

The High Cost of Hasty Hiring

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Carefully reading employment applications and checking out all references and prior-employment records is vital to hotel managers and personnel directors today. Many legal suits are the result of employees who, hired quickly because of an immediate need, commit some crime in relation to guest rooms or property.

Hoteliers may find themselves subject to paying large cash awards for negligence in hiring employees. To more vividly and emphatically present this growing problem, a little scene setting is in order.

Visualize the personnel manager of a 200-room property in a southwestern state. One day the maintenance foreman assigned to housekeeping informs him in no uncertain terms that he has to have more help immediately, that it is impossible to clean around the pool and the ice maker and food and soft drink service machine areas, service housekeeping by moving TV. sets and folding beds, and do all of the other things that his department is called upon to do without having a couple more strong backs added to the department.

Being very cost conscious, the personnel manager agrees that he will let the foreman have one more employee, not two. He proceeds to look through the employment applications which had been filed during the last month or so and comes across one that was submitted three weeks before for a janitorial position by a 18-year-old male. The application indicates that the applicant is available for immediate employment. The personnel manager telephones him to come in for an interview.

The application form was pretty standard in its solicitation of information about the person seeking employment. The first section contained the usual questions regarding name, Social Security number, address, marital status (indicated single), date of birth, height, weight, dependents (indicated one child), and employment desired. The next section dealt with inquiries about education. An examination of this section showed that he left school in the tenth grade. The next section indicated that for a period of approximately 3-4 months, he had worked at a military base as a janitor; his employment was terminated because

his "transportation broke down." Prior to that job, he had "chopped cotton" in the fields for minimum wage. His farm employment had terminated because the season was over. He had been out of work for 6-7 months.

For personal references he put the names, addresses, and telephone numbers of two women, indicating that he had known one for 10 years and the other for two. He also indicated he was in excellent health and physical condition.

The personnel manager concluded that this would be a good candidate. He notified the foreman that he would call the applicant in and, if the foreman was satisfied with him, he could hire him full-time at \$3.35 an hour.

The personnel manager did nothing more relative to the hire; although in the application the applicant authorized the employer to check any of the information, no inquiries were made.

The applicant came in, met with the personnel manager briefly and was sent to the foreman who spoke to him for 15 or 20 minutes. In his desperation for more help, he hired him on the spot and had him get his uniform and go right to work.

As of this moment the scene is set for disaster. The characters are all in place and destiny is being served. The employee was hired on July 28; on August 7 he gained entry into the guest room of a young, recently-married couple. The husband was off working and the young bride was surprised alone in the room. The new employee stabbed the young lady 27 times and then slit her throat.

The tragedy of it all was that the young lady would still be alive today if the personnel manager had done his job properly and fulfilled the duty and legal obligation owed to the young lady as a guest.

Property Was Fully Liable

This failure, in addition to wasting a life, cost the property \$6 million. After a full trial, the jury awarded the young lady's estate and husband \$1 million in consequential damages and \$5 million in punitive damages. The message of the jury was loud and clear: "We are not going to permit hotels to hire employees indiscriminately without regard to the welfare of their guests; hence, the \$5 million in punitive damages."

What was the basis of the liability? As an innkeeper you ask, "Am I responsible for every act of my employees?" In early common law the answer generally would be no; you as the employer would be liable only for the acts of your employee if said acts were committed within the scope of his employment.

Obviously the property did not hire the young man to assault or murder its guests, so why should it be liable when he did? The liability in this instance would not be based on a theory of *respondeat superior*, i.e., the employer being liable for the acts of his employee when such acts are committed in the course of his employment, nor can it be said that the property had "ratified" the acts of the employee. Liability might be more readily understandable in a case where the employer hired someone for a particular purpose, and the employee,

in performing his duties, exceeded his authority to act and as a result injured a guest.

An example of this would be if an innkeeper hires a bouncer whose duty consists of ejecting unruly guests and patrons from the lounge. On one occasion while ejecting an unruly guest, he uses more force than reasonably necessary to accomplish his purpose. As a result the guest sustains painful injuries. In this instance, while it is true that the bouncer was hired for the purpose of using reasonable force in ejecting the unruly guests or patrons, and not unreasonable force, it does not negate the fact that he was hired to use force.

The fact that he used more force than was reasonably necessary is no defense in a suit for such injury against the employer. Force was the purpose of his employment, and force, even unreasonable force, in ejecting a guest was indeed being expended in the course of his employment. But this reasoning does not apply to the factual situation present in the early narrative, so why the \$6 million verdict against the hotel? The reason is that, because of the innkeeper's relationship with his guests, a special set of duties and obligations arises.

Innkeeper Is Liable For Servant

Corpus Juris Secundum, the prestigious and authoritative legal publication, discusses the theories of liability of an innkeeper for the acts of his servant in the section dealing with "Inns, Hotels, Etc." in volume 41A C.J.S., Section 22, entitled, "Acts of Servants or Employees" (pp. 835-837). It reads in part as follows:

An innkeeper is under a duty to protect his guests against assaults, insults and negligent acts of his servants or employees.

A proprietor of an inn or similar establishment is under a duty to protect his patrons from injury, annoyance, or mistreatment through the acts of his servants or employees, and is under an implied duty and obligation knowingly to select employees who will not commit acts of violence against them, so far as is reasonably within his power so to choose employees.

The breach of duty in this respect constitutes negligence which renders the innkeeper liable for even a purely personal assault by the employee. According to some authorities, liability is dependent on a showing that the innkeeper had been negligent in either employing, retaining or supervising the employee whose unfitness for the position caused the injury of which complaint is made, but under other authorities an innkeeper may be liable even in the absence of negligence in hiring or retaining the employee, even if there is no showing that the innkeeper ratified the actions of the employee.

An innkeeper may be liable for the tortious acts of an employee, committed while he was engaged in the execution of some matter which was within the real or apparent scope of the duties entrusted to him, even though he acted wantonly or maliciously.

According to some cases, liability for tortious acts may be imposed regardless of whether the employee was acting outside the scope of his employment, but there is other authority that

in the absence of negligence on the part of the innkeeper in employing or retaining an employee, the innkeeper is not liable to a guest for a personal injury resulting from an assault and battery committed, or other act done, by an employee while acting outside of the scope of his employment, particularly where the innkeeper was not put on notice of his proclivity to commit such acts . . .

It has been stated that the law imposes at least a contractual obligation upon an innkeeper to see that his employees and agents extend courteous and decent treatment to his guests, and he may be liable for a breach of that duty, particularly where the guest is assaulted by an employee whose duties include the preservation of order. Thus, the fact that the hotel employee is not acting within the scope of his employment at the time he inflicts injury on a guest does not, of itself, absolve his employer from liability, and liability may be imposed even though the actions of the employee were not within the scope of his employment.

The standard of care which a hotel keeper is required to exercise in order to protect his guests against assaults, insults and negligent acts of his employees has been held to be ordinary or reasonable care, commensurate with the quality of the accommodation offered. However, other authorities have held him to a very high degree of care, and in the case of a first class family resort, reasonable care means a high degree of care. Some authorities liken the liability of an innkeeper for the torts of his servants to that of the liability of a carrier of passengers for the acts of its servants. Other authorities, while conceding the similarity of liabilities, consider that the limits are not the same, or hold that an innkeeper is not under the duty to exercise as high a degree of care as a carrier . . . It has been stated that no matter how strict the standard of care, the innkeeper is not an insurer of the freedom of a guest from the abuse, insult, or injury at the hands of his employees.

Five Liability Theories Are Available

So we see that there are at least five different theories of liability that are to be explored in determining whether or not the innkeeper is liable in any instance for the act or acts of his employee:

- Whether or not the act or acts which caused the injury were within the real or apparent scope of the employment of the employee, (Theory 1).
- Whether or not the employer had ratified the act or acts of the employee which had caused the injury, (Theory 2).
- Whether or not the innkeeper had failed to properly manage the hotel and supervise the employee who had caused the injury to the guest, (Theory 3).
- Whether or not the innkeeper had breached his contractual obligation to protect his guest from the assaults, insults, and negli-

gent acts of his servants or employees, (Theory 4).

- Whether or not the innkeeper had been negligent in the hiring of the employee who caused the injury to the guest, (Theory 5).

In the sample case presented for the reader's analysis, the first two theories can be summarily dropped, for there aren't any facts which would justify the assumption that the acts of the employee were within the scope of his employment or that they had been ratified by the innkeeper.

The third theory was applied in the case of *Daniel vs. The Oak Park Arms Hotel, Inc.*, 203 N.E. 2d 706, (Ill., 1965). The defendant was found negligent in the manner in which the hotel was operated and the jury assessed damages in the amount of \$25,000. This was a sizeable sum in 1965 when the case was decided. The case involved the rape of a female guest by a bellman who entered her room at 5 a.m. using a key which he took from a ring hanging on a hook behind the front desk. There was evidence that the employee had been drinking while on duty and that he had been absent from his post for two periods of about one hour each.

There was evidence that in order to get the pass keys to the rooms the bellman had to pass near a switchboard operator and a night attendant who could have determined that he had been drinking while on duty. While this evidence was not conclusive, the court said the evidence was sufficient for the jury to have reasonably come to the conclusion that the hotel staff could have and should have known of the bellman's absence from his post when he was upstairs drinking and they should have found out where he was. There was some evidence that the staff should have seen the bellman go in and take the pass key and a jury could reasonably find that there was negligence on the part of the hotel in not guarding the pass key more carefully.

So, in effect, because of the hotel's not knowing of the bellman's absence and drinking while on duty, and for not taking more care in guarding the pass key which the bellman used to gain access to the victim's room, the hotel failed to properly manage its property and supervise its employee. It was found to be negligent, and as a consequence, the liability affixes regardless of whether or not the bellman was acting within the scope of his employment.

This case may or may not have had any applicability in the sample case because it could never be established if the employee had used a pass key to gain access to the victim's room or not. There were no signs of forced entry and he said that she had left the door open.

The jury could have relied on either a combination of Theories 4 and 5 or on just Theory 5 alone. The jury could not have reached its decision on the fourth one alone because under the contract theory there is a recognition that an innkeeper has a common law duty to protect his guests from assaults, insults, abuses, and negligent or intentional acts of his employees that may cause the guest harm or injury. This duty arises not because the innkeeper wishes it, but rather because the law demands it and imposes it as an implied condition of the room rental contract.

Obviously the murderous attack on a guest by an employee violates this contractual obligation and the innkeeper is liable for all of the consequential damages suffered by the guest and her survivors resulting from the breach of this legally implied contractual obligation.

This contractual obligation was the basis of the liability in a Massachusetts case entitled *Crawford vs. Hotel Essex Boston Corporation, Inc.* 143 Fed Supp. 172 (D. Mass., 1956). In that case a guest at the defendant's hotel brought the action against the operator of the hotel for injuries sustained by the guest as the result of being assaulted by the hotel's house detective. The assault was unprovoked and resulted in the infliction of severe injuries. The court stated in its opinion that the operator of a hotel is liable for the injuries resulting from the excessive use of force by the officer, if the officer is engaged in an act within the scope of his employment or, perhaps, even if he only reasonably thinks that he is.

However, in this instance, the court found that the detective was not acting within the scope of his employment so that the guest could not recover damages on a *respondeat superior* theory. However, the court stated that there was another theory to be taken into consideration. That was that "the plaintiff was a registered guest to the hotel. This gave him contractual rights greater than those of the usual business invitee." He was entitled to "immunity from rudeness, personal abuse, and unjustifiable interference, whether exerted by the defendant or his servants, or those under his control."

Guests Are Entitled To Respect

The guest is entitled to respectful and considerate treatment at the hands of the innkeeper and his employees or servants, and this right created an implied obligation that neither the innkeeper nor his servants will abuse or insult the guest, or engage in any conduct or speech which may unreasonably subject him to physical discomfort, or distress of mind, or imperil his safety. The court went on to hold when such duty is breached, the fact that the assault was not committed within the scope of the servant's employment does not bar recovery. The basis for recovery would be contractual and not tort. Therefore, the guest is entitled to sue for breach of contract and would be entitled to recover at least consequential damages.

In view of what has just been stated, it appears that if the fourth theory had been used to the exclusion of all others in the example posed in this article, then the award would have been limited to consequential damages of \$1 million. As a general rule, punitive damages cannot be awarded in a suit for breach of contract.

So how did the \$5 million punitive damage award get into the picture? Obviously it was because the plaintiff's attorney utilized the fifth theory of liability, i.e., "negligence in hiring" the employee. By using this theory, the suit was in tort. In an action of tort the plaintiff cannot only recover consequential damages, but he can also recover punitive damages. Punitive damages are exactly what their name implies, i.e., damages which are awarded as pure punishment. As such, there is more concern by the court when arriving at damages with the will-

fulness, maliciousness, and viciousness of the injurious act as well as the total disregard of the rights and safety of others by the perpetrators.

A Georgia court in the case of *Harvey, et. al. vs. DeWeill*, 116 S.E. 2d 747, (1960) declared the law to be that the obligation of an innkeeper to protect patrons from injury or mistreatment includes the duty to select and retain only such employees as are fit and suitable to look after the comfort of guests and who will not commit acts of violence against them, and while breach of duty constitutes negligence and renders innkeepers liable for even a purely personal assault by the servant, in order to prove a claim of liability on this ground, the guest must prove negligence by the innkeeper in either employing or retaining an employee whose unfitness for the position caused the injury complained of.

In the case of *Blue Grass Restaurant Company vs. Franklin*, 424 S.W. 2d 594, (Ky. 1968), a Kentucky Court of Appeals, citing another Kentucky case as well as 29 Am. Jur. 45, Innkeepers, Sec 57, stated the law to be that, "Each patron in an inn is entitled to respectful as well as decent treatment by the innkeeper, its servants and other patrons and that his safety shall not be imperiled. The operator must so select its employees that they are unlikely to commit violence upon the guest."

The cases that impose the burden upon an innkeeper to use reasonable care in the pre-screening of prospective employees are legion, and the jurisdictions that so hold are in a strong majority.

With the fourth and fifth theories in mind, the facts can be re-examined to determine why the jury assessed \$6 million in damages against the hotel, whether or not the verdict could have been avoided or reduced, and, more importantly, whether the life of this young lady could have been preserved.

If there is knowledge that a prospective employee has a reputation for being vicious and has physically assaulted many people in the past, and he is hired anyway and then assaults a guest, in most, if not all, states the hotel would be liable for damages to the assaulted party.

In the case cited here, the application raised many questions which needed answering. The very first section of the application presented an 18-year-old unmarried male with a dependent child. Next the application revealed that the applicant had gone only to the tenth grade in school. Why wasn't he asked why he left school? Why wasn't the principal of the school called and asked about the applicant's school record? Had the manager checked he would have learned that the applicant had on various occasions committed acts of violence and vandalism at the school, ranging from setting the school on fire to spray painting the principal's automobile.

Personal Reference Checks Are Vital

The personnel reference section was not checked because the personnel manager said it was useless. He reasoned that applicants would list only individuals they were certain would say good things about them. In this instance the personnel manager's logic broke apart com-

pletely. Had he called the young lady that the application indicated the applicant had known for two years, he may or may not have been told that this woman had borne the applicant the child listed as a dependent on the application. This young lady would have said good things about her boyfriend.

The other young lady who was listed as knowing the applicant for 10 years when interviewed after the murder said that she was surprised to see herself listed as a reference.

She said that although she had known the young man for about 10 years, it was only through his mother, and, occasionally, through the applicant shopping in a grocery store owned by the girl's parents. She was unequivocal in stating that had she been asked about the applicant before he was hired, she would have told the personnel manager that the boy had a tendency toward violence and that he had been arrested many times for crimes of violence; she would never recommend him for the job.

It is important to remember that those who hire employees must not act in haste and repent in sorrow. An employee is never needed so badly to be hired without using all of the reasonable procedures available, scientific or otherwise, which are legally permissible to make a thorough investigation of the prospective employee's past. All employment applications should grant the prospective employer the right to investigate the applicant's character, to contact all references, and to secure any reports which may assist in the hiring.

If the applicant has not finished school and has left within the past two or three years, the school principal should be called to see if anyone remembers him. Inquire as to his conduct and as to the reason for his leaving. It is important whether he left to go to work to help support his parents and family or whether he was thrown out for vicious, bad, aggressive conduct.

Check all of the references listed, and ask former employers as many questions as you can about the applicant, including circumstances of his termination. Did he quit or was he discharged? Would they rehire him if he applied there again? If not, why not? Now, while it is true that the former employer may be reluctant to discuss the former employee for fear of saying something libelous or otherwise actionable, very often what little they say, or even what they don't say, carries a clear message.

When contacting personal references, don't confine yourself to a few general questions, but ask more revealing personal questions: How did he treat his friends, siblings, mother, and father? Was he quick-tempered, aggressive, etc.? Ask for the names of some other people who know the applicant and call them.

Keep a record of everyone you contact about the applicant. Write the name of the informant, the date, how contacted, what they told you, any questions they refused to answer, etc. Keep this record with the application in a separate file. Do this whether the applicant is hired or not. Even if not hired, it may be important information in the event the applicant denied employment should ever bring a discrimination suit.

Police Checks Should Be Made

If your state permits pre-employment polygraphing, you could have the applicant submit to such a test. A police check in those areas that permit them can be accomplished by a simple call or trip to the police station where any criminal record of the applicant in that jurisdiction would be readily revealed. In the example cited here, an examination of the police records would not have turned up a criminal record for, despite the fact that the employee had a criminal record, it was a juvenile record and by law could not have been revealed. None-the-less, informing the applicant that such an inquiry might be made may, as with the polygraph, cause the applicant to reveal his criminal past.

Fingerprinting could be used in those states that permit them to be used to get F.B.I. criminal conviction reports. There are those who advise that polygraph and fingerprint reports should be used only for employees who will be handling great sums of money. However, most hotel employees have access to guest rooms or to areas frequented by guests. Any employee who has access, either in the course of performing work assignments or by the use of readily available room keys or pass keys, should be subject to such tests. The same holds true for employees whose job functions keep them in the areas where soft drink, ice cream, or candy vending machines are located or near the pool and access corridors to the pool, recreational areas, or other points of interest to young children.

It might be argued that the polygraph, police inquiries, and fingerprint reports fall into the same category as asking a prospective employee on the application: "Have you ever been convicted of a crime?" This question has been held to be discriminatory against blacks in violation of Title VII of the Civil Rights Act of 1964. The argument against this challenge is twofold. First, this question has been held to be discriminatory in violation of Title VII if an affirmative answer to the question results in an automatic and total exclusion of the applicant from employment. Without this "automatic exclusion" requirement, the statistical formulas that established the discriminatory effect of the question fail and no discrimination results. A non-automatic exclusion policy is merely one which provides facts to be weighed in the hiring process together with the nature and circumstances of the crime and the rehabilitation of the applicant before deciding whether or not to hire. Discriminatory questions and practices which would ordinarily violate Title VII are permissible if they are a "bona fide job qualification." The fact that hotel employees have access to guest rooms and property in their absence and to the young children on the property makes inquiry into their criminal records an exception to the discrimination prohibited by Title VII as a bona fide job qualification.

Another great way to get information on a prospective employee is to get a credit report. Different states vary as to what their courts define as being a reasonable standard of care that must be met in pre-screening of prospective employees. Some say that the higher the rate paid by the guest, the higher the degree of care that must be exercised by the hotel in pre-screening employees. However, in all instances, it is minimally a "reasonably standard of care."

It may not be necessary to use all of the methods suggested, and in certain states you may be prohibited from using some of them. But the law mandates that you use a reasonable number of them or others which may be just as effective. The law does not say that if after conducting a reasonable investigation you are reasonably satisfied that the prospective employee will not present a hazard if hired and then the employee does commit an act of violence directed toward a guest, you will in all probability not be liable for his acts because you met the reasonable standard of care in pre-screening the employee.

Neither will you be held liable from that particular act of the employee if you continue to employ him. His continued retention will not amount to a ratification of his prior violent act. However if he should commit another act of violence on the job which is directed toward a guest, you may be on some pretty thin ice trying to avoid liability to the second guest.

You may argue that these procedures take lots of time and cost money; however, \$6 million is a lot of money which would take a long time to earn.