

IN THE COURT OF APPEALS OF IOWA

FILED

MAY 31 1988

CLERK SUPREME COURT

KEVIN JACKSON,

Plaintiff-Appellee,

vs.

MARY JANE HART, d/b/a LAST
CHANCE BAR,

Defendant-Appellant.

Filed May 31, 1988

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8-176
87-1373

Appeal from the Iowa District Court for Polk County (No. CL 066-38830) -
Joel D. Novak, Judge.

Defendant bar owner appeals judgment, after a jury trial, in favor of plaintiff in negligence action. **AFFIRMED.**

Gerry M. Rinden, of Wintroub, Rinden & Okun, Des Moines, for the defendant-appellant.

Stuart M. Pepper, Artis Breon, and Alfredo Parrish, Des Moines, for the plaintiff-appellee.

Heard by Hayden, P.J., and Sackett and Habhab, JJ.

SACKETT, J.

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This case involves an altercation between patrons at a licensed liquor establishment and raises the question of the premise owner's responsibility.

Plaintiff Kevin Jackson was injured in the altercation and sued defendant on dram shop and negligence theories. The cause was submitted to a jury which rejected plaintiff's dram shop count but found for him under his negligence theory. The jury found plaintiff was damaged in the amount of \$100,000. The damage award was reduced by forty percent for negligence the jury attributed to plaintiff. Defendant appeals. We affirm.

Kevin Jackson and Randy Whitfield, while customers in defendant's bar, had an argument. Plaintiff then left the bar but returned through a back door and started chasing Whitfield. The two men ran behind the bar. A third customer, Fenton Kinchelow, followed them behind the bar and hit plaintiff on the head with a Texas fifth. Plaintiff suffered injuries.

The questions are:

1. Is there substantial evidence of negligence on the part of defendant? Is there evidence the acts of Kinchelow were foreseeable to defendant?
2. Did plaintiff's negligence exceed defendant's?
3. Was there substantial evidence in the absence of medical testimony to submit the issue of plaintiff's damages to the jury?
4. Did the trial court err in admitting evidence of Kinchelow's prior felony conviction while not allowing evidence of plaintiff's prior felony conviction?

I.

Was there substantial evidence of negligence? The defendant's argument focuses on whether there was substantial evidence to support a finding the defendant had reason to know the intentional act of Kinchelow in hitting plaintiff on the head would occur. See Martinko v. H-N-W Assocs., 393 N.W.2d 320, 321 (Iowa 1986); Restatement (Second) of Torts § 344 comment f, at 225-26

(1965). Was Kinchelow's act a sudden isolated act or could it have been anticipated? See Foust v. Kinley, 254 Iowa 690, 698, 117 N.W.2d 843, 848 (1962). If it were a sudden isolated act defendant is not responsible therefor. Id.

A possessor of premises is not bound to anticipate the unforeseeable independent acts of a third person because it is only when such acts can reasonably be anticipated that the possessor has the duty to take some precautionary measure to protect against such independent acts. Harvey v. Van Aelstyn, 319 N.W.2d 725, 730 (Neb. 1982).

There was evidence there had been prior fights, violence and a brawl at the bar. There was evidence the earlier confrontation between plaintiff and Whitfield that evening required someone to break it up. There were no security guards on the premises. The bartenders were not equipped to deal with disruptive behavior.

Generally questions of negligence are for the jury. Nichols v. Westfield Industries, Ltd., 380 N.W.2d 392, 398 (Iowa 1985). See Iowa R. App. P. 14(f)(10). Questions of foreseeability are ordinarily for the fact finder. Galloway v. Bankers Trust Co., 420 N.W.2d 437, 440 (Iowa 1988). Plaintiff must show defendant could foresee the general character or general type of the event or the harm. It is not necessary for plaintiff to show defendant could foresee its precise nature, details or the manner of its occurrence. Id. Defendant argues the assault was an independent cause which could not be foreseen. The likelihood that such an act would occur is only one factor to be considered by the fact finder on the question of foreseeability. Id.

Applying the rationale of Galloway, we determine the evidence of prior problems and violence in the bar, including that on the evening in question, coupled with the absence of personnel equipped to deal with fights in the bar,

provides sufficient evidence from which a fact finder could determine the injury was foreseeable.

We consider too in our determination the place and character of the business. See Martinko, 393 N.W.2d at 322. There is a greater likelihood a person who is in a bar for the purpose of consuming liquor will be less responsible in his or her actions than a person going to a premises where intoxicants are not served.

II.

Defendant next contends we should find as a matter of law plaintiff's fault exceeded the fault of defendant. Questions of negligence and proximate cause are generally for the fact finder. See Nichols, 380 N.W.2d at 398. We find no reason to disturb the jury's determination on this issue.

III.

Defendant contends there was insufficient evidence to submit the issue of plaintiff's damages. Plaintiff called no medical experts but elected to rely on other testimony as to his injuries. Evidence came in without objection after being hit with the bottle plaintiff's left eye and face were bleeding and injured. Plaintiff stated the injury was painful and burned, his eyelid was torn, and he had no sight in the left eye after the incident. He now has a glass eye which is teary and sometimes falls out. Plaintiff thought he had two or three operations. Plaintiff has visible scars. Plaintiff spent eight days in the hospital as an inpatient and three days as an outpatient. Plaintiff has had a period of adjustment with the eye. For a while he lost his visual judgment and balance; he experienced pain and suffering and headaches.

There is no rule the nature of an injury must be shown by medical testimony if the injury is such that it may satisfactorily be shown by other evidence. Daiker

v. Martin, 250 Iowa 75, 81, 91 N.W.2d 747, 750 (1958). See also Arenson v. Butterworth, 243 Iowa 880, 890-91, 54 N.W.2d 557, 563 (1952) (despite absence of medical evidence plaintiff would have future suffering, the court found evidence plaintiff had suffering up to the time of trial and had not recovered justified submission of future pain and suffering). There was sufficient evidence from which the jury could reasonably find plaintiff lost an eye and received scarring as a result of the altercation. There was sufficient evidence to submit the damage issue to the jury.

IV.

Defendant's last argument is the trial court erred in rejecting evidence of plaintiff's burglary conviction in 1976, more than ten years prior to trial.

Iowa Rule of Evidence 609(b) provides:

Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

To succeed on this issue defendant must show the trial court abused its discretion. State v. Hackney, 397 N.W.2d 723, 726 (Iowa 1986). Defendant had the burden to show the probative value of plaintiff's conviction outweighed its prejudicial effect. State v. Roth, 403 N.W.2d 762, 767 (Iowa 1987). The rule creates a rebuttable presumption convictions over ten years old are more prejudicial than probative. Hackney, 397 N.W.2d at 727. Evidence of convictions more than ten years old should be admitted very rarely and only in exceptional circumstances. Id. We find no exceptional circumstances here.

We find no abuse of discretion.

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Costs of this appeal should be taxed to appellant except for the amount of \$158.20 which shall be paid by appellee pursuant to Iowa Rule of Appellate Procedure 15(b).

AFFIRMED.