

5-1-2003

## Duty of Care to the Intoxicated: The Irish Approach

Mary Drennan

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### Recommended Citation

Mary Drennan, *Duty of Care to the Intoxicated: The Irish Approach*, 4 San Diego Int'l L.J. 423 (2003)  
Available at: <https://digital.sandiego.edu/ilj/vol4/iss1/14>

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# Duty of Care to the Intoxicated: “The Irish Approach?”

MARY DRENNAN\*

## TABLE OF CONTENTS

I.	INTRODUCTION .....	424
II.	TRADITIONAL PRINCIPLES OF PUBLICAN LIABILITY .....	424
	A. <i>On the Premises—A Clear Picture</i> .....	424
	B. <i>Off the Premises—The Going Gets Murky</i> .....	426
	C. <i>The English Position</i> .....	428
III.	WHAT A MESS: LEGAL INCONGRUITIES AND POLICIES IN CONFLICT .....	432
	A. <i>Control</i> .....	432
	B. <i>Vulnerability</i> .....	432
	C. <i>Defenses</i> .....	434
IV.	CONSEQUENCES AND CONCLUSIONS?.....	435

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## I. INTRODUCTION

“Human beings, drunk or sober are responsible for their own torts.”<sup>1</sup>

Traditionally the common law has been loathe to impose a duty of care on a third party to help another individual in danger, even where such assistance would not be a source of inconvenience to the helper.<sup>2</sup> Although there is no general duty to act, certain relationships may give rise to a duty of care.<sup>3</sup> This Article examines whether the relationship between publican and patron should or should not produce such an obligation. It also addresses the possible defenses to such a claim in the tort of negligence. Finally, as the matter is not a settled point of Irish law, this Article also attempts to assess the potential approach of its courts, in view of the approach taken by the English courts to the issue and the flurry of academic comment in the wake of a recent Irish settlement.<sup>4</sup> These issues are certain to surface in litigation again.<sup>5</sup> Regardless of the approach taken by the Irish courts, the impact of any resolution will have dramatic consequences on Irish society and culture.

## II. TRADITIONAL PRINCIPLES OF PUBLICAN LIABILITY

### A. *On the Premises—A Clear Picture*

Under Irish common law and statute,<sup>6</sup> a publican is under a duty of care to look after the safety of all his customers, intoxicated and sober alike. This duty applies “in respect of activities and accidents that happen on a premises, relating to the physical condition of the premises and the acts of other customers.”<sup>7</sup> In *Hall v. Kennedy and Rudledge t/a The White House*,<sup>8</sup> Judge Morris stated that the publican’s obligation is

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1. *Meege v. United States*, 344 F.2d 31, 32 (6th Cir. 1965) (citing *State for Use of Joyce v. Hatfield*, 78 A.2d 754, 756 (Md. 1951)). See also W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 32, at 178 n.41 (West Publishing, 5th ed. 1984) [hereinafter PROSSER & KEETON].

2. See, e.g., PROSSER & KEETON, *supra* note 1, § 53.

3. For example, employer and employee; schoolmaster and pupil; and, occupier and visitor. Clearly, the element of control is a special factor in these relationships. See *id.* § 56.

4. See *Murphy v. Ballyclough Co-operative Creamery Ltd.*, [1998] No. 1993/5528, T.E.H.C. 197 (Feb. 27, 1998) (Ir.) [hereinafter *Murphy*].

5. See RAYMOND BYRNE & WILLIAM BINCHY, ANNUAL REVIEW OF IRISH LAW 1998 610 (Round Hall 1999) [hereinafter BYRNE & BINCHY].

6. See Occupiers’ Liability Act, 1995 available at [http://193.120.124.98/1995\\_10.html](http://193.120.124.98/1995_10.html) (last visited Sept. 25, 2002) [hereinafter Occupiers’ Liability Act].

7. Mark Dunne, *Publicans’ Liability for Injuries Off the Premises*, 5 IR. BAR REV. 152 (1999).

8. *Hall v. Kennedy and Rutledge t/a, The White House*, [1990] No. 1786 p (Ir. H. Ct. Dec. 20, 1993) (LEXIS transcript).

to “take all reasonable care for the safety [of the patron] while on the premises. This would include in this case ensuring that a customer in the premises did not assault him.”<sup>9</sup> In *Kennedy*, the plaintiff’s action against the second named defendant (the bar owner) failed because the behavior of the first named defendant, who brutally attacked the plaintiff with a glass, disclosed nothing of his violent intentions.<sup>10</sup> The court held that it would have been unforeseeable on the part of the bar staff to have anticipated such an incident.<sup>11</sup> Thus, the knowledge of the bar staff was a crucial element in this case.

In *Murphy v. O’Brien*,<sup>12</sup> the plaintiff, who at the time was intoxicated, fell from the lowest step of a stairs which led to the ladies’ toilets in the defendants’ public house.<sup>13</sup> The handrail did not project far enough to allow a person to maintain a steady course on the last step.<sup>14</sup> The plaintiff, who “had plenty to drink” elsewhere,<sup>15</sup> was helped into the bar by friends. The group of friends were admitted into the bar by the defendant bar owner, and the party was served with drinks, but it was uncertain whether the plaintiff herself purchased or consumed any alcohol on the premises.<sup>16</sup> Judge Sheridan imposed liability, not under the principle of occupiers’ liability, but on the basis of *Donoghue v. Stevenson*,<sup>17</sup> as the plaintiff was a prospective customer.<sup>18</sup> Justice Lavan reached a similar conclusion in *Walsh v. Ryan*,<sup>19</sup> citing both the “neighbor principle” of Lord Atkin in *Donoghue v. Stevenson* (specifically referring to *Murphy v. O’Brien*), or alternatively finding for the plaintiff on the basis of occupiers’ liability.<sup>20</sup>

9. *Id.* at 5.

10. *See id.*

11. *See id.*

12. *Murphy v. O’Brien*, [1987], Ir. L.T.R. (ns) 75 (Cir. Ct. of Ir., Sheridan, J.) [hereinafter *Murphy v. O’Brien*], noted in BRYAN MCMAHON & WILLIAM BINCHY, A CASEBOOK ON THE IRISH LAW OF TORTS 79 (2nd ed. 1992) [hereinafter MCMAHON & BINCHY, CASEBOOK].

13. MCMAHON & BINCHY, CASEBOOK, *supra* note 12, at 79.

14. *Id.*

15. *Id.*

16. *See* BRYAN MCMAHON & WILLIAM BINCHY, LAW OF TORTS § 8.08 (2nd ed. 2000) [hereinafter MCMAHON & BINCHY].

17. *Donoghue v. Stevenson*, [1932] A.C. 562 (Scot.) [hereinafter *Donoghue v. Stevenson*] (3–2 decision). (the defendant manufacturer was held to be under a legal duty to the appellant consumer to take reasonable care that the manufactured article was free from defect likely to cause injury to health. *Id.*).

18. MCMAHON & BINCHY, CASEBOOK, *supra* note 12, at 80.

19. *Walsh v. Ryan*, [1989] No. 10535p (Ir. H. Ct. Feb. 12, 1993) (LEXIS transcript).

20. *Id.* at 8.

The Occupiers' Liability Act was introduced in 1995 to address the problems and widespread confusion that had arisen in the area. The coalition government in power at that time in Ireland also came under pressure from landowners to clarify matters, because, in reality, the common law duty of care owed to trespassers seemed to be of a higher standard than that due to invitees and licensees.<sup>21</sup> Under the Occupiers' Liability Act of 1995, a duty is owed by the occupier to visitors,<sup>22</sup> recreational users,<sup>23</sup> and trespassers.<sup>24</sup> The duty owed by the occupier, who exercises control over the premises to the visitor, requires that when an entrant who is present on the premises at the invitation or with the permission of the occupier, is shown the common law duty of care. This duty is defined as reasonable care in the circumstances to ensure that a visitor does not suffer injury or damage by reason of any danger existing on the property. Consequently, the publican's duty to look after patrons on the premises is indisputable.

### B. *Off the Premises—The Going Gets Murky*

Currently, Irish law with respect to a publican's liability where accidents occur off the premises and involve an intoxicated patron is unclear. Despite the frequency of alcohol-related accidents in Ireland, it has been suggested by one commentator that the law remains unsettled due to the fear of pub owners and insurance companies that Irish courts will set a precedent similar to "their Canadian and Australian brethren."<sup>25</sup> As a result, "publican liability" litigation is customarily settled prior to court level adjudication. For example, a case that was settled prior to a

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21. See *Purtill v. Athlone Urban Dist. Council*, [1968] IR 205. See also *McNamara v. Electricity Supply Bd.*, [1975] IR 1 (holding that the standard of care owed to trespassers was held to be one of "reasonable care." However, the duty owed by the occupier to the licensee was to warn him of "concealed dangers"; the occupier was under a duty to warn an invitee of "unusual dangers" on the premises).

22. Occupiers' Liability Act § 3(1)-(2) ("to take such care as is reasonable in the circumstances . . . to ensure that a visitor to the premises does not suffer injury or damage by reason of any danger existing thereon.").

23. Occupiers' Liability Act § 4(1)(a)-(b). Cf. *MCMAHON & BINCHY*, *supra* note 16, § 12.65. The occupier must take care not to injure the recreational user intentionally or with reckless disregard for this recreational user. *Id.*

24. Occupiers' Liability Act § 4(1)(a)-(b). Cf. *MCMAHON & BINCHY*, *supra* note 16, § 12.65. The occupier is under a duty to ensure that he does not injure the trespasser intentionally or act with reckless disregard for this trespasser. *Id.*

25. *Dunne*, *supra* note 7, at 152. In these jurisdictions, the courts have held that a pub or hotel owner owes a duty of care to an intoxicated patron and may be liable for injuries sustained off the premises as a result of his drunkenness. *Id.* The leading Canadian decision is *Jordan House Ltd. v. Menow & Honsberger*, [1973] 38 D.L.R. 3d 105; cf. *Schmidt v. Sharpe*, [1983] (1983) 21 A.C.W.S. 2d 96; *Stewart v. Pettie*, [1995] 1 S.C.R. 131. The leading Australian decision is *Johns v. Cosgrove*, [1997], 27 M.V.R. 110 (Austl.).

hearing, *Murphy v. Ballyclough Co-operative Creamery Ltd.*,<sup>26</sup> “sparked a public debate in Ireland over the “duties a publican owes, or should owe, to patrons.”<sup>27</sup> Mr. Murphy attended a shareholders’ meeting of the creamery in Mallow, Co. Cork.<sup>28</sup> He had parked his car at a nearby racecourse and taken a bus into Mallow town.<sup>29</sup> Following that meeting (at which free alcoholic beverages were provided), he went to the Roundabout Tavern in Mallow, where he consumed “a considerable amount of drink and became inebriated.”<sup>30</sup> He was then driven by Mrs. Kay Napier to his van at the racecourse “as it was raining heavily on the night.”<sup>31</sup> The plaintiff then drove to the Duhollow Lodge Hotel where he was served one drink, although he was initially refused service because of his intoxicated condition.<sup>32</sup> On his way home, he crashed his van into a wall and, as a result, he sustained injuries that rendered him a paraplegic.<sup>33</sup> In his suit against the Duhollow Lodge Hotel, the plaintiff claimed that the last publican was negligent in serving him when he had knowledge or ought to have had knowledge that the plaintiff was already intoxicated and, consequently the publican was “wholly or partly to blame for the accident.”<sup>34</sup> In his opinion, Judge Morris stated:

It may well be that any negligence. . . on the part of the first and second-named defendant[s] [The Roundabout Tavern owners, William and Kay Napier] in providing alcohol to the plaintiff would have been overwhelmed by the alleged negligence of the remaining defendants [Edward and Mary Canny, owners of the Duhollow Lodge Hotel] if established.<sup>35</sup>

As it is noted in McMahon and Binchy’s work, the judge was not adverse to the imposition of liability on a publican for supplying too much drink to a customer who later crashes his car.<sup>36</sup> The courts also await a case where the intoxicated is the perpetrator, rather than the victim of harm. To attempt to foresee how the Irish judiciary might

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26. Murphy, *supra* note 4.

27. Kathleen Moore-Walsh, *The Roundabout Tavern Settlement: A Reflection of American Publican Liability?*, 13 IR. L. TIMES (NS) 205 (2000).

28. *See id.* at 205.

29. *Id.*

30. *Man sues publicans for letting him drive when drunk*, IRISH TIMES, Oct. 14, 1998, at 4.

31. Catherine Cleary, *Insurers put on pressure to settle case, says publican*, IRISH TIMES, Oct. 15, 1998, at 7.

32. Moore-Walsh, *supra* note 27, at 205.

33. *See id.* at 206.

34. MCMAHON & BINCHY CASEBOOK, *supra* note 12, at 174.

35. Murphy, *supra* note 4, at 8.

36. MCMAHON & BINCHY CASEBOOK, *supra* note 12, at 174.

decide a case such as *Murphy*, the approach of the courts in the United Kingdom is worthy of consideration.

### C. *The English Position*

A number of pertinent cases have come before the English courts recently and, interestingly, contributory negligence was a factor used in the resolution of each. The most recent decisions have retreated from the joint Australian and Canadian view, which focuses on the knowledge of the publican and foreseeability of harm.<sup>37</sup>

The case of *Barrett v. Ministry of Defense*<sup>38</sup> concerned a naval airman (Barrett), who had been posted to a remote British base in Northern Norway. Cheap alcohol was freely available on the base.<sup>39</sup> Senior officers routinely failed to take appropriate steps to curb excessive drinking, although such measures were outlined in naval codes of discipline.<sup>40</sup> On the night in question, Barrett was celebrating both his birthday and a promotion.<sup>41</sup> He drank himself into a stupor, became unconscious, and was removed by officers to his bunk.<sup>42</sup> No medical attention was sought by the officers on duty, and although they checked on him a number of times throughout the night, he nevertheless asphyxiated on his own vomit.<sup>43</sup> The decedent's wife sued the Ministry of Defense for failing to prevent Barrett from becoming drunk and for failing to protect him once he became drunk.<sup>44</sup> The Court of Appeal overturned the trial judge's finding that the defendants owed a duty of care to the deceased to

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37. Dunne, *supra* note 7, at 156–57.

38. *Barrett v. Ministry of Def.*, 1 W.L.R. 1217 (C.A. 1995) [hereinafter *Barrett*].

39. *Id.* at 1220.

40. *See id.* at 1220. The senior naval officer at the base was charged with and pleaded guilty to a breach of Queen's Regulations for the Royal Navy 1967 art. 1810, which provides:

It is the particular duty of all officers, fleet chief petty officers, chief petty officers, petty officers and leading ratings actively to discourage drunkenness, overindulgence in alcohol and drug abuse by naval personnel both on board and ashore. Should a man appear to be suffering from any of these abuses they are immediately to take appropriate action to prevent any likely breaches of discipline, possible injury or fatality, including medical assistance if it is available. Action taken is to be reported to the officer of the watch/officer of the day, naval provost unit or other naval authority as appropriate.

*Id.*, noted in *Barrett*, *supra* note 38, at 1220.

41. *Barrett*, *supra* note 38, at 1221.

42. *See id.* at 1222.

43. *Id.*

44. Barbara Harvey & John Marston, *Intoxication and claimants in negligence*, 149 NEW. L.J. 1004, 1005 (1999). Judge Phelan, sitting as a judge of the High Court [of England and Wales] in the Queen's Bench Division, gave judgment for the plaintiff for £160,651.16. He reduced the damages of £214,201.54 by twenty-five percent, which he held was the deceased's share of responsibility for his death. The defendant appealed the decision, noted in *Barrett*, *supra* note 38, at 1219.

prevent him from becoming drunk.<sup>45</sup> In his opinion, Lord Justice Beldam referred to existing categories of relationships in which a duty of care already existed, such as employer and employee, pupil and schoolmaster; and, occupier and visitor.<sup>46</sup> He reasoned:

The characteristic which distinguishes these relationships is reliance expressed or implied in the relationship which the party to whom the duty is owed is entitled to place on the other party to make provision for his safety. 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.<sup>47</sup>

An “unwarranted contravention of the principle of individual responsibility”<sup>48</sup> would arise from imposing a duty of care on the defendants to control the plaintiff’s drinking. Lord Justice Beldam claimed:

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.<sup>49</sup>

Despite this view, the defendants were found liable for failing to discharge properly the duty they owed to the deceased when they assumed responsibility for him after he became unconscious, as “the measures taken fell short of the standard to be reasonably expected.”<sup>50</sup> The level of contributory negligence was increased from one quarter to two-thirds.<sup>51</sup>

Another case involving the Ministry of Defense and intoxicated servicemen recently came before the English courts. In *Jebson v. Ministry of Defense*,<sup>52</sup> the plaintiff soldier was returning in an army lorry from a night out organized by a commanding officer. During this journey, the intoxicated plaintiff had fallen from the tailgate of the lorry after attempting to climb onto its roof.<sup>53</sup> The Court of Appeal found that because the defendants had organized transport for the soldiers with the

45. Barrett, *supra* note 38, at 1226.

46. *Id.* at 1224.

47. *Id.*

48. Claire McIvor, *Liability in Respect of the Intoxicated*, 60 CAMBRIDGE L.J. 109, 118 (2001).

49. Barrett, *supra* note 38, at 1224.

50. *Id.* at 1225.

51. *Id.*

52. *Jebson v. Ministry of Def.*, 1 W.L.R. 2055 (C.A. 2000) [hereinafter *Jebson*].

53. *See id.* at 2055.



knowledge that they would become intoxicated on the night out, the defendants had assumed a duty of care to the claimant and his fellow soldiers.<sup>54</sup> Thus, a failure to supervise the men while in the lorry, coupled with the foreseeability of injury as a result of the drunken soldiers, meant that the defendants had not discharged this duty fully.<sup>55</sup> Lord Justice Potter's judgment echoed that of Lord Justice Beldam in *Barrett*: Ordinarily an adult's inebriated state would not impose a duty of care on others to look after him.<sup>56</sup> But in some cases such a duty might exist:

[T]he law recognizes that there may be circumstances where by reason of drunkenness or other factors foreseeably likely to affect an adult's appreciation of danger, he may act in a childish or reckless fashion, and that in appropriate circumstances there may exist a duty on others to make allowance for those actions and to take precautions for the perpetrator's safety.<sup>57</sup>

This principle did not apply in *Jebson* because the defendants, in providing transport for the men and knowing that they would likely be drunk on the return journey, had already assumed a duty of care.

Although there seems to be no obligation to prevent another person from becoming drunk, there are a number of English decisions in which exposing the plaintiff to further harm after having provided him with alcohol has given rise to a duty of care.<sup>58</sup> In *Brannan v. Airtours plc.*, the defendant travel company organized an evening party at a Tunisian holiday resort.<sup>59</sup> Plenty of free wine was provided.<sup>60</sup> Despite warnings made early in the evening by the travel company representative that it was dangerous to walk across tables to get to the toilets or the dance floor due to the presence of large electric fans at either end, the plaintiff did so anyway.<sup>61</sup> Reportedly, he did this to avoid disturbing others at his table.<sup>62</sup> He climbed up and walked along the table and into the rotating fan at its end, injuring his face.<sup>63</sup> Crucially, evidence that another guest on a previous package holiday organized by the same travel company

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54. *Id.* at 2056.

55. *McIvor*, *supra* note 48, at 119.

56. *Jebson*, *supra* note 52, at 2066.

57. *Id.* at 2067.

58. See *Griffiths v. Brown*, THE TIMES, Oct. 23, 1998 (Queen's Bench Division) (Transcript: Smith Bernal) (LEXIS Professional, UK Cases, Combined Courts) [hereinafter *Griffiths*]. Two other important factors must be emphasized: first, the knowledge that the plaintiff is intoxicated to such an extent that he/she is incapable of taking proper care for his/her own safety and second, the foreseeability of the risk of injury. *Id.*

59. *Brannan v. Airtours plc.*, THE TIMES, Feb. 1, 1999 (C.A. Civil Division) (Transcript: Smith Bernal) (LEXIS Professional, UK Cases, Combined Courts).

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

had injured himself under similar circumstances was submitted.<sup>64</sup> The Court of Appeal distinguished the *Barrett* decision, stating that in the instant case “it was plainly foreseeable that party-goers might drink a bit too much and lose some of their normal inhibitions and close attention to their safety.”<sup>65</sup> The plaintiff’s contributory negligence was apportioned at fifty percent.<sup>66</sup>

Relationships outside of the traditional scope of publican-patron may impose a duty of care as well. In *Griffiths v. Brown*, the plaintiff had requested that a taxi driver drop him off at a certain location.<sup>67</sup> The plaintiff, who was inebriated but was able to walk without staggering and give instructions to the driver, alighted from the taxi at the requested location. The plaintiff then attempted to cross the road and was hit by a car, sustaining serious injuries.<sup>68</sup> The court rejected the plaintiff’s argument that the taxi driver owed him a duty of care not to let him alight at a hazardous crossing while knowing that the plaintiff was drunk.<sup>69</sup> Judge Jones held, in his judgment, that “the duty of care is the same whether the passenger is drunk or sober.”<sup>70</sup>

Two interesting points were made in the judgment. First, if a duty of care were to exist, it could only be “in a clear and obvious case, that is where the passenger had plainly reached such a state of intoxication that he was clearly incapable of taking care for his own safety.”<sup>71</sup> Judge Jones held that in the instant case, on the evidence it was not apparent to the taxi driver that Mr. Griffiths was intoxicated.<sup>72</sup> One observer opined that had he been obviously inebriated, “a duty of care could have been both owed and breached.”<sup>73</sup> A taxi driver, in picking up an obviously intoxicated passenger, would be undertaking a responsibility, as the officers were in *Barrett*, to look after someone who is unable to look after himself.

Judge Jones, in making his second point, alluded to the hypothetical passenger who intends to spend an evening drinking and pre-orders a

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64. *Id.*

65. *Id.*

66. *Id.*

67. Griffiths, *supra* note 58.

68. McIvor, *supra* note 48, at 120.

69. *See id.*

70. Griffiths, *supra* note 58.

71. *Id.*

72. *Id.*

73. McIvor, *supra* note 48, at 121.

taxi.<sup>74</sup> If the intention of the passenger to drink was communicated to the driver, and the arrangement was to take the passenger home after this drinking session, a duty would arise to deliver the passenger safely.<sup>75</sup> Judge Jones concluded that the duty would arise “because of what had been agreed or arranged and the express or implied assumption of added responsibility by the driver.”<sup>76</sup> This same principle was applied in *Jebson*, namely that a knowing arrangement to transport an intoxicated individual gives rise to a duty of care.

### III. WHAT A MESS: LEGAL INCONGRUITIES AND POLICIES IN CONFLICT

#### A. Control

Under the Atkinian<sup>77</sup> approach, a defendant is liable for negligence if his conduct results in a reasonably foreseeable injury to the plaintiff. In other words, a duty of care must first exist for there to be a breach.

But when does a duty of care arise? Clearly, the element of control, as the judgments in *Barrett* and *Jebson* show, is an essential factor. The publican is exercising control over the ultimate source of danger—the intoxicated patron. How, then, could he not be held responsible in negligence for the dangerous article that he has put into circulation? The publican’s customers can surely be defined as his neighbors: “[P]ersons . . . so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.”<sup>78</sup> The added aspect of control acts as a justification for the imposition of an obligation.<sup>79</sup>

#### B. Vulnerability

Certain commentators also argue for the imposition of liability on the publican on the basis that “particular relationships generate an affirmative duty to act so as to protect a vulnerable person, even one who is the cause of his or her own vulnerability.”<sup>80</sup> If a publican has knowledge of the customer’s inability to take reasonable care for his own safety, why

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74. *Id.*

75. *Id.*

76. *Id.*

77. *Donoghue v. Stevenson*, *supra* note 17, at 571–72 (Lord Atkin’s judgment, in particular, widened the categories of the negligence, thereby establishing the “neighbor principle”: a manufacturer has a duty to take reasonable care, even if he/she does not know the manufactured product to be dangerous and there is no contractual relationship between him/her and the consumer. *Id.*).

78. *Id.* at 580.

79. EGIN QUILL, *TORTS IN IRELAND* 404 (Gill and Macmillan 1999).

80. BYRNE & BINCHY, *supra* note 5, at 612.

should he not be under an obligation to take care that the customer is not injured after having served that customer the alcohol that made him vulnerable? In law, there is a special duty to take care of "immature or feeble" people including the blind.<sup>81</sup> It appears reasonable to afford those same protections to an intoxicated person. In Ireland, the Gardaí (Police) have already been held to owe a duty of care to an inebriated person in their custody.<sup>82</sup> Should the same standard not apply to publicans?

Arguments against this position state that such a duty would impose an impractical and unreasonable obligation on the publican to keep a tally of the amount of drink served to a particular customer or customers.<sup>83</sup> In a quiet country pub, keeping a tally may be a relatively easy task, but it is submitted that in a larger, busier establishment, this requirement would be overly burdensome.

There must also be limits on a duty of care, if one is owed. Perhaps the duty of care should be owed to those patrons who are intoxicated and are at immediate risk of coming into or causing a dangerous situation (for example, driving an automobile), as opposed to those patrons who are merely intoxicated. Under this regime, overservice, in and of itself, may not constitute a breach.<sup>84</sup> This approach, however, may simply lead to a different quandary than the one it resolves.

The issue of foreseeability also arises because there must be some foreseeable risk of harm to the patron or a third party. However, mere foreseeability of harm is not sufficient for a duty to exist under English law. The English courts, unlike those in Ireland, have departed from the foreseeability principles laid down in *Anns v. Merton London*

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81. *Glasgow Corp. v. Taylor* [1992], A.C. 44, 67 (Scot.) (question of the Corporation's liability for the injury suffered by a child from eating berries from a bush growing in a public garden). In *Haley v. London Electricity Board*, 1 A.C. 778 (H.L. 1965), it was held that the respondent electricity suppliers were negligent in their duty of care to the blind appellant. Having excavated a trench along a pavement in a London suburb, the respondents placed a punner-hammer across the pavement to prevent access to the trench. The appellant's stick missed the sloping handle of the punner-hammer, which caused him to trip and fall. He sustained serious injuries. On appeal to the House of Lords it was held that the duty owed to blind pedestrians was no different to that owed to their seeing counterparts, even though extra precautions might have to be taken in the case of blind persons.

82. See *McKevitt v. Ireland* [1987] 1 I.L.R.M. 541 (Ir. S.C.).

83. *Munro v. Porthkerry Park Holiday Estates Ltd.*, THE TIMES, Mar. 9, 1984, 83/477 (Queen's Bench Division) (Transcript: Barnett, Lenton) (LEXIS, UK Cases, Combined Courts) [hereinafter *Munro*].

84. See *Barrett*, *supra* note 38, at 1224.

*Borough Council*,<sup>85</sup> which “put foreseeability of risk at centre stage.”<sup>86</sup> Instead, the preference has been to follow the dicta of Judge Brennan in the Australian case of *Sutherland Shire Council v. Heyman*,<sup>87</sup> which allows for the development of categories of negligence “by analogy with established categories,”<sup>88</sup> rather than unwieldy governance by an unlimited doctrine of foreseeability. The Irish Courts have not strayed from the principles set forth in *Anns*, where the foreseeability of harm remains an important factor in publicans’ liability cases. If the publican has overserved the patron and is, to the publican’s knowledge, intoxicated (i.e. he poses a hazard to himself and others), there exists a reasonable foreseeability that the patron will cause an accident and injury. Therefore, letting an intoxicated patron drive breaches the duty of care. The stronger the reasons for believing that the patron will actually drive home, “the stronger the case is for imposing liability on the bar proprietor.”<sup>89</sup> The fact that the patron has done so before without a mishap will not absolve the publican of liability.

There are also questions of causation in relation to injuries sustained by third parties that the Irish courts will also have to answer. Would the intoxicated person’s illegal act of drinking and driving qualify as a sufficient *novus actus interveniens* thus breaking the chain of causation between an injured pedestrian, for example, and the publican? Doubt has been cast over this proposition because the intoxicated patron may not have the mental capacity to perform such a *novus actus interveniens*.<sup>90</sup> Also, a publican may be held liable in negligence where the negligence consists solely in facilitating another’s intentional or reckless act.<sup>91</sup> Perhaps it will be more likely that an Irish court will find a nexus between the injury to the third party and the publican’s conduct.

### C. Defenses

In response to the potential imposition of liability for breach of the duty of care imposed by law, publicans can offer evidence of reasonable precaution or the absence of duty.

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85. *Anns v. Merton London Borough Council*, [1978] 1 A.C. 778 (H.L. 1965) [hereinafter *Anns*].

86. Dunne, *supra* note 7, at 157.

87. *Sutherland Shire Council v. Heyman*, [1985] 157 C.L.R. 424.

88. Barrett, *supra* note 38, at 1224.

89. BYRNE & BINCHY, *supra* note 5, at 611.

90. See *id.* *Novus actus interveniens* (a new act intervening). The act must be intentional or reckless.

91. Where a “defender negligently causes or permits to be created a source of danger, and it is reasonably foreseeable that third parties may interfere with it, and sparking off the danger, thereby cause damage to persons in the position of the pursuer.” *Smith v. Littlewoods Organisation Ltd.*, 1 All ER 710, 730 (H.L. 1965) (Goff, L.J.).

For example, commentators hypothesize that if the bar owner shows that a monitoring system has been put in place, but it is still quite difficult for the staff to keep a tally on the amount every customer has had to drink (due to volume of patrons, etc.) then “less likely is the prospect of liability being imposed.”<sup>92</sup>

Conversely, if the patron is accompanied by others or is put into the care of others who are responsible, then this course of action may relieve the publican of liability.<sup>93</sup>

Furthermore, there is also the proposition suggested by Lord Justice Beldam in *Barrett* that “I am not my brother’s keeper” and that it would be “fair, just and reasonable” to impose liability. Instead, it would be more appropriate “to leave the responsibility for consuming alcohol in the hands of the drinker.”<sup>94</sup> Certainly, this argument, at least in cases involving injuries caused to the patron himself, is consistent with the doctrine of *volenti non fit injuria* which has come into play in a number of publicans’ liability cases in the United Kingdom.<sup>95</sup>

#### IV. CONSEQUENCES AND CONCLUSIONS?

There are a number of foreseeable disadvantages to imposing a duty of care on publicans for the acts of their intoxicated patrons. First, there may be an understandable reluctance on the part of publicans to serve customers more than a minimal number of drinks, to avoid liability for any accidents linked to the consumption of the alcohol served. While this “deterrent effect” may have the positive effect of reducing the number of accidents, particularly road traffic accidents caused by alcohol, the imposition of a duty of care would also result in lower revenues to the severe detriment of small businesses. As a result of the dramatic implications of the resolution of these issues, perhaps a legislative, rather than a judicial, solution is called for.

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92. BYRNE & BINCHY, *supra* note 5, at 610.

93. See Munro, *supra* note 83.

94. Dunne, *supra* note 7, at 157.

95. *Volenti non fit injuria* (to a willing person no injury is done). That to which a man consents cannot be considered to be an injury. See, e.g., *Morris v. Murray*, 3 All E.R. 801 (where the claimant was injured when a plane, piloted by a friend with whom he had been drinking, crashed. His argument—that his drunkenness undermined the defense of *volenti non fit injuria*—failed because, despite being drunk, he was capable of understanding what he was doing). Cf. *Ratcliff v. McConnell*, [1999] 1 W.L.R. 670 (where the 19 year-old plaintiff student was seriously injured when he dove into the college’s open-air swimming pool when swimming there with friends. The act took place at night, when access to the pool was prohibited. Although the claimant was not drunk, he had been drinking). See *Harvey & Marston*, *supra* note 44, at 1005.

When these cases are litigated, there will undoubtedly be pressure on bar proprietors to settle the disputes instead.<sup>96</sup> Inevitably, higher insurance premiums for publicans will result and the patron will pay more for the alcohol he consumes.

While there is no indication that the Irish Parliament (Dáil) will take up these issues, they remain questions to be decided in Irish courts. Whether the courts will follow the approach of their English brethren remains to be seen. Regardless, a set of coherent principles must be established by the judiciary so as to avoid a situation where the negative economic consequences are visited upon small business owners. Certainly, the scope of publicans' liability should not be permitted to be governed by the slippery slope maxim: "If one step, why not fifty?"

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96. See Cleary, *supra* note 31, at 7.