

CANADA / JUDGMENT

Jordan House Ltd. v. Menow

[1974] SCR 239

COURT

Supreme Court of Canada

DECIDED

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Jordan House Ltd. v. Menow

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Supreme Court Judgments

Date

1973-05-07

Report

[1974] SCR 239

Judges

Martland, Ronald; Judson, Wilfred; Ritchie, Roland Almon; Spence, Wishart Flett; Laskin, Bora

On appeal from

Ontario

Subjects

Torts

Decision Content

Supreme Court of Canada

Jordan House Ltd. v. Menow, [1974] S.C.R. 239

Date: 1973-05-07

Jordan House Limited (Defendant) Appellant;

and

John James Menow (Plaintiff)

and

Floyd Austin Honsberger (Defendant) Respondent.

1972: November 8, 9; 1973: May 7.

Present: Martland, Judson, Ritchie, Spence and Laskin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Negligence—Duty of care—Patron of hotel beverage room ejected after becoming intoxicated—Patron injured when struck by car while walking on highway—Liability of hotel.

The plaintiff M, a frequent and well-known patron of the defendant hotel's beverage room became intoxicated there after having been served with beer from time to time during the course of a late afternoon and evening. At about 10 p.m., M was ejected from the hotel by the employees thereof, the owner-operator then knowing that M was unable to take care of himself by reason of intoxication and that he would have to go home, probably by foot, by way of a main highway on which the hotel fronted. Within half an hour after M was ejected from the hotel, and while he was walking near the centre line of the highway, he was struck by a vehicle driven by the defendant H and as a result sustained serious injuries. On the basis of the concurrent findings of fact by the trial judge and by the Court of Appeal M was awarded damages against the defendant hotel and against the defendant H under an equal apportionment of fault among all three parties. The defendant hotel appealed to this Court from the judgment of the Court of Appeal.

Held: The appeal should be dismissed.

Per Martland, Spence and Laskin JJ.: The hotel was in an invitor-invitee relationship with M as one of its patrons. Given that relationship, the hotel operator's knowledge of M's propensity to drink and his instruction to his employees not to serve him unless he was accompanied by a responsible person, the fact that M was served not only in breach of this instruction but as well in breach of statutory injunctions against serving a patron who was apparently in an intoxicated condition, and the fact that the hotel operator was aware that M was intoxicated, the proper conclusion was that the hotel came under a duty to M to see that he got home safely by taking him under its charge or putting him under the charge of a responsible person, or to see that he was not turned out alone until he was in a reasonably fit condition to look after himself. There was a breach of this duty for which the hotel must respond according to the degree of fault found against it. The harm that ensued was that which was reasonably foreseeable by reason of what the hotel did (in turning M out) and failed to do (in not taking preventive measures).

Per Judson and Ritchie JJ.: The knowledge of the innkeeper and his staff of the plaintiff's somewhat limited capacity for consuming alcoholic stimulants without becoming befuddled and sometimes obstreperous, seized them with a duty to be careful not to serve him with repeated drinks after the effects of what he had already consumed should have been obvious. It was a breach of this duty which gave rise to liability in the present case.

[Dunn v. Dominion Atlantic Railway Co. (1920), 60 S.C.R. 310, applied; Bolton v. Stone, [1951] A.C. 850; Lambert v. Lastoplex Chemicals Co. Ltd., [1972] S.C.R. 569; Donoghue v. Stevenson, [1932] A.C. 562, referred to.]

APPEAL from a judgment of the Court of Appeal for Ontario^[1], affirming a judgment of Haines J. in favour of the plaintiff in an action for damages for personal injuries. Appeal dismissed.

John A. Campbell, Q.C., for the defendant, appellant.

B.J. MacKinnon, Q.C., and Thomas Dunne, for the plaintiff, respondent.

Brendan O'Brien, Q.C., for the defendant, respondent.

The judgment of Martland, Spence and Laskin JJ. was delivered by LASKIN J.—This is a case of first instance. The principal issue is whether the operator of a hotel may be charged with a duty of care to a patron of the hotel beverage room who becomes intoxicated there, a duty to take reasonable care to safeguard him from the likely risk of personal injury if he is turned out of the hotel to make his way alone. If such a duty may be imposed, it falls to determine the nature or scope of the duty to the intoxicated patron. This determination must then be related to the present case by inquiring whether on its facts there has been a breach of the duty by the appellant hotel so as to engage its liability to the respondent plaintiff for personal injuries. I shall refer later in these reasons to another issue raised on behalf of the respondent Honsberger.

There are concurrent findings of fact in this case by the trial judge, Haines J., and by the Ontario Court of Appeal in favour of Menow, on the basis of which he was awarded damages against the appellant hotel and against the respondent Honsberger under an equal apportionment of fault among all three parties. Honsberger was the driver of a car which struck Menow as he was walking east near the centre line of Highway No. 8 after having been ejected from the hotel. Neither the quantum of damages nor the apportionment of fault is in issue in this appeal.

The hotel premises front on Highway No. 8, a much-travelled two-lane highway running east and west between Hamilton and Niagara Falls, Ontario. The road is asphalt, twenty-one feet wide, and, at the material time, January 18, 1968, the shoulders were icy, with snowbanks beyond them, and the pavement itself was wet although not slippery. Menow was employed by a fruit farmer and lived alone on his employer's farm which was on a side road about two and one-half miles east of the hotel. The direct route to his abode was along the highway and then north along the side road. Menow was a frequent patron of the hotel's beverage room, where beer was served, and was well known to the owner-operator of the hotel, one Fernick. He was often there in the company of his employer and the latter's foreman, also well known to Fernick. Menow had a tendency to drink to excess and then to act recklessly, although ordinarily he was courteous and mannerly. The hotel management and the beverage room employees knew of his propensities, and, indeed, about a year before the events out of which this case arose he had been barred from the hotel for a period of time because he annoyed other customers, and thereafter the hotel's employees were instructed not to serve him unless he was accompanied by a responsible person.

On January 18, 1968, Menow, his employer and the foreman arrived at the hotel at about 5.15 p.m. and drank beer. The employer and the foreman departed within a short time, leaving the plaintiff there alone. Fernick came on duty at about 7 p.m. and saw that the plaintiff was then sober. He was served with beer from time to time, and there is a finding that towards 10 p.m. Fernick was aware that Menow was drinking to excess and that he had become intoxicated, the hotel having sold beer to Menow past the point of visible or apparent intoxication. At about 10 p.m. or 10.15 p.m. Menow was seen wandering around to other tables in the beverage room and consequently was ejected from the hotel by employees thereof, Fernick then knowing that the plaintiff was unable to take care of himself by reason of intoxication and that he would have to go home, probably by foot, by way of a main highway.

No excessive force was used in turning Menow out of the hotel. The evidence shows that he was put out on a dark and rainy night and that he was wearing dark clothes not readily visible to motorists. It appears that Menow, when he was outside the hotel, was picked up by an unknown third person and taken part of the way home, being let out on Highway No. 8 at 13th Street. The ride had not been arranged by the hotel. It was while continuing in an easterly direction and, indeed, while walking beyond 11th Street, his turn-off point (because, according to his testimony, he was looking for a friend) that Menow was struck by the Honsberger vehicle. It is unnecessary to detail the circumstances attending the accident because Honsberger does not challenge in this Court the finding of negligence and the apportionment of one-third fault against him. It is enough to say that the accident occurred within half an hour after Menow was ejected from the hotel, and that he was staggering near the centre of the highway when he was hit by the Honsberger vehicle which was travelling east.

On the foregoing facts, Haines J. found that the hotel owed and was in breach of a common law duty of care to Menow. The duty of care was first put on two grounds, each related but in different ways, in the assessment of the duty and of its breach, to certain statutes. Adverting to s.53(3) of The Liquor Licence Act, R.S.O. 1960, c.218, and to s.81 of The Liquor Control Act, R.S.O. 1960, c.217, Haines J. held that in contravening those provisions the hotel was in breach of a common law duty to Menow not to serve him intoxicating drink when he was visibly intoxicated. He thus relied on these enactments as indicating a standard upon which a common law duty could be founded. Second, although in the view of the trial judge, s.53(4) and (6) of The Liquor Licence Act imposes a duty on a licensed hotel operator to eject an intoxicated patron and empowers his forcible removal if he refuses to leave on request, he held that this authority is qualified by a duty not to subject that patron to danger of personal injury, foreseeable as a result of eviction. In the present case Haines J. found that the hotel was vicariously liable for the actions of its employees who were in breach of a common law duty of care not to eject Menow as they did when they knew or ought to have known that he would thereby be placed in a position of danger to his personal safety.

The trial judge took a third position in imposing liability on the hotel by holding that “the defendant’s employees undertook affirmative action to remove the plaintiff from the premises. In so doing they assumed a duty of care to take reasonable precautions to ensure that his safety was

not endangered as a result of their actions”. I may say at once that I do not regard this assessment as adding anything to the first two grounds upon which Haines J. proceeded. The affirmative action of removal did not in itself result in any injury to the plaintiff, as might have been the case if excessive force had been used against him (which is not suggested in the present case) nor was it followed by any breach of duty raised by and resulting from the affirmative action per se; hence it can only be considered in the present case as wrapped up in the duty of care, if any, resting upon the hotel towards an intoxicated patron.

In its brief oral reasons supporting the judgment of Haines J., the Ontario Court of Appeal stated that “we place our dismissal of the appeal on the simple ground that so far as the hotel is concerned, there was a breach of the common law duty of care owed to the plaintiff in the circumstances of this case”.

The following are the statutory provisions referred to by the trial judge in the course of his reasons relating to the hotel’s liability to Menow: Liquor Licence Act, R.S.O. 1960, c. 218:

s.53(3) No liquor shall be sold or supplied on or at any licensed premises to or for any person who is apparently in an intoxicated condition.

- (4) No person holding a licence under this Act shall permit or suffer in the premises for which the licence is issued,
- (b) any gambling, drunkenness or any riotous, quarrelsome, violent or disorderly conduct to take place.
- (6) Any person holding a licence under this Act who has reasonable grounds to suspect from the conduct of any person who has come upon the premises in respect of which such licence is issued that such person although not of notoriously bad character, is present for some improper purpose or is committing an offence against this Act or the regulations, may request such person to leave the licensed premises immediately and, unless the request is forthwith complied with, such person may be forcibly removed.

s.67 Where any person or his servant or agent sells liquor to or for a person whose condition is such that the consumption of liquor would apparently intoxicate him or increase his intoxication so that he would be in danger of causing injury to his person or injury or damage to the person or property of others, if the person to or for whom the liquor is sold while so intoxicated,

- (a) commits suicide or meets death by accident, an action under The Fatal Accidents Act lies against the person who or whose servant or agent sold the liquor; or
- (b) causes injury or damage to the person or property of another person, such other person is entitled to recover an amount to compensate him for his injury or damage from the person who or whose servant or agent sold the liquor.

Liquor Control Act, R.S.O. 1960, c.217:

s.81 No person shall sell or supply liquor or permit liquor to be sold or supplied to any person under or apparently under the influence of liquor. Section 67 of The Liquor Licence Act has no direct application to the facts of the present case, and the trial judge did not attempt to apply it even indirectly as pointing to a standard of care resting upon the hotel. Counsel for the appellant hotel urged, however, that the express provision for civil liability upon a breach of s.67 reflected a legislative policy precluding the founding of a cause of action upon breach of the other terms of The Liquor Licence Act (or of The Liquor Control Act) invoked by the trial judge. In my opinion, this is to mistake the use to which the trial judge put s.53(3) of The Liquor Licence Act and s.81 of The Liquor Control Act. I do not read his reasons as holding that the mere breach of those enactments and the fact that Menow suffered personal injury were enough to attach civil liability to the hotel. He regarded them rather as crystallizing a relevant fact situation which, because of its authoritative source, the Court was entitled to consider in determining, on common law principles, whether a duty of care should be raised in favour of Menow against the hotel.

Before dealing in more detail with this central question, I wish to refer to an issue raised by counsel for Honsberger in reliance on s.67(b) of The Liquor Licence Act. If the judgments below stand so far as the hotel's liability is concerned, Honsberger would have the benefit of the Ontario Negligence Act in respect of any claim over against the hotel for the damages assessed against both defendants. But on the assumption that the hotel is exonerated here, the submission on behalf of Honsberger is that the unappealed affirmation of the judgment against him amounts to "injury or damage to the...property" of Honsberger, within s.67(b), and thus entitles him to recover from the hotel the amount for which he has been held liable to Menow. The Court did not require counsel for the hotel to respond to this submission. It was of the opinion that s.67(b) cannot be so interpreted. That provision does not entitle a blameworthy defendant to cast himself in the role of a plaintiff claiming not for damage suffered by it but rather for that suffered by the intoxicated person and for which it is in part responsible. This is entirely apart from the attempt to read the word "property" in a sense which is entirely foreign to its ordinary meaning as well as to the context in which it is used in s.67(b).

I return to the main issue. 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. This is the generality which exhibits the flexibility of the common law; but since liability is predicated upon fault, the guiding principle assumes a nexus or relationship between the injured person and the injuring person which makes it reasonable to conclude that the latter owes a duty to the former not to expose him to an unreasonable risk of harm. Moreover, in considering whether the risk of injury to which a person may be exposed is one that he should not reasonably have to run, it is relevant to relate the probability and the gravity of injury to the burden that would be imposed upon the prospective defendant in taking avoiding measures. Bolton v. Stone^[2], in the House of Lords and Lambert v. Lastoplex Chemicals Co. Ltd.,^[3] in this Court illustrate the relationship between the remoteness or likelihood of injury and the fixing of an obligation to take preventive measures according to the gravity thereof.

In the present case, it may be said from one point of view that Menow created a risk of injury to himself by excessive drinking on the night in question. If the hotel's only involvement was the supplying of the beer consumed by Menow, it would be difficult to support the imposition of common law liability upon it for injuries suffered by Menow after being shown the door of the hotel and after leaving the hotel. Other persons on the highway, seeing Menow in an intoxicated condition, would not, by reason of that fact alone, come under any legal duty to steer him to safety, although it might be expected that good Samaritan impulses would move them to offer help. They would, however, be under a legal duty, as motorists for example, to take reasonable care to avoid hitting him, a duty in which Honsberger failed in this case. The hotel, however, was not in the position of persons in general who see an intoxicated person who appears to be unable to control his steps. It was in an invitor-invitee relationship with Menow as one of its patrons, and it was aware, through its employees, of his intoxicated condition, a condition which, on the findings of the trial judge, it fed in violation of applicable liquor licence and liquor control legislation. There was a probable risk of personal injury to Menow if he was turned out of the hotel to proceed on foot on a much-travelled highway passing in front of the hotel.

There is, in my opinion, nothing unreasonable in calling upon the hotel in such circumstances to take care to see that Menow is not exposed to injury because of his intoxication. No inordinate burden would be placed upon it in obliging it to respond to Menow's need for protection. A call to the police or a call to his employer immediately come to mind as easily available preventive measures; or a taxi-cab could be summoned to take him home, or arrangements made to this end with another patron able and willing to do so. The evidence shows that the hotel had experience with or was sensitive to the occasional need to take care of intoxicated patrons. The operator had in other like instances provided rides. He also had spare rooms at the time into one of which Menow could have been put. Given the relationship between Menow and the hotel, the hotel operator's knowledge of Menow's propensity to drink and his instruction to his employees not to serve him unless he was accompanied by a responsible person, the fact that Menow was served not only in breach of this instruction but as well in breach of statutory injunctions against serving a patron who was apparently in an intoxicated condition, and the fact that the hotel operator was aware that Menow was intoxicated, the proper conclusion is that the hotel came under a duty to Menow to see that he got home safely by taking him under its charge or putting him under the charge of a responsible person, or to see that he was not turned out alone until he was in a reasonably fit condition to look after himself. There was, in this case, a breach of this duty for which the hotel must respond according to the degree of fault found against it. The harm that ensued was that which was reasonably foreseeable by reason of what the hotel did (in turning Menow out) and failed to do (in not taking preventive measures).

The imposition of liability upon the hotel in the circumstances that I have recounted has roots in an earlier decision of this Court when related to the evolutionary principles stemming from *Donoghue v. Stevenson*,^[4] which have become part of this Court's course of decision. The affinity of *Dunn v. Dominion Atlantic Railway Co.*^[5] with the present case is sufficiently shown by the following three sentences from the reasons of Anglin J., who was one of the plurality of this Court which allowed the appeal of the administrator of the estate of a deceased passenger, killed by a

passing train when put off at a closed and unlighted station in a drunken condition:

The right of removal of a disorderly passenger which is conferred on the conductor (under a railway bylaw) is not absolute. It must be exercised reasonably. He cannot under it justify putting a passenger off the train under such circumstances that, as a direct consequence, he is exposed to danger of losing his life or of serious personal injury.

I do not regard the Dunn case as turning on the fact that the defendant was a common carrier, any more than I regard it as relevant here whether or not the defendant hotel was under innkeeper's liability in respect of the operation of its beverage room.

The risk of harm to which Menow was exposed by the hotel was not abated to its exoneration by reason of the fortuitous circumstance that Menow obtained a ride part of the way home. The short period of time that elapsed between the time that he was removed from the hotel and the time of the accident is telling in this respect, as is the fact that the risk was not increased or changed in kind when he was dropped off at 13th Street. Counsel for the appellant did not argue on causation, but did contend that any duty that the hotel might have had evaporated because of voluntary assumption of risk. The argument is untenable, whether put on the basis of Menow's self-intoxication or on the basis of the situation that faced him when he was put out of the hotel. In his condition, as found by the trial judge, it is impossible to say that he both appreciated the risk of injury and impliedly agreed to bear the legal consequences. However, the trial judge did find Menow contributorily negligent in becoming intoxicated, advertent in this connection to s.80(2) of The Liquor Control Act which enjoins any person against being in an intoxicated condition in a public place. This finding has not been attacked.

The result to which I would come here does not mean (to use the words of the trial judge) that I would impose "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". A great deal turns on the knowledge of the operator (or his employees) of the patron and his condition where the issue is liability in negligence for injuries suffered by the patron. I would dismiss the appeal with costs.

The judgment of Judson and Ritchie JJ. was delivered by

RITCHIE J.—I agree with my brother Laskin that this appeal should be dismissed.

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

In my view it was a breach of this duty which gave rise to liability in the present case.

Appeal dismissed with costs.

Solicitors for the defendant, appellant: Seed, Greer, Long, Campbell & Howard, Toronto.

Solicitors for the plaintiff, respondent: Fleming, Harris, Barr, Hildebrand, Geiger & Daniel, St. Catharines.

Solicitors for the defendant, respondent: Phelan, O'Brien, Rutherford, Lawer & Shannon, Toronto.

[1][1971] 1 O.R. 129, 14 D.L.R. (3d) 545, sub nom. Menow v. Honsberger et al.

[2] [1951] A.C. 850.

[3] [1972] S.C.R. 569.

[4] [1932] A.C. 562.

[5] (1920) 60 S.C.R. 310.

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