CITATION: Bucknol v. 2280882 Ontario Inc., 2018 ONSC 5455
COURT FILE NO.: CV-14-887-00
DATE: 2018 09 17

2018 ONSC 5455 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
KEVIN BUCKNOL	Jeffrey Herman, for the Plaintiff/Responding Party
Plaintiff/Responding Party	
- and -	
2280882 ONTARIO INC., o/a CLASSIC LOUNGE, aka CLASSIC LOUNGE NIGHTCLUB	Robert Betts, for the Defendant/Moving Party
Defendant/Moving Party	
	HEARD: January 24, 2018 and June 1, 2018 (written submissions only)

REASONS FOR JUDGMENT

COROZA J.

Overview

[1] In the early morning hours of May 5, 2012, Mr. Bucknol was a customer in the Classic Lounge Nightclub ("Classic") and was struck by a beer bottle that

caused a significant injury to his eye. The person who threw the bottle has never been identified. As a result of this regrettable incident, Mr. Bucknol has sued the bar for negligence.

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[2] Classic has brought this motion for summary judgment asking that I dismiss all claims against it. Mr. Bucknol requests that I dismiss the motion. In the alternative, he requests that I grant summary judgment in favour of him and find Classic liable for his injuries.

[3] I originally heard this motion on January 24, 2018 and I reserved. However, in June of 2018, counsel for Classic brought to my attention that in May of 2018, the Supreme Court of Canada released the decision of *Rankin (Rankin's Garage & Sales) v. J.J.,* 2018 SCC 19, [2018] S.C.J. No. 19. I requested that both parties file further written submissions on the impact of *Rankin*. I received their helpful submissions on June 11, 2018. I am very grateful to both counsel for their diligence.

[4] For the reasons that follow, I allow the application. There is no genuine issue for trial.

Factual Background

[5] Mr. Bucknol went to Classic with his brother and friends. He arrived at the bar around midnight. Sometime, between 2:00 a.m. and 2:30 a.m., he was struck in the face by a beer bottle that had been thrown. Moments before he was

struck, Mr. Bucknol noticed an altercation between two men close to him, and he believed that the bottle hit him one to two seconds after he saw the two men. The incident happened very quickly.

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[6] After being struck, Mr. Bucknol immediately went to the washroom to clean himself up. He then left the premises immediately to attend at a hospital. According to Mr. Bucknol, he did not speak with employees, security personnel, or police officers who were at the club to report the incident.

[7] Mr. Bucknol suffered significant injuries. The bottle shattered the bone above and around his left eye, causing immediate swelling and damage to the eye.

[8] On June 29, 2012, Mr. Bucknol's counsel wrote to Classic advising the bar that he was contemplating a lawsuit. Classic's insurer retained investigators to look into the claim.

[9] On February 26, 2014, Mr. Bucknol issued a statement of claim naming Classic as a defendant.

<u>The Issues</u>

[10] The following issues must be resolved on this motion:

1. Has Mr. Bucknol proven negligence on the part of Classic?

2. Has Mr. Bucknol proven a breach of the *Occupiers' Liability Act,* R.S.O. 1990, c. O.2 ("OLA")?

3. Was the incident reasonably foreseeable?

4. Has Mr. Bucknol established the required elements of spoliation?

5. Is there a genuine issue for trial?

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[11] Before I turn to the analysis of these issues, I will start with setting out what is not disputed by the parties.

[12] First, the *Occupiers' Liability Act* imposes a legal duty on an occupier of a premises towards another person who comes onto those premises. That duty is on the occupier to ensure that its premises are, in all the circumstances as is reasonable in the situation, reasonably safe for persons attending on the premises.

[13] Second, Classic is an occupier of the premises. Classic acknowledges that it owes a duty to customers when they enter the bar.

[14] Third, summary judgment is available to Classic if I am able to reach a fair and just determination of the merits and find that there is no genuine issue for trial. This test has been set out by the Supreme Court of Canada in *Hryniak v. Mauldin,* 2014 SCC 7, [2014] 1 S.C.R. 87 (see also Rule 20.04(2) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194).

[15] Fourth, a summary judgment motion cannot be defeated by vague references to what may be adduced in the future. In a summary judgment motion, the court can reasonably assume that the parties have placed before it, in some form, all of the evidence that will be available for trial (see: *DaSilva v. Gomes*, 2018 ONCA 610).

[16] I now turn to the issues raised on this motion.

ISSUE 1: Has Mr. Bucknol proven negligence on the part of Classic?

[17] The Supreme Court of Canada has provided a very concise definition of negligence. Conduct is negligent if it creates an objectively unreasonable risk of harm. In order to avoid liability, a person must exercise the standard of care that would be expected of an ordinary, reasonable and prudent person in the same circumstances (see: *Ryan v. Victoria (City),* [1999] 1 S.C.R. 201, at para. 28).

a. Classic's Position

[18] Classic makes the following arguments.

[19] First, Mr. Bucknol has failed to show that Classic fell short of the applicable standard of care because he has not offered evidence as to what the expected standard of care should be.

[20] Second, Mr. Bucknol has not introduced any evidence as to what Classic could have done to eliminate the risk of harm to Mr. Bucknol.

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[21] Third, Mr. Bucknol must demonstrate that something Classic did, or did not do, caused the injury. Classic argues that there is no evidence on this record that would permit me to draw the inference that it did anything that caused the bottle to be thrown at Mr. Bucknol.

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b. Mr. Bucknol's Position

[22] Mr. Bucknol argues Classic has a duty to make the premises safe. That duty includes: i) having adequate security personnel inside the club; ii) providing proper training to employees; and iii) putting a system in place to ensure employees were following protocols. Since Classic did not produce firsthand evidence from witnesses who would have knowledge of the relevant facts, including employees such as security guards who are still in its employ, not all the evidence that will be available for trial has been placed before the court. Therefore, there are genuine issues for trial.

c. Analysis on Issue 1

[23] I cannot accept Mr. Bucknol's argument that the failure of Classic to produce firsthand evidence from witnesses who are in its employ is fatal to its position. It seems to me that if Mr. Bucknol is relying on the absence of evidence, then, as the responding party on this motion, he must "lead trump or risk losing" (see: *Dasilva v. Gomes, supra* at para 15).

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[24] In my view, Classic has introduced evidence on this motion to demonstrate that in the circumstances of this case, it has fulfilled its duty of reasonable care to make the premises safe by: i) having adequate security personnel inside of the club; ii) providing proper training to employees and iii) putting a system in place to make sure they were following protocols and keeping recordings of incidents per its stated policy.

[25] The evidence comes from the following material filed on this motion: i) the statement of Clint Marshall who was head of security, dated September 25, 2012, that was read in at an examination for discovery on March 17, 2015; ii) the evidence of Classic's owner, Randolph Lima, who was examined for discovery on March 17, 2015 and cross examined on an affidavit that he prepared for this motion on October 5, 2017; iii) the statement of Cst. Mark Haljaste, a Toronto Police Service Officer who was hired by the bar that evening; and iv) the statement of Maria Garcia, the bar's manager, dated August 23, 2012, that was read in at the examination of discovery on March 17, 2015.

d. Evidence of Clint Marshall

[26] Clint Marshall stated that during the time when the bar was open on Friday and Saturday, there are usually eight security personnel present and they wear black attire with the word "security" on the front and back. Security is usually posted at the common entry and exit points of the club. All security personnel have licenses issued to them.

[27] Security personnel and all bartenders are Smart Serve certified (i.e. certified to serve alcohol by the Alcohol Gaming Commission of Ontario).

[28] Classic has surveillance cameras that operate 24 hours a day, 7 days a week and when the club is open, there are also four paid Toronto Police Service Officers stationed outside the entrance of the club.

[29] When patrons first enter the club, they are physically searched and padded down. They are also checked over by a hand metal detector and a stationary metal detector.

[30] The club has a maximum occupancy of 385 patrons and they have a counter system at the front of the club to ensure they do not exceed this number.

[31] On May 5, 2012, he recalls being called to the DJ booth where he met a man who was dripping blood on the DJ equipment. He saw some blood on part of his face and on the floor. Security had asked him what had happened but he refused to tell them. He said that someone had hit him. After escorting this male outside of the club, other males associated to this male acknowledged that they would seek medical attention.

[32] The police were not aware of the incident. The incident happened quickly and everything was under control.

[33] He discussed the incident briefly with Maria Garcia.

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e. Evidence of Mr. Randolph Lima

[34] Mr. Lima is the owner of Classic. He is usually on site to ensure that the bar is running smoothly. However, he could not recall if he was there on May 4 to 5, 2012. If he was not there, then Maria Garcia would have been in charge. Maria is the manager of the bar and is his mother.

[35] Classic is licensed to serve alcohol and has a capacity of 382 customers with room for an additional 108 customers on the patio. A headcount “clicker” is used to track the occupancy on a nightly basis. However, the information is not logged. He is usually present and will ask his head of security for a status on customers and whether anything has occurred that requires his attention.

[36] There are usually 15 to 20 employed people working in the bar comprised of bartenders, busboys, disc jockeys and security with four paid police officers.

[37] On most evenings, there are eight security personnel, six to eight bartenders and two to three busboys with one doorman in the front entrance. There are also four paid duty police officers who are stationed near the entrance.

[38] In May of 2012, the head of security was Clint Marshall. If there were any incidents, Mr. Marshall was required to tell him and bring it to his attention. He believed that on May 5, 2012, seven security personnel and four paid duty uniformed police officers were working.

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[39] All of the security personnel who work in his bar are licensed. All bartenders are Smart Serve certified.

[40] Mr. Lima employs three “busboys” during the evening. The busboys are employed to clear bottles. The busboys come in at 10:00 p.m. and throughout the night are walking around the bar clearing bottles and glasses.

[41] According to Mr. Lima, there have been about five fights in the bar since he has owned it. There have been no major incidents and, in his view, the presence of police officers near the entrance deters customers from causing trouble.

[42] There were 16 surveillance cameras in the premises in 2012. He did not have many blind spots in the club. Video footage from these cameras is saved for thirty days before it is automatically deleted.

[43] Mr. Lima explained that if he is given notice about something he should be looking for, he will save the video recording and ensure that it is not deleted. The video in this case from the cameras was not preserved because he did not receive notice of an incident.

[44] Although he could not recall it, he acknowledged that a letter was sent to Classic on June 29, 2012. After receiving the letter, he checked to see if the

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video was retained for May 4 and May 5 but it had already been automatically deleted.

f. Evidence of P.C. Haljaste

[45] Cst. Haljaste was interviewed on April of 2013 about the incident by the insurance investigators.

[46] He provided paid duty services to Mr. Lima and Ms. Garcia for a number of years.

[47] There are usually three paid duty officers who wear their uniforms outside near the entrance of the bar. They usually remain outside but will go in to the bar if required.

[48] The bar has a metal detector and customers are also checked by security with hand wands.

[49] He was not aware of any major incidents involving this bar.

[50] In his view, the bar's staff seemed well trained.

g. Evidence of Maria Garcia

[51] Maria Garcia stated that the bar had been operating for about nine months before this incident. The bar is usually open from Friday and Saturday between 9:00 p.m. and 3:00 a.m. Employees do regular safety checks of the bar

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and patrons must go through a metal detector to enter into the premises. Patrons are also physically searched and given wristbands. She is usually present at the club as a manager.

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[52] Security personnel wear black and the security logo must be visible in the front and the back of the attire.

[53] Bartenders are Smart Serve certified. There are 16 different angles shown by the surveillance cameras.

[54] There are usually three police officers present and one sergeant from 31 Division of the Toronto Police Service.

[55] Security personnel are posted at entry and exit points of the club.

[56] There have been minor scuffles at the bar but security has always dealt with it in the past and there has never been a need for police to intervene.

[57] If there are incidents, they log it into a record book for record keeping. However, security had no reason to interject in any incident or altercation that evening. No one approached her or her employees about the incident.

[58] In my view, contrary to Mr. Bucknol’s assertion, Classic has introduced evidence that it took the following steps to ensure the premises are safe:

1. Ensuring police presence to deter any criminal behaviour;

2. Employing licensed security guards;

3. Employing more security than the requirements under the *Toronto Municipal Code* require (see Article XLI of *Toronto Municipal Code,* Chapter 545 By-Law 20-2006). The by-law for the City of Toronto requires that a club have at least one security guard for every 100 patrons in attendance at the premises. The maximum capacity according to Mr. Lima is 490 patrons and Classic had seven security personnel and four police officers employed on May 4 to 5, 2012. Instead of the required ratio of 1:100 (security to patrons), Classic is utilizing a ratio of 1:44.

4. Installing 16 surveillance cameras in the premises that cover most areas of the interior of the club;

5. Ensuring that security personnel are posted at all entry and exit points and within the club;

6. Requiring that bartenders are Smart Serve certified; and

7. Employing busboys to clear glass bottles from the premises throughout the night.

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h. Conclusion on Issue 1

[59] While there is a positive obligation upon occupiers to ensure that those who come onto their properties are reasonably safe, in this lawsuit, the onus is upon Mr. Bucknol to prove on a balance of probabilities that Classic failed to meet the standard of reasonable care. There is no presumption of negligence and the fact of Mr. Bucknol's injury in and of itself does not create a presumption of negligence.

[60] I agree with Classic that Mr. Bucknol must point to some act or failure to act on its part that led to the injury. He has failed to do so.

[61] Furthermore, Mr. Bucknol has filed no evidence setting out the relevant standard of care for the bar. If Mr. Bucknol is relying on a standard of care, one would have expected they would have set out evidence as to what this standard of care is. Expert evidence could have been called, or documentation from the City of Toronto setting out the standards for bars in terms of security would have been helpful.

[62] I also agree with Classic that it did not have to call all specific employees that were working that night to advance their claim for summary judgment. I say this for the following reasons.

[63] First, it must be kept in mind that Mr. Bucknol bears the onus here on the issue of negligence.

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[64] Second, Mr. Bucknol must also put his “best foot forward” on this motion.

[65] Third, there is no property in a witness and the names of employees who were working that evening were provided to Mr. Bucknol and there appears to be no request for will says from these employees.

[66] Finally some of these employees including Mr. Marshall no longer work for Classic and it was open to Mr. Bucknol to examine these individuals pursuant to Rule 39.03 of the Ontario *Rules of Civil Procedure*. That Rule provides that a person may be examined as a witness before the hearing of a pending motion or application for the purpose of having a transcript of his or her evidence available for use at the hearing. This was not done. There has been ample time for Mr. Bucknol to obtain evidence in responding to the summary judgment motion.

[67] Mr. Bucknol also specifically argues that Ms. Garcia, as manager of the bar, would have been relevant and helpful. He highlights that Mr. Marshall’s evidence is that he reported the incident to her and Ms. Garcia’s evidence is that no one reported the incident to her. Mr. Bucknol therefore submits that the failure to secure her evidence on this motion means that it would not be favourable to Classic.

[68] In my respectful view, these claims are without merit.

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[69] First, to the contrary, Maria Garcia's statement was read in by counsel at the examination for discovery in March of 2015. That statement specifically states that Maria Garcia had no record of altercations and that she approached her staff after the incident and no one had any knowledge or recognized Mr. Bucknol.

[70] Second, while there may be a contradiction between Mr. Marshall and Ms. Garcia's evidence about the reporting of the incident (he says he reported it to her and she says no one reported anything to her), in my view this is not material to the issue of whether or not Classic implemented reasonable steps to make the premises safe at the time of the incident. An internal reporting system relating to incidents that have already occurred can do nothing to prevent the incidents occurring in the first place. The contradiction is not material.

[71] I conclude that Classic has shown that it has a regular regime of inspection, maintenance and monitoring sufficient to discharge its obligation. The test is not whether the system in place prevented the incident. The test is whether there were reasonable efforts made. On my review of this record, I am prepared to say that Classic has taken all reasonable steps to minimize risk of injury to its customers.

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ISSUE 2: Has Mr. Bucknol proven a breach of the Occupiers' Liability Act?

[72] Mr. Bucknol claims that Classic is also negligent pursuant to the provisions of the OLA. As I have set out above, the OLA provides that there is a positive duty on Classic to ensure that its premises are, in all the circumstances as is reasonable in the situation, reasonably safe for persons attending on the premises. The positive duty imposed on Classic does not mean that they must remove every possible danger from their premises. It also does not require that they must constantly look for potential dangers or conduct constant surveillance. They need only take measures that are reasonable in the circumstances. Again, perfection is not the standard.

[73] What is reasonable? That depends on the circumstances. What is reasonable is measured by the average person, not an extraordinary conscientious individual and not an exceptionally skilled person, but a person of reasonable, average, ordinary prudence in the same set of circumstances.

[74] The Court of Appeal has made the following three observations about the OLA.

[75] First, the OLA imposes on occupiers an affirmative duty to make the premises reasonably safe for persons entering them by taking reasonable care to protect such persons from foreseeable harm.

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[76] Second, the OLA assimilates occupiers' liability with the modern law of negligence.

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[77] Third, the responsibility of the occupier is not absolute and they are only required to take such care as in all the circumstances of the case is reasonable (see *Waldick v. Malcolm* (1989), 70 O.R. (2d) 717).

a. Classic's Position

[78] Classic concedes it is an occupier as defined in the OLA and is subject to the duties outlined above. Therefore, Classic owed a duty and they accept that this duty applied to it on May 5, 2012. Pursuant to *Waldick*, Classic argues that it has met its obligations under the OLA and Mr. Bucknol has not offered evidence to establish what was reasonable in the circumstances. Alternatively, Classic argues that Mr. Bucknol has not proven a breach of the duty under the OLA.

b. Mr. Bucknol's position

[79] Mr. Bucknol argues that Classic has not established that it implemented reasonable care in the circumstances of this case to make the premises safe. Mr. Bucknol asserts the following:

(i) There were no security personnel in the vicinity of the incident at the time Mr. Bucknol was struck. If there had been, security would have been able to prevent the incident from occurring;

(ii) Mr. Bucknol was struck because there had to have been an uncleared beer bottle remaining in the club originating from the sale of an alcoholic beverage to a customer of Classic lounge; and

(iii) There is an absence of evidence from security staff, bartenders, or busboys who were working on the night of the incident.

c. Analysis on Issue 2

[80] For the reasons dealt with above in my analysis of Issue 1, I find that Classic has met its obligations under the OLA. There has been no evidence introduced by Mr. Bucknol on how Classic failed in its duty to make the premises reasonably safe. I also make the following three points.

[81] First, there is no history of bottles or glass objects being thrown at this club. Indeed, the evidence from Mr. Marshall, Mr. Lima and Ms. Garcia is that there have not been any significant issues with the bar in the nine months it was open before the incident. There is nothing on this record that would suggest that an incident such as this one was a frequent occurrence.

[82] Second, I reject Mr. Bucknol’s claim that there was no security personnel in the vicinity of the incident and that if there had been, they would have prevented any incident from occurring. In my view, this argument is speculative. I

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acknowledge that Mr. Bucknol asserts that he did not see any security inside of the club when he was struck. However, the fact that he did not see anyone does not mean that security was absent in the vicinity of the incident when it happened. Indeed, Mr. Marshall explained that all security personnel regularly rotate within the premises except those who are stationed out at the front door.

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[83] More significantly, I do not accept the argument the incident could have been prevented had security been present during in the area. The context of this incident must be taken into account. On Mr. Bucknol's evidence, the incident occurred very quickly. He noticed an altercation between two others and he was hit one or two seconds after hearing the commotion. It seems to me that the timing of the whole incident does not support Mr. Bucknol's claim that security and busboys could have prevented this incident.

[84] Third, the assertion that it was a bottle that was not cleared that had struck Mr. Bucknol is speculative. There is no evidence that the bottle that hit Mr. Bucknol was a bottle that had not been cleared. The evidence is that three regular busboys are employed between 10:00 p.m. to 3:00 a.m. to clear bottles. We simply do not know who threw the bottle or where the bottle came from.

d. Conclusion on Issue 2

[85] I do not accept that there is evidence of a breach of the OLA.

ISSUE 3: Was the incident reasonably foreseeable?

[86] Foreseeability of harm is a necessary ingredient of a relationship that gives rise to a duty of care (see *Nespolon v. Alford et al.* (1998), 40 O.R. (3d) 355 (C.A.).

a. Classic's Position

[87] Classic argues that the incident was not reasonably foreseeable and Classic cannot be liable for Mr. Bucknol's injuries.

b. Mr. Bucknol's position

[88] Mr. Bucknol concedes that he did not detect that he was in danger from being hit by a bottle. However, he argues that a situation of danger developed in the bar and Classic had a duty of care to prevent potential harm caused by other customers. Mr. Bucknol argues that since Classic did not produce first hand witnesses who would have knowledge of relevant facts, not all of the evidence is available for trial and there is a genuine issue for trial.

c. Analysis on Issue 3

[89] To provide context for my analysis on this issue, I will start with a general summary of the *Rankin's Garage* case released by the Supreme Court of Canada in May. In that case, the plaintiff J. and his friend C. were at C.'s mother's house. The boys drank alcohol provided by C.'s mother and smoked marijuana. Sometime after midnight, the boys made their way to Rankin's

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Garage, a car garage. The garage property was not secured, and the boys began walking around the lot checking for unlocked cars with the intention of stealing valuables. C. found an unlocked car parked behind the garage. He opened the car and found its keys in the ashtray. Though he did not have a driver's licence and had never driven a car on the road before, C. decided to steal the car so that he could go and pick up a friend. C. told J. to "get in", which he did. C. drove the car out of the garage and drove off. Tragically, while on the highway, the car crashed and J. suffered a catastrophic brain injury.

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[90] J. sued Rankin's Garage, his friend C., and his friend's mother for negligence.

[91] The majority decision of the Supreme Court of Canada held that the defendant, Rankin did not owe the plaintiff a duty of care.

[92] In doing so, the Court helpfully listed the first principles regarding foreseeability and the duty of care. I highlight some of these principles:

1. Whether or not a duty of care exists is a question of law. The plaintiff bears the legal burden of establishing a cause of action, and thus the existence of a prima facie duty of care.

2. In order to meet this burden, the plaintiff must provide a sufficient factual basis to establish that the harm was a reasonably

foreseeable consequence of the defendant's conduct in the context of a proximate relationship. In the absence of such evidence, the claim may fail.

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3. When determining whether reasonable foreseeability is established, the proper question to ask is whether the plaintiff has offered facts to persuade the court that the risk of the type of damage that occurred was reasonably foreseeable to the class of plaintiff that was damaged. It is important to frame the question of whether harm is foreseeable with sufficient analytical rigour to connect the failure to take care to the type of harm caused to persons in the plaintiff's situation. The foreseeability question must therefore be framed in a way that links the impugned act to the harm suffered by the plaintiff.

4. Further, the fact that something is possible does not mean that it is reasonably foreseeable. Obviously, any harm that has occurred was, by definition, possible. Thus, for harm to be reasonably foreseeable, a higher threshold than mere possibility must be met.

5. Whether or not something is "reasonably foreseeable" is an objective test. The analysis is focussed on whether someone in the defendant's position ought reasonably to have foreseen the harm rather than whether the specific defendant did.

6. Courts should be vigilant in ensuring that the analysis is not clouded by the fact that the event in question actually did occur. The question is properly focussed on whether foreseeability was present prior to the incident occurring and not with the aid of 20/20 hindsight.

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[93] The majority held that all the evidence respecting the practices of Rankin's Garage or the history of theft in the area, such as it was, concerned the risk of theft. The evidence did not suggest that a vehicle, if stolen, would be operated in an unsafe manner. This evidence did not address the risk of theft by a minor, or the risk of theft leading to an accident causing personal injury. Therefore the majority reasoned that it did not automatically flow from evidence of the risk of theft in general that a garage owner should have considered the risk of physical injury.

[94] On the facts of this case, the Supreme Court held that physical injury is only foreseeable when there is something in the facts to suggest that there is not only a risk of theft, but that the stolen vehicle might be operated in a dangerous manner. Therefore, the evidence did not demonstrate that bodily harm resulting from the theft of the vehicle was reasonably foreseeable.

[95] In my view, *Rankin* supports Classic's position on this motion.

[96] First, the decision confirms that there must be some circumstance or evidence to suggest that Classic ought to have reasonably foreseen the risk of injury.

[97] Second, it also reminds us that it is Mr. Bucknol who bears the onus of establishing that Classic ought to have contemplated the risk of personal injury when considering its security practices.

[98] Third, the evidence introduced on this motion does not demonstrate that a bottle being thrown and hitting Mr. Bucknol in the face was a risk that Classic should have considered.

[99] In my view, the record supports Classic's position that the incident was not reasonably foreseeable.

[100] The record includes the following:

(i) The entire incident occurred in a very short time frame – seconds.

(ii) There is no evidence that intoxication by any patron led to the incident.

(iii) There is no evidence that the particular location Mr. Bucknol was standing in was dangerous.

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(iv) There is no evidence of prior instances of beer bottles being thrown inside of the bar.

(v) There is no history of frequent altercations or disputes involving customers in the bar.

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[101] Classic relies on the decision in *McKenna v. Greco et al. (No. 2)* (1985), 52 O.R. (2d) 85 (Ont. H.C.J) (appeal dismissed: see 1986 CanLII 2553 (ON CA)).

[102] In *McKenna*, a patron was seriously injured by one of the individual defendants in an altercation which occurred in a bar in the defendant hotel. The altercation in question was of short duration. Steele J. ruled that the hotel was not liable to the plaintiff.

[103] He found that the hotel and bar were reasonably staffed for the clientele at the time and the individual defendants were not known to be intoxicated persons who constituted a danger to the hotel’s invitees. Moreover, there was nothing to alert the hotel to any danger on the occasion in question, or on previous occasions. Steele J. concluded that the injury was caused solely by one of the individual defendants, whose actions could not be apprehended, reasonably anticipated or prevented by the hotel.

[104] In my view, *McKenna* is instructive. This is a similar case. Like the bar in *McKenna*, there was no prior history of an incidents. Even if there was a fight

taking place between the two men near the DJ booth, a bottle being thrown across to where Mr. Bucknol was standing was not reasonably foreseeable. This incident happened so quickly that even if employees saw the fight or altercation, it is speculative to suggest that the actual throwing of the bottle could have been prevented.

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[105] I acknowledge that Classic could have secured more evidence on this motion from other employees. However, as I stated earlier, this is not fatal and I must assume all of the evidence that could have been called has been called. In my view, although Classic did not introduce any evidence from other security personnel, police officers, or bartenders, the absence of this evidence does not convert the incident to a reasonably foreseeable one.

d. Conclusion in Issue 3

[106] I conclude that the incident was not reasonably foreseeable and it cannot be said that Classic should bear liability. On this record, there was nothing to alert Classic to any danger in the evening in question.

ISSUE 4: Has Mr. Bucknol established the required elements of spoliation?

[107] Classic had 16 surveillance cameras on the premises in 2012. These cameras capture footage 24 hours a day, 7 days a week. The video footage is catalogued for one month before being deleted. Mr. Lima explained that if he is given notice about something he should be looking for, he will save the video

recording. In this case, the recordings were deleted because he was not given notice of any incident.

[108] The concept of spoliation refers to the intentional destruction of relevant evidence when litigation is existing or pending.

[109] The principal remedy for spoliation is the imposition of a rebuttable presumption of fact that the lost or destroyed evidence would not assist the spoliator. The presumption can be rebutted by evidence showing the spoliator did not intend, by destroying the evidence, to affect the litigation, or by other evidence to prove or repel the case. Generally, the issues of whether spoliation has occurred, and what remedy should be given if it has, are matters best left for trial where the trial judge can consider all of the facts and fashion the most appropriate response (see: *MacDougall v Black & Decker Canada Inc.*, 2008 ABCA 353 (CanLII)).

[110] The leading case regarding spoliation in Ontario is the decision of Newbould J. in *Catalyst Capital Group Inc. v. Moyse*, 2016 ONSC 5271, 35 C.C.E.L. (4th) 242. Newbould J. found that spoliation requires four elements.

[111] First, the missing evidence must be relevant.

[112] Second, the missing evidence must have been destroyed intentionally.

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[113] Third, at the time of destruction, litigation must have been ongoing or contemplated.

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[114] Finally, it must be reasonable to infer that the evidence was destroyed in order to affect the outcome of the litigation

[115] I also adopt the comments of Penny J. in *Leon v. Toronto Transit Commission,* 2014 ONSC 1600, 22 M.P.L.R. (5th) 100, at paras 9 and 10:

> Spoliation in law, however, does not occur merely because evidence has been destroyed. Rather, it occurs where a party has intentionally destroyed evidence relevant to ongoing or contemplated litigation in circumstances where a reasonable inference can be drawn that the evidence was destroyed to affect the litigation. Once this is demonstrated, a presumption arises that the evidence would have been unfavorable to the party destroying it. This presumption may be rebutted by other evidence through which the alleged spoliator proves that his actions, although intentional, were not aimed at affecting the litigation, or through which a party either proves his case or repels the case against them. When the destruction is not intentional, it is not possible to draw the inference that the evidence would tell against the person who destroyed it. The unintentional destruction of evidence is not spoliation. It is not appropriate to presume the missing evidence would tell against the person destroying it where the destruction is unintentional.

a. Position of Mr. Bucknol

[116] Mr. Bucknol claims that the recordings of the surveillance cameras positioned in the interior of the club would have revealed what had occurred to Mr. Bucknol. Since the videos from the surveillance cameras were not preserved and automatically deleted 30 days after the incident, then I can draw an adverse inference that the recordings would have provided evidence that was unfavourable to it.

b. Classic's position

[117] Classic argues that Mr. Lima has provided evidence that he did not get notice of the incident within 30 days and, as such, video footage of the incident was not preserved (security cameras on premises only retain footage for one month prior to being deleted). There is no evidence that the video recordings were intentionally destroyed, which is an essential element of spoliation.

c. Analysis on Issue 4

[118] In my view, Mr. Bucknol's claim of spoliation is not supported on this record.

[119] I accept that Mr. Marshall stated that Ms. Garcia had knowledge of the incident in question in the case at bar because they discussed it briefly. Ms. Garcia contradicts this evidence because she states she did not know about the incident.

[120] However, even assuming that Ms. Garcia knew about the incident and never passed it on to Mr. Lima, this does not mean that the recordings were intentionally destroyed.

[121] The mischief that the principle of spoliation of evidence seeks to prevent is the inference with: (1) the establishment and maintenance of a fair trial process; and (2) the quest for the truth.

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[122] Even if Mr. Marshall and Ms. Garcia did not notify Mr. Lima about the incident, these actions cannot be examined in isolation. I cannot ignore that Mr. Bucknol has admitted that he did not report the incident to anyone in the club or speak with the police. I am not criticizing his decision because he may very well have been trying to focus on leaving the club to seek immediate medical attention. However, his evidence is that he did not contact the club in the days after the incident.

[123] In my view, the claim of spoliation fails at step three of the test set out by Newbould J. in *Catalyst Capital Group*. At the time the videos were deleted, there was no ongoing or contemplated litigation. Mr. Bucknol did not serve his notice on Classic until after the video surveillance retention system automatically deleted the videos for the date in question. I disagree with Mr. Bucknol's suggestion that a reasonable person would contemplate that, following a bloody injury incident, litigation would likely ensue. There are many bar fights and/or accidents where people end up bleeding where nobody decides to sue the occupier of a premises, let alone the person who caused the injury.

d. Conclusion on Issue 4

[124] I do not accept that the principle of spoliation applies here.

[125] First, there is no evidence that the evidence was destroyed intentionally.

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[126] Second, there is no evidence that would allow me to infer that the evidence was destroyed in order to affect the outcome of the litigation.

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[127] In any event, even assuming that the security video could have shown a fight taking place that does not mean that the incident was reasonably foreseeable.

ISSUE 5: Is there a genuine issue for trial?

[128] The roadmap for summary judgment summarized by Corbett J. in *Sweda Farms Ltd. v. Egg Farmers of Ontario*, 2014 ONSC 1200 at paras. 33-34 is helpful:

> [33] As I read Hryniak, the court on a motion for summary judgment should undertake the following analysis:
>
> 1) The court will assume that the parties have placed before it, in some form, all of the evidence that will be available for trial;
>
> 2) On the basis of this record, the court decides whether it can make the necessary findings of fact, apply the law to the facts, and thereby achieve a fair and just adjudication of the case on the merits;
>
> 3) If the court cannot grant judgment on the motion, the court should:
>
> a. Decide those issues that can be decided in accordance with the principles described in 2), above;
>
> b. Identify the additional steps that will be required to complete the record to enable the court to decide any remaining issues;
>
> c. In the absence of compelling reasons to the contrary, the court should seize itself of the further steps required to bring the matter to a conclusion.

[129] Applying this test, for the reasons noted above, I grant Classic's motion for summary judgment.

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[130] I have assumed that I have all of the substantive evidence I need to make a decision on liability.

[131] I am satisfied that the evidence shows that the act of the unknown individual who threw the bottle was not reasonably foreseeable in the circumstances. Since the element of foreseeability is not present, Mr. Bucknol's claim against Classic must fail. There is no genuine liability issue requiring a trial.

[132] I am also satisfied that Classic did not have to remove every possible danger from their premises. They took measures that were reasonable in the circumstances to make sure that their customers were safe. Again, perfection is not the standard.

Conclusion

[133] I find that there is no genuine issue requiring a trial and the action against Classic is dismissed

[134] If counsel cannot agree on costs, they may file written submissions, of no more than five pages, and their bill of costs. I will receive Classic's submissions 15 days from the date of this ruling. Mr. Bucknol's submissions are due 15 days after the receipt of Classic's submissions. There will be no reply.

Coroza J.

Released: September 17, 2018

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CITATION: Bucknol v. 2280882 Ontario Inc., 2018 ONSC 5455
COURT FILE NO.: CV-14-887-00
DATE: 2018 09 17

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ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

KEVIN BUCKNOL

Plaintiff/Responding Party

- and -

2280882 ONTARIO INC., o/a CLASSIC LOUNGE, aka CLASSIC LOUNGE NIGHTCLUB

Defendant/Moving Party

REASONS FOR JUDGMENT

COROZA J.

Released: September 17, 2018