CRIME PREVENTION OTTAWA

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An Intoxicated Woman and Sexual Assault

Does She Have a Negligence Claim Against the Bar that Induced Her Intoxication?

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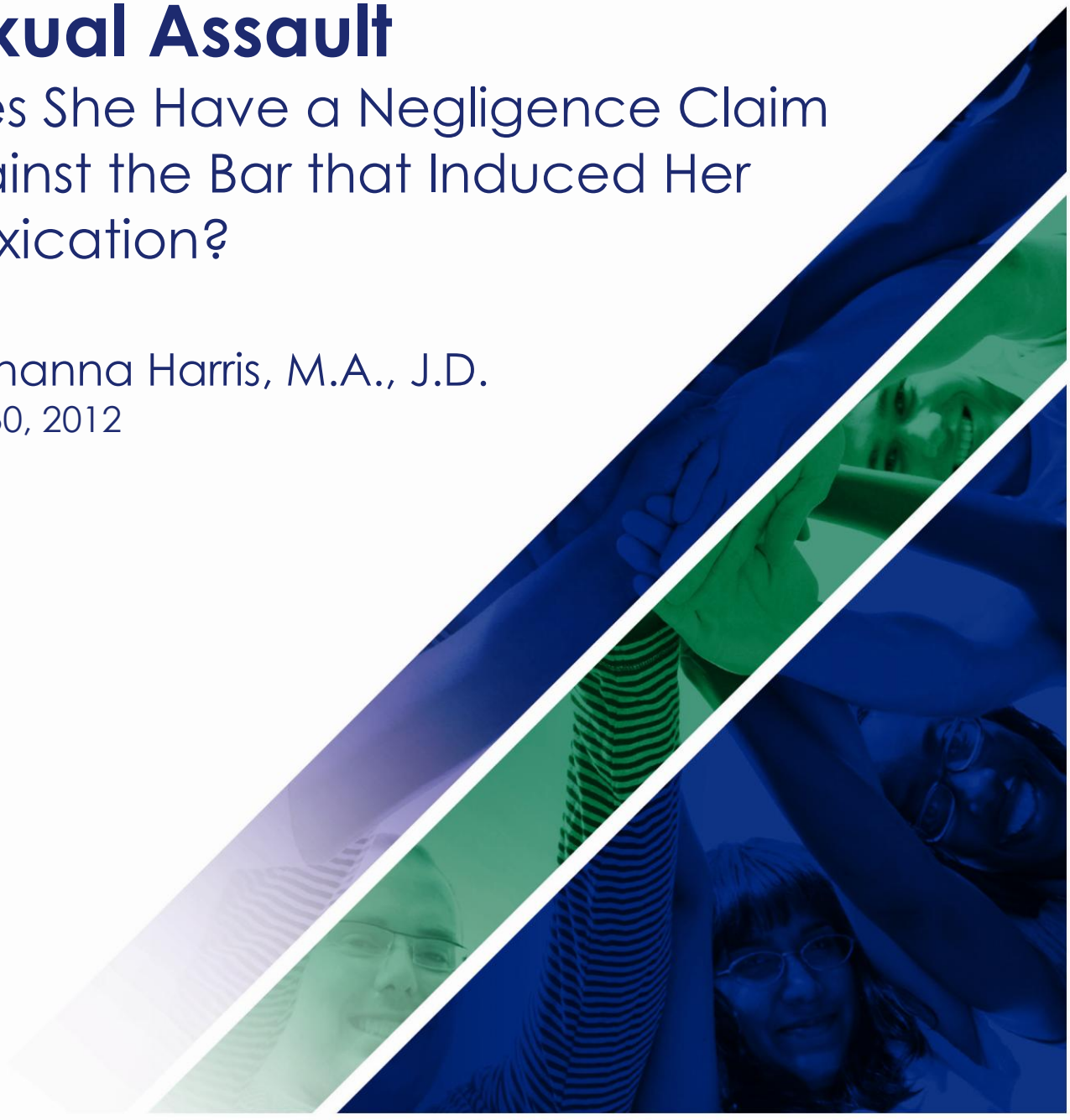

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Introduction

Incidents of sexual assault[1] and alcohol consumption often correlate. Research demonstrates that approximately one-half of sexual assault crimes are associated to alcohol consumption.[2] A study conducted in the United States of victims and perpetrators of sexual assault revealed that at least one-half of women surveyed admitted to being inebriated at the time they were sexually assaulted; and that alcohol consumption occurred simultaneously for both victims and perpetrators.[3] Additionally, the Statistics Canada 2004 General Social Survey suggests that more than half of sexual assault incidents occur in a commercial or institutional environment.[4] Recognizing the connection between alcohol consumption and the sexual assault of women, Crime Prevention Ottawa is interested in exploring whether a commercial establishment serving alcohol, such as a bar, tavern or pub, could be held liable for negligence in the sexual assault of a woman who became intoxicated as a patron of the establishment. Given the scarcity of Canadian case law regarding this issue, this memorandum will canvass this topic by referencing Canadian cases that establishes a foundation to advance such a claim, and eight reported American cases found, specifically addressing this issue, to assess its likelihood of success in Canadian courts.

Issue

Under the common law, can a commercial establishment serving alcohol, such as a bar, tavern, or pub, be held liable for negligence where a female patron, intoxicated at the establishment, is subsequently sexually assaulted either by another patron or a stranger to the establishment?

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[1] Antonia Abbey, "Alcohol and Sexual Assault" (2001) 25 Alcohol Health and Research World at p. 10: sexual assault is defined as, "The full range of forced sexual acts, including forced touching or kissing; verbally coerced intercourse; and vaginal, oral, and anal penetration."
[2] Antonia Abbey, "Alcohol and Sexual Assault" (2001) 25 Alcohol Health and Research World at 2.
[3] *Ibid.*
[4] Statistics Canada, *Sexual Assault in Canada* (Ottawa: Canadian Centre for Justice Statistics, 2008) at p. 14.

Brief Answer

A woman who is a victim of sexual assault by a third party, and is attempting to establish negligence liability against an establishment that facilitated her intoxication, must prove five elements. That is, she must show that the establishment owed her a duty of care; it owed her a standard of care, which it breached; the breach caused her sexual assault; the nexus between the breach and the sexual assault was not remote; and her injury is recognized by law. Essentially, she is likely to successfully prove that the establishment owed her a duty of care. However, complications will arise in her attempts to prove the remaining elements. More accurately, where her sexual assault occurred off the premise of the establishment and the perpetrator is a stranger to the establishment, or where the perpetrator, a patron of the establishment, failed to make his intentions visible, she is likely to fall short in demonstrating a breach of the standard of care, that the breach was the cause of her sexual assault, and her injury was not remote.

Conversely, her likelihood of success in proving these elements increases where her sexual assault took place on the premise of the establishment and her perpetrator was overt with his intentions, or she was a minor at the time she was sexually assaulted.

Analysis

Law

Establishments where alcohol is sold are prohibited from over serving their patrons or selling alcohol to those who appear to be intoxicated.[5] Violating this prohibition may result in a civil action, should the intoxicated patron cause injury or damage to himself or herself, or to another person.[6] The stated requirement for civil action does not appear to address situations where injury to an intoxicated patron is caused by a third party. Despite this appearance, the common law analysis of negligence liability extends to such circumstances. Under the common law, the plaintiff has the burden of proving five elements, on a balance of probabilities, to establish negligence against the defendant for injuries inflicted by a third party.[7] She must first show that the defendant owed her a duty of care. This element defines the scope of the legal obligation owed

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[5] *Liquor License Acts*, RSO 1990, c L19, s 29.
[6] *Ibid* s 39.
[7] Robert Solomon et al., *Cases and Materials on the Law of Torts*, 7th ed (Toronto: Thomson Canada Limited, 2007) at 268.

to her by the defendant.[8] Where a duty of care is established, she has the obligation to demonstrate that the defendant owed her a standard of care, which it subsequently breached. The standard of care owed is examined through the lens of a reasonable person in the situation of the defendant, and is determined by analyzing whether it was reasonably foreseeable that the defendant's breach may have caused an injury of any kind to the plaintiff.[9]

Should she be successful in establishing that a breach occurred, she must further adduce evidence that her injury was caused by the defendant's failure to meet the standard imposed. From the evidence put forth, the trier of fact determines whether her injury would not have occurred but for the actions of the defendant. If the inquiry generates a negative response, her claim fails.[10] However, should it produce an affirmative answer, she is required to establish a legal connection between the defendant's breach of the standard of care and the injury she suffered. In other words, she must demonstrate that her specific injury was a reasonably foreseeable consequence of the specific breach by the defendant; thus, not too remote.[11] Once she has revealed that her injury was not remote, she is expected to show that her injury is recognized by law.[12] Establishing all five elements provides her with a prima facie claim in negligence, and subsequently, enables the defendant to raise defenses applicable to its case.[13]

This analysis will focus exclusively on the first four elements: duty of care, standard of care, causation, and remoteness. By way of precedents, duty of care is likely to be demonstrated. The remaining three elements raise concerns, which will be demonstrated in the sections below.

Application

Duty of Care

It is a well established premise that, due to their special relationship with the public as invitor-invitee, establishments serving alcohol owes a duty of care to their patrons.[14] More importantly, they owe a duty to intoxicated patrons harmed by third parties. The leading case for this proposition is Menow v Jordan

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[8] *Ibid* at 269.
[9] *Ibid* at 269 & 483.
[10] *Ibid* at 269 & 528.
[11] *Ibid* at 269. Also see, *Assiniboine South School Division, No. 3 v Greater Winnipeg Gas Co.* (1971), 21 DLR (3d) 608. Albeit case, is widely used in Canada as it sets the parameters for remoteness.
[12] Solomon et al, *Ibid* at 269.
[13] *Ibid* at 270.
[14] See, *Menow v Jordan House Ltd*., [1974] S.C.R. 239 [*Menow*]; *Stewart v Pettie*, [1995] 1 SCR 131 [*Stewart*]; *Feaver v Briggs*, 2009 NBQB 305 (CanLII) [*Feaver*].

House Ltd. (Menow).[15] Menow, a frequent patron of the hotel bar, became visibly intoxicated, which resulted in his removal. The hotel owner, knowing that Menow was unable to care for himself due to his intoxication, and that his only means of traveling was on foot, failed to provide him with any assistance to ensure his safe arrival home. As he attempted to walk home, Menow was struck by a vehicle and sustained serious injuries. Justice Laskin, as he then was, determined that the hotel owed Menow a duty of care to ensure that he arrived home safely given their knowledge of his intoxication. Similarly, in Feaver v Briggs (Feaver), Russell J., of the New Brunswick Queen's Bench, asserted that the bar knew or ought to have known that Mr. Feaver was intoxicated thus, owing him a duty of care to protect him from the potential dangers of walking to his next destination.[16]

The circumstances in both cases that effectuated the injuries of the patrons are comparable to that of a woman who became intoxicated at a commercial establishment, and subsequently, sexually assaulted by a third party. Therefore, she is likely to establish a duty of care.

Standard of Care

As previously mentioned, the Ontario Liquor License Act prohibits an establishment from over-serving or serving alcohol to a patron who is or appears to be intoxicated.[17] However, a breach of this standard does not impose liability on the defendant. According to Laskin J., as he then was, "The 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."[18] Therefore, to impose liability, it must be demonstrated that the establishment failed to take affirmative steps to prevent reasonably foreseeable injuries from occurring.[19] Such precautions are determined by an objective analysis referring to "...the standard of care that would be expected of an ordinary, reasonable and prudent person in the same circumstances" as the defendant.[20]

The precautions that may be invoked differ based on the facts and circumstances of the case. For example, the Supreme Court of Canada, in Menow stated that while the Liquor License Act permitted the hotel to eject Menow, a reasonable person in the circumstances of the defendant would

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[15] *Menow, Ibid.*
[16] *Feaver, Supra* note 14.
[17] *Supra* note 5.
[18] *Menow*, supra note 14 at 247.
[19] Stewart, supra 14 at para 36.
[20] *Ryan v Victoria (City),* [1999] 1 SCR 201 at 222.

have taken precautions to prevent his injuries. This is especial true given that the hotel was apprised of Mr. Menow's level of intoxication, it knew that his only means of travel was by foot, and the hotel's location on a busy highway. Laskin J. insisted that equipped with this knowledge, the defendant should have contacted the police, Mr. Menow's employer, or called him a cab.[21] The standard of care required in Feaver differed significantly. Russell J., determined that the standard expected of a reasonable person in the circumstances of the defendant was met. This finding was based on facts revealing that although Feaver was intoxicated, he was in the company of his non-intoxicated spouse and friends when they walked to their next destination. Additionally, Feaver did not appear intoxicated, and the tavern owner knew that he and his company were going to have transportation to take them home.[22]

Menow and Feaver provides the foundation necessary for a woman to advance her claim against a commercial establishment to implicate it in her sexual assault as it facilitated her intoxication. However, R.K. v Dickson,[23] initiates a discussion regarding the difficulties a sexually assaulted woman may encounter proving a breach of standard of care by the establishment. R.K. met a friend at the Maliboo bar to celebrate her birthday. Later that evening they were joined by her friend's nephew, who eventually raped her in her car in the parking lot of her friend's apartment. R.K. argued that the bar failed its standard of care to protect her when it over served alcohol to the perpetrator. More specifically, she argued that the bar knew, from past encounters with the perpetrator, that he becomes arrogant and violent when he is intoxicated. Tucker J. of the Ontario court of appeal rejected her claim stating,

> I question...Ms. R.K.'s allegation that the bar failed in its standard of care in the circumstances...[t]here is no evidence of any behaviour of which the Maliboo knew on the evening in question that Mr. Dickson was a physical threat to Ms. R.K. or to anyone. In fact all the evidence the bar had was to the contrary. Tragedy occurred shortly after the group left the bar but this cannot be found by the court to be a direct result of the bar's actions or inactions.[24]

It can be argued that the results of both Menow and Feaver naturally flowed from the facts of the cases as the facts produced clear assumptions of the individuals' need for protection, and the extent of the standard necessary to accommodate their need. Yet, in R.K., her need for protection went

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[21] *Menow, supra* note 14 at 248.
[22] *Feaver, Supra* note 14 at para 15.
[23] *R.K. v Dickson* [2005] O.T.C. 753.
[24] *Ibid* at para 116.

undetected. The court appears to imply that the perpetrator's actions are determinative of the decision to render sexual assault a consequence of over serving. This implication insulates an establishment from liability because, unless the perpetrator's actions are clear as to his intentions, sexual assault will not be deemed reasonably foreseeable. This, by extension, ignores the plight of women in situations where the perpetrators are discreet in their actions, or they are strangers to the establishment. While this observation is not from a case involving an intoxicated woman, jurisprudence from the United States render this a reality for many intoxicated women advancing a claim against a commercial establishment.

Jurisdictions in the United States impose two possible analysis to determine standard of care: the totality of the circumstances approach and the prior similar acts approach.[25] Jurisdictions employing the totality of the circumstances approach examine all past acts that transpired at the establishment, along with the location, nature, and condition of its premises. While jurisdictions applying the prior similar acts approach consider whether the establishment had previously encountered similar incidents.[26] The analysis that engulfs these approaches bears some similarities to the standard of care analysis witnessed in Menow and Feaver, but most importantly, R.K. For example, in Motz v Johnson[27] the court, utilizing the prior similar acts approach, determined that the defendant did not breach its standard of care to the victim. Johnson attended a party hosted by the Delta Tau Delta fraternity in Bloomington, Indiana. Both her and the perpetrator, Motz, a member of the fraternity, became intoxicated, and as the night progressed he sexually assaulted her. The court determined that there was a lack of evidence revealing that the fraternity was aware of the possibility that Motz would sexually assault Johnson as his actions at the party, and in the past, did not suggest a propensity to commit sexual assault. Therefore, the sexual assault was not reasonably foreseeable.

Martin v Prime Hospitality Corp. (Martin)[28] and Taylor v Centennial Bowl, Inc.,[29] (Taylor), albeit an older case, further illuminates how the perpetrators actions are important to satisfy courts that a breach of standard had occurred by the defendant. In Martin, the court employed the totality of the circumstances approach to determine that the hotel failed to meet its standard of care to Ms. Martin. Justice Leleft accepted evidence that she was over-served and heavily

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[25] Deborah La Fetra, "A Moving Target: Property Owner's Duty to Prevent Criminal Acts on the Premises" (2006) 28 Whittier L Rev 409 at 412.
[26] *Ibid*.
[27] *Motz v. Johnson*, (1995) 651 N.E.2d 1163 (Ind. App. 1995).
[28] *Martin v Prime Hospitality Corp.*, (2001) 345 N.J. Super. 278.
[29] *Taylor v. Centennial Bowl, Inc*. (1966) 65 Cal.2d 114, 121.

intoxicated; the night auditor was made aware of concerns by two patrons that Ms. Martin may be violated by the perpetrator; and the night auditor failed to properly investigate the situation once she acquired this information. According to Leleft J., "Prime should have exercised reasonable care to protect [the] plaintiff. In exercising such care, Prime should have taken reasonable steps to discover whether [the] plaintiff was in danger or likely to be in danger and, if so, given warning or otherwise taken steps to protect [the] plaintiff from the danger."[30] Notwithstanding this finding, Leleft J. reversed the judgement of the lower court, which ruled in favour of Martin, and ordered a new trial regarding apportionment of fault. The judge opined that although Prime failed to adequately exercise the standard of care owed to Martin, she contributed to her victmization, and thus, partially responsible for its occurrence.[31]

Taylor appertains to a woman who was rudely propositioned by a male patron on two occasions. Both advances were witnessed by the bouncer at the bar who, upon her departure, informed her not to go outside because the perpetrator was out there. The bouncer walked her to the bar entrance, but failed to walk her to her car, where she was assaulted by the perpetrator. The California court of appeal, using the totality of the circumstances approach, reversed the summary judgement granted by the court of first instance for the bar. The court explained that because the bouncer was aware of the inappropriate advances and failed to exercise adequate precautionary measures to protect Taylor, the bar breached its standard of care. Accordingly, providing Ms. Taylor with a warning was insufficient as the bouncer could have walked her to her car, and waited for her to leave the premise.[32]

A standard of care analysis is further complicated where the sexual assault of the intoxicated woman occurred off the premise of the establishment. Bjorgolfsson v Destination Boston Hotel[33] (Bojorgolfsson) is an example of this complication. While at the Beantown Pub, Bjorgolfsson became visibly intoxicated. She alleged that her glass was kept full by someone who she believed was the co-owner of the pub. Upon her departure from the pub, she realized that she was heavily intoxicated and incapable of driving home. A bartender saw her in the parking lot and took her keys to prevent her from attempting to drive. The police were called, but prior to their arrival she was escorted to the hotel next door to the pub where she was raped by one of the hotel employees. Assessing the totality of the circumstances, the judge granted Beantown Pub a summary judgement stating,

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[30] *Supra* note 28 at 288.
[31] *Ibid* at 293.
[32] *Supra* note 29 at 123-24.
[33] *Bjorgolfsson v Destination Boston Hotel,* (2006) 21 Mass. L. Rep. 419.

> Beantown Pub breached its duty to the plaintiff first by serving her alcohol after she was visibly intoxicated and then by failing to call the police or waiting for 911 to arrive so that she could be placed in protective custody or taken to the emergency room. However, there must be limits to the scope or definition of reasonable foreseeability...[34][Emphasis added].

Beantown Pub was not provided any reason which would lead it to believe that Bjorgolfsson would be raped by the hotel employee. Therefore, the rape was not reasonably foreseeable, and the pub did not breach the standard of care owed to her.[35]

Similarly, a Massachusetts court of appeal ruled that a bar was not liable for the rape of a woman by two men who were strangers to the bar. This is irrespective of the fact that she was visibly intoxicated and over served alcohol. Justice Armstrong asserted that the evidence put forth by the plaintiff failed to demonstrate that rape was a reasonably foreseeable consequence of the bar's failure to ensure her safe arrival home. Such an act would only be reasonably foreseeable if it was inferred that an intoxicated patron, by reason of her inebriated state, was more vulnerable to becoming a victim of criminal activity, such as rape. To permit such an inference would impose an unreasonable burden on the defendant to anticipate every kind of criminal behaviour, reasonable or not.[36]

Both cases are contrasted with Reynolds v CB Sports Bar.[37] This case provides a positive possibility for women advancing these claims. Reynolds argued that the two patrons from the bar who facilitated her injuries, induced her intoxication in order to sexually assault her. She further asserted that the bar was aware of their intentions. Reynolds, on the night of her injuries, left the bar with the two patrons, but managed to escape their vehicle once she realized their intentions. During her escape she was struck by a car and sustained serious injuries. Justice Kanne, of the Illinois court of appeal, commenced his discussion explaining that generally bars' liability to their patrons cease as soon as they leave the premise.[38] However, in this particular circumstance, the judge reversed the summary judgement granted by the trial judge for the defendant, noting that while there was no duty to investigate the plans and intentions of the perpetrators, once the bar employee learned their motives the employee

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[34] *Ibid* at para 27.
[35] *Ibid* at para 28.
[36] *Westerback v. Harold F. LeClair Co., Inc.,* (2000) 735 N.E.2d 1256 at 1259-1260.
[37] *Reynolds v CB Sports Bar,* (2010) 623 F.3d 1143.
[38] *Ibid* at para 12.

assumed a duty to protect Reynolds.[39] On the one hand, the recognition that a bar may be liable for the sexual assault of its intoxicated patron is a positive development. On the other hand, the requirement to prove that the bar employee had knowledge of the intentions of the perpetrator, absent visible actions, limits a woman's potential success in demonstrating a breach of standard of care.

Three observations can be deduced from the cases presented in this section. First, overt behaviour of the perpetrator is significant, if not determinative, to establish the precautions a reasonable person in the circumstances of the defendant would exercise to protect the patron. Additionally, where the perpetrator is unknown to the bar and the sexual assault occurs off the premise of the establishment, proving a breach of standard of care is unlikely. Lastly, if the plaintiff can produce evidence revealing that the establishment knew the intentions of the perpetrator, she is owed a standard of care to prevent her injury from occurring. Each observation is capable of limiting the likelihood of success of a woman attempting to show that a particular establishment had a standard of care to prevent her sexual assault as they contributed to her intoxication.

Causation

As highlighted in the preceding section, there are a myriad of obstacles hindering the success of a woman's ability to demonstrate a breach of standard of care; however, if she is successful in establishing a breach, she proceeds to causation. According to the Supreme Court of Canada, the general test to determine causation is the but for test. The plaintiff must show, but-for the negligent actions of the defendant, her injuries would not have occurred.[40] An example of the application of this test is well evidenced in two earlier cases, Crocker v Sundance Northwest Resorts Ltd.[41] and Menow. Mr. Crocker, who was visibly inebriated, took part in a tubing competition held by Sundance. As a result of his intoxication, he suffered severe injuries from tubing as he was unable to control the movement of the tube. Sundance argued that Mr. Crocker's injuries did not result from his intoxication because the risk of participation was the same for both sober and intoxicated participants. The Supreme Court of Canada, affirming the trial judge's finding, dismissed this assertion stating that the risk of injury was greater for intoxicated participants as they did not have the psychological competency to slow down or stop the tube, if needed. Therefore,

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[39] *Ibid* at para 25.

[40] *Hanke v. Resurfice Corp*. [2007] SCC 7, at paras. 20-25. See also, Snell v. Farrell, [1990] 2 SCR 311.

[41] *Crocker v Sundance Northwest Resorts Ltd*., [1988] 1 S.C.R. 1186.

Sundance's failure to protect Mr. Crocker caused him to suffer severe injuries.[42] Similarly, in Menow, Justice Laskin found that but for the hotel's failure to prevented Mr. Menow from walking home in his inebriated state, he would not have been struck by a car.

Both cases are contrasted with Donaldson v John Doe. and R.K. Donaldson appertains to a plaintiff who was injured by a glass mug removed from the defendant pub by an intoxicated patron. Donaldson argued that if the pub had a proper system in place to prevent patrons from taking the mugs off premise, he would not have been injured. The British Columbia court of appeal disagreed with this assertion, determining that Donaldson lacked the proof necessary to demonstrate that the pub's failure to implement a proper system of removing the mugs caused his injuries.[43] The case of R.K contextualizes the but for analysis in circumstances of sexual assault. Justice Tucker maintained that R.K. was unable to prove that the breach of over serving the perpetrator caused him to sexually assault her: "There is not even evidence that alcohol caused the attack other than Mr. Dickson's statement that it was the cause, which I find to be an excuse not proof."[44]

These cases are presented to reveal that the but for test is highly fact specific, and is significantly onerous on the plaintiff to prove actual causation. This latter observation may impede a woman's success as she is required to advance evidence revealing that the establishment's failure to protect her in her intoxicated state was the cause of her sexual assault. Admittedly, she may argue that the alcohol impeded her judgement, and heightened her vulnerability to sexual assault; and as a result, the establishment's breach of standard of care caused her to be a victim of sexual assault. However, R.K. has demonstrated that an argument beyond psychological impediment is required to prove causation. This is exemplified in the few American cases found to employ, in addition to a remoteness analysis, a similar approach to causation in their overall negligence analysis. For example, in Westerback v. Harold F. LeClair Co., Inc., (Harold), a patron who was visibly intoxicated, was over served by the bar. After her departure, she happened upon two men who offered her a ride home and who eventually raped her. The court insisted that the bar serving the intoxicated woman did not cause her rape because the rape was an intentional act, not in the purview of the bar. Moreover, it was perpetrated by individuals unknown to the bar.[45] These sentiments were echoed in Bjorgolfsson,

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[42] *Ibid* at para 31.
[43] *Donaldson v John Doe. Pacific Promotions Ltd., 530077 B.C. Ltd.* [2009] B.C.J. No. 154.
[44] *Supra* note 23 at 119.
[45] *Supra* note 35.

a case previously mentioned.[46] However, another case, A.B., a minor, by her parents and natural guardians, C.H. and T.B. v Fern Johnson, Elizabeth Veloso, Mark Concannon, et al., (A.B.),[47] differed in its result. A.B., who was an adolescent at the time of the assault, accompanied her sister and guardian to a party hosted by one of the defendants. At the party, A.B. became intoxicated, and was subsequently sexually assaulted by her guardian upon their return home. The New Jersey court of appealed, in denying a summary judgement for the defendant, ruled that a trial was necessary to determine whether her intoxication caused her sexual assault because it is not unusual to think that "intoxicating alcohol may give rise to [the] sexual assault" of a minor.[48] Comparing A.B. to the above cases, implies that where the victim is a minor, the perpetrator's actions prior to the assault may be irrelevant.

The Supreme Court Canada has developed approaches to modify the but for test in "special circumstances" where it may appear inapplicable.[49] These modifications enable the plaintiff to prove either that the defendant materially contributed to her injury, or the defendant materially increased her risk of injury.[50] However, to divert from the but for test, the court must be satisfied that it would

> ...be impossible for the plaintiff to prove that the defendant's negligence caused the plaintiff's injury using the "but for" test. The impossibility must be due to factors that are outside of the plaintiff's control; for example, current limits of scientific knowledge. Second, it must be clear that the defendant breached a duty of care owed to the plaintiff, thereby exposing the plaintiff to an unreasonable risk of injury, and the plaintiff must have suffered that form of injury. In other words, the plaintiff's injury must fall within the ambit of the risk created by the defendant's breach. [emphasis added][51]

This strict requirement, coupled with precedents that have employed the but for test,[52] and bears some similarities to the circumstances of an intoxicated who was sexually assaulted by a third party, provides an unlikelihood that courts will divert from the but for test. This solidifies a woman's dependence on the test,

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[46] *Supra* note 32.
[47] *A.B., a minor, by her parents and natural guardians, C.H. and T.B. v Fern Johnson, Elizabeth Veloso, Mark Concannon, et al.* (2010) U.S. Dist. LEXIS 136780.
[48] *Ibid* at 17-18. It is important to note that the final verdict for this case is either unreported or pending. A thorough search was conducted to obtain its result, but to no avail.
[49] *Supra* note 39 at para 24.
[50] *Supra* note 7 at
[51] *Supra* note 29 at 25.
[52] See *Menow, Supra* note 14; Feaver, supra note 14.

which provides an increased likelihood of failure to prove causation as she cannot definitively show that the defendant's breach caused her sexual assault; unless the defendant had knowledge that she was going to be a victim, and failed to protect her. The latter assumption may be modified if the victim is a minor.

Remoteness

Remoteness or proximate causation is concerned with the legal connection between the breach of standard of care and the injury suffered by the plaintiff. There is a degree of reasonable foreseeability necessary to determine whether the injuries suffered were too remote from the breach.53 A general remoteness analysis determines whether the specific kind of injury suffered by the plaintiff was a reasonably foreseeable outcome of the specific kind of breach occasioned by the defendant.[54] This general analysis concentrates on determining whether the defendant's breach was the sole cause of the plaintiff's injuries, without analyzing the possibility of the act of a third party. This, by extension, ignores circumstances where the plaintiff's injuries were caused by or may be contributed to a separate action that occurred after the defendant's breach. This separate action is referred to as an intervening act.[55]

Recognizing the possibility of intervening acts, courts, without amending the general analysis, have accepted three categories of intervening acts which are capable of effecting the liability imposed on the defendant.[56] This discussion will focus on illegal or criminal intervening acts as sexual assault is a criminal act. An illegal or criminal act is capable of breaking the chain of legal causation and insulating the defendant from liability where it is demonstrated that the defendant did not have a specific duty to prevent the criminal act.[57] This is similar to the approach espoused in the United States:

> "Generally, the act of a third person in committing an intentional tort constitutes a superseding cause of harm to another resulting therefrom, even though the actor's conduct created a situation which afforded an opportunity to the third person to commit such a tort or a crime. However, liability will be imposed where the actor realized, or should have realized,

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[53] *Supra* note 7 at 561. Also see, *Assiniboine South School Division, No. 3 v Greater Winnipeg Gas Co.* (1971), 21 DLR (3d) 608 cited in *Supra* note 7 at 581; *Supra* note 23.
[54] *Assiniboine South School Division, No. 3 v Greater Winnipeg Gas Co.* (1971), 21 DLR (3d) 608 cited in *Supra* note 7 at 581.
[55] *Ibid.*
[56] *Ibid* at 582.
[57] *Ibid* at 583.

> the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit a crime."[58]

Even with the welcomed potential for liability, many intoxicated women who have been sexually assaulted have encountered significant difficulties proving remoteness or proximate causation. In Harold, Armstrong C.J., of the Massachusetts court of appeal, upheld a summary judgement in favour of the bar. He ruled that there was no proximate connection between the defendant's breach of serving a visibly intoxicated woman and failing to act accordingly to protect her, and the rape incident. Furthermore, the perpetrators were strangers of the bar, which solidifies the lack of proximate causation. The Chief Justice further implied that to draw an inference suggesting that rape is in the ambit of what constituted a reasonably foreseeable injury would open the floodgates to liability and potentially implicate bar owners for all criminal acts that may befall their patrons. This would be an unreasonable consequence for policy and practical reasons.[59]

A similar analysis and result was witnessed in Bjorgolfson. Bjorgolfsson argued that her rape, albeit off site, was reasonably foreseeable for reasons, such as the pub's knowledge of her extreme intoxication, her relocation to the hotel adjacent to the bar without her consent, the treatment she received from the hotel staff, which was noticed by some pub employees, and the proximity between the time she was raped and the time she left the pub. Justice Troy of the Massachusetts superior court, while conceding that the pub knew or ought to have known that she was inebriated, maintained that the facts presented were insufficient to impose liability as they did not reveal rape as a reasonably foreseeable consequence. The pub employees had no reason to believe that the hotel employee was going to rape her, and thus, unreasonable to hold the pub liable for an act that is outside the scope of what should be considered reasonably foreseeable given the circumstances.[60]

While judges in the aforemetioned cases appear to employ a strict approach where the perpetrator is a stranger to the establishment, they appear less stringent and more open-minded to impose liability if the perpetrator was a patron. For instance, in Reynolds, the judge ruled that although there is no duty imposed on the bar employees to investigate the intentions of the patrons that enter their establishment, the bar employees have a duty to protect against those criminal acts that are reasonably foreseeable.[61] Therefore, once the

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[58] *Supra* note 35 at 1258.
[59] *Ibid* at 1260.
[60] *Supra* note 32 at 26-7.
[61] See *Taylor, supra* note 29.

employees learned the motives of the perpetrator they acquired the duty to protect Reynolds from a potential attack.[62] A significant problem observed from this outcome was mentioned in a preceding section: proving a bar employee's knowledge will be almost impossible for the plaintiff, unless the perpetrator is overt in his pursuit, effectuating suspicion. The intention of the perpetrator was not a consideration in A.B. By reason of her status as a minor, the judge in A.B. asserted that it is not impractical to assume that an intoxicated minor is likely to be at risk of sexual assault.[63] Comparing the results of both Reynolds and A.B., there is an implicit suggestion that where the victim is a minor, courts are more likely to be 'sympathetic' to her case. This observation was also witnessed in Amentler v 69 Main Street LLC,[64] discussed below.

The hardships mentioned above are also evidenced in circumstances where the perpetrator is a patron of the bar and the sexual assault occurred on site. For instance, in Martin the judge determined that the plaintiff contributed to her sexual assault as she knew she had an addiction to alcohol and voluntarily consumed it to arrive at an inebriated state. He asserted that the hotel's perception of reasonably foreseeable danger was further minimized by her actions towards her rapist prior to her rape, and as such, the hotel's duty did not include the responsibility to protect her against sexual assault. Nevertheless, they attributed some fault to the bar.[65] The New Jersey District Court employed a different analysis as a result of the victims age in Amentler. Amentler, an adolescent, was raped at a social gathering to promote a bar. The judge, in denying a summary judgement to the defendant, stated that an intoxicated minor is vulnerable to sexual assault.[66]

The cases presented in this section reveal the problematic nature of proving proximate causation or remoteness by intoxicated women sexually assaulted by a third party. They reveal that she has a stronger likelihood of demonstrating that her sexual assault was a reasonably foreseeable outcome where the sexual assault occurred on the premise of the establishment and the perpetrators actions were overt. Additionally, her chances also increase if she was a minor at the time the sexual assault occurred. Should she be a victim of a sexual assault by a stranger to the establishment, her likelihood of success greatly diminishes.

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[62] *Supra* note 36.
[63] *Supra* note 46 at 17-18
[64] *Amentler v 69 Main Street LLC*, (2012) U.S. Dist. LEXIS 138.
[65] *Supra* note 28.
[66] *Supra* note 53 at 12.

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