Research Memorandum #85: Wrongful Death; Emotional Distress

Restatement (2d) of Torts §281, State of Major (20XX-1): "An action based on common law negligence requires that there be a duty, a breach of that duty, and that the breach be the proximate cause of harm."

Meva v. Dalbert, 276 Maj. 3d 60 (20XX-3): "This case raises the issue of liability of a tavern owner for injuries to patrons. In an establishment where intoxicating liquors are sold the tavern owner/operator, while not an insurer of the safety of his patrons, owes a duty to his patrons to exercise reasonable care and vigilance to protect them from foreseeable injury, mistreatment, or annoyance by other patrons. Richard was a patron who had caused a fight earlier in the evening, and was told to leave. Dalbert, an experienced tavern keeper, 'wise in the ways of pugnacious patrons,' instructed the bartender to call the police if Richard returned and to pass those instructions on to the bartender coming on shift. The duty of care was breached by the bartender when she did not call the police or eject Richard, who later returned. Richard subsequently injured plaintiff, Meva, a patron in the tavern.

"Foreseeability of risk of harm to plaintiff was established when Dalbert testified at trial, 'Under the circumstances known to me on the evening in question, and with my experience in the tavern business I guess I could anticipate that Richard might well return to renew his quarrel with Meva.' See Trial Transcript at 128."

Dissent. Beaver, J.: "I sharply differ from the majority. A duty of reasonable care requires notice of the peril confronting a guest. There was no actual notice to the tavern operator of peril to his guest where the plaintiff's injury was caused by a sudden affray on a busy evening. Absent actual notice, there was no foreseeable risk. I would reverse the judgment."

Nan v. Brady, 280 Maj. 3d 22 (20XX-2): "Brady the tavern owner was not liable to a patron shot by a third person. Nan was a patron at Brady's tavern. Nan was dancing with the assailant Colby's estranged girlfriend. The occurrences were so highly extraordinary or improbable as to be wholly beyond the range of foreseeability. We hold that the shooting of Nan was not foreseeable and therefore there was no breach of any duty owed by the tavern owner to the patron.

" 'The duty to use care to avoid injury to others arises from the foreseeability of the risk created,' see *Meva v. Dalbert,* 276 Maj. 3d 60 (20XX-3). The foreseeability of risk was not evident where there was a slapping incident between Nan and Colby two weeks before; the estranged girlfriend had advised Brady of her fear that she would be killed by her ex-boyfriend and the girlfriend had requested Brady to call the police if the boyfriend appeared.

"The factors which we considered in determining that the owner Brady did not breach the duty of reasonable care were that the assailant boyfriend appeared calm (although he had been drinking for four hours previously at another bar and was refused service there); Brady had not seen or served the assailant the night of the shooting; Brady had no personal knowledge of when the assailant had threatened the girlfriend, what the threat was, or that he had a propensity to use a gun; the assailant entered through a back door used mainly by daytime deliverymen; and the incident took fifteen to twenty seconds from the time the assailant confronted the plaintiff until the time the plaintiff was shot. Judgment affirmed."

Michaels v. Seawind Tavern, Inc., 280 Maj. 3d 116 (20XX-2): "This case concerns a wrongful death action. Plaintiff's husband was shot while at the Seawind Tavern. The trial court found that the plaintiff's husband's injury was not foreseeable even though three weeks earlier the assailant had been removed from the tavern for carrying a concealed weapon. The court held that the tavern owner and his agent were not required to search the assailant every time he entered the tavern.

"We agree with the factors the Court of Appeals used in affirming the trial court judgment that the assailant's acts were not foreseeable. The assailant appeared quiet and in full control; he had only two drinks in two hours; his gun was concealed (hidden in a shoulder holster under a leather jacket); and the gun discharged accidentally when the assailant attempted to unload it under the table. Because the assailant did not appear intoxicated, there was no notice (or it was not foreseeable) that the assailant posed a threat to other patrons, see dissent in *Meva v. Dalbert, 276* Maj. 3d 60 (20XX-3). We reject the notion that liability should be imposed because the tavern served intoxicants to an already intoxicated

person. 'His state of sobriety must be judged by the way he appeared to those about him, not by what a blood test later reveals.' See *Nock v. Newcity,* 143 Maj. App. 2d 4 (20XX-29).

"Strict liability should not be imposed against one who furnishes liquor to a patron who commits a tort while intoxicated. Here the assailant had a .16 blood-alcohol reading. The common law does not permit liability to attach without a concomitant showing of a violation of an established standard of reasonable care thereby causing foreseeable injury. *Nock v. Newcity*, supra at 917. The defendant's employees did not have notice that they were furnishing liquor to an individual who was intoxicated where he had ordered only two drinks while in the tavern, he was never boisterous, and he appeared quiet and in full control of his faculties."

O'Leary v. Johns, 268 Maj. 3d 576 (20XX-5): "The defendant had a Christmas party and supplied food, refreshments, and alcoholic beverages. Mr. Wolf, a friend of the defendant Johns, attended the party and became intoxicated. Wolf later drove away from the party and struck plaintiff, O'Leary. Plaintiffs asserted the defendants were negligent because they furnished alcohol to Wolf knowing that Wolf was already intoxicated and that Wolf would be unable to safely drive away from the party.

"We reject plaintiff's claim that the furnishing of alcohol to a person already intoxicated was negligence as a matter of law. Plaintiffs relied upon the following statute:

> (a) No person shall sell any liquor to any person apparently under the influence of liquor.
>
> (b) Every person who violates any provision of this title or the accompanying liquor board regulations shall be guilty of a violation of this title, whether otherwise declared or not, and is subject to a fine of $1,000. Violation of this statute is not a criminal offense.

"There is no clear legislative intent to create a right to recover civil damages for those who were engaged in a 'purely social setting.' The expansion of such liability is at this time within the province of the legislature. We choose to not address it at this time."

Smith v. Lice, 269 Maj. 3d 800 (20XX-5): "We affirm the dismissal of plaintiff's claim upon summary judgment. Both the trial and appellate courts correctly rejected plaintiff's argument that liquor furnished to one in violation of a statute imposes civil liability.

"Unless the recipient is obviously intoxicated, in a state of helplessness, or within a special relationship to the supplier, any further expansion of liability as a policy decision should be made by the legislature after full investigation, debate, and examination of the relative merits of both positions.

"The trial court found that Smith 'was not in such a state of helplessness or debauchery as to be deprived of his will power or responsibility for his behavior.' "

Old v. Bacon Inn, 284 Maj. 3d 777 (20XX-1): "We affirm the Appellate ruling that the violation of a Major statute prohibiting the sale of alcohol to minors constitutes negligence per se. In *Old*, a restaurant owner continued to serve seventeen-year-old Richard Old despite the fact that Old was obviously intoxicated. Old drove away from a cocktail lounge and was killed in a one-car accident. The plaintiffs reasoned that since a specific statute makes the furnishing of alcohol to minors a misdemeanor, the unlawful furnishing constituted negligence per se. We agree."

Burger v. Calhoun, 274 Maj. 3d 42 (20XX-4): "Contributory negligence of a decedent can be imputed to the heirs in a wrongful death case. But since the adoption of the comparative fault doctrine in our state, we no longer may need to consider assumption of risk as a necessary defense. The appellate court properly ruled that the jury should have been instructed that it should consider contributory negligence of plaintiff's decedent Burger as being a proximate cause of decedent's injury and death. Decedent Burger was dancing with defendant Calhoun's ex-girlfriend at the time decedent Burger was shot. Defendant Calhoun stated, 'Shove off or I'll shoot you.' The girlfriend told Burger to ignore Calhoun. Calhoun repeated his threat and Burger, not knowing Calhoun had a gun, said 'Bug off, twerp.' Calhoun then shot Burger."

Noe v. Flowers, 281 Maj. 3d 400 (20XX-8): "Judgment affirmed for plaintiffs for outrageous infliction of emotional distress (OIED). Plaintiff parents witnessed defendant lifeguard's

unsuccessful rescue and revival of plaintiffs' four-year-old daughter from the lake into which she fell from a dock. Lifeguards were not equipped with a boat or flotation devices, and this negligence delayed their efforts in attempting to reach and rescue the child. Plaintiffs were present when their daughter went underwater and watched as their recovered child gasped for breath and died during resuscitation attempts. Plaintiffs after the incident suffered from physical and metal injuries: headaches, nervous indigestion, insomnia, and emotional distress.

"Plaintiff must prove the elements of OIED: duty, breach of that duty by outrageous conduct, proximate cause, and damage. We are continually concerned about the genuineness of plaintiffs' motional distress and the potential scope of defendant's liability. Judicial reluctance to recognize OIED has been grounded in a variety of policy rationales: (1) the difficulty of quantifying intangible injuries by objective standards; (2) the tenuous proximate cause relationship between defendant's conduct and the plaintiffs' subjective emotional response; (3) the specter of a flood of fraudulent claims; and (4) unlimited liability for defendants.

"To address these policy considerations, the Major courts have adopted additional requirements. First, not all acts give rise to the tort of OIED. Only acts which, if considered by a reasonable person, would be outrageous or reckless will be considered to be actionable.

"Second, a defendant has a duty to not inflict emotional distress upon foreseeable plaintiffs. Not all bystanders who observe the bodily injury caused by the defendant's negligence are 'foreseeable plaintiffs.' It would be unreasonable if a defendant who imperiled one person were required to compensate all bystanders whose emotions were disturbed by the conduct. We have held that, as a matter of law, a family member who was present at the scene, as the plaintiff's were here, or arrive shortly thereafter was a 'foreseeable plaintiff' and that others are not.

"Third, also as a product of the policy considerations and common sense, this court has also required that the plaintiff prove that the plaintiff's observations of the injured victim caused emotional distress, that the plaintiff's mental distress must be the reaction of a normally constituted reasonable person and that distress manifested itself in objective symptoms."

Gordon v. Guterson, 367 Maj. 3d 540 (20XX-4): "Trial court's summary judgment dismissal of an action for outrageous infliction of emotional distress is reversed. Plaintiff, Laura Gordon, is the sister of decedent, Tag Gordon. Tag Gordon and his friend, Seth Cunningham, were driving to Snowpintal Ski Resort. His sister and her boyfriend, Robert Garfield, were following a few miles behind. They planned to spend the morning skiing as a group, but, because Laura Gordon and Robert Garfield intended to return home early in the afternoon, they took separate cars. Tag Gordon pulled over to the side of the road to put on tire chains when defendant Guterson's car drove onto the shoulder of the road, knocking Tag Gordon into the ditch, causing multiple fractures and severe lacerations to his body and face. Within a minute, his sister's car arrived at the scene, and she saw her severely injured brother lying in the ditch, crying out in agony and calling her name. He died while she looked on. Laura Gordon suffered from panic, anxiety, shock, and ongoing emotional distress.

"The appellate standard for reviewing a trial court's ruling on a motion for summary judgment is de novo. Summary judgment should only be granted if the evidence on record establishes that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. It should be granted for the defendant if the plaintiff cannot establish a prima facie case for the elements of the claim. The court considers the facts and inferences in the light most favorable to the nonmoving party.

"In *Noe v. Flowers*, 281 Maj. 3d 400 (20XX-8), we rejected the bright-line proposition that a relative must be present at the time of the accident in order to recover for emotional distress. We have instead adopted the position that a relative may recover if the distress was caused by observing the injured person at the scene shortly after the event and before a substantial change has been made in the victim's condition or location. This reasoning acknowledges the horror of seeing the victim shortly after the injury without creating liability for every grieving relative. In this case, the type of traumatic event and timing required by this tort are present. Laura Gordon arrived immediately after her brother had been struck. She observed his crushed, bleeding body lying in the ditch and that he was crying out in agony. Worse yet, she saw him die.

"For liability to pass to the defendant in an OIED claim, the plaintiff must be able to first prove a causal link between what the plaintiff observed at the scene and the resulting emotional distress. Second, the plaintiff must establish the emotional distress with evidence showing a manifestation of objective symptoms. This requirement may be satisfied by medical evidence and emotional distress susceptible of medical diagnosis. The medical diagnosis must establish that the emotional distress stemmed from the injury to a relative. In the case at hand, psychologist Dr. D. Petrie's deposition attributed Laura Gordon's emotional distress to observing her brother's injuries and death. Dr. Petrie also diagnosed Ms. Gordon's post-traumatic stress disorder and enumerated the symptomatology of the disorder. This evidence was sufficient to raise a material issue as to this element of OIED."

Martin v. AJB, Inc., 268 Ill. App. 3d 11 (20XX-1): "During January of 20XX-2, Donovan and James Barnes shot and killed Larry Martin. Plaintiffs seek to recover for the injuries suffered by Martin, but not from the Barnes brothers, who have little or no money. Plaintiffs have filed this action against AJB, the manufacturer of the gun used by the
Barnes, alleging that the gun was an unreasonably dangerous product and that AJB was therefore strictly liable for the damage caused by the weapon. The trial court found no support for plaintiffs' theory in Major law and dismissed the suit for failure to state a cause of action.

"Plaintiffs' claim, in essence, is that manufacturing and selling handguns to the public is an ultra hazardous activity that gives rise to strict liability for any damage done by the guns.

"Illinois recognizes strict liability under two theories: unreasonably dangerous defective products and ultra hazardous activities. Strict products liability follows the Restatement (Second) of Torts (20XX-23), which imposes strict liability upon one 'who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property.' Under Illinois law, a product is 'unreasonably dangerous' when it is dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.

"Plaintiff has not directly pursued a products liability approach here because the gun involved in the shootings was not defective and posed no obvious danger that required warning, and thus was not unreasonably dangerous. Judgment affirmed."

Olen v. Richardson Guns, Inc., 269 Md. App. 3d 14 (20XX-5): "Olen was injured when an unnamed assailant shot him in the chest during an armed robbery of the grocery store where he was employed. The weapon used in the crime was a Richardson Revolver Handgun, designed, marketed, assembled, and sold by Richardson Guns, Inc.

"Olen and his wife filed a tort action against Richardson Guns, Inc. in the Circuit Court for Mont County, setting forth several theories for recovery. The first claim was strict liability, plaintiffs claiming the handgun was 'abnormally dangerous.' Claim two, also strict liability, alleged the handgun was defective in 'marketing, promotion, distribution and design,' rendering it 'unreasonably dangerous.' Claim three rested on a negligence theory. Claim four, for loss of consortium, was due to negligence.

"The trial court dismissed plaintiffs' claims for failure to state a claim for relief. We reverse and remand.

"This court has repeatedly said, 'The common law is not static; its life and heart is its dynamism – its ability to keep pace with the world while constantly searching for just and fair solutions to pressing societal problems.' *Harris v. Board of Educ.*, 295 Md. 442 (20XX-5). Indeed, we have not hesitated to change the common law to permit new actions or remedies where we have concluded that such course was justified.

"In our view, generally to impose strict liability upon the manufacturers or marketers of handguns for gunshot injuries resulting from the misuse of handguns by others would be contrary to Maryland public policy as set forth by the Legislature.

"There is, however, a limited category of handguns which clearly is not sanctioned as a matter of public policy. To impose strict liability upon manufacturers and marketers of these handguns, in instances of gunshot wounds caused by criminal use, would not be contrary to the policy embodied in the enactments of the General Assembly. This type of handgun, commonly known as a 'Saturday Night Special,' presents particular problems for law enforcement officials. Saturday Night Specials are generally characterized

by short barrels, light weight, easy concealability, use of cheap quality materials, poor manufacture, inaccuracy and unreliability. These characteristics render the Saturday Night Special particularly attractive for criminal use and virtually useless for the legitimate purposes of law enforcement, sport, and protection of persons, property and business.

"The legislative policies of both the United States Congress and Maryland Assembly reflect the view that Saturday Night Specials comprise a distinct category of handguns that, because of their characteristics, should be treated differently from other handguns. See Gun Control Act of 1965, 82 Federal Code §291; Maryland Code §30 (20XX-6).

"Saturday Night Specials are largely unfit for any of the recognized legitimate uses sanctioned by the Maryland gun control legislation. They are too inaccurate, unreliable and poorly made for use by law enforcement personnel, sportsmen, homeowners or businessmen. The chief 'value' a Saturday Night Special handgun has is in criminal activity, because of its easy concealability and low price.

"Moreover, the manufacturer or marketer of a Saturday Night Special knows or ought to know that it is making or selling a product principally to be used in criminal activity. For example, a salesman for Richardson Guns, describing what he terms to be a 'special attribute' of a Richardson Handgun, was said to have told a potential handgun retailer, "If your store is anywhere near a high crime area, these ought to sell real well. This is more assuredly a crime gun.'

"For the above reason, we conclude that it is entirely consistent with public policy to hold the manufacturers and marketers of Saturday Night Special handguns strictly liable to innocent persons who suffer gunshot injuries from the criminal use of their products. In light of the ever-growing number of deaths and injuries due to such handguns being used in criminal activity, the imposition of such liability is warranted by today's circumstances.

"Reversed and remanded in accordance with this opinion. Each party to pay its own costs."