offender to the victim is thus often precluded by the limits of personal assets as well as indignity inherent in making rape restitution a matter of monetary exchange.[46]

Third-party responsibility in the form of premises liability gets at the next-in-line culpable party as a means of encouraging better safety procedures and making the victim whole. Civil liability against proximately negligent bars serves a similar purpose in going after the "next best" available defendant to foster a societal shift in attitudes toward sexual assault prevention.[47]

How Liability Both Serves Social Justice and Protects Bars

Imposing duties of care manifestly creates a safer situation for women in bars. Mandating that bars mitigate against a known danger calls awareness to a rampant problem and promotes reasonable safety measures enhancing the security of patrons and staff alike. Yet owners themselves stand to gain a great deal from an expansion of this form of premises liability. As one commentator has noted: "By looking at [relevant] cases, companies can clearly see the high cost of premises security liability—and the true value of putting in adequate security measures before it's too late."[48] The extreme probative value of one large damages award to a plaintiff can cripple an otherwise successful and law-abiding business. It is simply prudent to acknowledge the legal basis for a duty to ensure adequate security and deterrence and reckon with it—paying limited out-of-pocket costs for training and structural upgrades preemptively to avoid a protracted lawsuit. Expanding liability could in turn reduce incidents and limit litigation to only the most egregiously negligent cases.

An enlarged duty, too, addresses both of the principal schools of thought on tort law: corrective justice and deterrence theory. Sexual assault victims often cannot obtain the justice they desire through criminal law; civil remedies make such plaintiffs whole by targeting third-parties with both sufficient assets and an existing premises duty of care. In the absence of a strong legislative signal, the onus is on the victim to assume the burden of suing an expansion and enforcement of legal duties and accordant damages to foster social change. Such suits would send a powerful signal that certain behaviors are beyond the realm of acceptable actions and must be mitigated against by property owners.

Tort law's deterrent function potentially serves even greater social utility. Judge Posner has argued that "the fear of a negligence suit [creates] incentives on the part of enterprises to make their activities safer, up to the point that it [becomes] cheaper to pay tort damages."[49] Resource optimization, rather than altruism, underpins the acceptance of new duties. In line with Judge Learned Hand's "negligence calculus," the burden of adequate security clearly is preferable to take on given the magnitude of resultant injuries

(and damage awards) and probability of assaults occurring.[50] Hand's formula, based in part on the seminal Coase theorem, posits the possibility of a social and economic equilibrium; bars insulating against a heightened negligence standard will in turn pass such costs on to customers, who conversely accept such premiums as a reasonable guarantee of their safety.

In short, the expansion of legal duties for liquor establishments for proximately caused sexual assaults based on a premises liability theory makes victims whole, fosters a safer drinking environment for women, and insulates establishments themselves from potentially crippling high-stakes lawsuits.

Endnotes

1. Jody Raphael, Rape is Rape 88 (2013).
2. Lorna J.F. Smith, Concerns About Rape, Home Office Research Study No. 106, at 1 (1989).
3. Sandra Laville, *Degraded Victim Abandons Anonymity,* The Telegraph, May 18, 2001, http://www.telegraph.co.uk/news/uknews/1330709/Degraded-victim-abandons-anonymity.html.
4. *State v. DeLawder*, 344 A.2d 446 (Md. 1975).
5. Ellen M. Bublick, *Tort Suits Filed by Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms, and Constituencies*, 59 SMU L. Rev. 55 (Winter 2006).
6. David Lissak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists,* 17 Violence and Victims 1 (2002).
7. BARCC and Collective Action DC are two such organizations the author has contacted regarding their work in this field.
8. *Troxel v. Iguana Cantina, LLC*, 29 A.3d at 1048 (Md. 2011).
9. Additionally, finding liability under a premises liability theory requires the four elements of a common law negligence claim to be proven: Duty, Breach, Causation (Factual & Proximate), and Injury. See *Pipher v. Parsell,* 930 A.2d 890 (Del. 2007).
10. Restatement (Second) of Torts § 344 (1965).
11. *Seibert v. Vic Regnier Builders, Inc.,* 856 P.2d 1332 (Kan. 1993).
12. *Bass v. Gopal*, 716 S.E.2d 910 (S.C. 2011).
13. Restatement, *supra* note 10.
14. *Bass*, *supra* note 12.
15. *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968).
16. *Bass, supra* note 12.
17. *Ann M. v. Pacific Plaza Shopping Ctr.,* 863 P.2d 207, 214–15 (Cal. 1993).
18. *Shadday v. Omni Hotels Management Corp.*, 477 F.3d 511 (7d Cir. 2007). Also see *Clohesy v. Food Circus Supermarkets, Inc.*, 694 A.2d 1017 (N.J. 1997).
19. *Loomis v. Granny's Rocker Nite Club,* 250 Ill.App.3d 753, 620 N.E.2d 664 (1993).
20. *Del Lago Partners Inc. v. Smith,* 307 S.W.2d 762 (Tx. 2010).
21. *Zueger v. Carlson,* 542 N.W.2d 92 (N.D. 1996).
22. *Seibert, supra* note 11.
23. *McClung v. Delta Sq. Ltd. Partnership,* 937 S.W.2d 891 (Tenn. 1996).
24. *Id.*
25. *See Seibert v. Vic Reginer Builders Inc.; Clohesy v. Food Circus Supermarkets, Inc.; Martinko v. H-N-W Associates*, 393 N.W.2d 320 (Iowa 1986).
26. *Simmons v. Homatas*, 236 Ill.2d 459, 925 N.E.2d 1089 (2010).
27. *Sacco v. Carothers*, 567 N.W.2d 299 (Neb. 1997).
28. *Id.*
29. *Id.*
30. Michael V. Sachdev, *The Party's Over: Why the Illicit Drug Anti-Proliferation Act Abridges Economic Liberties*, 37 Colum. J.L. & Soc. Probs. 585, 602 (2004).
31. Christopher Haas, *Owner and Promoter Liability in "Club Drug" Initiatives*, 66 Ohio St. L.J. 511, 531 (2005).
32. Sachdev, *supra* note 30, at 606.
33. Jake Blumgart, *Sexual Aggression in Bars and Clubs: Bartenders and Bouncers Need to Step Up to Protect Customers,* Slate, April 2, 2014, http://www.slate.com/articles/double_x/doublex/2014/04/sexual_aggression_in_bars_and_clubs_bartenders_and_bouncers_need_to_step.html.
34. Such a duty could conceivably encompass a "zero-tolerance" policy on the "date rape" drug GHB. Given existing penalties for allowing drug use and distribution within a premises, it makes strong economic sense to forcibly eradicate the presence of drugs.
35. Laura Bates, *Everyday Sexual Assault*, Huffington Post, March 9, 2012, http://www.huffingtonpost.co.uk/laura-bates/everyday-sexual-assault_b_1847497.html provides a good overview of the types of behavior I am referring to. So does http://www.collectiveactiondc.org/programs/safe-bars/. 3 adverbs.?
36. Lissak & Miller, *supra* note 6.
37. *Supra* note 25.
38. Katy Waldman, *Sexual Aggressors in Bars Aren't Necessarily Drunk, But Their Targets Are,* Slate, March 6, 2014,http://www.slate.com/blogs/xx_factor/2014/03/06/study_sexual_aggression_in_bars_and_clubs_depends_on_the_woman_s_level_of.html.
39. Blumgart, *supra* note 33. CASS's Safe Bars program provides the following documents directly to bars: BARCC, e-mail message directly to author, April 25 2014.
40. *Id.*
41. *Id.*
42. *Id.*
43. Elizabeth A. Ryan, *Can I Start You Off with Some Drinks?": An Analysis of Commercial Alcohol Provider Liability in Texas,* 39 Tex. Tech L. Rev. 45, 65 (2006). The $35 million refers to a Texas Dram Shop Act case where the seller of alcohol sold a twelve-pack of beer to an obviously intoxicated customer.
44. Morgan O. Reynolds, *Crime and Punishment in America, 1999,* Natl. Center for Policy Analysis, March 1, 1999, http://www.ncpa.org/pub/st229.
45. Ellen Bublick, *Civil Tort Actions Filed by Victims of Sexual Assault: Promise and Perils*, National Resource Center on Domestic Violence, http://www.vawnet.org/applied-research-papers/print-document.php?doc_id=2150.
46. Claire Bushey, *Why Don't More Women Sue Their Racists*, Slate, May 26, 2010, http://www.slate.com/articles/double_x/doublex/2010/05/why_dont_more_women_sue_their_rapists.html.
47. The "least-cost avoider" principle popular in strict and products liability cases is relevant here.
48. Teresa Anderson, *Laying Down the Law: A Review of Trends in Liability Lawsuits*, Security Management 43-51, October 2002.
49. Christopher J. Robinette, *Can There Be a Unified Theory of Torts: A Pluralist Suggestion From History and Doctrine*, 43 Brandeis L.J. 69 (Spring 2005).
50. See *United States v. Carroll Towing Co.*, 159 F.2d 169 (1947).

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The Erosion of the "One Bite" Rule

By Kevin G. Faley

Introduction

Although the dog may be man's best friend, the American public has been feeling the adverse effects of a growing dog population as dog-bite attacks are on the rise.[1] New York law holds dog owners liable for injuries caused by their pets only if the owners knew or should have known of their dog's "vicious propensity." Once this knowledge is established, the owner faces strict liability. The Court of Appeals has made it clear that the sole claim for such attacks lies in strict tort liability, rather than ordinary negligence.[2] Given this circumscribed standard—and the difficulty of proving prior notice—the popular saying is essentially true, that "every dog is entitled to one bite."[3]

However, the recent holding in *Hastings v. Sauve* has reformed the traditional rule. In *Hastings*, the Court of Appeals deviated from its long held common-law principles of liability and held that an owner of a domestic animal can be liable under ordinary negligence principles.[4]

The Common Dog-Bite Problem

There are approximately 83 million pet dogs in the United States and 47% percent of households own at least one dog.[5] A survey conducted by the Center for Disease Control (CDC) and the Humane Society of the United States revealed that an estimated 4.7 million dog bites occur in the U.S. each year.[6] Nearly 800,000 of those bites require medical care. Approximately two-thirds of dog bites occur on or near the victim's property. Most victims had a familiarity or prior dealings with the dog. Even more disturbing is that approximately 50% of dog attacks involved children under 12 years old.[7]

The rise in dog bites has had a deleterious effect on the insurance industry. Dog bites account for roughly one-third of homeowner insurance claims nationally and insurers paid an estimated $413 million on such claims.[8] In total, dog bite losses exceed one billion dollars per year.[9]

Interestingly, insurance companies also have their own "one bite rule."[10] "A company will pay for the first occurrence, but will then either cancel the insurance or add a 'canine exclusion'…[and] the next time the dog bites, the owner must pick up the tab." Some insurance companies go as far as refusing coverage to certain breeds, such as Pit Bulls, Dobermans, Rottweilers, Chows—concentrating on breeds that are responsible for a disproportionate number of injuries through the years.[11]

The Traditional "Vicious Propensity" Rule

The traditional "vicious propensity" rule was applied by the Court of Appeals in *Collier v. Zambito*.[12] The 12-year-old plaintiff was visiting the defendant's home and was invited by defendant to pet defendant's mixed breed dog, Cecil. As plaintiff approached, Cecil lunged and bit plaintiff's face. Defendants sought summary judgment emphasizing that they did not have prior notice of Cecil's vicious propensities, however, the Supreme Court denied the motion. On appeal, the Court of Appeals granted defendant's motion for summary judgment.

The Court articulated that the evidence submitted by plaintiff was insufficient to raise an issue of fact as to whether the dog had vicious propensities. It further acknowledged that "for at least 188 years, the law of this state has been that the owner of a domestic animal who either knows or should have known [of] that animal's vicious propensities will be held liable for the harm the animal causes as a result of those propensities." The Court clarified the meaning of viciousness and notice, as:

> Propensity to do any act that might endanger the safety of the persons and property of others in a given situation… [and the] knowledge of vicious propensities may of course be established by proof of prior acts of a similar kind of which the owner had notice.

Simply put, the Court re-established that the only way for the owner of an animal to learn of its vicious propensities is to witness the animal acting on such tendencies.

The nature of the attack does not demonstrate that the dog had a proclivity to such vicious behavior.[13] A dog bite does not constitute conclusive evidence of the animal's vicious state of mind.[14] "Beware of Dog" signs are typically "insufficient in the absence of any additional corroborative evidence that prior to the incident the dog demonstrated any fierce or hostile tendencies."[15] Courts have consistently held that breed alone is insufficient to establish a factual issue regarding the dog's vicious propensities.[16]

The Court of Appeals, in *Bard v. Jahnke*, held that an injury involving a domestic animal cannot create a claim for ordinary negligence, but rather, is also solely determined under the rules of strict tort liability.[17] In *Bard*, the plaintiff was engaging in carpentry work in a dairy barn on defendant's property. While working on the barn, plaintiff was attacked and injured by a charging bull owned by defendant. The defendant allowed the bull to roam the farm freely in order for it to breed with

cows, thus, knowing of the bull's heightened aggression level during mating season. Plaintiff argued that defendant was negligent in permitting the breeding bull to roam freely. The Court declined to apply the negligence standard. The Court reasoned that the bull "had never attacked any farm animal or human-being before…[and thus declined] to dilute the traditional rule…[of] vicious propensities."

In strong opposition, Judge Robert Smith dissented and recognized that adhering to such a rigid rule was antiquated and illogical. He perceived the majority's decision as contrary to precedent, asserting that "[t]his Court [became] the first state court of last resort to reject the Restatement rule." Expressing confidence in the Restatement (Second) Torts which provides that "[the] one who…harbors a domestic animal is subject to liability for harm done by animal…if [the] [owner] [was] negligent in failing to prevent the harm,"[18] Justice Smith further opined that restricting recovery in such circumstances to strict liability was contrary to fairness and unworkable.

However, after *Collier* and *Bard*, the Second Department allowed a dog attack case to proceed under a theory of negligence. In *Petrone v. Fernandez*, a mailwoman was injured while running away from an unrestrained Rottweiler that chased and attacked her. The Department held that a dog owner could be liable in negligence based upon his violation of a Local Leash law, even in the absence of the dog's prior vicious propensities.[19]

Additionally, in certain limited circumstances, constructive, rather than actual notice was sufficient to hold defendant liable for the harm caused by defendant's animal. In *Smith v. Reilly*, the Fourth Department, in a 3-2 decision, affirmed the lower court's denial of defendant's motion for summary judgment.[20] In *Smith*, a bicyclist collided with a dog when it ran onto the road and collided with plaintiff, causing plaintiff to be propelled over the handlebars. The Court found that "defendant's testimony that [the] dog had a propensity to 'bolt' from her residence…[raised] an issue of fact whether defendant had… constructive notice that the dog was either vicious or likely to interfere with traffic." The Court further opined that "the evidence submitted by plaintiffs also raises a triable issue of fact whether defendant had notice of the dog's proclivity to act in a way that created the risk of harm to plaintiff that resulted in the accident."

Such interpretations of the traditional rule, however, were short-lived. The Court of Appeals promptly stepped in and overturned both Appellate Division decisions.

First, in overturning *Petrone*, a unanimous Court left little doubt on the strict application of the vicious propensity rule. Addressing the Leash Law violation, the Court held that "defendant's violation of the Local Leash law is irrelevant because such a violation is only some evidence of negligence and negligence is no longer a basis for imposing liability after *Collier* and *Bard*."[21] Furthermore, the Court reaffirmed its holding in *Bard*, asserting that "when harm is caused by a domestic animal, its owner's liability is determined solely by application of the rule articulated in *Collier*."

Judge Pigott Jr., concurring in a separate opinion, discussed his apprehension with the traditional rule articulated in *Collier*. He suggested that "in [his] view, and for the reasons stated in Judge R.S. Smith's dissent in *Bard*, it was wrong to reject negligence altogether as a basis for liability of an animal owner." He further opined that "negligence by an owner, even without knowledge concerning a domestic animal's vicious propensity, may create liability."

The Court of Appeals then reversed the Fourth Department's holding in *Smith*.[22] The Court invalidated the lower courts reliance on testimony that the dog, on three to five occasions, escaped defendant's control, barked and ran towards the road, as insufficient to establish a triable issue of material fact. Preserving the traditional "vicious propensity" rule, it became clear that the Court of Appeals had no intention of deviating from its traditional rule, or so it seemed.

In With the New, Out With the Old

Although a bright-line rule regarding domestic animal owner liability was set in place, lower courts were apprehensive in applying the rigid application of the traditional rule. Even so, these courts were well aware of their duty to dismiss any case where an animal's prior vicious propensity could not be shown. However, in *Hastings v. Sauve*, the Court of Appeals decided to sidestep its long held precedent.

In *Hastings*, plaintiff was injured when the van she drove collided with defendant's cow on a public road.[23] The cow had been kept on defendant's property and there was ample evidence suggesting that the fence separating the property from the road was overgrown and in bad repair. Plaintiff contended that defendant was negligent in improperly confining the cow within his property. Although the Third Department dismissed the case and held in favor of defendant, it did so reluctantly. The Department noted that

> While we are obligated to affirm Supreme Court's dismissal of plaintiffs' claims against [defendant], we must note our discomfort with this [traditional] rule of law as it applies to these facts—and with this result. There can be no doubt that the owner of a large animal such as a cow or a horse assumes a very different set of responsibilities in terms of the animal's care and maintenance than are normally undertaken by someone who owns a house-

> hold pet. The need to maintain control over such large animal is obvious…here, plaintiff was injured not because the cow was vicious or abnormal, but because [defendant] allegedly failed to keep it confined on farm property and, instead, allowed it to wander unattended onto the adjacent highway. For this reason… traditional rule of negligence should apply to determine the legal responsibility of the animal's owner for damages it may have caused.[24]

The Third Department found that summary judgment was properly granted to defendants because the cow did not show any prior vicious propensities, stating that "it is not for this Court to alter [the traditional] rule and, while it is in place, we are obligated to enforce it." Thus, the Appellate Division followed the Court of Appeals precedent.

The Court of Appeals had a change of heart, recognizing the growing dissatisfaction in the application of the traditional rule among the lower courts. The Court revisited *Bard* and *Petrone* in reversing the Third Department's holding in *Hastings*. It accepted the fact that to apply the rule of *Bard* "in a case like this would immunize defendants who take little or no care to keep their livestock out of the roadway or off of other people's property." The panel of judges included Judge R.S. Smith and Judge Piggott Jr. —the two justices who respectfully criticized the Court's constant denial of allowing a negligence cause of action in prior cases. The Court did not "consider whether the same rule applie[d] to dogs, cats, or other household pets."[25] The Court further opined that the question regarding household pets "must await a different case," thus leaving open the possibility that the traditional "vicious propensity" rule may be on its way out.

Conclusion

The Court of Appeals is seemingly expanding liability for animal owners. Given the language of the *Hastings* case, it appears that it is only a matter of time before the Court expands its holding in *Hastings* to household pets.

Endnotes

1. Richard J. Serpe, *2013 Dog Bite Statistics Show Rise*, Virginia Dog Bite Lawyer (last visited Feb. 12, 2014), http://virginiadogbitelawyer.com/2013-dog-bite-statistics-show-rise-in-certain-dog-attacks/.
2. *Filer v. Adams*, 106 A.D.3d 1417, 1419 (3d Dep't 2013).
3. Kenneth M. Phillips, *New York Dog Bite Law*, Dog Bite Law (last visited Dec. 16, 2013), http://dogbitelaw.com/mixed-dog-bite-statute-states/new-york-dog-bite-law.html.
4. *Hastings v. Sauve*, 21 N.Y.3d 122, 125 (2013).
5. The Humane Society, http://www.humanesociety.org/issues/pet_overpopulation/facts/pet_ownership_statistics.html#.UrMcNWRDu6o (Sept. 27, 2013).
6. American Humane Association, http://www.americanhumane.org/animals/stop-animal-abuse/fact-sheets/dog-bites.html (last visited Dec. 15, 2013).
7. *Id.*
8. Mary Randolph, *Dog Owners' Liability Insurance*, Nolo Law for All (last visited Dec. 16, 2013), http://www.nolo.com/legal-encyclopedia/free-books/dog-book/chapter11-8.html.
9. Kenneth M. Phillips, *Dog Bite Statistics*, Dog Bite Law (last visited Dec. 16, 2013), http://dogbitelaw.com/dog-bite-statistics/dog-bite-statistics.html.
10. Randolph, *supra* note 8.
11. *Id.*
12. *Collier v. Zambito*, 1 N.Y.3d 444, 446 (2004).
13. *Massimo v. Monfredo*, 272 A.D.2d 306, 307 (2d Dep't 2000).
14. *Rogers v. Travis*, 229 A.D.2d 879, 880 (3d Dep't 1996).
15. *Lugo v. Angle of Green, Inc.*, 268 A.D.2d 567 (2d Dep't 2000).
16. *Mulhern v. Chai Mgmt.*, 309 A.D.2d 995, 997 (3d Dep't 2003).
17. *Bard v. Jahnke*, 6 N.Y.3d 592, 599 (2006).
18. *Id.* at 600.
19. *Petrone v. Fernandez*, 53 A.D.3d 221, 222 (2d Dep't 2008).
20. *Smith v. Reilly*, 83 A.D.3d 1492, 1493 (4th Dep't 2011).
21. *Petrone v. Fernandez*, 53 A.D.3d 221 (2d Dep't 2008), *rev'd*, 12 N.Y.3d 546, 550 (2009).
22. *Smith v. Reilly*, 83 A.D.3d 1492 (4th Dep't 2011), *rev'd*, 17 N.Y.3d 895, 896 (2011).
23. *Hastings v. Sauve*, 94 A.D.3d 1171 (3d Dep't 2012), *rev'd*, 21 N.Y.3d 122, 124 (2013).
24. *Id.* at 1173.
25. *Id.* at 126.

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3D Printing—The New Industrial Revolution: Innovation or Infringement?

By James A. Johnson

Additive Manufacturing, or 3D Printing, is a process of making a three-dimensional solid object of virtually any shape from a digital model. 3D Printing is achieved using an additive process, where successive layers of material are laid down in different shapes. Additive manufacturing is expanding to become a manufacturing paradigm. It may be the next industrial revolution. But, it creates problems for intellectual property owners.

Additive manufacturing is expanding to become a manufacturing paradigm that potentially will disrupt the current industrial manufacturing base. Proliferation of industrial-level 3D printers is available that can make plastic objects to industrial printers that can print materials such as metal and glass. Thus, a 3D printer is potentially an infringement machine. This process enables physical products and parts protected by intellectual property laws to be replicated. There is no need to buy a replacement part when one can simply print one up from a file. This means virtual inventories and low cost volume production. 3D printers are at work in product design studios, engineering departments, manufacturing plants, aerospace and automotive industries, dental labs and hospitals. One company is working on a technique to print functioning human organs. Enter Organovo, a biomedical engineering start-up. This company, founded in 2007, uses 3D printing in the tissue engineering field. It uses human cells and shapes them into real tissue. Physicians can, in effect, create an organ in a lab precisely when it is needed. In addition, research institutions such as Columbia and Harvard are also working on 3D printing and tissue engineering.

Consider the following scenario. In 2020 a physician informs a patient that his liver is not functioning properly and will have to be removed. The patient has an extremely worried look on his face because he knows that the liver filters the blood and rids the body of toxins. The physician immediately tells the patient not to worry—"we are going to print you a new one!" Hello 3D printing and its ability to create organs ***on demand.*** Bioprinting uses the person's own cells to grow the organ, eliminating the potential for rejection. Unlike the first industrial revolution which focused on mass production 3D printing makes possible ***personalization*** for inventors, entrepreneurs and homemakers to manufacture objects on their own.

In May 2013 University of Michigan researchers reported in the *New England Journal of Medicine* that they have used a 3D printer to create a custom made, life-saving implant for a baby boy. The baby had a rare disorder in which one of the airways in his lungs collapsed when he exhaled. This problem caused him to stop breathing and turn blue.

Using a 3D printer Michigan researchers custom-built a tiny flexible splint that will grow with the baby boy. In lieu of making a cast of the boy's airway with plaster, the researchers used a CT scanner which gave them a 3D blueprint. The 3D printer permitted the doctors to design and produce the splint quickly. Custom designing medical devices using 3D printers is gaining momentum nationwide.

INFRINGEMENT QUESTION

Can product manufacturers stop activities that reconstruct, repair and modify their products by using 3D printers?

Section 101 of the Patent Act provides for the issuance of a patent to a person who invents or discovers any new and useful manufacture, process or composition of matter. A question arises if existing intellectual property laws will cover some of the products engendered by additive manufacturing. The 3D printer can be used to modify existing products for appearance and functionality. And, in some cases, the modified product may be better than the original. This will reduce the sales of the original product manufacturer. Can product manufacturers stop activities that reconstruct, repair and modify their products by those using 3D printers?

The answer to the above questions is Yes and No. Yes, because utility patents are available to cover protection for novel products and methods engendered by additive manufacturing. Design patents and copyrights can cover ornamental and designs of the products. But, even "shrink wrap" license agreements that impose restrictions on consumer use of software may not adequately address all of the challenges caused by additive manufacturing. Companies that create and sell products that are easily subject to additive manufacturing, such as toys, footwear, aerospace parts, prosthetics and replacement parts, are especially at risk of this new paradigm.

At this juncture, prototyping appears to be the most effective 3D printing application and Stratasys appears to be the leader. Stratasys is an Eden Prairie, Minnesota manufacturer of 3D printers that create thermoplastic tools that are lighter in weight than traditionally made tools. Although 3D printing is in its infancy, it is a blessing for manufacturers and entrepreneurs but a nightmare for existing intellectual property owners. Even President Obama in his State of the Union address in early 2013 espoused that 3D printing could "revolutionize the way we make almost everything."

Federal Question

In May of this year a University of Texas Law School student and founder of Defense Distributed declared that his company has developed the world's first 3D printed handgun. The gun, called The Liberator, is made from styrene, a thermosplastic. It is designed to fire standard handgun rounds, using interchangeable barrels for different calibers of ammunition. Stratasys, the 3D printing company, seized the printer it had rented to Defense Distributed after the company learned how its machine was being used.

Congressman Steve Israel (D-NY), in opposition to Defense Distributed plans, issued a recent press release calling for the extension of the Undetectable Firearms Act and clauses dealing with 3D printed parts. Israel advocates a ban on plastic firearms for obvious reasons. On May 9, 2013 the government shut down the online blueprint for The Liberator. But, is there a Second Amendment federal question lurking in the background?

Conclusion

Three-dimensional printing may be difficult for intellectual property owners to identify and stop infringers. This new technology of 3D printing will reshape markets. When end users or contract manufacturers can print products on demand it creates challenges in protecting existing intellectual property. The dialogue must now be on how to meet this continued evolution of product design and creativity within the ambit of our IP system. However, if it is determined that 3D printing is infringement—this is a TORT. I submit a remedy can best be handled by members of this Section.

James A. Johnson of James A. Johnson, Esq., in Southfield, Michigan is an accomplished Trial Lawyer. Mr. Johnson is an active member of the Michigan, Massachusetts, Texas and Federal Court Bars. He can be reached at 248-351-4808 or through his website: www.JamesAJohnsonEsq.com.

2014 Trial Academy Testimonial

By Dr. Kinga Tibori-Szabó, Esq.

My experience with the 2014 NYSBA Trial Academy revolves around three themes: overcoming fears, building on hope and focusing on new beginnings.

At first, attending the 2014 Trial Academy was about overcoming fears. After law school, one rarely gets the chance to practice his or her skills and be critiqued by someone whose only role is to make you a better lawyer. We get feedback—good and bad—from colleagues, superiors and clients, but not necessarily as part of a benevolent exercise, but rather as a result of actions that we take and that influence the life of others. Our job is indeed a learning experience, but it is one that may involve hard lessons. I wanted to test my courtroom skills and my self-confidence without being under the pressure of a real-life commitment. The program of the Trial Academy offered exactly that: an opportunity to learn without the fear of failure.

As soon as it started, the Trial Academy shifted my focus from fear to hope. I found the morning lectures very useful—especially for a foreign-educated, non-resident New York attorney practicing abroad, who needed to brush up her knowledge of the pertinent rules. My favorite part of the Academy was, however, the breakout-group exercise. Practicing your courtroom skills before experienced practitioners and judges was a unique opportunity. From the point of view of testing your self-confidence, being watched by seasoned lawyers and judges can be quite daunting. But you gather the courage and you do your best. The faculty comments on your performance and advises you on what you need to improve. For me, one of the most important moments of the program—and perhaps of my career—was being told that I have the necessary skills, that I have what it takes and that I can do a good job. Ultimately, this was what I needed: to be given hope that if I worked hard, I could succeed—and that I might not be that far away from success.

Last, but not least, the Trial Academy was about new beginnings. Apart from offering an environment in which a young attorney can safely practice his or her trial skills, the Academy also brought together practitioners from all over the country and from abroad. Whether it only entailed exchanging a few words and business cards, or having heartfelt discussions over lunch or dinner on various topics, I met people whom I would not have come across otherwise. For me, this meant having many more reasons in the future to visit New York. Among the many remarkable people I met, I wish to name two: Russell Dombrow (Dombrow Law LLP), a former graduate of the Trial Academy who gave me invaluable networking advice and who introduced me to practitioners with whom I may work in the future, and Sherry Wallach (Wallach & Rendo LLP), our team leader, who had the special ability to read my mind: she felt each uncertainty I had and gave me invaluable advice on how to overcome it.

I am also indebted to the Torts, Insurance and Compensation Law Section of the New York State Bar Association for granting me a scholarship to attend the 2014 Trial Academy.

Was it worth flying across the Atlantic Ocean to attend the Trial Academy? Yes, it was absolutely worth it. I have overcome my fears of not rising to my own expectations as a practitioner, was given hope that I can do well and I met many wonderful people with whom I truly hope to keep in touch in the future.

Kinga is an international attorney and currently works at the Special Tribunal for Lebanon, in The Hague (Netherlands). She has a PhD in international law and was admitted to the New York State Bar in 2013.

Book Review:

Business and Commercial Litigation in Federal Courts, Third Edition

Reviewed by David M. Gouldin

I had the privilege of providing a review of the multi-volume *Business and Commercial Litigation in Federal Courts*, then in its Second Edition, for the *TICL Journal* back in 2007. The Thomson Reuters publication is now in its Third Edition, and I am pleased to share with you my insights concerning this most recent publication.

Those of you who have the Second Edition would, I'm sure, agree that *Business and Commercial Litigation in Federal Courts* is a comprehensive, learned, and yet practical series from which any lawyers, judges, and writers would benefit.

Robert L. Haig continues to be the Editor-in-Chief of this work, and he should be saluted for the authors he has secured to contribute to this treatise. There are 251 principal authors, and now an additional 34 chapters covering a range of subjects. The roster of contributors includes a true "who's who" in the commercial litigation field, mixing both jurists and highly respected practitioners. Mark Alcott, our former State Bar president, authored a chapter on "Theft or Loss of Business Opportunities." The Honorable Harold Baer, Jr., from the Southern District of New York, addresses the very timely subject of "Alternative Dispute Resolution." David Boies, the highly regarded trial lawyer, authored a chapter on the increasingly timely subject of "Litigation Technology."

"Trials" is the title of the important chapter authored by John J. Curtin, Jr. and John R. Snyder from the Bingham McCutchen firm in Boston. The late John Curtin, who died in November 2013, taught trial practice at Boston College Law School for more than 40 years. Edward L. Foote and Peter C. McCabe, III collaborated on the chapter entitled "Cross-Examination." They offer observations from more than seven decades of combined jury trial experience which are recommended reading for any practitioner in the field. The chapter by Kenneth Geller and David M. Gossett on "Appeals to the Supreme Court" is educational reading for all lawyers, regardless of whether you expect to appear before our highest court in the near future.

Bob Haig not only drew authors from the Northeast, but from across the nation, as evidenced by the contribution of Harry M. Reasoner from Houston on "Ethical Issues in Commercial Cases" and the chapter on "Jury Conduct, Instructions and Verdicts" co-authored by the Honorable Susan P. Graber, Circuit Judge for the United States Court of Appeals for the Ninth Circuit, her colleague on the Ninth Circuit, M. Margaret McKeown, and the Honorable Jeffrey T. Miller, a United States District Judge serving the Southern District of California.

One of the concerns that a practitioner may have in buying a multi-volume, comprehensive publication such as *Business and Commercial Litigation in Federal Courts, Third Edition* is that even though the reader may be confident that answers to his or her questions are contained within such a comprehensive publication, getting to those answers may be difficult because of the size of the work. I am happy to report that access to the text pertinent to each reader's concern is greatly facilitated by having a thorough and reader-friendly index to this 11 volume work.

Bob Haig and the editors at Thomson Reuters are to be applauded for their recognition of the importance of Volume 12, the tables and index for the 130 chapters which form the core of this work. It is an invaluable key to accessibility and the type of tool one would expect with a publication of this quality. Volume 12 provides the practitioner with thousands of citations to current cases, statutes and rules, all of which complement the many forms which provide a particularly helpful starting point when any lawyer is attempting to customize a particular agreement or pleading for a business or commercial matter on which he or she is working.

To facilitate further legal research, many chapters in the Third Edition contain research references to West's Key Number Digest, the A.L.R. Library, and legal encyclopedias such as Am. Jur. 2d and C.J.S. The CD-ROM that comes with this publication contains many of the jury instructions, forms and checklists that are included in the printed volumes. As Bob Haig, the Editor, has indicated, this series is a highly successful joint venture between Thomson Reuters and the American Bar Association Section of Litigation.

In the chapter on "Trials" there is a section that deals with the unexpected developments which can occur, a constructive reminder of what a roller coaster experience a trial can be. An unusually bad performance by a witness, an unexpected exhibit, or a strong performance by opposing counsel may infect even the most seasoned professional with some measure of pessimism. As the authors note, it is important to recognize the difference between something which is fatal to your case and something which simply requires additional effort, a new strategy, or further investigation.

Even attorneys who have thoroughly prepared their case may encounter departures from what is expected, but as the authors suggest, "The key is not to panic and not to do anything precipitous or rash." The hallmark of a great trial lawyer is obviously the ability to determine how serious the bleeding is, and how to cauterize the wound.

The scope of the coverage, the expertise and experience of the authors, and the ability of any lawyer to gain easy access through the thorough index to this library of information make this publication "a must" for any firm or individual with a significant roster of federal commercial litigation and a wise investment for those whose practice is more state oriented.

As I noted, the Third Edition of this prodigious work contains 34 new chapters, which provide a definite "value add" for anyone who already has the Second Edition and is contemplating the benefit of the newest publication. Bob Haig's objective was that the Third Edition of this treatise be a step-by-step practice guide that covers every aspect of a commercial case, from the assessment that takes place at the inception, through pleadings, discovery, motions, trial and appeal. Great emphasis is placed on strategic considerations specific to commercial cases. I would strongly recommend the publication.

David M. Gouldin is a Partner at Levene Gouldin & Thompson, LLP. He is a former President of the Broome County Bar Association.

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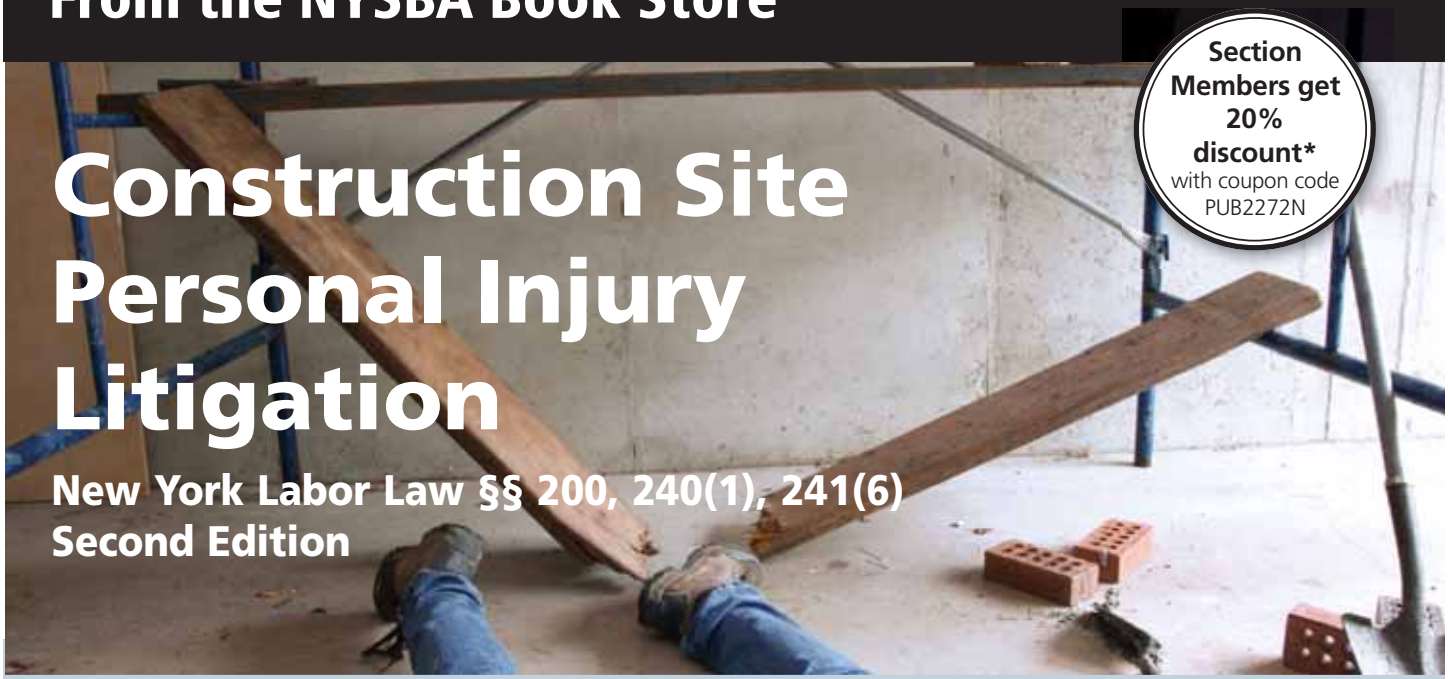

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