*Cambridge Law Journal*, **60(1)**, March 2001, pp. 109–127
*Printed in Great Britain*

# LIABILITY IN RESPECT OF THE INTOXICATED

CLAIRE MCIVOR*

THE imposition of non-vicarious liability for harm committed by another is a thoroughly modern legal phenomenon that has been described by Stapleton as "the worrying result of the development and application of broad principles of negligence".[1] As far as the "staggering march of negligence"[2] is concerned, of the diverse forms in which third party liability has already manifested itself, it is arguably that which arises in respect of the intoxicated that causes the most concern. Although a relatively new category of liability, it has already taken strong root in a number of commonwealth jurisdictions and is currently experiencing a period of rapid growth. Indeed, so meteoric has been its rise, and so frantic the scramble to jump on the liability bandwagon, that the basic principles of tort law have been all but trampled underfoot. For this extension of the boundaries of tortious liability has been effected with socio-political aims in sight, but with little or no consideration of its wider legal ramifications. In the past, the English lawyer would have had little to fear from such developments, confident that, in keeping with their characteristically restrictive stance, the English courts would shun any attempt to establish third party "alcohol liability" in our legal system. No longer. There is a small but significant body of recent case law to indicate that, although it may be at an embryonic stage, alcohol liability is gaining some foothold in the English law of tort.

Third parties could be held personally liable in respect of the intoxicated in two distinct ways: for harm by another to the intoxicated or for the tortious conduct of the intoxicated. The intoxicated person may therefore feature as either the victim of harm or as the perpetrator. In the first case, the defendant's duty of care will be one of protection owed to the intoxicated; in the second case, it will be one of control owed to third parties. It is important that these two scenarios are not dismissed as merely

* Ph.D candidate, University of Durham. I am indebted to Professor Harvey Teff for his comments on an earlier draft of this article.

[1] J. Stapleton, "In Restraint of Tort", in P. Birks (ed.), *The Frontiers of Liability*, vol. 2 (OUP 1994), p. 84.

[2] T. Weir, "The Staggering March of Negligence", in P. Cane and J. Stapleton (eds.), *The Law of Obligations: Essays in Celebration of John Fleming* (Oxford Clarendon 1998), p. 97.



https://doi.org/10.1017/S0008197301000642 Published online by Cambridge University Press

exemplifying different facets of the one duty, for that would constitute a dangerous oversimplification of the legal issues at stake; dangerous in the sense that the legal implications of each form of liability would not be fully explored. As will be seen presently, the Canadian experience of alcohol liability provides ample proof of this danger. Rather, the duty to protect the intoxicated from third parties, and the duty to protect third parties from the intoxicated must be recognised as two entirely separate legal duties, each governed by its own particular set of legal rules.

## I. The Commonwealth Position

Among commonwealth jurisdictions, the notion of alcohol liability is most developed in Canadian tort law. Its origins may be traced back to the 1974 decision of the Supreme Court of Canada in *Jordan House Ltd.* v. *Menow*,[3] which saw a tavern owner held liable for the injuries sustained by a drunken patron, subsequent to his ejection from the establishment. The claimant in question was an habitual drunkard and a known troublemaker who had previously been banned from the defendant's hotel for anti-social behaviour. On the night in question, he was thrown out for being drunk and annoying other guests and, while making his way home, he was hit by a negligent motorist. In seeking to hold the company that owned the hotel (hereafter the hotel) jointly responsible for his injuries, the claimant's argument was that the hotel had breached its common law duty to protect him in his intoxicated state.

That the hotel owed the claimant a duty of care was not doubted by the Supreme Court. Its primary concern was rather with the nature and scope of this duty. On this issue, two distinct views emerged. For Laskin J., everything more or less turned on the hotel's special knowledge of the claimant's particular susceptibility to alcohol and the effect it had on him.[4] This gave rise to a duty to take reasonable steps to ensure that he got home safely. The bar staff, in Laskin J.'s view, should either have arranged safe transport for him, called the police or even put him up for the night in the hotel. Given the magnitude of his expectations, it would seem clear that Laskin J. regarded the duty of care involved as being of an exceptional nature, for he surely could not have thought it reasonable to oblige hoteliers regularly to provide their overly intoxicated patrons with the benefit of accommodation services normally reserved for paying guests.

[3] (1973) 38 D.L.R. (3d) 105. For a comment on the decision, see: H. Silberberg, "The Intoxicated Patron: A Re-Appraisal of the Duty of Care" (1974) 20 McGill L.J. 491.
[4] *Ibid.*, at p. 113.

https://doi.org/10.1017/S0008197301000642 Published online by Cambridge University Press

Indeed, he stressed that he was not imposing "a duty on every tavern owner to act as a watch dog for all patrons who enter his place of business and drink to excess".[5]

Richie J., on the other hand, imposed a much stricter test of liability. In his view, the defendant's duty was not merely to protect the claimant once he became intoxicated, but rather to *prevent* intoxication in the first place. For him, therefore, the duty of care arose at a much earlier point. Whereas, under Laskin J.'s formulation, the duty of care arose when the claimant became too drunk to look after himself, for Richie J. it presumably came into play when the hotel employees provided the claimant with his first drink. From the point of view of the claimant, the practical significance of framing the duty in such terms is that it makes it much easier to satisfy the fault element of negligence. If the defendant has not taken reasonable care to prevent intoxication, that in itself operates to breach the duty and nothing that is done afterwards to help the patron will suffice to undo that breach. Even providing a personal escort to take the claimant home would not make any difference, unless of course it had the effect of preventing the harm from occurring in the first place. However, such divergence of opinion within the court was, in the end, of little consequence in this case, for the defendant's conduct was such that it constituted a breach of both versions of the duty of care. Along with the negligent motorist, the hotel was held liable for two-thirds of the claimant's losses.

Arguably, the correct way to interpret the decision in *Jordan House* would be to simply regard it as limited to the very special facts of the case. Of course, that is not how it has been interpreted. Not only did subsequent courts unfortunately latch on to the test propounded by Richie J., they, rather more worryingly, fashioned it to serve specific socio-political purposes, and thereby significantly widened its sphere of applicability. The potential of the *Jordan House* decision to be used as a sword in the fight against drink driving was quickly recognised. Thereafter, it was a slippery slope.

In *Canada Trust Co.* v. *Porter*,[6] the Ontario Court of Appeal accepted *Jordan House* as establishing a new general principle of liability based on the provision of alcohol and used it to authorise a claim in negligence against a tavern owner brought by the victims of a road accident caused by one of the tavern's intoxicated patrons. In a flash, without any discussion of the matter, the duty of commercial alcohol providers to protect their intoxicated patrons had been transformed into an all-encompassing duty, notably

[5] *Ibid.*
[6] Unreported, Ont. C.A., 28 April 1980.

https://doi.org/10.1017/S0008197301000642 Published online by Cambridge University Press

entailing an additional obligation to control the actions of such patrons in order to protect third parties. In a further twist, this duty of care was made to extend to all patrons, irrespective of whether they had had any personal dealings with the defendant. The patron in *Canada Trust* was effectively a stranger to the bar staff and had, moreover, been served from behind a partition, so that the staff were not in a position to keep track of how much he, or any other patron, was drinking or to monitor his conduct. According to the Court, it was the defendant's responsibility to establish serving and staffing practices to ensure that no one on the premises was served past the point of intoxication.

Allowing a duty of care to arise from the mere fact of serving alcohol, in the absence of any personal relationship between the claimant and the defendant, introduces a whole range of problems. For clearly, to remove the most effective control mechanism from the equation really is to invite an influx of vexatious claims. It also raises practical difficulties of implementation, for there are various degrees of intoxication which depend to a large extent on the constitution and temperament of the particular individual concerned. How is a bartender to determine the time at which it becomes appropriate to intervene and stop serving?

This point is aptly illustrated by the next major case in the Canadian alcohol liability saga. The facts of *Schmidt* v. *Sharpe*[7] are as follows. Already intoxicated, the first defendant enters the second defendant's establishment whereupon he consumes three beers, then gets into his car and promptly drives off the road, seriously injuring his passenger. Together the two defendants are held liable for 70 per cent. of the victim's losses; the first defendant for obvious reasons, and the second defendant for breaching its duty not to serve an intoxicated patron. In the light of the first defendant's blood alcohol level, the Court considered that the bar staff should have noticed his drunkenness. Given that the first defendant was not known to the bar staff, had not been showing any visible signs of intoxication when he arrived and had consumed only a small proportion of his overall alcohol intake for the evening there, the judgment against the second defendant would appear unduly harsh.

Moreover, even though the victim had been drinking with the first defendant prior to accepting a lift from him, the Court refused to accept the defence argument that he had consented to the risk of injury. By deliberately construing the defence of *volenti non fit injuria* in a very narrow sense, the Court was able to dismiss it as

[7] (1983) 27 C.C.L.T. 1.

https://doi.org/10.1017/S0008197301000642 Published online by Cambridge University Press

inapplicable in the circumstances. It simply pointed out that the victim had not been aware that the first defendant had been drinking before they met, so that he could not be taken to have understood the true nature and extent of the risk he was taking. That the Court, nevertheless, expected such awareness of the bar staff is a clear illustration of its pro-victim stance.

With such a staggering build-up, it will have come as no surprise to anyone when, in 1986, the principles governing provider liability, erstwhile limited to those supplying alcohol for commercial gain, were extended to include social hosts.[8] However, *Schmidt* v. *Sharpe* probably represents the highpoint of alcohol provider liability in Canada. From subsequent case law there can be detected signs of a slight judicial retreat.

The facts of *Hague* v. *Billings*[9] follow a familiar pattern—victims of a road accident caused by a drunken driver bringing a claim in negligence against the alcohol provider. A notable feature of this case, though, is that it was not just one licensed establishment that had provided the driver with alcohol that was sued, but two. The first bar had served him with just one drink before staff realised that he was already drunk and refused further service. He then made his way to the second bar, where he was served four more drinks. It was after leaving this bar that he drove into the claimants' car.

That the liability of the second bar was upheld comes as no great surprise at this point. Of greater interest, in the present context, is how the issue of the first bar's liability was dealt with. The Ontario High Court, and later the Ontario Court of Appeal,[10] decided that this bar could not be liable for serving the driver past the point of intoxication simply on the basis of the single drink they had provided, for, at that stage, they had not had time to properly ascertain his state of inebriation. While it might not have been under a duty to prevent intoxication, however, the Court did consider that it was bound by a duty to prevent him from driving and that this duty arose at the point at which the staff realised that he was drunk. Moreover, it found that the efforts of the proprietor to persuade the driver to hand over his car keys to one of his friends were insufficient to fulfil this duty. Actual control needed to be taken of the situation and if the staff were not capable of doing this themselves, then they should have called in the police. On this analysis, therefore, the duty of care had been breached. Liability was, however, ultimately avoided on the basis of causation for it

[8] *Baumeister* v. *Drake* (1986) 38 C.C.L.T. 1. See also *Wince* v. *Ball* (1996) 136 D.L.R. (4th) 104.
[9] (1989) 68 O.R. (2d) 321.
[10] (1993) 15 C.C.L.T. (2d) 264.

https://doi.org/10.1017/S0008197301000642 Published online by Cambridge University Press

was found that even if the police had been summoned, the accident would still have occurred.

The main point of significance to be drawn from *Hague* v. *Billings* is that the judicial approach to the duty issue adopted in that case was more akin to that set out by Laskin J. in *Jordan House* than that of Richie J. As such, it marks a clear departure from the previous trend. That it represents the shape of things to come would appear to be confirmed by the most recent significant decision in this field: *Stewart* v. *Pettie*.[11] Accompanied by his wife, sister and brother-in-law, Pettie spent the evening at a dinner theatre where he consumed between 10 and 14 measures of rum. He was served each time by the same waitress who kept a running total of all alcohol ordered by the group. Upon leaving the theatre, a group decision was made to allow Pettie to drive them all home, even though both Pettie's wife and his sister were sober and were aware of how much he had had to drink. On that particular night, the roads were slippery and although Pettie drove in a cautious and safe manner, he lost control of the vehicle. Pettie's sister was seriously injured in the crash that followed and, along with her husband, she brought an action in negligence against, *inter alia*, Pettie and the dinner theatre. On the issue of the theatre's liability, the trial judge's decision to dismiss the action was overturned by the Court of Appeal and then reinstated again by the Supreme Court of Canada.

Given the particular importance of the Supreme Court's decision, as the highest-ranking judicial pronouncement on the subject of alcohol provider liability, it is to be regretted that the judgment handed down is not easy to analyse. Although the Supreme Court clearly considered that overservice would not, in itself, suffice as a basis for the liability of an alcohol provider, which is a clear endorsement of the more lenient approach adopted in *Hague* v. *Billings*, it rather confusingly chose to explain its reasoning in terms of breach rather than duty. Basically, what the Supreme Court said was that, on the authority of *Jordan House*, there could be no doubt that commercial providers of alcohol owe a duty of care to their own patrons and to third parties who might reasonably be expected to come into contact with an intoxicated patron, most obviously, users of the highway. Cast in such broad terms, it is not surprising that the court recognised a duty in this case. More problematic, in its view, was the issue of the standard of care required of the defendant theatre in order to discharge this duty. It was under this rubric that the Supreme Court went on to

[11] (1995) 23 C.C.L.T. (2d) 89. See also *Wince* v. *Ball* (1996) 136 D.L.R. (4th) 104.

https://doi.org/10.1017/S0008197301000642 Published online by Cambridge University Press

consider the kind of issues that previous courts, quite correctly, it is submitted,[12] had treated as relevant to the question of the existence of the duty in the first place. In particular, it was only at this point that the Supreme Court questioned whether the circumstances were such that the theatre was under an obligation to take positive steps to ensure that Pettie did not drive. It considered that positive steps would only have been required if there had been a foreseeable risk that Pettie would drive. The fact that he was accompanied by two sober adults negated the existence of the necessary risk factor. The theatre had met the standard of care required of it by simply "remaining vigilant" in the circumstances, and so liability was avoided on the basis that the duty had not been breached. Alternatively, it was held that the action would also fail for lack of causation, for the inference drawn by the court was that even if the theatre had intervened, the claimants would still have allowed Pettie to drive.

Apart from the fact that it makes difficult a neat summary of the current approach of the Canadian courts to alcohol provider liability, the confusion evidenced by the Supreme Court in *Pettie* as regards the nature of the distinction between the duty and breach elements of negligence is of little concern in the present context. A broad conclusion which can still be drawn is that those who provide alcohol in Canada to persons who subsequently become intoxicated risk incurring liability in tort if such provision takes place in circumstances in which there is a foreseeable risk that the intoxicated person will engage in a potentially harmful course of action. The cases may further suggest that it is only the risks associated with roads and road vehicles that would be deemed foreseeable enough in this respect. If so, then this would certainly constitute one way in which the principles of alcohol provider liability are self-limiting.

It is to be noted at this point, though, that it is not only by placing themselves in the position of providers that Canadian citizens run the risk of being sued in respect of alcohol-related injuries. There is a designated area of Canadian tort law known as alcohol liability, which boasts a number of established categories.[13] Of these, provider liability is simply the one that has received the most attention. The others include: alcohol-related occupier's liability;[14] liability for sponsoring dangerous activities involving the

[12] On this point, see dicta of Evans L.J. in *Barrett* v. *Enfield London Borough Council* [1997] 2 F.L.R. 167.

[13] See further, R. Solomon and J. Payne, "Alcohol Liability in Canada and Australia: Sell, Serve and be Sued" (1996) 4 Tort L.R. 188.

[14] See, *e.g.*, *Niblock* v. *Pacific National Exhibition* (1981) 30 B.C.L.R. 20; *Buehl* v. *Polar Star Enterprises Inc.* (1989) 72 O.R. (2d) 573; *McGinty* v. *Cook* (1991) 79 D.L.R. (4th) 95.

https://doi.org/10.1017/S0008197301000642 Published online by Cambridge University Press

intoxicated,[15] and liability for transporting the intoxicated.[16] Significantly, if the importance of each category were to be judged in accordance with the amount of litigation generated by it, alcohol-related occupier's liability would actually rank much higher than provider liability. This is because in Canadian tort law the principles governing occupier's liability are very expansive, particularly by comparison with the United Kingdom. Such liability may arise not only in respect of the condition of the premises and activities taking place there, but also by reference to the conduct of entrants. There are a number of reasons why the provider liability cases have, nevertheless, attained the highest profile. Firstly, these cases have reached the highest courts and have been officially reported, whereas the others, for the most part, have warranted a mention only in regional or local press. Also, insurance companies are often quick to settle alcohol-related occupier's liability claims at the outset, for it has become a fairly established area of liability. The result is that these suits do not get publicised at all.

The development of alcohol liability in Australia, although along similar lines, has progressed at a much slower pace, Australian judges having tended to proceed with much greater caution than their Canadian counterparts. As yet, it is only occupiers[17] and commercial alcohol providers[18] who may find themselves saddled with liability in respect of the intoxicated, with the courts using the notion of proximity and the requirement of a high degree of foreseeability as mechanisms of control. The Australian courts are also more likely than those in Canada to allow a *volenti* defence to be used against an intoxicated claimant.[19] Nevertheless, a significant body of jurisprudence on the subject now exists, and recent indications are that it is going to keep on expanding.

## II. The Position in English Law

Writing in 1988 about the development of alcohol provider liability in the United States, Jeremy Horder concluded that it was unlikely,

[15] *Crocker* v. *Sundance Northwest Resorts Ltd.* (1988) 44 C.C.L.T. 225.
[16] *Dunn* v. *Dominion Atlantic Railway Co.* (1920) 60 S.C.R. 310; *The Canadian Pacific Railway Co.* v. *Blain* (1904) 34 S.C.R. 74.
[17] *Chordas* v. *Bryant (Wellington) Pty. Ltd.* (1988) 92 F.L.R. 401; *Wormald* v. *Robertson* (1992) Australian Torts Reports 81–180; *Gorman* v. *Williams* [1985] 2 N.S.W.L.R. 662.
[18] *Johns* v. *Cosgrove & Chevron Queensland Ltd.* (unreported, Qld. Sup. Ct., 12 Dec 1997); *Rosser* v. *Vintage Nominees Pty. Ltd. Licensee* (unreported, District Court of Western Australia, 5 June 1998). References taken from T. Blyth, "Hotelier and Social Host Liability for Alcohol-Related Injuries—A Review of The Law in Australia" (1999) E. Law—Murdoch University Electronic Journal of Law, vol. 6, no. 3.
[19] R. Solomon and J. Payne, *op. cit.*, p. 120.

https://doi.org/10.1017/S0008197301000642 Published online by Cambridge University Press

"if not impossible",[20] that this kind of liability would ever find a place in English tort law. It is true that, as yet, this specific form of alcohol liability has not established itself here. However, diverse forms of alcohol liability are beginning to creep into our legal system, albeit in a rather haphazard fashion.

Our starting point is *Barrett* v. *Ministry of Defence*,[21] in which the widow of a naval airman who died at an airbase after consuming an excessive quantity of alcohol sued the MoD for failing to prevent her husband's death. The deceased had been stationed at an isolated base in northern Norway at which seemingly unlimited quantities of low priced alcohol was freely available. On the fatal night in question, the deceased, who had been celebrating both his thirtieth birthday and news of a promotion, drank himself into a stupor. When he became unconscious, the duty senior rate organised for him to be taken by stretcher to his bunk, where he was placed in the recovery position. No medical attention was sought, although the duty ratings did check on him a number of times. The deceased, nevertheless, suffocated on his own vomit. In holding the MoD liable, Phelan J. explained that, although it was only in exceptional circumstances that a defendant could be fixed with a duty to take positive steps to protect an adult of full capacity from his own foibles, such exceptional circumstances existed in this case. The fact that the deceased was known to be a heavy drinker combined with the free availability of alcohol and the very lax attitude of those in charge towards drunkenness made it readily foreseeable that the deceased would become intoxicated. Of particular importance also was the capacity of the defendant to exercise control over the prevailing environment and to discourage drunkenness through the implementation of the existing codes of discipline. Instead, these were largely ignored. By the standards set out in the relevant Navy regulations and standing orders to cover the exact type of situation in question, the care provided to the deceased was wholly inadequate. Phelan J. did recognise, however, that the deceased was at least partly to blame for his own fate, and made a finding of 25 per cent. contributory negligence.

The MoD appealed against the decision, contending that the judge had been wrong to find that a duty of care existed in the circumstances, or that, alternatively, the finding of contributory negligence should have been fixed at, at least, 50 per cent. Beldam L.J., delivering the main judgment of the Court of Appeal, agreed with the

[20] "Tort and the Road to Temperance: A Different Kind of Offensive Against the Drinking Driver" (1988) 51 M.L.R. 735, 743.
[21] *The Independent*, 3 June 1993, C.A. [1995] 1 W.L.R. 1217.

https://doi.org/10.1017/S0008197301000642 Published online by Cambridge University Press

defendant's arguments to the extent that the judge had erred in his reasoning on the issues of duty and breach. In his view, the imposition on the defendant of a duty to control the actions of the deceased in order to prevent him from injuring himself would represent an unwarranted contravention of the principle of individual responsibility. He stated:

> I can see no reason why it should not be fair just and reasonable for the law to leave a responsible adult to assume responsibility for his own actions in consuming alcoholic drink. No one is better placed to judge the amount that he can safely consume or to exercise control in his own interest as well as in the interest of others. To dilute self-responsibility and to blame one adult for another's lack of self-control is neither just nor reasonable and in the development of the law of negligence an increment too far.[22]

He then went on to distinguish the Canadian decisions, *Jordan House* and *Crocker* v. *Sundance*,[23] stating that the duty of care in these cases was founded on factors additional to the mere provision of alcohol and the failure to enforce provisions against drunkenness.[24]

Crucially, however, although Beldam L.J. concluded that the defendants were not under a duty to prevent the deceased from drinking so much that he fell unconscious, he held that, through its actions in putting the deceased into his bunk after he had collapsed, the defendant "assumed responsibility" for the deceased and so placed itself under a continuing duty to exercise reasonable care to ensure his safety. Beldam L.J. further held that although the trial judge had been wrong to equate the Navy's regulations and standing orders with the legal standard of care required of the defendant, a breach of the duty of care could, nevertheless, still be established because, even by ordinary standards of reasonableness, the steps taken were wholly inadequate.

Beldam L.J. therefore ultimately concurred with the judge's finding that liability should be imposed on the defendant. However, he chose to give effect to his view that individuals should be made to take primary responsibility for their own actions by varying the apportionment of liability, increasing the deceased's level of contributory negligence from one quarter to two thirds.

Interestingly, the issue of the liability of the MoD for harm suffered by intoxicated servicemen has arisen again for consideration just recently. The outcome does not bode well for the

[22] *Ibid.*, at p. 1224.
[23] (1988) 44 C.C.L.T. 225.
[24] [1995] 1 W.L.R. 1217, 1225.

https://doi.org/10.1017/S0008197301000642 Published online by Cambridge University Press

MoD. In *Jebson* v. *MoD*,[25] the claimant was a soldier who had fallen from the back of an army lorry after climbing on its tailgate in a fit of drunken high spirits. He was with a group of soldiers being transported back from a night out organised by the company commander. The thrust of his argument was that in arranging the outing with the knowledge that it would involve heavy drinking, and in supplying the transport, the defendants had placed themselves under a duty to provide adequate supervision of the men while in the lorry and that this they had failed to do. The driver, who was the only sober member of the party, was unable to see into the back of the lorry from his front cab. Overturning the decision of the trial judge, the Court of Appeal found in favour of the claimant.

In a judgment that has clear echoes of Beldam L.J. in *Barrett*, Potter L.J. stated that, although ordinarily an adult could not rely on his drunkenness so as to impose a duty on others to exercise special care, this was not an invariable rule.[26] It did not apply in this case because the defendants had impliedly undertaken an obligation of care towards the claimant. For Potter L.J., the fact that the defendants had provided the transport for the soldiers, knowing that they were all likely to become inebriated, was crucial to this conclusion.[27] He did, however, assess the claimant's contributory negligence at 75 per cent.

*Jebson* would thus appear to send out a clear message to the MoD that the courts do not intend to resile from the principle of third party liability in respect of the intoxicated set out in *Barrett*. Unfortunately, the Court of Appeal did not avail itself of the opportunity presented by this case to elaborate on the reasons why the MoD has been made a particular target for this kind of liability. It can only be assumed that it has something to do with the nature of the relationship that exists between servicemen and their employers, with its emphasis on control, and perhaps with the strong alcohol-related culture that seems to pervade military life.[28] It is noteworthy that Potter L.J. did try to pre-empt the making of a direct link between the finding of liability and the military status of the defendants, but his attempt was so feeble as to be without meaning. His example of "an appropriate civilian analogy from civilian life"[29] was that of a works outing arranged by an employer, along with transport and a driver, for "a group of young and

[25] C.A., 21 June 2000 (unreported). (Transcript obtained.)
[26] At para. 25 of transcript.
[27] *Ibid.*
[28] See para. 24 of transcript.
[29] *Ibid.*

https://doi.org/10.1017/S0008197301000642 Published online by Cambridge University Press

boisterous employees".[30] Not content with limiting the ambit of the ratio by reference to the characteristics of potential claimants, however, he went on to introduce the type of vehicle involved as a further qualifying factor, specifying that it be a lorry with a similarly positioned tailgate and a driver who is unable to see into the back of it. It is submitted that this would seldom apply to a non-military vehicle.

The next case of interest in this context is *Griffiths* v. *Brown*,[31] which involved a claim in negligence against a taxi driver for injuries sustained by an inebriated passenger *after* he had alighted from the vehicle. The passenger in question had been dropped off by the taxi driver across the road from the specific destination he had requested. While crossing the road, he was hit by a car and seriously injured. He sued the taxi driver, alleging that the latter was under a duty of care not to set him down at any point at which it was foreseeable that, because of his intoxication, he would be at a greater risk of injury than a sober person. He argued that the taxi driver had breached this duty by obliging him to cross the road to get to his destination.

The claim failed. Jones J. opined that the defendant was under no duty of care to the claimant, other than to take reasonable care to carry him safely during his journey and to set him down at a place where he could safely alight. In this, his duty was no different to that which would be owed to a sober passenger. He distinguished the Canadian authorities in much the same way as Beldam L.J. did in *Barrett*, stating that the particular circumstances that gave rise to the duties in those cases were not present in the case at hand. However, in a move that had the effect of seriously undermining the conclusiveness of this pronouncement about duty, Jones J. went on to consider the question of breach, making it clear that his purpose in doing so was to guard against the possibility that a duty did actually exist in the circumstances. In doing this, he also further elaborated on the kind of situation in which, in his view, it would be feasible for a duty of care to exist. For him, the degree of intoxication was determinative, for he considered that such a duty could only exist where a passenger had reached such a state of intoxication as to be plainly incapable of taking care of his or her own safety. It followed that this was also the only circumstance in which the duty could be breached. In this case, the claimant had consumed somewhere in the region of 12 to 13 pints of strong lager and was obviously very drunk. But the fact that he was able to walk without staggering and give instructions to the

[30] *Ibid.*
[31] (1998) *The Times*, October 23. (Transcript obtained.)

https://doi.org/10.1017/S0008197301000642 Published online by Cambridge University Press

defendant as to his destination was taken as evidence that he still retained some degree of control over himself. This, in consequence, meant that a breach of duty could not be established.

The natural conclusion is that, had the claimant been in a worse state, a duty of care could have been both owed and breached by the taxi driver.[32] Interpreted in this way, the decision is entirely reconcilable with *Barrett*. The principle to emerge is that an undertaking to provide a service, or in some way to come to the aid of, an individual who is so intoxicated as to be incapable of taking care for his or her own safety will be held to amount to an "assumption of responsibility" for that person and so give rise to a duty of protection. That this notion of there being an "assumption of responsibility" is judicially recognised as constituting a legitimate ground on which to base a duty to rescue the intoxicated is supported by other dicta of Jones J. in *Griffiths*.

When discussing the kinds of situation in which a duty of care would arise on the part of the taxi driver, Jones J. put forward the examples of a young child or a mentally handicapped person travelling alone in a taxi. He opined that, owing to the inability of such passengers to take proper care for their own safety, they would be carried only by virtue of some special arrangement under which the taxi driver would assume some "added responsibility" toward them. He cited also the example of an individual intending to become intoxicated on a night out and ordering a taxi in advance to take him or her home safely. If these drinking intentions were made known to the driver, then Jones J. considered that a duty would arise "because of what had been agreed or arranged and the express or implied assumption of added responsibility by the driver". Arguably, this latter example could be seen as an extension into the "civilian" world of the principle of liability set out in *Jebson*.

Of course, identifying the concept of an "assumption of responsibility" as forming the basis of the duty to protect the intoxicated is the easy part. The more difficult task lies in determining what actually constitutes such an assumption, for, other than the fact that it stems from an "undertaking", which may be either express or implied, the judgments just considered provide little guidance. Clearly, where there is an express undertaking there can be no problem. The difficulty lies with knowing how to identify an implied undertaking to assume responsibility. It becomes necessary to take our analysis further afield.

[32] Such is the interpretation of the decision given by R. Lawson (1998) 142 S.J. 1064.

https://doi.org/10.1017/S0008197301000642 Published online by Cambridge University Press

An obvious starting point would be the House of Lords decision in *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.*,[33] which famously established a limited exception to the rule against recovery in tort for negligently inflicted economic loss. It sets out that a duty to take reasonable care not to cause pure economic loss will arise where a special relationship exists between the claimant and the defendant, such relationship being based upon two reciprocating factors: a voluntary assumption of responsibility on the part of the defendant and reasonable reliance on this assumption on the part of the claimant. Although the *Hedley Byrne* principle was originally confined to cases of economic loss arising from negligent misstatements, it was later extended to include instances of such loss caused through the provision of services[34] and it is this latter category that would appear to be of most relevance to the issue at hand. However, it takes only a brief excursion into this area of the law to realise that this line of inquiry is unlikely to lead anywhere. For although the *Hedley Byrne* concept of "assumption of responsibility" is now into its fourth decade of existence, there is still much debate surrounding such fundamental issues as its true meaning,[35] purpose or, indeed, utility. It has been severely criticised in judicial quarters as being more of a label than a substantive test,[36] for it gives no indication of the criteria that underpin it. Nor has it even been applied in a consistent manner by the courts. As Janet O'Sullivan points out,[37] in some cases it has been used to label a genuine exercise of choice by the defendant in question to act on behalf of the particular claimant;[38] in others, to denote a situation in which the defendant ought to have decided to act on behalf of the claimant, whether or not he or she actually did.[39] Used in this latter way, it is a legal fiction which constitutes little more than a watered down proximity test, for it may be based on nothing more than the fact that there is a close relationship between the claimant and the defendant, even in the absence of any personal dealings between them.

Moreover, owing to the fact that it applies exclusively to cases of economic loss, and that these cases straddle the boundary

[33] [1964] A.C. 465.
[34] *Henderson* v. *Merrett Syndicates Ltd.* [1994] 3 All E.R. 506.
[35] The current predominant view seems to be that it refers to relationships that are "equivalent to contract". See D. Howarth, *Textbook on Tort* (Butterworths 1995), p. 276.
[36] See, *e.g.*, dicta of Lord Griffiths in *Smith* v. *Eric Bush* [1989] 2 All E.R. 514 at 536 and of Lords Roskill and Oliver in *Caparo* v. *Dickman* [1990] 2 A.C. 605 at 628 and 637. See also K. Barker, "Unreliable Assumptions in the Modern Law of Negligence" (1993) 109 L.Q.R. 461.
[37] "Negligence Liability of Auditors to Third Parties and the Role of Assumption of Responsibility" (1998) 14 P.N. 195, 198–199.
[38] See, *e.g.*, *Henderson* v. *Merrett Syndicates Ltd.* [1994] 3 All E.R. 506.
[39] An example of this may be found in *White* v. *Jones* [1993] 3 All E.R. 481.

https://doi.org/10.1017/S0008197301000642 Published online by Cambridge University Press

between tort and contract, the *Hedley Byrne* concept of assumption of responsibility has strong contractual affinities. In the context of the present discussion on alcohol liability, the principles of contract law have no application whatsoever. The need for a concomitant reliance on the part of the claimant also further distinguishes the *Hedley Byrne* notion from that used in relation to alcohol liability. For it cannot realistically be suggested that the reason why individuals actively seek to become intoxicated, knowing that the attainment of such a state carries with it certain risks, is that they rely on others, especially strangers, to protect them from such risks. If they give any thought at all to the risks, they either see them as highly unlikely to materialise, or as simply outweighed by the benefits. Even if such reliance did exist, it could hardly be deemed reasonable.

If the courts have not set out any guiding principles for determining the existence of an assumption of responsibility, then the natural conclusion to be drawn is that they do not have in mind any specific principles, but simply approach the question in individual cases on an ad hoc basis. In the context of alcohol liability, the attribution of this kind of an assumption would seem to be made on the basis that the particular defendant could easily prevent the injury through low-cost measures and it is considered appropriate in the circumstances that he or she should render such protection. Could we be witnessing the introduction into our legal system of a duty of easy rescue, such as that advocated by Weinrib two decades ago?[40] Whatever the case, it is clear that if the law of tort in this domain is to develop in accordance with the principles of coherence, consistency and certainty, it is imperative that the judiciary provide some express clarification of the issues just raised.

There are several reasons behind the general antipathy in English tort law towards duties of affirmative action. First and foremost, it is thought to be too great an infringement of the individual's right to freedom to require him or her to take positive steps to protect another from harm that he or she has not personally inflicted. Not only is it inconsistent with the principles of corrective justice forming the philosophical foundation of our tort system, it is also contrary to ordinary notions of justice and fairness to saddle an innocent individual with the burdens, in terms of time, money and effort, that inevitably accompany such duties. So far as litigation is concerned, there are also causation difficulties to consider. Of course, it is only in the context of nonfeasance that these arguments can apply with any force. That is, only in cases in

[40] E.J. Weinrib, "The Case for a Duty to Rescue" (1980) 90 Yale L.J. 247.

https://doi.org/10.1017/S0008197301000642 Published online by Cambridge University Press

which all that the defendant can be reproached for is passive inaction, in the sense of having played no role in the infliction of the harm. Thus, the rule against imposing affirmative duties of action forms part of the wider no-liability-for-omissions rule. Where, on the other hand, the conduct of the defendant can be described as misfeasance, in that he or she was positively involved in bringing about the harm, there can be no real objection to the imposition of a duty to take further steps to avert the danger. The most fundamental principle of English tort law, as determined by the doctrine of corrective justice, is that in acting to further one's own interests, individuals must take care not to infringe the interests of others, or else be faced with a duty of reparation.

The criticism most commonly levelled at the omissions rule is that the misfeasance/nonfeasance distinction upon which it is based is often difficult to apply in practice. It is claimed that there are many grey areas where the boundary between the two is blurred. The fact that most faulty conduct can be described in terms of a failure to take a particular course of action has been a particular cause of concern. It is submitted, however, that much of the confusion to which the distinction gives rise may be attributed to a simple but fundamental misunderstanding regarding its actual nature and scope and that, to this extent, it may be easily addressed. The most common mistake is to attempt to use the terms misfeasance and nonfeasance to describe the defendant's overall course of conduct when, properly applied, they should be used solely to refer to the alleged source of the defendant's negligence. In establishing, therefore, whether a given case is to be designated as one involving misfeasance (an act) or nonfeasance (an omission), the focus of the inquiry should be on the nature of the allegations made by the claimant. Do they relate to something that the defendant did (misfeasance) or to something that he or she failed to do (nonfeasance)? Where the claim relates directly to a particular action on the part of the defendant that can be clearly and directly linked to the harm complained of, or where it relates exclusively to a specific failure to act, then this will be a very straightforward exercise. More often than not, however, the allegation of negligence will concern a combination of both action and inaction. The paradigm scenario would involve some positive action that is not, in itself, capable of forming the basis of a sustainable claim in negligence, perhaps because it is not directly enough connected with the harm to satisfy the requirements of causation, or even that it would not constitute fault, but which is relied upon by the claimant to argue that, in the circumstances, further action should have been taken. It is submitted that, if the

https://doi.org/10.1017/S0008197301000642 Published online by Cambridge University Press

claim is dependent in any way upon an argument that there was something that the defendant should have done that he or she did not do, then it has to be designated as one involving an omission and the liability rules governing negligent omissions will have to be applied to determine the duty issue. From the point of view of the claimant, the difference between a claim of this mixed nature and one based upon a "pure" omission, that is, one based solely on a failure to act, is that the evidence of the positive background conduct may help to convince the court that the imposition of an exceptional duty of care would be justifiable in the circumstances. These hybrid claims are therefore usually less controversial in this context.

Applying this rationale to the English decisions on alcohol liability just discussed, it would seem that, while all three certainly fall into the omissions category, none of them is really that contentious in this respect. For there can be identified in each clear evidence of positive conduct on the part of the defendants linking them to the harm complained of. The taxi driver in *Griffiths* had actively contributed to the risk of harm by dropping the claimant off at the point at which he did, while the defendants in *Barrett* were responsible not only for the supply of alcohol but also for effectively encouraging drunkenness and in *Jebson*, the defendants had organised the outing knowing that it would involve the consumption of excessive quantities of alcohol and they had supplied the transport. Indeed, in these latter two cases, this evidence was directly relied on by the respective courts in recognising the existence of a duty of affirmative action.

Rather, what causes these decisions to conflict so sharply with instinctive notions of natural justice is the fact that there are clearly other parties who are more closely and directly involved with the harm, and who have played a much more significant role than the defendant as regards its infliction, notably the victims themselves. Indeed, Jane Stapleton would describe these defendants as mere peripheral parties.[41] Arguably, this alone should cause the claim to fall at the third stage of the *Caparo* test for duty, the "fair, just and reasonable" requirement. This suggests that the disquiet to which these cases give rise stems from a concern that the theory of responsibility being applied, with its primary emphasis on social cooperation, is at odds with common notions of justice and fairness. It thus indicates a strong attachment to the traditional doctrine of individual moral responsibility.

[41] "Duty of Care: Peripheral Parties and Alternative Opportunities for Deterrence" (1995) 111 L.Q.R. 301.

https://doi.org/10.1017/S0008197301000642 Published online by Cambridge University Press

The third and final decision for discussion in the present context is that of the Court of Appeal in *Brannon* v. *Airtours Plc*.[42] Its significance in the present context lies primarily in what it reveals about the court's attitude to the issue of the intoxicated victim's contributory negligence. Illustrating the diverse contexts in which the principles of alcohol liability in English tort law have been applied, the defendant in this particular case was a tour operator, responsible for organising an evening of entertainment at which the claimant was injured. The festivities in question took place at a holiday resort in Tunisia, where the claimant was staying as part of a package deal organised by the defendants, and consisted of the usual mixture of food, music and copious quantities of alcohol. Long tables with benches had been arranged to seat the party-goers and at the end of these were placed electric fans. A general warning had been issued at the start of the evening by an Airtours representative about the dangers of walking on the tables because of the presence of the fans. However, as the night wore on, and inhibitions became loosened by alcohol, the claimant, like many others, did begin to walk across the tables anyway. Predictably, he ended up injuring himself on one of the fans.

At trial, the judge held Airtours liable for the claimant's injuries on the grounds that it had knowingly introduced him into a dangerous setting and intentionally put him into a party mood by providing him, free of charge, with unlimited quantities of alcohol. Moreover, Airtours had known the fans to be a danger since another holidaymaker had previously been injured by one, yet its representatives had issued only one warning about this on the night in question and made no attempt to prevent the party-goers, including the claimant, from climbing onto the tables. Recognising, however, that the claimant was primarily to blame for his own injuries, in that he had walked into a readily visible fan, the court made a finding of 75 per cent. contributory negligence. It is against this finding that the claimant successfully appealed.[43] Giving the judgment of the Court of Appeal, Auld L.J. accepted the claimant's argument that the figure had been set too high and duly reduced the figure to 50 per cent.

## III. Conclusion

The new legal phenomenon of alcohol liability that is currently working its way into our tort system is just one manifestation of a wider legal trend towards imposing liability for the acts of third

[42] (1999) *The Times*, February 1. (Transcript obtained.)
[43] Significantly, no cross-appeal was made by the defendants against the finding of negligence.

https://doi.org/10.1017/S0008197301000642 Published online by Cambridge University Press

parties. As yet, the development in English law of a set of principles of liability in respect of the intoxicated has taken place at a fairly restrained pace, particularly by comparison with other commonwealth jurisdictions. Such liability has not yet extended beyond the factual scenario of the intoxicated as the victim, as opposed to the perpetrator, of harm and is currently limited by the rather nebulous concept of "an assumption of responsibility". Nevertheless, the potential is there for it to progress much further. A warning is sounded that, unless an attempt is made to establish the parameters of such liability by reference to a set of coherent principles, its future development cannot be controlled and the consequences for the law of tort more generally can only be negative.

https://doi.org/10.1017/S0008197301000642 Published online by Cambridge University Press