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The Intoxicated Patron: A Re-appraisal of the Duty of Care

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"First Principles"

Dean Roscoe Pound once suggested that judicial individualization of basic principles through choice of a rule is most noticeable in the law of torts.[1] The recent decision of the Supreme Court of Canada in *Jordan House Ltd.* v. *Menow and Honsberger*[2] confirms this statement. The leading judgment of Laskin,J. (as he then was), in which Martland and Spence,JJ. concurred, begins with the words: "This is a case of first instance".[3] In other words, there was no leading case directly in point. Therefore, the Court was at large and had to rely on first principles to reach its decision. It is this fact which makes the case both remarkable and important. By the same token, attempts to fit the various judgments into a framework of orthodox rules, developed and derived from cases dealing with entirely different fact situations, can only be helpful to a limited extent. In cases of first impression, basic value judgments are applied to entirely new situations. The unprecedented application must ultimately either be accepted or rejected. Such cases, therefore, leave little room for argument in terms of syllogistic consistency or inconsistency.

Accordingly, it is proposed to examine in the first place the basis on which the Court has related the facts of *Jordan House* to the four traditional elements of liability in negligence, that is to say: (1) the duty situation; (2) foreseeability of harm or damage, including the kind of harm or damage which ought to be foreseen; (3) the carelessness of the person on whom the duty of care has been imposed;

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1 *An Introduction to the Philosophy of Law* (1954), 68.

2 (1973), 38 D.L.R. (3d) 105.

3 *Ibid.*, 106.

and (4) the causal connection between the carelessness and the harm or damage alleged to have resulted from it.[4] In the second place, the effect of the judgments on the law will be discussed with particular reference to their possible applicability to allied situations. Their wider implications, such as their bearing on the movement towards no-fault liability in the law of tort, will also be considered. Such an analysis must take into account throughout the Court's value judgment underlying the decision. Firstly, however, a summary of the facts and of the tenor of the judgments is required.

Findings of Fact

The appellant company[5] owned a hotel situated on a much travelled highway between Hamilton and Niagara Falls. The first respondent, Menow, was a frequent patron of the hotel's beverage room and bar facilities. He had a tendency to drink to excess and to act recklessly when he became intoxicated, though normally he was quiet and well behaved. The hotel management and its employees knew of his propensities and instructions had been issued not to serve him with intoxicating drinks unless he was accompanied by a responsible person. The day on which the events giving rise to this case occurred, Menow had come to the hotel originally in the company of his employer and foreman, who had left after a short while. He was alone in the hotel bar when the manager arrived there at about 7 p.m. At that time Menow had been in the bar for approximately two hours but was still in a sober condition. He was served with beer from time to time over the next three hours, until the manager realized that Menow was drinking to excess "and that he had become intoxicated, the hotel having sold beer to Menow past the point of visible or apparent intoxication".[6]

Shortly after 10 p.m., he began making a nuisance of himself by wandering around to other tables. He was then turned out of the hotel, although the manager knew that he was "unable to take care of himself by reason of his intoxication and that he would have to go home, probably by foot, by way of a main highway".[7] The night was dark and rainy and Menow wore dark clothes not readily visible to motorists. Once outside the hotel, Menow was given, fortuitously, a lift by a passing motorist for part of his way home. However, after he had been left off he walked along

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[4] See *e.g. Clerk and Lindsell on Torts* 13th ed. (1969), para. 973.
[5] Hereafter referred to as "the hotel" or as "Jordan House".
[6] *Supra*, f.n.2, 107.
[7] *Ibid.*

the highway for some distance. He was staggering near the centre of the road when he was struck by a car driven by Honsberger, the second respondent. At that point, just under half an hour after he had been ejected from the hotel, Menow was no longer on his direct way home, but had gone further along the highway than necessary, looking for a friend. On these facts, the trial court held that the accident and the injuries suffered by Menow were caused by the combined negligence of the manager of Jordan House, Honsberger and Menow himself, and apportioned the blame equally among them. Menow and Honsberger accepted the judgment, except that Honsberger objected to the apportionment and claimed an indemnity from the hotel, but Jordan House appealed.

The Judgment

In the trial court [8] Haines,J. held that Jordan House, its manager and other employees owed and were in breach of a common law duty of care to Menow, namely (a) "not to serve him with intoxicating drink when he was visibly intoxicated"[9] and further (b) "to take reasonable precautions to ensure that his safety was not endangered"[10] as a result of his intoxication. He derived the basis for this common law duty from certain statutory provisions which laid down in peremptory terms that no liquor shall be sold to any person who is apparently in an intoxicated condition and that *inter alia* the holder of a liquor licence must not tolerate drunkenness or any disorderly conduct on the premises in respect of which such a licence has been issued.[11] In his view these provisions "were enacted not only to protect society generally, but also to provide some safeguard for persons who might become irresponsible and place themselves in a position of personal danger",[12] so that "it may be inferred that the legislators intended to provide tort liability"[13] for their breach in appropriate cases in addition to making their contravention a criminal offence.[14] Finally, Haines,J.

[8] (1969), 7 D.L.R. (3d) 494.

[9] *Ibid.*, 500.

[10] *Ibid.*, 503.

[11] *Liquor Licence Act*, R.S.O. 1960, c.218, s.53(3) and 53(4); *Liquor Control Act*, R.S.O. 1960, c.217, s.81.

[12] *Supra*, f.n.8, 499.

[13] *Ibid.*, 500.

[14] These expressions may give the impression that Haines,J. derived the basis for the hotel's liability directly from the statutory provisions. Read against the background of the judgment as a whole it does not appear that he intended to go so far. However, any doubts about the scope of those provisions have been resolved by Laskin,J. See *infra*, text following f.n.17.

emphasized that it was when the hotel's employees "undertook affirmative action to remove the plaintiff [Menow] from the premises" that they, acting for the hotel, "assumed a duty of care to take reasonable precautions to ensure that his safety was not endangered as a result of their actions",[15] even though at that stage they were justified and possibly even obliged to eject him from the beverage room, if not from the hotel itself.[16]

The Ontario Court of Appeal confirmed the judgment of Haines, J. "on the simple ground that so far as the hotel is concerned, there was a breach of the common law duty of care owed to the plaintiff [Menow] in the circumstances of this case".[17]

In the Supreme Court,[18] Laskin,J. accepted the proposition that the statutory provisions on which Haines,J. had relied in the trial court to impose a duty of care on the hotel were relevant, although he qualified his acceptance of the principle to some extent. He regarded them

> ... as crystallizing a relevant fact situation which, because of its authoritative source, the Court was entitled to consider in determining, on common law principles, whether a duty of care should be raised in favour of Menow against the hotel.[19]

However, he emphasized that this should not be taken to mean that the mere breach of the statutory duty and the fact that Menow had suffered injury were enough to attach civil liability to Jordan House. Neither did Laskin,J. attach special importance to the "affirmative action" of the hotel's staff in removing Menow from the bar premises. In his view such action could ouly be considered "as wrapped up in the duty of care" which rests on the operator of a beverage room towards an intoxicated patron in such circumstances as existed in this case. Accordingly, Laskin,J. proceeded from the general premise that "[t]he common law assesses liability for negligence on the basis of breach of a duty of care arising from a foreseeable and unreasonable risk of harm to one person created by the act or omission of another".[20] However, in so far as such "liability is predicated upon fault, the guiding principle assumes a nexus or relationship between the injured person and the injuring person which makes it reasonable to conclude that the latter owes a duty to the former not to expose him to an

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[15] *Supra*, f.n.8, 503.
[16] *Liquor Licence Act, supra*, f.n.11, s.53(6).
[17] (1970), 14 D.L.R. (3d) 545, 546.
[18] *Supra*, f.n.2.
[19] *Ibid.*, 110.
[20] *Ibid.*

unreasonable risk of harm".[21] In arriving at the decision as to whether the potential victim is being exposed to an unreasonable risk of harm, the probability or remoteness and the gravity of injury must be taken into account and related "to the burden that would be imposed upon the prospective defendant in taking avoiding measures".[22] Applying these principles to the facts found by the trial court, the learned judge concluded that the hotel's liability for negligence *vis-à-vis* Menow had been established. Ritchie,J. arrived at the same result, albeit along a slightly different route.

The Duty Situation

Before Jordan House could be held liable to Menow for the injuries he had suffered, or indeed before such liability could even be contemplated, it was necessary to establish that the former owed a duty of care to the latter. According to Haines,J. such a duty had its roots in the statutory provisions which prohibit operators of licensed premises from supplying liquor to any person who is apparently in an intoxicated condition, and which forbid operators to "permit or suffer" any drunkenness or quarrelsome, disorderly conduct on such premises.[23] Laskin,J. emphasized the special invitor-invitee relationship which existed between Jordan House and Menow and which placed the hotel in a different position from "persons in general"[24] who, if they saw Menow in an intoxicated condition and unable to control his steps, "would not, by reason of that fact alone, come under any legal duty to steer him to safety, although it might be expected that good samaritan impulses would move them to offer some help".[25] But, Laskin,J. also stressed that the hotel "was aware, through its employees, of his [Menow's] intoxicated condition, a condition which ... it fed in violation of applicable liquor licence and liquor control legislation".[26] However, since he had already made it clear that a violation of this legislation *per se* would not attach civil liability to the hotel, but that such liability had its roots in the invitor-invitee relationship which had been established with Menow, one must enquire into the reasons for reference to the specific statutory provisions.

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[21] *Ibid.*
[22] *Ibid.*, 111.
[23] *Liquor Licence Act, supra,* f.n.11, s.53(4).
[24] *Supra,* f.n.2, 111.
[25] *Ibid.*
[26] *Ibid.*

It is suggested that Laskin,J. referred to the provisions of the Liquor Acts because they laid down a standard of conduct applicable to the specific invitor-invitee relationship between the operator of a beverage room and his patrons. In other words, the duty of care which he held to exist as a result of such a relationship is not necessarily attached to other invitor-invitee relationships in which one party supplies another with liquor. Thus it may, or may not, be imposed upon the committee or licensee of a club, or on the host at an official banquet or at a private party. The obvious difference between the latter and a tavern-owner is that the tavern-owner expects to make a profit from the supply of liquor to his patrons, which is not true of a club or the host at a banquet or a private party. Nevertheless, the grant of a liquor licence even for a banquet is subject to the same statutory provisions to which Laskin,J. referred, so it may not be sufficient to seek the reason for the imposition of liability on the hotel in *Jordan House* in the field of "business enterprise liability". On the other hand, it is probable that the host of a private party could be expected to ensure that his guests do not suffer harm when they leave him in a state of intoxication, or to see to it that they do not drink too much in the first place on the basis of "ordinary humanitarian" or similar grounds.[27] Certainly, Ritchie,J. did not appear to attach special importance to the tavern-owner's profit motive when he gave his reasons for the dismissal of the appeal and said:

> For my part... the circumstances giving rise to the appellant's liability were that the inn keeper and his staff, who were well aware of the respondent's propensity for irresponsible behaviour under the influence of drink, assisted or at least permitted him to consume a quantity of beer which they should have known might well result in his being incapable of taking care of himself when exposed to the hazards of traffic. Their knowledge of the respondent's somewhat limited capacity for consuming alcoholic stimulants without becoming befuddled ... seized them with a duty to be careful not to serve him with repeated drinks after the effects of what he had already consumed should have been obvious.[28]

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[27] Of course, there may always be special reasons for holding even a private host liable for harm suffered or caused to others by an intoxicated guest. See *e.g. S.* v. *Els*, [1972] 4 S.A. 696, where a private host "laced" his guest's drink, knowing that the guest had taken sedatives. A South African court acquitted the guest of driving under the influence of liquor when incapable of having proper control of his car. It is suggested that the host would be civilly liable if the guest had been involved in an accident and caused damage either to himself or to a third person.

[28] *Supra*, f.n.2, 105.

Nor were Haines,J. and Laskin,J. prepared to go so far as to impose "a duty on every tavern-owner to act as watch dog for all patrons who enter his place of business and drink to excess".[29]

The crux of the matter in all negligence cases is, therefore, the existence of a duty of care to avoid acts and omissions which are likely to injure one's neighbour-in-law: only if that duty exists can the question of whether or not it has been breached arise at all. In the majority of cases, however, the category of negligence, *i.e.* the existence of the duty, has already been established. Consequently, the problem *whether* a duty of care exists is, at most, considered only in passing while the gravamen of the discussion will fall almost immediately on the questions of foreseeability, the degree of care required from the defendant, and causation. It is different, of course, in cases of first impression in which the existence of a new duty must first be established. Here the difficulty is to find in the common law authorities

> ...statements of general application defining the relations between parties that give rise to the duty. The courts are concerned with the actual relationships which come before them in actual litigation, and it is sufficient to say whether the duty exists in those circumstances.[30]

The result is, it is here submitted, that although "negligence" is nowadays regarded as a single and separate tort — unified by the criterion of foreseeability of harm — it is in truth still only a common denominator for a variety of heterogenous situations in which one party is charged with a duty to avoid acts and omissions which are likely to cause harm to another party, but there is still no general criterion, no "measure of decision", which determines the circumstances in which such a duty of care will be imposed. This means that even when a duty of care has been recognized to exist between two or more parties who stand in a particular relationship to each other, the extent of the duty is rarely fully defined. As a result it is, of course, often difficult to distinguish between the existence of a duty and the scope of that duty. Indeed, the existence of the duty appears to be invariably co-extensive with its scope.

Another result of the absence of a unifying factor enabling lawyers to determine *a priori* whether or not a duty of care exists is that the law of negligence is today in a state similar to that of the law of torts in the days when a remedy depended on finding the proper writ (such as trespass, assumpsit and the like) which

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[29] *Ibid.*, 113; *supra*, f.n.8, 503.

[30] *Per* Lord Atkin in *Donoghue* v. *Stevenson*, [1932] A.C. 562, 579.

the common law courts would recognize. In other words, even now liability in negligence will depend on whether the plaintiff can "find a pigeonhole in which to fit the harm he has suffered before the courts will afford a remedy".[31] For instance, in *Candler* v. *Crane, Christmas & Co.*[32] it was held that no liability in tort would be imposed for economic injury caused by negligent false statements, *i.e.* there was no "pigeonhole" from which a remedy could be taken to assist the plaintiff. Some thirteen years later, in *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.*,[33] it was found that such a pigeonhole existed after all, although in that particular case the remedy contained in it was not available to the plaintiff. But strictly speaking, the label which was affixed to that pigeonhole after it had been discovered was not exact. Only the principle that negligent false statements might found an action in tort had been enunciated; yet the exact remedy existed, at least for the time being, for persons who relied on the information given by bankers about the financial standing of their clients, provided that the bankers had not covered themselves by an exemption clause.

The question naturally arising from *Hedley Byrne* is how one determines whether or not a "special relationship" exists. While it may be accepted without much difficulty that no liability should be imposed on the solicitor giving casual but wrong advice during a railway journey because there is no special relationship between him and his fellow travellers, why is it still doubtful whether the solicitor who negligently draws a will which deprives the intended beneficiary of the legacy which he should have received is liable to the legatee? No doubt, "[i]n this state of uncertainty a helpful guide can be found in the famous dissenting judgment of Denning, L.J. in *Candler*" which recognizes that "at bottom the problem is one of exclusion: negligence in word cannot in all respects be treated like negligence in act, for that would open up too wide an arc of liability".[34] But is this really an answer or does it not rather underline the problem which is at the very root of all negligence cases? Certainly, it epitomizes the problem of exclusion which the *Jordan House* case has created in another field of negligence liability. Already Laskin,J. and Haines,J. have indicated that there is no general duty of care imposed on tavern-owners towards

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[31] Fleming, *The Law of Torts* 4th ed. (1971), 6.
[32] [1951] 2 K.B. 164, [1951] 1 All E.R. 426.
[33] [1964] A.C. 465.
[34] *Salmond on the Law of Torts* 16th ed. (1973), 209.

their intoxicated patrons. Surely, a distinction must be made between operators of beverage rooms who supply liquor as a matter of business expecting to make a profit from it, and others who have no profit motive but who may nevertheless be expected to live up to the standard which the liquor laws lay down. Therefore, it would seem that the statutory provisions alone cannot suffice for imposition of liability on innkeepers in particular.

Nor is there a definite statement or even a clear indication in any of the judgments that liability was imposed on the hotel in terms of "business enterprise liability", or that the hotel might be in a better position to insure against the risk of an intoxicated client suffering injury on his way home. Haines,J., it would seem, felt that the imposition of a duty of care *vis-à-vis* an intoxicated patron solely by reference to the standard of conduct established by the legislator might be regarded as insufficient. For this reason, he emphasized that the manager and staff of the hotel had taken affirmative action to eject Menow from the beverage room, exposing him to the dangers of the highway and compelling him to make his way home in an advanced state of intoxication. Accordingly he found that it was at this stage, if not before, that the hotel was seized with a duty of care toward him. Ritchie,J., however, had no doubt that this duty originated at a far earlier stage: when the hotel's employees "assisted or at least permitted him to consume a quantity of beer which they should have known might well result in his being incapable of taking care of himself when exposed to the hazards of traffic".[35] Since the imposition of this duty was based specifically on the fact that the manager of Jordan House and his staff "were well aware of the respondent's propensity for irresponsible behaviour under the influence of drink",[36] it seems likely that he shared the view expressed in the other two judgments that a barkeeper cannot, as a general rule, be held responsible if his patrons drink liquor to excess. Nevertheless, Ritchie,J. appears to go further than Haines,J. and *semble* Laskin,J. in so far as his judgment indicates that he is prepared to impose a duty on every tavern-owner to act as a watch dog for every patron whose inability to hold his liquor and tendency to drink to excess is well known to him. The tavern-owner must not only ensure that such a patron does not suffer harm, but must also take precautions that he receives no further supplies of liquor as he is approaching, yet before he has actually reached,

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[35] *Supra,* f.n.2, 105.
[36] *Ibid.*

a stage of intoxication at which it becomes likely that the patron is unable to appreciate the effect of even one more drink.[37]

In contrast to the judgments of Ritchie,J. and Haines,J., the leading judgment of Laskin,J. indicates that the learned judge was reluctant to single out any fact or aspect of the case before him as being of particular importance for the decision of the issue, which he phrased as follows:

> ... whether the operator of a hotel may be charged with a duty of care to a patron of the hotel beverage room who becomes intoxicated there, a duty to take reasonable care to safeguard him from the likely risk of personal injury if he is turned out of the hotel to make his way alone.[38]

On the one hand, he deprecated the importance of Menow's ejectment by the hotel staff (which Haines,J. had stressed) because

> [t]he affirmative action of removal did not in itself result in any injury to the plaintiff, as it might have been the case if excessive force had been used against him (which is not suggested in the present case) nor was it followed by any breach of duty raised by and resulting from the affirmative action *per se* ... .[39]

On the other hand, he conceded that a "great deal turns on the knowledge of the operator (or his employees) of the patron and his condition where the issue is liability in negligence for injuries suffered by the patron".[40] But it is obvious (as it must have been to Ritchie,J. when he decided to deliver a separate judgment) that he did not attach as much significance to it as did the latter. In fact, one is almost left with the impression that Laskin,J. left the scope of the duty which rests upon the operator of a beverage room deliberately vague so as not to hamper the courts in their task of developing it as and when future cases arise. He expressed himself in these terms:

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[37] Admittedly, Ritchie,J. also said later that the knowledge of the innkeeper and his staff of Menow's limited capacity to consume liquor without becoming befuddled or obstreperous seized them with a duty to be careful not to serve him with drinks *after the effects of what he had already consumed should have become obvious.* However, at the risk of being accused of reading more into a judgment than it actually says, it is submitted that this passage must be read within its context and thus be taken to mean that where an innkeeper and his staff have special knowledge of a patron's propensities and weaknesses, they are also under a special duty to watch out for "danger signs" and to refuse to serve him earlier than they would refuse a patron who is not known to them.

[38] Laskin,J.'s own definition of the "principal issue" in the *Jordan House* case: *supra,* f.n.2, 106.

[39] *Ibid.,* 108.

[40] *Ibid.,* 113.

> Given the relationship between Menow and the hotel, the hotel operator's knowledge of Menow's propensity to drink and his instruction to his employees not to serve him unless he was accompanied by a responsible person, the fact that Menow was served not only in breach of this instruction but as well in breach of statutory injunctions against serving a patron who was apparently in an intoxicated condition, and the fact that the hotel operator was aware that Menow was intoxicated, the proper conclusion is that the hotel came under a duty to Menow to see that he got home safely by taking him under its charge or putting him under the charge of a responsible person, or to see that he was not turned out alone until he was in a reasonably fit condition to look after himself.[41]

While the difference in approach between the judgments did not affect the result in *Jordan House*, it is nevertheless significant. Not only have Haines,J. and Ritchie,J. circumscribed the scope of the duty situation with greater precision than Laskin,J., but they also hold somewhat different views of the social conduct which is required from a tavern-owner in general.[42]

The Foreseeability of Injury and Harm

It is generally accepted that liability for negligence can be imposed only if the injury or harm resulting from it was foreseeable by the alleged tortfeasor, who is assumed to be a "reasonable man".[43] But it is equally accepted that foreseeability by itself is not necessarily sufficient to found such liability. When the law "denies its aid to casualties of negligence despite the foreseeability of harm",[44] it is sometimes said that the person whose act or omission has caused injury to another was under no duty toward his victim to abstain from acting as he did, or if he chose not to act, to prevent the injury or harm. In the absence of a duty, the act or omission does not entail liability. Although it is axiomatic that, since Lord Atkin's celebrated neighbour principle,[45] the existence or non-existence of a duty of care must be expressed in terms of foresight and foreseeability, this does not mean that an act which is unlawful becomes lawful and justified merely because the harm or injury resulting from it was not foreseeable. That this must be so becomes clear if one considers a negligent act which results in harm which was partially foreseeable and par-

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[41] *Ibid.*, 112.

[42] See also *infra*, the Court's Value Judgment.

[43] *E.g. Fleming, supra*, f.n.31, 135, defines negligence as "failure to take care against unreasonable risk of foreseeable injury".

[44] *Ibid.*, 136. See also Linden, *Canadian Negligence Law* (1972), 210: "The fact is that some foreseeable risks are not within the scope of duty owed, while some unforeseeable risks are considered within the duty."

[45] *Donoghue* v. *Stevenson*, [1932] A.C. 562, 580.

tially not foreseeable. It can hardly be said that in such a case the act was partly lawful and partly unlawful.[46] It follows that lack of foreseeability does not justify the infliction of harm, but only absolves the person who has caused it from liability for it. Conversely, neither the deliberate nor negligent infliction of injury can, of course, convert an act or omission which is lawful *per se* into an unlawful act or omission merely because the injury was foreseeable.[47]

In the *Jordan House* case the Court had no difficulty in finding that the conduct of the hotel, acting through its manager and other employees, was unlawful and that the injuries which Menow eventually sustained when he was hit by Honsberger's car were foreseeable by a "reasonable man". However, it appears that the learned judges differed about the stage at which the injury became foreseeable. In retrospect it seems clear that the hotel had a duty towards Menow from the moment at which his companions departed until he was safely at home, or in the company of another person who would look after him. In short, the hotel's duty was to see to it that he suffered no harm by reason of the fact that he was incapable of looking after himself because he had consumed more liquor than he could carry in the hotel's beverage room. It was on this total fact situation that Laskin,J. founded the hotel's liability and accordingly he declined to attach specific significance to any particular fact or stage. Ritchie,J., on the other hand, apparently thought that the likelihood of injury became foreseeable as soon as Menow had consumed several tankards of beer and that from then onward the manager and staff were bound to keep him under observation. Haines,J. regarded the "affirmative action" by which Menow was removed from the hotel as the crucial moment at which the likelihood of injury became actually foreseeable. Admittedly, he referred to various provisions in the Ontario liquor legislation, but he regarded them as relevant only to the extent that they prescribed a certain general standard of conduct with which the operator of a beverage room is expected to comply and as qualifying his right to eject an intoxicated patron.

If one thus analyses the judgments, especially those of Ritchie, J. and Haines,J., it appears that foreseeability of harm or injury is not an ingredient of the duty of care *per se* in so far as the existence of such a duty must be established objectively and in-

[46] See *e.g. The Liesbosch Dredger* v. *The Edison,* [1933] A.C. 449.

[47] See *infra,* Fault, Strict and No-Fault Liability: Rights and Wrongs.

dependently. This means that it must first be determined whether the injured person's interest which has been invaded was a protected interest, either in general or at least against violation by the alleged tortfeasor. Unless it is so protected, the injury is not tortious and the question whether it could or ought to have been foreseen is immaterial. Of course, once it has been established that the injured interest was a protected interest, foreseeability becomes highly relevant; it is then related not to the existence of the duty (which has already been determined) but to the blameworthiness of the tortfeasor's conduct, *i.e.* his subjective culpability. To equate foreseeability with the existence of a duty instead of relating it to the breach of that duty after its existence has been established may result in failure to distinguish between the objective and subjective ingredients of the negligence concept. This may lead to the classification of "conduct as 'lawful' or 'unlawful' in the abstract", the danger of which has been enunciated by Dean Wright.[48] The subjective character of the foresight element is also emphasized in American jurisprudence, where it is unequivocally related to the "standard of conduct" and not to the existence of the duty.[49]

The equation of foreseeability with the existence of a duty of care is also apt to obscure the fact that a finding of negligence always involves two separate value judgments: one which determines *in limine* whether the injured person's interest is worthy of protection (*i.e.* whether a duty of care existed at all) and another which then classifies the standard of conduct of the alleged tortfeasor. It is only in this latter process of classification that foresight becomes relevant: not to establish whether a duty exists, but to decide whether there has been a breach of a pre-existing duty. In the ordinary run of cases which are concerned with fully recognized categories of negligence, it does not matter as a rule if the duty situation and the foreseeability of harm are telescoped into each other. But the distinction here emphasized becomes of

[48] Wright, *Cases on the Law of Torts* 4th ed. (1967), 9.

[49] See *Restatement of Torts* 2d, para. 281: The elements of a cause of action for negligence are defined as "an invasion of an interest of another, if: (a) the interest invaded is protected against unintentional invasion, and (b) the conduct of the actor is negligent with respect to the other, or a class of persons within which he is included..." (the other two requirements are irrelevant in the present context). Para. 289 clearly relates foresight to the "standard of conduct", distinguishing between the general standard of the reasonable man and the higher standard required from a person whose knowledge or experience is superior to that of the ordinary reasonable man. This emphasizes the subjective character of the foresight element.

the utmost importance when a new category of negligence is created as happened, it will be submitted, in the *Jordan House* case.

The Breach of the Duty of Care

Of course, even when a duty between an alleged tortfeasor and an injured person has been established and it has been found that the harm or injury which the former has caused was foreseeable, it is still necessary to show that such harm or injury was the result of a failure to exercise the degree of care expected from a reasonable man. Whether or not a person lives up to the required standard of care depends, as Laskin,J. said, on the probability or remoteness of injury and the gravity of such injury as balanced against the burden of precautions necessary to eliminate the danger of injury or harm. Thus, after the Court had held that the special invitor-invitee relationship between the hotel and Menow justified the imposition of a duty of care and that the possibility of an accident was by no means remote if Menow were ejected, it followed that it was reasonable to expect the hotel to ensure that Menow was not exposed to injury as a result of his intoxication. The Court held that *vis-à-vis* Jordan House, "no inordinate burden would have been placed on it in obliging it to respond to Menow's need for protection".[50] Laskin,J. suggested that a call to the police or his employer were easily available "preventive measures"; alternatively, a taxi-cab could have been summoned to take him home, or similar arrangements made with another patron. In the last resort, Menow should have been given a spare room for the night rather than be permitted to leave the hotel by himself. From these observations, it may be inferred that Laskin,J., having dissented from Haines,J. on the importance of the affirmative action by which Menow was turned out of the beverage room, regarded the hotel's failure to prevent Menow from leaving by himself as the breach of the duty of care which it owed him.

If this assumption is correct it raises two questions. First, what was the hotel's position prior to this time in view of the fact that its staff had served Menow knowing of his tendency to act irresponsibly when intoxicated? While this question must be raised in the present context, it is proposed to deal with it in connection with the distinction between protective and control legislation in general. The second question arises from the fact that "[t]he borderline between active misconduct and passive inaction has never

[50] *Supra*, f.n.2, 111.

been easy to draw".[51] The difficulty here, though closely related to the breach-of-duty problem, is normally regarded as one of causation and will accordingly be considered as such. Ritchie,J. saw the breach of the duty in the hotel employees supplying Menow with beer in quantities which they should have known would result in his being incapable of taking care of himself. In the result, none of the judgments expressed any doubt that the hotel was in breach of its duty of care. The interest which they arouse on this point lies in the different reasons on which this conclusion was based.

The Causal Connection between the Carelessness and the Injury

Finally, it is necessary to establish that the alleged tortfeasor's carelessness, *i.e.* his breach of duty, was the cause of the harm or damage which the injured party has suffered. As a general rule, the carelessness remains a legally relevant cause unless the plaintiff would have suffered substantially the same kind of injury as he did in fact suffer even if the defendant had not been negligent. Therefore, it is clear that the Court was justified in finding that the hotel's carelessness was a legal cause of Menow's injuries. Honsberger's negligence in hitting Menow was obviously not a *novus actus interveniens* in the legal sense (although it justified apportionment of fault) considering the short time which had elapsed after he was turned out of the beverage room, and because the harm was of the very kind which the hotel ought to have foreseen. Similarly, neither the lift which Menow had obtained nor the fact that he was no longer on his direct way home when the accident happened were relevant as they had not resulted in a substantial change of the risk to which the hotel had unreasonably exposed him.[52] The suggestion "that any duty that the hotel might have had evaporated because of volumtary assumption of risk" received short shrift from Laskin,J. who described it "as untenable, whether put on the basis of Menow's self-intoxication or on the basis that faced him when he was put out of the hotel" because it was "impossible to say that he both appreciated the risk of injury and impliedly agreed to bear the legal consequences".[53]

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[51] Fleming, *supra*, f.n.31, 141, 170.

[52] On the concept of legal cause, see generally Fleming, *ibid.*, 169 ff. and *Restatement of Torts* 2d, paras. 430 ff.

[53] On the basis of self-intoxication only the apportionment of fault between all three parties was justified. See further *infra*, The Court's Value Judgment, on this point. Furthermore, it should be noted here that Laskin,J. did not regard the problem of self-assumption of risk strictly as one of causation, but rather as a defence *sui generis*. See also *e.g. Restatement of Torts* 2d,

However, although it is not altogether difficult to accept that the Court was justified in finding that the conduct of the hotel's manager and other staff was the legal cause of Menow's injuries, it is still necessary to determine which of their actions constituted not only a breach of the duty of care the hotel owed to Menow but was also the *causa causans*, or one of several proximate causes of the latter's injuries. This is obviously not merely an academic exercise because only the answer to this question can determine the *ratio decidendi* of the judgments. For instance, Haines,J. regarded Menow's ejectment as the turning point of events, while Laskin,J. treated it as being of minor importance. Their difference of opinion would seem to amount to this: Haines,J. emphasized the fact that the hotel took "affirmative action" against Menow and thereby actively exposed the latter to the dangers of the traffic on a busy highway; Laskin,J. apparently thought that the method by which Menow was exposed to this hazard did not matter and that the hotel's duty was to accept generally responsibility for Menow's safety in this regard. This means that he would have also held the hotel liable for Menow's injuries if he had left on his own accord, whether in response to such a demand after making a nuisance of himself, or if he had just decided to leave. In other words, Laskin,J. considered that the hotel had a duty to prevent Menow from leaving by himself; if the hotel failed to act as his guardian angel after the manager and his staff had "assisted or at least permitted" his consuming liquor to the extent that he was no longer able to take care of himself, it was immaterial that they actually turned him out of the hotel, except perhaps in terms of their moral blameworthiness.

If one adopts this point of view, the difficulty of establishing a chain of causation between an omission and an injury disappears completely, at least in situations such as Laskin,J. postulated in *Jordan House*. The position simply is this: when I have a duty not to cause a certain result, *e.g.* not to injure another person, any action I take to cause injury constitutes a breach of that duty; if I have a duty to prevent injury to that other person, then my failure to do so amounts to a breach of my duty. In fact, however, it is submitted that this explanation applies to all cases in which a person is under a duty not to injure his "neighbour-in-law" because then he must, in terms of Lord Atkin's celebrated dictum, *always* "take reasonable care to avoid acts *or omissions* which you can reasonably foresee would be likely to injure your neighbour".[54]

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paras. 496A-496G. It is submitted, however, that for the purpose of the present discussion of the case, it may be conveniently treated in the context of causation.

[54] *Supra*, f.n.45 (Emphasis supplied).

On this basis the question of whether the defendant's act was the cause of the harm or injury suffered by the plaintiff is confined to the comparatively few cases in which it is doubtful whether the defendant's action was the true cause or whether it merely provided the opportunity for the infliction of harm on the plaintiff or for his injury.[55] The supply of liquor by a tavern owner to his patrons normally provides only an opportunity for their becoming intoxicated. Thus, despite the invitor-invitee relationship which exists in every case, the operator of a beverage room normally would not be under a duty of care to ensure that none of the guests drink to excess, even if intoxication *per se* would be regarded as "harm or injury", which is not the case.[56] Therefore, the finding that the conduct of the hotel's manager and other staff was a legal cause of Menow's injuries requires further explanation, particularly in the light of the Supreme Court judgments which rejected as being decisive the "affirmative action" by which Menow was turned out of the hotel. It is submitted that the only possible explanation is that such a finding was based on a value judgment made only after the Court was satisfied that, objectively, a duty situation between the tortfeasor and the injured party existed, and only after finding both carelessness and foreseeability.

The Court's Value Judgment

In the final analysis, the demarcation of the sphere of the duty of care in negligence will always depend upon the Court's assessment of "the demands of society for the protection from the carelessness of others".[57] It is for this reason that the "categories of negligence are never closed",[58] which means that in accordance

[55] Where the action is likely to cause harm, a duty of care is imposed; where it provides a mere opportunity, as a general rule no such duty exists. See Hart and Honore, *Causation in Law* (1959), 230-231, where the problem is related to the foreseeability test. It should be noted here that one and the same action may, at one and the same time, be the legal cause as well as a mere opportunity. For instance, a mother places a bottle of poison within easy reach of a small child. If the child drinks the poison, the mother will have caused the harm which befalls the child. If a lodger drinks from the bottle, she will be said to have provided a mere opportunity.

[56] The operator's duty begins only when a patron is already visibly or apparently intoxicated. Laskin,J. and Haines,J. expressly and Ritchie,J. by implication declined to impose a duty on tavern-owners to act as watch dogs of their guests.

[57] Lord Denning, M.R. quoting Lord Pearce in *Hedley Byrne* v. *Heller* (*supra*, f.n.33, 534, 536): *Dorset Yacht Co. Ltd.* v. *Home Office*, [1969] 2 All. E.R. 564, 567, [1969] 2 Q.B. 412, 426, [1969] 2 W.L.R. 1008, 1015, 1017.

[58] Lord MacMillan in *Donoghue* v. *Stevenson*, *supra*, f.n.45, 619.

"with changing social needs and standards new classes of persons legally bound or entitled to the exercise of care may from time to time emerge".[59] It is in this sense that Laskin,J. must have felt the need for the establishment of a new category of negligence when he described *Jordan House* as a "case of first instance" and concluded that the operator of an establishment supplying liquor ought to be charged with a duty to take reasonable care to safeguard a patron who becomes intoxicated from the likely risk of personal injury if he is turned out of such an establishment. But on what ground should such a duty be imposed? Why should the operator be made the intoxicated patron's keeper? After all, the patron is apparently sober when he arrives and the operator lawfully supplies him with liquor. Only when he becomes visibly or apparently intoxicated is the operator under a duty to desist from serving him with more drinks, a duty which is probably imposed upon him in the interests of the public at large as well as in the interests of the patron. When the latter becomes truculent, or makes a nuisance of himself, the operator is entitled, and probably even compelled, to eject him. This is clearly a right conferred, and a duty imposed, upon the operator solely in his own interests and for the benefit of other guests then present. The supply of liquor, though potentially harmful and therefore subject to control and licensing laws, is recognized as a legitimate pursuit of business activities in society. The legitimacy of this activity is based on the premise that the public has an interest in the maintenance of such facilities as beverage rooms, restaurants serving liquor with meals, bars, and the like. This means that the innkeeper's interest in carrying on his trade, in so far as it serves the corresponding interest of the public, outweighs *prima facie* the interest of those members of the public who come to harm or suffer injury if they abuse the facilities provided for them and consume liquor in excess of their ability to carry it.

It follows that traditionally the responsibility not to get drunk rests on the patron; the barkeeper's responsibility not to sell liquor begins only when the patron is already apparently in an intoxicated condition.[60] The patron is "free" to get drunk, albeit at his own risk. If he becomes disorderly, only he is subject to criminal sanctions so long as the innkeeper does not serve him with more drinks. If he is injured as a result of being ejected, he has no redress unless excessive force is used against him: the innkeeper has not been held responsible if he comes to grief on his way home or elsewhere.

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[59] Asquith,L.J. in *Candler* v. *Crane, Christmas & Co.*, [1951] 2 K.B. 164, 192. See *Street on Torts* 5th ed., 105.

[60] *Liquor Licence Act* and *Liquor Control Act, supra*, f.n.11.

It is this *laissez-faire* attitude which the judgments in *Jordan House* reject or qualify by calling for a comparison and evaluation of the conflicting interests involved. On the one hand, there are the interests of the innkeeper and his other guests in not being disturbed by a man who cannot hold his liquor; on the other hand, there are now also the interests of the intoxicated patron to be taken into account.[61] But how far shall the latter prevail over the former? So far, it seems clear enough that even a drunkard's life and health rank higher than the innkeeper's and his other guests' convenience. Will the same apply to the intoxicated patron's property? How far is it likely that *Jordan House* will be applied to other situations? Will the tavern-owner be liable if he merely fails to prevent an intoxicated patron from leaving if it is obvious that he will be unable to take care of himself alone? Although the answers to these questions must ultimately depend upon the Court's views of the social needs at the time they arise, they will also require a decision on how far the Court is allowed or prepared to go in converting relevant liquor control and licensing laws from control norms into protective norms.

Control and Protective Legal Norms

The difficulty involved in drawing the distinction between control and protective norms is known by every legal system. In common law jurisdictions it lies at the root of the problem of whether the breach of a statutory duty confers a right on others to claim damages for injury to their person or property following on the breach *per se*. In code systems the difficulty does not only arise with reference to specific enactments, but also in connection with the "blanket" section found in most civil law codes by which a person who contravenes a statute enacted for the protection of others is liable to make good the damage which another person may suffer as a result of the contravention.[62] In theory the difficulty

[61] It is perhaps significant that Laskin,J. could refer only to one Canadian case in which this conflict of interests has been considered during the past fifty years: *Dunn* v. *Dominion Railway Co.*, [1920] 60 S.C.R. 310; 52 D.L.R. 149, where a majority of the Supreme Court allowed the claim of the deceased estate of a drunken passenger who was killed by a passing train after he had been ejected at a closed and unlighted station. There it was held that the "right of removal of a disorderly passenger... conferred on the conductor is not absolute. It must be exercised reasonably [and cannot be exercised] under such circumstances that, as a direct consequence, [the passenger] is exposed to danger of losing his life or of serious personal injury." (*Per* Anglin,J. at 318 and 154 respectively).

[62] *E.g.* s.823 BGB (German Civil Code); Arts. 1382, 1384 C.C.

is easily resolved: a statute, or a common law rule for that matter, is a protective norm if its purpose is to protect the particular interests of a class of persons against a particular kind of hazard or harm; it is a control norm if its purpose is to protect the interests of the state or "to secure to individuals the enjoyment of rights or privileges to which they are entitled only as members of the public".[63]

In practice, however, it is often extremely difficult to forecast whether a court will classify a particular norm as a control norm or as a protective norm, and as the classification invariably calls for the determination of a duty problem, it always involves "a large element of judicial policy and social expediency ... however it may be obscured by use of the traditional formulae".[64] Thus it is said on the one hand that no action lies, as a general rule, against a local authority or public amenities company which fails to carry out its statutory duties.[65] On the other hand, in *Dorset Yacht Club* v. *Home Office*[66] the House of Lords held that the Home Office was liable for the damage which Borstal boys had caused to the Yacht Company's property after they had escaped from custody due to the negligence of the Crown officers who were responsible for them. A less progressive court might have held that the statutory provisions which regulate the supervision of Borstal boys are intended solely for the protection of the State or society as a whole and refused to grant a remedy to the plaintiff.[67]

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[63] *Restatement of Torts* 2d, paras. 286, 288. But see also *infra*, f.n.67.

[64] MacDonald,J. in *Nova Mink Ltd.* v. *Trans-Canada Airlines*, [1951] 2 D.L.R. 241, 256. See also Lord Denning's observations *supra*, text *ad* f.n.57.

[65] See *e.g. East Suffolk Rivers Catchment Board* v. *Kent*, [1940] 4 All E.R. 527; *H.R. Moch Co.* v. *Rensselaer Water Co.*, 159 N.E. 896, 247 N.Y. 160 (C.A. 1928).

[66] *Supra*, f.n.57 (C.A.); [1970] 2 All E.R. 294, [1970] 2 W.L.R. 1140 (H.L.). While the Court of Appeal might have reached the same result ten or fifteen years ago, it is doubtful whether the House of Lords would have done so at that time. See also *infra*, f.n.67.

[67] The fact that the argument in the *Dorset Yacht Club* case, *ibid.*, turned to a large extent on questions of foreseeability and remoteness is irrelevant in the present context, as the court's value judgment may find its expression in any one, or all, of the four elements of the negligence concept. See also *Levine* v. *Morris*, [1970] 1 All E.R. 144 (C.A.) where it was held that the Ministry of Transport owes a duty to motorists when putting up road signs and is therefore liable to individual motorists who may accidentally leave the road and collide with a sign which, in breach of the duty, is so placed that a collision may occur with comparative ease. Contrast *Coote* v. *Stone*, [1971] 1 All E.R. 657, [1971] 1 W.L.R. 279, where failure to comply with a regulation which prohibits stopping on a "clearway" was held to be only a control norm.

The "conversion" or extension of a statutory control norm into a general protective norm on the basis that the former indicates a "standard upon which a common law duty [could] be founded" is thus generally a matter of judicial policy.[68] But although this means that the crucial decision about the legal rule to be applied or established, and also about the scope of that rule, has been made before the judgment is cast into syllogistic form,[69] legal reasoning requires that the decision be explained by the use of "traditional formulae".[70] Here the problem is that it is often difficult to justify in strictly logical terms what is essentially a value judgment.[71] However, it is possible to determine how the value judgment is arrived at, and this in itself is important. The object of control norms is twofold: to promote the welfare of society (*e.g.* establishment of public utilities, social services and the like, as well as ensuring that they are run efficiently); and to regulate private and public activities with a view to potential risk of injury or harm to members of the public. In a sense, therefore, the difference between control and protective norms is one of degree rather than of principle.

In another sense, however, there is this distinction: protective norms postulate that the activities to which they relate can be carried on only on the condition that they do not result in harm or injuries to

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[68] See *supra,* The Judgments and Fleming, *supra,* f.n.31, 126, who suggests that the impasse which the conflicting considerations militating for and against a norm being declared either "protective" or "control" may be avoided by predicating "civil liability on wilful and negligent breaches alone or to admit the excuse of inevitable accident, mistake and necessity"; alternatively, one may "reject all rules of thumb... and leave to the trier of facts what weight to attach to the statutory prescription in the light of all attendant circumstances".

[69] See Cross, *Precedent in English Law* 1st ed., 204; 2d ed., 178.

[70] *Supra,* text *ad* f.n.64.

[71] Once the premise has been selected, the difficulty seems to disappear. The desired result can then be logically explained, because it is inevitably determined by the chosen premise. But how is this premise determined? When that determination was made, "[j]ustice reacted upon logic, sentiment upon reason, by guiding the choice to be made between one logic and another" (Cardozo, *Nature of the Judicial Process* (1921), 45). It may be said that the conversion of a control norm into a protective norm can be more easily justified in terms of logic than refusal to convert it, especially in cases in which "[t]he duty [is] of such paramount importance that it is owed to all the public" because it would be "strange if a less important duty which is owed to a section of the public may be enforced by an action, while a more important duty which is owed to the public at large cannot" (*per* Lord Atkin in *Phillips* v. *Britannia Hygienic Laundry,* [1923] 2 K.B. 832, 841, [1923] All E.R. 127, 138). But even so, the decision remains essentially a value judgment.

others, whereas control norms relate to activities which are permitted by law despite the fact that they inevitably involve a certain amount of risk of harm or injury to others. Control norms thus regulate those activities in the pursuit of which the law permits the creation of danger of injury to others and is prepared to tolerate within certain limits that such others will in fact suffer injury and harm from time to time.[72] But since in such cases the causing of harm or injury is not regarded as unlawful *per se*, failure to comply with a control norm does not entail liability for such injury or harm. It is assumed that the control norm imposes no duty on the offender toward the person who has been injured.

The decision that a norm is not a protective but a mere control norm is a quantitive rather than a qualitative value judgment as it is invariably only a matter of expediency which cannot be justified on any other grounds than that "[t]he law does not spread its protection so far".[73] When the courts consider that mere regulation of the activities to which a control norm relates is no longer sufficient in the interests of society, they gradually convert it into a protective norm by holding that "[c]ompliance with a legislative enactment or an administrative regulation [*i.e.* any control norm] does not prevent a finding of negligence where a reasonable man would take additional precautions".[74] This means that the standard of conduct laid down by the control norm now only defines "[the] minimum standard, applicable to the ordinary situations" which it is intended to regulate.[75] This is what happened in the *Jordan House* case. The result is that, in reality, another category of negligence has been added to those which have hitherto existed. Thus, the courts are again "at large" and faced with the task of defining the scope of the new duty situation which has been created.

The Scope of the New Category of Negligence

In the *Jordan House* case, the imposition of the duty of care on the hotel was justified on the basis of its invitor-invitee relationship with Menow, and the knowledge of the hotel operator and his staff of Menow's propensity to drink to excess and of his inability to take care of himself when he was intoxicated. The breach of that duty was

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[72] Therefore, ultra-hazardous activities are those which are most strictly controlled.

[73] See *H.R. Moch Co.* v. *Rensselaer Water Co., supra,* f.n.65, 899 and 165, where Cardozo,C.J. quotes the U.S. Supreme Court in *Robins Dry Dock Repair Co.* v. *Flint,* 275 U.S. 303, 48 S.Ct. 134, 726 Ea. 290.

[74] *Restatement of Torts* 2d, para. 288C.

[75] *Ibid.,* Comment.

seen to consist of the manager and other employees permitting Menow to consume a quantity of beer which they ought to have known would make him incapable of looking after himself and thereafter exposing him to the hazards of traffic without taking any measures to ensure his safety. Laskin,J. also stressed that the hotel had served Menow "in breach of statutory injunctions against serving a patron in an intoxicated condition". Ritchie,J. did not refer to any breach of the relevant liquor control and licensing laws. This appears to be the only difference between his judgment and that of Laskin,J. and it is obvious that he regarded it as significant. Both judgments declined to attach any importance to Menow's ejectment, as Haines,J. had done. This would seem to indicate that the hotel's duty went further than merely not to turn him out, but that it was under the obligation to prevent him from leaving the beverage room unless he was in the company of a responsible person able and willing to look after him. On this basis, his ejectment was important only in that the hotel possibly advanced the time at which it reached the final *locus poenitentiae* at which it could have saved itself from the consequences of its breach of duty.

The emphasis which the judgments placed on the knowledge by the hotel manager and staff of Menow's propensities raises the question of how intimate that knowledge must be before it will be regarded as a factor upon which to found an innkeeper's duty of care to an intoxicated guest. Menow was a "regular" of the beverage room of Jordan House. This fact would justify the demand that its employees pay special attention to Menow, and Ritchie,J. seemed to think that they were under an obligation to refuse serving him even before he became visibly and apparently intoxicated. The same may also have been the view of Laskin,J. despite his repeated references to the hotel having served Menow in breach of the relevant liquor control and licensing regulations. If this interpretation of the judgments is correct, then the question arises whether a similar duty will in the future be imposed on liquor licensees with respect to every patron whom they have reasonable grounds to believe will become visibly or apparently intoxicated if served another drink. A breach of this duty may often be difficult to prove, but difficnlt does not mean impossible. At least for the time being, the courts are not likely to be overly zealous in finding that a breach of such a duty has been established, but it is by no means impossible to say that such a duty will be imposed in appropriate cases.

As regards the reservation that a great deal must always turn on the knowledge of the operator or his employees of the patron and his condition, a state of approaching intoxication is often as visible

and apparent as the actual state of intoxication. But assuming that the operator and his staff, not being required to act as watch dogs, have excusably supplied a casual guest with liquor until he is visibly intoxicated, will they be permitted to turn him out into a busy highway or do they come under a duty to prevent him, too, from leaving the beverage room? In the *Jordan House* case, the manager and his staff knew that Menow would be incapable of looking after himself, but it must be admitted that not all persons under the influence of liquor are necessarily incapacitated. There are certainly grounds for saying that the operator of a beverage room should not be made the keeper of every guest who has had "one over the dozen". Nevertheless, there will always be a number of cases in which a patron is either obviously incapable or about whom a reasonable man must have considerable doubt as to his fitness to face the hazards of the traffic on a busy road. The invitor-invitee relationship exists between a tavern-owner and a casual guest just as it did in Menow's case, and in the hypothetical situations discussed here the tavern-owner has also the knowledge of the guest's condition. It is submitted that it can hardly make any difference whether that knowledge has been acquired over a long period of time or a few minutes before the patron is forced, or permitted, to face the same dangers as those to which Menow had been exposed. Logically he should be entitled to the same care as the customer of long standing. However, it must, of course, always be remembered that the life of the law is not logic but experience.[76]

Another possible situation which should be considered concerns the person who arrives at a beverage room in an already intoxicated state and whom the operator has refused to serve with additional drinks. This person is not an invitee, but in the position of a trespasser. Is the innkeeper permitted to eject him, even when it is obvious that he is incapable of taking care of himself? The duty towards a trespasser is generally only to "refrain from intentional injuries or reckless acts".[77] Depending on the degree of the trespasser's intoxication, the innkeeper may well act recklessly if he ejects him. But even though this may not be the case, he might still become liable if the standard of conduct towards trespassers in *Graham* v. *Eastern Woodworkers Ltd.*[78] is adopted. MacDonald,J.

[76] O.W. Holmes, *The Common Law* (1881), 1, However, it should be borne in mind that in *Dunn's* case (*supra*, f.n.61), the train conductor had no *special* knowledge of the passenger's disposition or long experience of his conduct when under the influence of drink.

[77] See generally B.M.E. McMahon, *Occupiers' Liability in Canada*, (1973) 22 I.C.L.Q. 515, 528.

[78] [1959] 18 D.L.R. (2d) 260.

said in that case that an occupier must always act "with due regard to the foreseeable risks incident thereto of injury to other persons, including trespassers, known to be in the area" or, of course, on his immediate premises.[78a] It seems doubtful that an occupier will be on safer ground if *Herrington* v. *British Railway Board*[79] is held to be applicable to the innkeeper-intoxicated trespasser relationship until that decision has been further explained.[80] It might be argued that this is a *sui generis* relationship to which the general rules of occupier's liability cannot be applied. If this should be correct, then the tavern-owner's position might be regarded as similar to that of the person who passes so close to the proverbial pool in which a small child is drowning that the child is able to grab his leg. Is the passer-by entitled to shake off the child? It is suggested that no court would tolerate such callousness, although consideration of this problem has hitherto neatly been avoided.

It is surprising how seldom the problem of an innkeeper's duty of care has attracted the attention of the courts. It was, however, recently considered in Germany where the High Court at Munich had little sympathy for an intoxicated guest who was run over by a car and killed after he had been turned out. There, the Court laid down as a general rule that an innkeeper is under no duty to inform the police or the local Red Cross organization if an intoxicated patron leaves his premises and, by necessary implication, that he need not prevent him from leaving.[81]

[78a] *Ibid.*, 271.

[79] [1972] A.C. 877.

[80] See *Salmond on The Law of Torts* 16th ed. (1973), 286.

[81] O.L.G. *(Oberlandesgericht)* Munich 11.2.1966, NJW *(Neue Juristische Wochenschrift)* 1966, 1165ff. In this case, the deceased had arrived at the inn already in an intoxicated condition. He was nevertheless given a glass of beer, which was unintentionally knocked over by another guest. The deceased thereupon started a quarrel, and when asked to leave he refused and took a knife from his pocket. Thereupon he was led out of the beverage room into a court yard with (in the words of the judgment) "gentle force". Shortly afterwards another guest arrived and reported that he had seen the deceased (then still very much alive) lying in a ditch only about 10 yards from the inn. Subsequently he was killed by a motorist who was found to have been entirely blameless. A claim against the innkeeper was dismissed. It was based on various provisions of the German Criminal Code, *inter alia* a section which makes it an offence (and is admittedly a protective norm) to expose a helpless person to injury or harm. The Court held on the facts that it had not been established beyond doubt that the deceased was in a helpless condition, nor (if he was) that the innkeeper had negligently failed to recognize that condition when the deceased was ejected. The judgment also pointed out that the deceased, although originally an invitee, had become a trespasser when he refused to leave the inn. Consequently, the innkeeper's action was

The extent to which the *Jordan House* case may be regarded as having heralded a change in the law will only become apparent as more cases of this kind come before the courts. It is likely that such cases will be brought by motorists who become involved in accidents which result in injuries (but not death) to themselves.[82] The temptation to extend the liability of the operators of licensed premises is obvious. Of course, it may be argued that on a proper construction of the statutory provisions, the legislator has already decided that such liability should not be imposed: he specifically made licensees liable for damage caused to third parties by patrons under the influence of liquor. In other words, the legislator would have introduced liability for injury to intoxicated patrons when he imposed liability for damages to third parties on tavern-owners. On the other hand, it may be argued that the legislator intended to put the existence of a licensee's liability *vis-à-vis* third parties beyond doubt, but was satisfied that the duty relationship between tavern-owners and their patrons would be worked out gradually through the courts by the application of common law principles as social needs and the justice of individual cases required.

There is after all a world of difference between the two situations. As between the innkeeper and third parties, the former provides the opportunity for his patrons to become intoxicated, and if the patron in a state of intoxication causes injury to others, then there is no reason why the innkeeper and the patron should not both be liable. As between themselves, however, entirely different considerations must

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objectively lawful and not merely subjectively excusable or "not culpable" (see *supra,* text before f.n.48). Not even the fact that he was subsequently informed that the deceased was lying in a nearby ditch (which meant that he must have become helpless almost immediately after he had been ejected) imposed a duty on the innkeeper to come to his assistance. It is on this basis that the principle which the Court enunciated (as stated in the text prior to this note) is of general application despite the special facts of the case. Another facet of the decision, which is interesting when compared with the attitude of the Court in the *Jordan House* case, is that the German Court attached at least some importance to the fact that the deceased would not have been on the main road on which he was killed if he had gone home on a direct route.

[82] S.67 of the *Liquor Licence Act, supra,* f.n.11, imposes liabilities under the *Fatal Accidents Act* on the operator of a beverage room who sells liquor to a person "whose condition is such that the consumption of liquor would apparently intoxicate him ... so that he would be in danger of causing injury to his person" if the latter should commit suicide or meet death by accident while under the influence of liquor. That section does not provide for liability of the operator of a beverage room if that person merely injures himself but does not die from such injuries.

apply. *Prima facie* the patron who drinks to excess is more blameworthy than the innkeeper, who merely supplied the liquor. However, this may not always be so, as the *Jordan House* case shows. Here, the operator of the beverage room or his staff, in the words of Ritchie,J., "assisted or at least permitted"[83] a patron to become intoxicated when they were in a better position to appreciate the consequences than the patron himself. The same might apply where the patron is still rather young and therefore less responsible than an older person.

The extent to which "circumstances alter cases" may again be illustrated by reference to two German decisions which were reached by the application of fundamental principles without the assistance of relevant liquor legislation. In 1953, the Federal Supreme Court of Germany decided in a criminal case that a tavern-owner was under a duty to prevent a patron from driving his motor car if he had supplied him with so much liquor that the patron was no longer in a position to have full and proper control of his car. This duty was held to exist irrespective of whether the tavern-owner had been at fault in supplying liquor to the patron concerned.[84] One year later, the district court at Heilbronn applied the *ratio decidendi* of the Federal Supreme Court to a civil case in which an innkeeper had allowed a driver to continue his journey, knowing that the patron was under the influence of liquor to such an extent that his driving ability was markedly impaired. The Court held the innkeeper liable for the injuries which a third party suffered in an accident caused by the intoxicated driver's inability to control his car.[85] In both cases, the Courts held that it was not the fact that the innkeeper had supplied the guest with an excess of liquor which made him criminally and civilly liable, but that it was his failure to take preventive measures which was decisive.

While these two cases differ from *Jordan House*, it is submitted that they are relevant because they illustrate the attitude of the courts to the problem of when a tavern-owner should be held liable for the consequences of having supplied a patron with an excess of liquor, and injury is suffered by the patron or third parties. The same applies to a third case[86] in which the Federal Supreme Court of Germany qualified its earlier judgment.[87] In that case, three patrons entered a bar at midnight when they had already consumed

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[83] *Supra*, f.n.2, 105.
[84] BGHSt 22.1.1953, NJW 1953, 551ff.
[85] LG (*Landgericht*) *Heilbronn* 3.2.1954, NJW 1954, 1922ff.
[86] BGHSt 13.11.1962, NJW 1964, 412ff.
[87] *Supra*, f.n.84.

a certain quantity of liquor. They then proceeded to drink 10 or 12 whiskies each. When about three hours later they wanted to drive off in their motor car, the barkeeper advised them to take a taxi, as he realized that none of them was capable of taking proper control of the car. They did not take his advice and subsequently the car was overturned and two of the party were injured.

In these circumstances the Federal Supreme Court acquitted the barkeeper. It maintained the principle it had established in the earlier case,[88] but introduced a substantially different standard of care with regard to the civil liability of an innkeeper who permits an intoxicated patron to drive off in his motor car. It seems inevitable that, in yet another case, the Federal Supreme Court will openly admit that in German law, different standards will be applied depending upon whether the intoxicated patron has caused an accident in which only he has come to harm, or whether the accident has resulted in injuries to third parties.

Fault, Strict and No-Fault Liability: Rights and Wrongs

Few discussions of problems in the law of tort can nowadays avoid the controversial issues of fault and no-fault liability. In the *Jordan House* case, the hotel's liability was clearly predicated upon fault, and there is no indication that the Court even contemplated the possibility of liability being imposed on any other basis. On the other hand, it may well be that strict liability is attached to innkeepers if their intoxicated patrons cause injuries to third parties.[89] At the same time, it is interesting to consider the effect of the *Jordan House* decision in a jurisdiction which has introduced a system of no-fault liability with regard to motor car accidents. Assuming that Honsberger had not been negligent and that the damages to which Menow was entitled did not exceed the amount of his no-fault insurance, would Honsberger's insurance company have to pay Menow? If so, would it then be entitled to claim from *Jordan House* the amount it was obliged to pay to Menow? Alternatively, if (as in the actual case) Honsberger was negligent, would his insurance

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[88] *Ibid.*

[89] *Prima facie* s.67 of the *Liquor Licence Act, supra,* f.n.11, which makes an operator liable to third parties who have suffered harm or injury as the result of an intoxicated patron's actions, suggests the imposition of strict liability. But the absence of expressions such as "wrongfully" and the like is not always decisive, and it may be that at least certain defences showing absence of fault will be admitted. (I have been unable to find among the sources available to me any decisions directly in point).

company then be prevented from recovering a contribution from Jordan House?

In connection with the possible demise of fault liability in certain areas of tort law,[90] an interesting suggestion has recently been made by a Canadian writer who believes that the *Jordan House* case proves that "[t]he availability of the tort remedy (based on fault) may act as a prod where the criminal law has become a dead letter".[91] Fault or no-fault liability, this case is likely to induce operators of beverage rooms to seek insurance coverage against such claims as Menow's, and the availability and cost of such insurance may well have a bearing on the attitude of the courts in extending or restricting the tavern-owner's liability in similar situations. In more general terms, whether one favours an extension of the principle of no-fault liability in the law of tort, or whether one adopts a more cautious attitude toward it, *Jordan House* illustrates the need for careful reconciliation between the traditional fault principle and the introduction of the no-fault liability rule. Even if the latter gains in momentum it is likely that both of them will co-exist for some very considerable time.

Even more important is to ensure that the introduction of a system of no-fault liability will not destroy the distinction between "right" and "wrong" in the law of tort. This consideration does not affect only those who believe, as the writer does, that the law should reflect what has been called "the moral sense" of society, but also those who do not believe in the "minimum ethical content of law" and maintain that law and morality should be kept apart. There must be a criterion which determines whether or not an action or omission is justified, as opposed to being merely excusable,[92] and it is difficult to see how this criterion can be expressed otherwise than in terms of "right" and "wrong". A distinction must be made between an action which is right *per se* and one which is wrong though it may be excused.

The significance of this submission may be illustrated by reference to the case of *Depue* v. *Flatau*,[93] where it was held that a rancher, who refused a visitor who had been taken ill permission to stay at his house overnight, was liable for the injuries which the latter suffered due to the extreme cold after

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[90] See Fleming, *The Decline and Fall of the Law of Delict*, (1973) VI CILSA 259.

[91] Linden, *supra*, f.n.44, 481.

[92] See text *supra*, *ad* f.n.47.

[93] 100 Minn 299, 111 N.W. 1 (S.C. 1907). See also Wright, *supra*, f.n.48, 118.

he had been turned out by the rancher. One might argue that a party, in whose favour a duty of reasonable care was held to exist and to have been breached, ought to be entitled to use reasonable force against the other party. This would mean that the visitor in *Flatau's* case, or a person who might have accompanied him, would have been entitled to resist the rancher. It is easy to envisage that in the course of a scuffle the rancher might have suffered injury either to his person or to his property. In a system in which no-fault liability is taken to its logical conclusion, the question as to which of the parties was at fault would not be asked, and both the visitor and the rancher would have been entitled to compensation.

No doubt, it is not only desirable but a social necessity that victims of accidents and of wrongful acts should receive compensation. But should society accept responsibility for such compensation without seeking recovery in appropriate cases? The principle of loss distribution is obviously merely an extension or application of Bentham's rule of the greatest happiness for the greatest number, and its introduction is a sign that a society has reached a certain stage of maturity. However, loss distribution does not have to become indiscriminate and random distribution. There must be a measure of decision and the criminal law is certainly not a very appropriate means to provide it. Nor is insurance a bottomless barrel which can supply a panacea. Nothing that has been said here should be regarded as a negation of the principle of loss distribution *per se,* but as a *caveat* against its acceptance until it has been fully developed. New remedies often bring with them new dangers which then take the place of those which they are intended to combat.