

These citations appear to harm plaintiff's position rather than to help it. Gift subscriptions paid for by others are paid subscriptions.

Plaintiff also contends that a person to whom a paper is sent without his consent is not a subscriber but cites no postal regulation in this regard. Instead, plaintiff cites *Ashton v. Stoy*, 96 Iowa 197, 64 N.W. 804, 805 (1895), to the effect that a subscriber must be one who gives his consent. However, in issue was the definition of a "subscriber" under a section of the Iowa Code concerning newspapers eligible to publish official county reports.

[2] Because plaintiff indicated he particularly relied upon the report made to the United States Postal Service regarding the number of subscriptions, the regulations concerning who is entitled to be included upon a subscription list in such a report would appear to be particularly appropriate. Plaintiff has called to our attention the above-quoted regulation 132.463 which says that "[a] minor portion of the subscription list may consist of persons whose subscriptions were paid for as gifts," which is the situation here. It says nothing about having to have the consent of the person to whom the subscription is given. No information is given to us as to what percentage constitutes a "minor portion" and we cannot say, as a matter of law, that 500 out of the number here is not a minor portion.

[3] Plaintiff also points out that a considerable number of the requests for subscriptions came to defendants with no money enclosed, and that these subscriptions were from persons who had filled out and mailed a printed request form for a subscription which the paper had published. He claims these were not legitimate subscriptions. There is no copy of the request form in evidence. However, defendants treated a completed request form as a promise to pay for the subscription and plaintiff has not produced proof that it was improper to treat it so.

The decree of the trial court is affirmed.

279 Or. 237

Joy A. CAMPBELL, personal representative of the Estate of Marie M. Scheie, Deceased, Respondent,

v.

Keith CARPENTER and Mary Carpenter, Individually and dba Mary Jo's Inn, Appellants,

and

Betty Jean Pierce, Respondent.

Paul D. SCHEIE, personal representative of the Estate of Arnold Scheie, Deceased, Respondent,

v.

Keith CARPENTER and Mary Carpenter, Individually and dba Mary Jo's Inn, Appellants,

and

Betty Jean Pierce, Respondent.

Supreme Court of Oregon,
Department 2.

Argued and Submitted May 9, 1977.

Decided July 20, 1977.

Actions were brought for death of persons killed by automobile whose driver had become intoxicated at defendant's tavern. The Circuit Court, Multnomah County, William M. Dale, J., entered judgments against driver of automobile and against owners of tavern and owners appealed. The Supreme Court, Tongue, J., held that evidence would support findings that bartenders had continued to serve beer to customer after she was visibly intoxicated and that at time of serving drinks to customer tavern owners had reason to know that upon leaving the tavern she would probably drive away in her automobile.

Affirmed.

1. Appeal and Error ⇐934(1)

In appeal from judgment in favor of plaintiff, court would view evidence in light most favorable to the plaintiff in the event of any conflicts in the evidence and would accord to the plaintiff the benefit of all reasonable inferences that the jury could have drawn from the evidence.

2. Intoxicating Liquors ⇐310

Evidence in action against owners of tavern where driver became intoxicated before she was involved in accident resulting in death of plaintiffs' decedents would support finding that bartenders had continued to serve beer to driver after she was "visibly" intoxicated and that at time of serving the drinks the tavern owners had reason to know that upon leaving the tavern driver would probably drive away in her automobile. ORS 471.410(3), 472.310(3); N.J.S.A. 33:1-77.

3. Intoxicating Liquors ⇐285

A tavern keeper is negligent if, at the time of serving drinks to a customer, that customer is "visibly" intoxicated because at that time it is reasonably foreseeable that when such a customer leaves the tavern he or she will drive an automobile. ORS 471.410(3).

Francis F. Yunker, Portland, argued the cause for appellants Carpenter. With him on the brief was Mary J. Vershum, Portland.

Elden M. Rosenthal, Portland, argued the cause for respondents Campbell and Scheie. With him on the brief was Charles Paulson, P. C., Portland.

No appearance for respondent Pierce.

Before DENECKE, C. J., and TONGUE, BRYSON and TOMPKINS, JJ.

TONGUE, Justice.

These are two consolidated actions for wrongful death against the owners and operators of a tavern. Both decedents were

1. The complaint also alleged that defendants Carpenter were negligent in permitting defend-

ant. Pierce to leave the premises when they knew that she would be driving.

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killed by an automobile whose driver had become intoxicated at the tavern. The cases were tried before the court, without a jury. Judgments were entered against both the driver, defendant Pierce, and against the owners of the tavern, defendants Carpenter. Only defendants Carpenter appeal.

The principal allegation of the complaint is that defendants Carpenter sold and continued to sell alcoholic beverages to defendant Pierce "after she had become perceptibly under the influence of intoxicating liquors" when they knew or should have known that she would "leave the premises" by "operating a motor vehicle and constitute an unreasonable hazard and risk of harm to other persons on the public highway." Defendants Carpenter do not contend that these allegations fail to state a cause of action, but contend that the evidence was insufficient to prove this allegation.¹

Despite the fact that defendants do not challenge the sufficiency of the allegations of the complaint, it should be noted that this is the first case in Oregon in which this particular question has been presented. In *Wiener v. Gamma Phi, ATO Frat.*, 258 Or. 632, 485 P.2d 18 (1971), a case involving the serving of liquor to minors who were later involved in an automobile accident, we said (at 639, 485 P.2d at 21):

"* * * Ordinarily, a host who makes available intoxicating liquors to an adult guest is not liable for injuries to third persons resulting from the guest's intoxication. There might be circumstances in which the host would have a duty to deny his guest further access to alcohol. This would be the case where the host 'has reason to know that he is dealing with persons whose characteristics make it especially likely that they will do unreasonable things.' *Such persons could include those already severely intoxicated*, or those whose behavior the host knows to be unusually affected by alcohol. * * *" (Emphasis added)

ant. Pierce to leave the premises when they knew that she would be driving.

As authority for that statement we cited, among other authorities, *Rappaport v. Nichols*, 31 N.J. 188, 156 A.2d 1, 9, 75 A.L.R.2d 821 (1959). That case involved facts more similar to those involved in this case. In affirming a judgment for the plaintiff, and on a theory of common law negligence, that court stated the following rules (156 A.2d at 8-9), which defendants Carpenter apparently do not question and which we approve:

“* * * Negligence is tested by whether the reasonably prudent person at the time and place should recognize and foresee an unreasonable risk or likelihood of harm or danger to others. * * *

“The negligence may consist in the creation of a situation which involves unreasonable risk because of the expectable action of another. See *Brody v. Albert Lifson & Sons*, 17 N.J. 383, 389, 111 A.2d 504 (1955). *Where a tavern keeper sells alcoholic beverages to a person who is visibly intoxicated or to a person he knows or should know from the circumstances to be a minor, he ought to recognize and foresee the unreasonable risk of harm to others through action of the intoxicated person or the minor. * * **

“When alcoholic beverages are sold by a tavern keeper to a minor or to an intoxicated person, the unreasonable risk of harm not only to the minor or the intoxicated person but also to members of the traveling public may readily be recognized and foreseen; this is particularly

2. To the same effect, see *Waynick v. Chicago's Last Department Store*, 269 F.2d 322 (7th Cir. 1959); *Jardine v. Upper Darby Lodge No. 1973, Inc.*, 413 Pa. 626, 198 A.2d 550 (1964); *Vesely v. Sager*, 5 Cal.3d 153, 95 Cal.Rptr. 623, 486 P.2d 151 (1971); *Mitchell v. Ketner*, 54 Tenn. App. 656, 393 S.W.2d 755 (1964), among other cases. See also generally Annot., 75 A.L.R.2d 833 (1961).

It is also to be noted that in Oregon, as in New Jersey, state law prohibits the serving of intoxicating beverages to persons who are “visibly” or “apparently” intoxicated. See ORS 471.410(3) and ORS 472.310(3), and Oregon Liquor Control Regulations No. 10-065(2). Cf. R.S. 33:1-77, N.J.S.A. and Regulation No. 20, Rule 1, Division of Alcoholic Beverage Control, as discussed in *Rappaport v. Nichols*, 31 N.J. 188, 156 A.2d 1, 8, 75 A.L.R.2d 821 (1959).

evident in current times when traveling by car to and from the tavern is so commonplace and accidents resulting from drinking are so frequent. * * *

“The defendants contend that, assuming their conduct was unlawful and negligent as charged in the complaint, it was nevertheless not the proximate cause of the injuries suffered. But a tortfeasor is generally held answerable for the injuries which result in the ordinary course of events from his negligence and it is generally sufficient if his negligent conduct was a substantial factor in bringing about the injuries. * * *”² (Emphasis added)

[1] The question remains, however, to determine whether the evidence in this case was sufficient to satisfy the requirements as stated in *Rappaport*. As usual in an appeal from a judgment in favor of a plaintiff, we must view the evidence in the light most favorable to the plaintiff in the event of any conflicts in the evidence and also accord to the plaintiff the benefit of all reasonable inferences that the jury could have drawn from the evidence. See *Geer v. Farquhar*, 270 Or. 642, 644, 528 P.2d 1835 (1974).

In considering that question it is important to bear in mind that the question is not whether there was sufficient evidence from which the trial court could have properly found that Mrs. Pierce was “visibly” intoxicated at the time she left the tavern owned

We also note that in *Stachniewicz v. Mar-Cam Corporation*, 259 Or. 583, 586-87, 488 P.2d 436 (1971), we not only commented upon these statutes and regulations, but also commented upon the difficulty of determining whether a third party's injuries would have been caused by an already intoxicated person. Although we still consider that observation to have been appropriate under the quite different facts of that case, we accept and adopt the reasoning of the New Jersey court, as quoted above, as applied to cases involving facts such as those involved in this case. We do so not based upon or because of ORS 471.410(3), but as a matter of common law negligence, as did the New Jersey court.

by defendants Carpenter, but whether there was substantial evidence from which the trial court, as the trier of the facts could properly have found that at the time Mrs. Pierce was served the last (or any) drink prior to leaving the tavern she was "visibly" intoxicated.

There was testimony that Mrs. Pierce went to the tavern at about 4 p. m. and left about 6:30 p. m.; that during that interval she was served as many as eight beers; that before leaving the tavern she got into an argument with a man she met at the tavern, her ex-husband; that she was then asked by the bartender to leave and called the bartender a "bitch."

In addition, there was testimony that immediately upon leaving the tavern Mrs. Pierce drove her car in an exceedingly erratic manner, "screaming" up a street where children were playing, lurching around the next corner, "burning rubber" in doing so, swerving into the opposite lane of traffic so as to nearly hit oncoming cars head on; going through a "red light" at the next intersection, and then accelerating up a hill, passing four cars, at a speed of from 75 to 80 miles per hour, all immediately prior to the fatal accident in which the two decedents were killed.

Blood samples taken after the accident with the consent of Mrs. Pierce at 8:30 p. m., approximately two hours after leaving the tavern, showed a blood alcohol content of .24 percent. A professor of toxicology testified, that, in his opinion, such a blood alcohol content at that time for a woman of her weight, would indicate that if she stopped drinking at 6 p. m. she would still probably be showing "outward symptoms of intoxication" at 6:50 p. m., the time of the accident, but that he "would not say" whether she would be showing such symptoms at 5:30 p. m. (an hour before she left the tavern, according to at least some witnesses).

3. There was also some evidence that Mrs. Pierce took valium, a tranquilizer, while at the tavern. The trial court was not required to believe that evidence. There was also some

[2] He also testified, however, that even five and one-fourth beers would "build up" a blood alcohol level of .24 percent in a woman of her size and that at that level such a person would be "under the influence" and would probably show "outward symptoms" of intoxication. As previously noted, there was testimony from which the trial court could have found that the serving of beer to Mrs. Pierce continued until she had up to eight beers in a period of approximately two hours.³

We believe that the trial court could have properly found from this evidence that defendants' bartenders had continued to serve beer to Mrs. Pierce after she was "visibly" intoxicated.

We also hold that the trial judge, as the finder of the facts in this case, could have properly found from this evidence that at the time of serving such drinks to Mrs. Pierce defendants Carpenter had reason to know that upon leaving the tavern she would probably drive away in her automobile. It is also our opinion that the trial judge, in making that finding, could properly take notice of the fact that "in current times * * * traveling by car to and from the tavern is so commonplace" (as also observed in *Rappaport v. Nichols, supra*, 156 A.2d at 8) and that this includes visits to taverns by single women.

It is true that at some time after the drinks had been served to Mrs. Pierce, she left the tavern with her ex-husband. If a proper test of the negligence of a tavern keeper in such cases is that of negligence in allowing an intoxicated customer to drive an automobile upon leaving a tavern (as also alleged in plaintiffs' complaint), it might be contended that defendants Carpenter had no reason to know, at the time when Mrs. Pierce left the tavern, that she would try to drive her automobile because it was just as likely, if not more likely, that her ex-husband would be the driver.

testimony that after leaving the tavern Mrs. Pierce stopped elsewhere for another drink but that was contradicted by other witnesses.

[3] Under the rule of *Rappaport*, however, which we now adopt for application in such cases, a tavern keeper is negligent if, at the time of serving drinks to a customer, that customer is "visibly" intoxicated because at that time it is reasonably foreseeable that when such a customer leaves the tavern he or she will drive an automobile. As previously stated, we believe that there was sufficient evidence to support a finding in this case that at the time of serving the drinks to Mrs. Pierce, it was reasonably foreseeable to the defendants Carpenter that when she left the tavern she would be the driver of her own car, rather than that her estranged husband would be the driver.

Concluding, as we do, that there was substantial evidence to support the findings of fact by the trial court, its judgment in this case is affirmed.



279 Or. 259

FISHERMEN'S MARKETING ASSOCIATION, INCORPORATED, a California Corporation, dba Fishermen's Marketing Association of California, Incorporated, Appellant,

v.

Walter WILSON, aka "Roy Wilson", Respondent.

Supreme Court of Oregon,
In Banc.

Argued and Submitted May 5, 1977.

Decided July 20, 1977.

Nonprofit cooperative association, which was engaged in marketing fish for its members, brought action against a member to collect liquidated damages and attorney fees on basis of contention that he delivered a catch of fish to a nondesignated dealer in violation of association's bylaws and membership agreement. The Circuit Court,

Douglas County, Don H. Sanders, J., refused to enforce liquidated damages provisions, and association appealed. The Supreme Court, Linde, J., held that: (1) fact that association did not produce actual membership agreement signed by member for purpose of proving terms of his membership did not preclude recovery against member, and (2) provision for \$1,000 liquidated damages was enforceable against member, though it was found that the actual damages could be ascertained.

Reversed and remanded.

1. Appeal and Error ⇐ 719(6)

In action by nonprofit cooperative association, which was engaged in marketing fish, to collect liquidated damages and attorney fees against member on basis of contention that he delivered catch of fish to nondesignated dealer in violation of association's bylaws and membership agreement, fact that association did not produce actual membership agreement signed by member for purposes of proving terms of his membership did not preclude recovery against member, in light of fact that he did not challenge finding that membership agreement provided for liquidated damages and attorney fees. ORS 41.610.

2. Damages ⇐ 76

Liquidated damages provisions in cooperative bylaws and membership agreements are enforceable if they relate broadly to the assumptions which led to their authorization by statute, including the assumption that marketing cooperatives have a greater stake in each member's adherence to his agreement for the term of his membership than only the monetary loss resulting from a particular sale by the member outside the marketing agreement. ORS 62.355, 62.355(2).

3. Damages ⇐ 79(1)

Mere fact that monetary loss from a breach of a cooperative association's membership agreement is ascertainable does not relieve a member from an otherwise valid provision for liquidated damages, nor does