St. Mary's Law Journal

Volume 16 | Number 1 Article 7

6-6-1905

An Employer Has a Duty as a Reasonably Prudent Employer to Exercise Control over an Intoxicated Employee in Order to Prevent Unreasonable Risk of Harm to Others.

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CASENOTES

TORTS—Employer-Employee—An Employer Has a Duty as a Reasonably Prudent Employer to Exercise Control Over an Intoxicated Employee in Order to Prevent Unreasonable Risk of Harm to Others.

Otis Engineering Corporation v. Clark,
668 S.W.2d 307 (Tex. 1983).

Robert Matheson, an employee at the defendant Otis Engineering Corporation's ("Otis") Carrollton plant, was released one night before the end of his shift.[1] Matheson had a history of drinking on the job, so when his supervisor, Donald Roy, observed Matheson's intoxicated condition, Roy suggested he leave early.[2] A few miles from the plant premises,[3] Matheson was involved in a car accident in which he killed the wives of the plaintiffs, Clifford and Larry Clark.[4] The Clarks thereafter brought a wrongful

1. *See* Otis Eng'g Corp. v. Clark, 668 S.W.2d 307, 308 (Tex. 1983). Matheson was scheduled to work from 3:00 p.m. until 11:00 p.m., but was released by his supervisor, Donald Roy, at approximately 9:30 p.m. *See* Clark v. Otis Eng'g Corp., 633 S.W.2d 538, 539-40 (Tex. App.—Texarkana 1982), *aff'd,* 668 S.W.2d 307 (Tex. 1983).

2. *See* Otis Eng'g Corp. v. Clark, 668 S.W.2d 307, 308 (Tex. 1983). Matheson's drinking problems had earned him the reputation of being an undependable and disagreeable employee. *See* Clark v. Otis Eng'g Corp., 633 S.W.2d 538, 539 (Tex. App.—Texarkana 1982), *aff'd,* 668 S.W.2d 307 (Tex. 1983). Donald Roy was notified of Matheson's condition by other workers. *See* Otis Eng'g Corp. v. Clark, 668 S.W.2d 307, 308 (Tex. 1983). Roy testified that he first suggested to Matheson that he go home, but Roy would have ordered him to leave if he had refused. *See* Clark v. Otis Eng'g Corp., 633 S.W.2d 538, 541 n.1 (Tex. App.—Texarkana 1982), *aff'd,* 668 S.W.2d 307 (Tex. 1983).

3. *See* Otis Eng'g Corp. v. Clark, 668 S.W.2d 307, 308 (Tex. 1983) (accident occurred about three miles away from plant). There exists a discrepancy in the time of Matheson's departure, thereby allowing speculation about further off-premises drinking: The appellate record states five to eight minutes while the Texas Supreme Court found Matheson left one-half hour before the accident. *Compare* Clark v. Otis Eng'g Corp., 633 S.W.2d 538, 540 (Tex. App.—Texarkana 1982) (5-8 minutes), *aff'd,* 668 S.W.2d 307 (Tex. 1983) *with* Otis Eng'g Corp. v. Clark, 668 S.W.2d 307, 308 (Tex. 1983) (one-half hour).

4. *See* Otis Eng'g Corp. v. Clark, 668 S.W.2d 307, 308 (Tex. 1983). Matheson's car struck an abutment on a two-lane bridge, went airborne, turned over into the opposite lane,

death action against Otis, alleging that the company's failure to restrain Matheson from leaving when he was visibly intoxicated was the proximate cause of the accident.[5] The trial court upheld Otis' motion for summary judgment on the basis that, as a matter of law, there was no duty to restrain Matheson.[6] The Texarkana court of appeals reversed and remanded, finding that a fact issue regarding Otis' duty existed,[7] and the Texas Supreme Court granted writ.[8] Held—*Affirmed.* An employer has a duty as a reasonably prudent employer to exercise control over an intoxicated employee in order to prevent unreasonable risk of harm to others.[9]

The necessary elements of a cause of action in negligence are a legal right and a corresponding legal duty.[10] The plaintiff must establish that he has a right to have his loss shifted to the defendant.[11] Furthermore, the

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and struck the car being driven by Janis Clark, instantly killing her, her mother Geraldine, and another passenger. *See* Plaintiff's First Amended Original Petition at 2, Otis Eng'g Corp. v. Clark, 668 S.W.2d 307 (Tex. 1983). Dr. Charles Petty, the medical examiner, testified that Matheson's blood alcohol content at the time of the accident was 0.268%, which is equivalent to the consumption of 16 to 18 mixed drinks in one hour, or 20 to 25 in two hours. *See* Otis Eng'g Corp. v. Clark, 668 S.W.2d 307, 308 (Tex. 1983). Dr. Petty further testified that this level of intoxication in any person would be obvious to a normal person. *See id.* at 308. Texas defines legal drunkenness as a blood alcohol content of 0.10%. *See* TEX. REV. CIV. STAT. ANN. art. 67011-1(a)(2)(B) (Vernon Supp. 1984).

5. *See* Plaintiff's First Amended Original Petition at 2, Otis Eng'g Corp. v. Clark, 668 S.W.2d 307 (Tex. 1983).

6. *See* Otis Eng'g Corp. v. Clark, 668 S.W.2d 307, 308 (Tex. 1983). The plaintiffs answered Otis' motion for summary judgment, stating that the failure to restrain was the breach of the duty owed. *See* Plaintiff's Response to Defendant's Motion for Summary Judgment at 2, Otis Eng'g Corp. v. Clark, 668 S.W.2d 307 (Tex. 1983).

7. *See* Clark v. Otis Eng'g Corp., 633 S.W.2d 538, 542 (Tex. App.—Texarkana 1982), *aff'd,* 668 S.W.2d 307 (Tex. 1983). The court of appeals found that an affirmative act took place when Otis allowed Matheson to leave, thereby giving rise to a duty. *See id.* at 542. The summary judgment at the trial level was based on the employer's alleged nonfeasance, while both the appellate court and the Texas Supreme Court considered the failure to restrain as misfeasance. *Compare* Plaintiff's First Amended Original Petition at 2, Otis Eng'g Corp. v. Clark, 668 S.W.2d 307 (Tex. 1983) (failure to restrain constitutes nonfeasance) *with* Clark v. Otis Eng'g Corp., 633 S.W.2d 538, 542 (Tex. App.—Texarkana 1982), *aff'd,* 668 S.W.2d 307 (Tex. 1983) (failure to restrain is misfeasance) *and* Otis Eng'g Corp. v. Clark, 668 S.W.2d 307, 310-11 (Tex. 1983) (*Otis* case is not nonfeasance).

8. *See* Otis Eng'g Corp. v. Clark, 668 S.W.2d 307, 308 (Tex. 1983).

9. *See id.* at 311.

10. *See, e.g.,* Jacks v. Torrington Co., 256 F. Supp. 282, 286 (D.S.C. 1966) (legal right and duty required for cause of action); Gooden v. Tips, 651 S.W.2d 364, 366 (Tex. App.—Tyler 1983, no writ) (right and duty must be established); Bernard Johnson, Inc. v. Continental Contractors, Inc., 630 S.W.2d 365, 367 (Tex. App.—Austin 1982, writ ref'd n.r.e.) (vested right and corresponding duty essential to cause of action).

11. *See* D'Ambra v. United States, 338 A.2d 524, 527 (R.I. 1975). It is the plaintiff's burden to establish that he holds a legal right in order to sustain a cause of action. *See, e.g.,* Abalos v. Oil Dev. Co. of Tex., 544 S.W.2d 627, 631 (Tex. 1976) (burden on plaintiff to show legal right held); Gooden v. Tips, 651 S.W.2d 364, 366 (Tex. App.—Tyler 1983, no writ)

court must determine whether a duty was owed by the defendant to the plaintiff to justify legal protection of the plaintiff's rights from the defendant's conduct.[12] Historically, liability in negligence cases has been predicated upon this duty of care,[13] although liability is ultimately assessed by utilizing the standard formula: existence of a legal duty, breach of the duty, a causal connection between the alleged wrongful conduct and the injury sustained, and actual damages.[14] Additionally, proximate cause consists of two elements: causation in fact and foreseeability, both of which must be present to establish liability.[15] Based on these factors, the

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(right must be established); Bernard Johnson, Inc. v. Continental Contractors, Inc., 630 S.W.2d 365, 367 (Tex. App.—Austin 1982, writ ref'd n.r.e.) (vested right necessary to give rise to cause of action).

12. *See* D'Ambra v. United States, 338 A.2d 524, 527-28 (R.I. 1975). The issue of whether a duty does in fact exist is one of law for the court. *See, e.g.,* Gooden v. Tips, 651 S.W.2d 364, 366 (Tex. App.—Tyler 1983, no writ) (duty is question of law for courts); Jackson v. Associated Developers, 581 S.W.2d 208, 212 (Tex. Civ. App.—Amarillo 1979, writ ref'd n.r.e.) (issue of existence of duty for courts); Oldaker v. Lock Constr. Co., 528 S.W.2d 71, 77 (Tex. Civ. App.—Amarillo 1975, writ ref'd n.r.e.) (duty is court determination). Whenever there is liability in tort, there must first be a judicially determined duty. If the court fails to establish that a duty exists, judgment for the defendant must be rendered. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 206 (4th ed. 1971). No cause of action in negligence will lie where a duty has not been shown. *See* Reeves County Gas Co. v. Church, 464 S.W.2d 489, 491 (Tex. Civ. App.—El Paso 1971, no writ); *see also* Green, *Duties, Risks, Causation Doctrines,* 41 TEXAS L. REV. 42, 45 (1962) (duty, whether stated or assumed, must be at base of actions where liability is imposed).

13. *See, e.g.,* Devlin v. Smith, 89 N.Y. 470, 477 (1882) (liability rests upon duty imposed by law on everyone to avoid acts which pose danger to lives of others); Thomas v. Winchester, 6 N.Y. 397, 408-10 (1852) (negligently labelled jar of poison prescribed to patient; duty of care to whole world of possible consumers placed upon manufacturer); Heven v. Pender, 11 Q.B.D. 503, 509 (1883) (duty arises to use ordinary skill and care to avoid danger to others). Every time an individual acts, a duty of care to prevent injury to others arises. *See* Green, *Duties, Risks, Causation Doctrines,* 41 TEXAS L. REV. 42, 44 (1962). The duty of care upon which liability rests arises between two or more people for their well-being and protection. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 324-25 (4th ed. 1971); Comment, *The Modern Concept of Duty: Hoyem v. Manhattan Beach City School Dist. and School District Liability for Injuries to Truants,* 30 HASTINGS L.J. 1893, 1904-05 (1979). For various discussions of the early duty doctrines, see Fleming, *The Role of Negligence in Modern Tort Law,* 53 VA. L. REV. 815, 816 (1967) (extensive historical treatment of duty); Green, *Duties, Risks, Causation Doctrines,* 41 TEXAS L. REV. 42, 45 (1962) (discussion of cases giving rise to liability); Murphy, *Evolution of the Duty of Care: Some Thoughts,* 30 DE PAUL L. REV. 147, 148-52 (1980) (historical treatment of duty); Note, *Origin of the Modern Standard of Due Care in Negligence,* 1976 WASH. U.L.Q. 447, 451 (historic theory of negligence).

14. *See* Bennet v. Span Indus., Inc., 628 S.W.2d 470, 473-74 (Tex. App.—Texarkana 1981, writ ref'd n.r.e.) (duty, breach of duty, proximate cause, and damages are elements of negligence); Producers Grain Corp. v. Lindsay, 603 S.W.2d 326, 329 (Tex. Civ. App.—Amarillo 1980, no writ) (four required elements of negligence claim are duty, breach of duty, proximate cause, and damages).

15. *See* McClure v. Allied Stores of Tex., 608 S.W.2d 901, 903 (Tex. 1980). Texas ob-

trier of fact has the task of determining whether liability for negligence exists.[16]

Liability for negligence is often found where a duty to act has been performed in a careless or improper manner.[17] This "misfeasance" has historically been distinguished from inaction or "nonfeasance," wherein a recognized duty to act is not undertaken at all.[18] For liability to be imposed for nonfeasance, a special relationship between the plaintiff and the defendant must exist.[19] Often, social policy dictates the types of relationships that can result in liability for nonfeasance.[20] In the absence of a special relationship creating a legal duty, the mere refusal of an individual to respond is not actionable.[21] While an individual may not always have a

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serves the traditional concept of reasonable foreseeability as an element of proximate cause. *See* Landreth v. Reed, 570 S.W.2d 486, 489 (Tex. Civ. App.—Texarkana 1978, no writ). Foreseeability is established when a person of reasonable intelligence and prudence could have anticipated any danger to other persons which may have been created by his acts. *See* Clark v. Waggoner, 452 S.W.2d 437, 440 (Tex. 1970). The actor need not be aware of the extent of injury, only that by using practical sense and common experience he could have reasonably foreseen injury. *See id.* at 440. The knowledge of peril may be expressed, constructive, or implied. *See* Jackson v. Associated Developers, 581 S.W.2d 208, 211 (Tex. App.—Amarillo 1979, writ ref'd n.r.e.); *see also* Murphy, *Evolution of the Duty of Care: Some Thoughts,* 30 DE PAUL L. REV. 147, 168 n.134 (1980) (foreseeability is triggering event of determination of duty). *But see* Corbin v. Safeway Stores, 648 S.W.2d 292, 296 (Tex. 1983) (foreseeability is element of duty).

16. *See* Clark v. Waggoner, 452 S.W.2d 437, 440 (Tex. 1970). When the reasonable inferences to be drawn from the facts are not conclusive, the question of the existence of a duty may be one for the jury. *See* Bennet v. Span Indus., Inc., 628 S.W.2d 470, 474 (Tex. App.—Texarkana 1981, writ ref'd n.r.e.). However, if there is no dispute that a reasonable inference of liability may be drawn from the evidence, a question of law may be presented. *See* Priest v. Myers, 598 S.W.2d 359, 362-63 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ).

17. *See* Dudley v. Community Pub. Serv. Co., 108 F.2d 119, 121 (5th Cir. 1939) (misfeasance is doing act in careless manner); *see also* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 338 (4th ed. 1971) (misfeasance is active misconduct).

18. *See, e.g.,* Pilgrim v. Fortune Drilling Co., 653 F.2d 982, 985 (5th Cir. 1981) (nonfeasance under Texas law is failure to act when there exists a duty to act); Dudley v. Community Pub. Serv. Co., 108 F.2d 119, 121 (5th Cir. 1939) (misfeasance is doing things in negligent or wrong way); McCarty v. Hogan, 121 S.W.2d 499, 501 (Tex. Civ. App.—Fort Worth 1938, writ ref'd n.r.e.) (either misfeasance or nonfeasance may constitute negligence).

19. *See* Christy v. Prestige Builders, Inc., 290 N.W.2d 395, 400 (Mich. Ct. App. 1980).

20. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 339 (4th ed. 1971) (nonfeasance only found in particular relations).

21. *See* Jacks v. Torrington Co., 256 F. Supp. 282, 286 (D.S.C. 1966) (cause of action does not exist without required legal duty). Furthermore, where the defendant owes no duty, any omission or act by him shall not create a cause of action. *See* Bernard Johnson, Inc. v. Continental Contractors, Inc., 630 S.W.2d 365, 375 (Tex. App.—Austin 1982, writ ref'd n.r.e.). This is based upon the common law rule that a person does not generally owe a duty to protect another absent external factors. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 340 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS §§ 314, 315 (1977); Harper

duty to respond to another's peril, a volunteer who affirmatively assumes a duty to aid another owes that person a duty not to leave the person in a condition worse than that in which he was found.[22] This undertaking necessarily carries with it the obligation that the individual will act as a reasonably prudent person in order to avoid foreseeable harm.[23]

Some relationships impose a duty on one in control of another to ensure that the servient party does not cause harm to third persons.[24] An employment relationship, for example, creates employer liability when the employer has the power and right to control or direct the employee's conduct at the time of the negligent act.[25] Generally, an employer owes no duty to protect third persons from the torts of his employees committed outside the scope of employment.[26] Exceptions to the general rule exist, however,

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& Kime, *The Duty to Control the Conduct of Another,* 43 YALE L.J. 886, 887 (1934); Note, *Torts—Duty to Act for Protection of Another—Liability of Psychotherapist for Failure to Warn of Homicide Threatened by Patient,* 28 VAND. L. REV. 631, 632 (1975). Generally, one who does not create a danger has no legal duty to prevent injury. *See* Buchanan v. Rose, 138 Tex. 390, 392, 159 S.W.2d 109, 110 (1942); Roberson v. McCarthy, 620 S.W.2d 912, 914 (Tex. Civ. App.—Corpus Christi 1981, writ ref'd n.r.e.).

22. *See* Colonial Sav. Ass'n v. Taylor, 544 S.W.2d 116, 119 (Tex. 1976). A necessary consideration of how far a duty extends involves whether the extent of the defendant's act has put a force of harm into motion. *See* H.R. Moch Co. v. Renselaer Water Co., 159 N.E. 896, 898 (N.Y. 1928). Upon undertaking a duty of care for another, the actor is required to avoid increasing peril. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 343 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS §§ 321-33 (1977).

23. *See* Reeves County Gas Co. v. Church, 464 S.W.2d 489, 491 (Tex. Civ. App.—El Paso 1971, no writ). By voluntarily undertaking an affirmative act of care, the actor also accepts the responsibility to act with reasonable care in order that the recipient's person or property shall not be injured. *See* Colonial Sav. Ass'n v. Taylor, 544 S.W.2d 116, 119 (Tex. 1976).

24. *See* Harper & Kime, *The Duty to Control the Conduct of Another,* 43 YALE L.J. 886, 887 (1934) (master-servant relationship); Note, *Torts—Duty to Act for Protection of Another—Liability of Psychotherapist to Warn of Homicide Threatened by Patient,* 28 VAND. L. REV. 631, 633 (1975) (discusses relationship of psychotherapist-patient). *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 343 (4th ed. 1971) (general discussion of special relationships); RESTATEMENT (SECOND) OF TORTS § 315 (1977) (listing of special relationships). A custodial relationship of a potentially dangerous person, such as that between a mental health institution and a patient, or a prison and an inmate, may give rise to an extra duty of care. *See* RESTATEMENT (SECOND) OF TORTS § 319 (1977). Where no true custodial relationship exists, a duty to warn rather than a duty to control may exist. *See* Austin W. Jones Co. v. State, 119 A. 577, 581 (Me. 1923).

25. *See* Pilgrim v. Fortune Drilling Co., 653 F.2d 982, 985 (5th Cir. 1981). There is no duty to control when no right to control exists. *See id.* at 985. Texas law, absent special exception, only recognizes employer liability when an employment relationship existed at the time of, and in relation to, the employee's negligent act. *See* American Nat'l Ins. Co. v. Denke, 128 Tex. 229, 236, 95 S.W.2d 370, 373 (1936).

26. *See* Pilgrim v. Fortune Drilling Co., 653 F.2d 982, 985 (5th Cir. 1981). An employee is acting outside the scope of his employment when the employer no longer has the

when a tort is committed on the employer's premises[27] or with the employer's property.[28]

Dram shop liability imposes a duty upon a tavern owner to act with reasonable prudence and requires that he be aware of any foreseeable risk of harm that may be associated with an intoxicated patron.[29] Liability arises from the theory that risk of injury caused by an intoxicated person is an incident of holding a liquor license.[30] A minority of states have legislatively[31] or judicially[32] imposed dram shop liability, which ranges from lia-

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right to control his actions. *See* American Nat'l Ins. Co. v. Denke, 128 Tex. 229, 236, 95 S.W.2d 370, 373 (1936).

27. *See* Clark v. Otis Eng'g Corp., 633 S.W.2d 539, 542 (Tex. App.—Texarkana 1982), *aff'd,* 668 S.W.2d 307 (Tex. 1983); *see also* RESTATEMENT (SECOND) OF TORTS § 317 (a)(i) (1977) (discussion of employer liability).

28. *See* Clark v. Otis Eng'g Corp., 633 S.W.2d 539, 542 (Tex. App.—Texarkana 1982), *aff'd,* 668 S.W.2d 307 (Tex. 1983); *cf.* RESTATEMENT (SECOND) OF TORTS § 317 (a)(i) (1977) (employer liability for torts committed by off-duty employee using employer's property).

29. *See* Note, *Extension of the Dram Shop Act: New Found Liability of the Social Host,* 49 N.D.L. REV. 67, 68 (1972). It should be noted that even though it may naturally follow that by providing alcoholic beverages to an inebriated person he may injure himself, it is not necessarily true that he will drive a car and kill another, assault someone, or commit some other wrongful act. *See* Cowman v. Hansen, 92 N.W.2d 682, 684 (Iowa 1958). An intoxicated person assumes the role of one unable to care for himself and thereby requires a higher degree of caution on the part of others. *See, e.g.,* Gaylord Container Corp. v. Miley, 230 F.2d 177, 182 (5th Cir. 1956) (being drunk places one in the role of a child); Honsthemke v. New Orleans Ry. & Light Co., 84 So. 210, 211 (La. 1920) (condition of intoxication interferes with ability to care for oneself); Grennon v. New Orleans Pub. Serv., 120 So. 801, 804 (La. Ct. App. 1929) (intoxicated condition creates apparent helplessness).

30. *See* Note, *Extension of the Dram Shop Act: New Found Liability of the Social Host,* 49 N.D.L. REV. 67, 67-68 (1972). The purpose of imposing dram shop liability is to control the sale of alcoholic beverages to minors and visibly intoxicated persons and for the overall public good. *See* Browder v. International Fidelity Ins. Co., 321 N.W.2d 668, 673 (Mich. 1982). Where no dram shop act has been imposed, the common law prevails. *See* Lewis v. Wolf, 596 P.2d 705, 706 (Ariz. Ct. App. 1979). Pursuant to the common law, a person who is injured by an intoxicated person has no remedy against the tavern owner. *See* Megge v. United States, 344 F.2d 31, 32 (6th Cir.), *cert. denied,* 382 U.S. 831 (1965). This is based on the theory that the proximate cause of the injury is the purchaser's consumption of the alcohol, not the act of the vendor selling it to a presumably able-bodied person. *See* Sampson v. W.F. Enters., Inc., 611 S.W.2d 333, 335 (Mo. Ct. App. 1980); Mitchell v. Ketner, 393 S.W.2d 755, 756-57 (Tenn. Ct. App. 1964); Note, *Extension of the Dram Shop Act: New Found Liability of the Social Host,* 49 N.D.L. REV. 67, 68-69 (1972).

31. *See* ALA. CODE § 6-5-71 (1975); ALASKA STAT. § 04.21.020(a) (1980); CONN. GEN. STAT. ANN. § 30-102 (West 1975); ILL. ANN. STAT. ch. 43, § 135 (Smith-Hurd 1983-1984); IOWA CODE ANN. § 123.92 (West 1983-1984); MICH. STAT. ANN. § 18.992 (Callaghan 1980); MINN. STAT. ANN. § 340.95 (West 1983); N.Y. GEN. OBLIG. LAW § 11-101(1) (McKinney 1978); N.D. CENT. CODE § 5-01-06 (Supp. 1983); PA. STAT. ANN. tit. 47, § 4-497 (Purdon 1969); R.I. GEN. LAWS § 3-11-1 (1976); UTAH CODE ANN. § 32-11-1 (Supp. 1983); VT. STAT. ANN. tit. 7, § 501 (1972).

32. *See* Chastain v. Litton Sys., Inc., 694 F.2d 957, 961-62 (4th Cir. 1982) (applying

bility imposed upon a liquor licensee for serving minors or an obviously intoxicated person,[33] to that imposed upon the overly-congenial host who serves a party guest.[34] The Texas Legislature has considered the issue, but has declined to impose any form of dram shop liability, as evidenced by the failure of several bills in recent legislative sessions.[35]

The Texas Supreme Court, in *Otis Engineering Corporation v. Clark,*[36] determined that an employer has a duty as a reasonably prudent employer to take control of an intoxicated employee in order to prevent any unrea-

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North Carolina law); Marusa v. District of Columbia, 484 F.2d 828, 834 (D.C. Cir. 1973); Nazareno v. Urie, 638 P.2d 671, 673-74 (Alaska 1981); Ontiveros v. Borak, 667 P.2d 200, 213 (Ariz. 1983); Kerby v. Flamingo Club, 532 P.2d 975, 979 (Colo. Ct. App. 1974); Ona v. Applegate, 612 P.2d 533, 537-39 (Hawaii 1980); Alegria v. Payonk, 619 P.2d 135, 137 (Idaho 1980); Elder v. Fisher, 217 N.E.2d 847, 852 (Ind. 1966); Pike v. George, 434 S.W.2d 626, 629 (Ky. Ct. App. 1968); Cimino v. Milford Keg, Inc., 431 N.E.2d 920, 924 (Mass. 1982); Thaut v. Finley, 213 N.W.2d 820, 821-22 (Mich. Ct. App. 1973); Munford, Inc. v. Peterson, 368 So. 2d 213, 215-16 (Miss. 1979); Sampson v. W.F. Enters., Inc., 611 S.W.2d 333, 337 (Mo. Ct. App. 1980); Ramsey v. Anctil, 211 A.2d 900, 901 (N.H. 1965); Kelly v. Gwinnell, 476 A.2d 1219, 1224-25 (N.J. 1984); Lopez v. Maez, 651 P.2d 1269, 1276 (N.M. 1982); Berkeley v. Park, 262 N.Y.S.2d 290, 292 (N.Y. Sup. Ct. 1965); Mason v. Roberts, 294 N.E.2d 884, 887 (Ohio 1973); Campbell v. Carpenter, 566 P.2d 893, 897 (Or. 1977); Jardine v. Upper Darby Lounge No. 1973, 198 A.2d 550, 553 (Pa. 1964); Mitchell v. Ketner, 393 S.W.2d 755, 757 (Tenn. Ct. App. 1964); Sorensen by Kerscher v. Jarvis, 350 N.W.2d 108, 117 (Wis. 1984).

33. *See* ALASKA STAT. § 04.21.020(a) (1980) (serving minor or intoxicated person); CONN. GEN. STAT. ANN. § 30-102 (West 1975) (serving intoxicated persons); MICH. STAT. ANN. § 18.993 (Callaghan 1980) (serving inebriated persons or minors); N.Y. GEN. OBLIG. LAW § 11-101(1) (McKinney 1978) (selling or furnishing alcohol causing intoxication); PA. STAT. ANN. tit. 47, § 4-497 (Purdon 1969) (serving intoxicated person); R.I. GEN. LAWS § 3-11-1 (1976) (selling or furnishing alcohol causing intoxication); VT. STAT. ANN. tit. 7, § 501 (1972) (selling or furnishing alcohol causing intoxication).

34. *See* Coulter v. Superior Court, 577 P.2d 669, 672, 145 Cal. Rptr. 534, 537 (Cal. 1978); Williams v. Klemesrud, 197 N.W.2d 614, 615-16 (Iowa 1972); Ross v. Ross, 200 N.W.2d 149, 152-53 (Minn. 1972); Kelly v. Gwinnell, 476 A.2d 1919, 1224-25 (N.J. 1984); Weiner v. Gamma Phi Chapter of Alpha Tau Omega Fraternity, 485 P.2d 18, 21-22 (Or. 1971).

35. *See* Tex. S.B. 1, 68th Leg. (1983); Tex. S.B. 2, 68th Leg. (1983); Tex. H.B. 5, 68th Leg. (1983); Tex. H.B. 48, 68th Leg. (1983); Tex. H.B. 97, 68th Leg. (1983); Tex. H.B. 273, 68th Leg. (1983); Tex. H.B. 708, 68th Leg. (1983); Tex. H.B. 709, 68th Leg. (1983); Tex. H.B. 1809, 68th Leg. (1983). A majority of the bills dealt with open alcohol containers in cars; two bills directly addressed some form of dram shop liability. *Compare* Tex. H.B. 48, 68th Leg. (1983) (open container bill) *and* Tex. H.B. 273, 68th Leg. (1983) (bill concerning alcohol in vehicles) *with* Tex. H.B. 709, 68th Leg. (1983) (bill allowing for damages from person selling alcohol to known habitual alcoholic, intoxicated, or insane persons) *and* Tex. H.B. 1809, 68th Leg. (1983) (bill providing compensation for victims of inebriated drivers). Additionally, the Texas judiciary has declined to impose any sort of dram shop liability. *Cf.* Otis Eng'g Corp. v. Clark, 668 S.W.2d 307, 319 (Tex. 1983) (McGee, J., dissenting) (duty imposed not supported by statute or precedent).

36. 668 S.W.2d 307 (Tex. 1983).

sonable risk of harm to others.[37] Justice William Kilgarlin, writing for the majority, recognized that generally one has no duty to control the acts of another.[38] He noted, however, that as an exception to this rule, certain relationships may impose a duty of care, such as the custodial relationship established in section 319 of the Restatement (Second) of Torts.[39] In determining whether the employment relation gave rise to a duty to control, the court established a balancing test which weighed the foreseeability, risk, and probability of injury against the degree of the burden to prevent injury, the consequences of charging the actor with the burden, and the social utility of his conduct.[40] In addition, the majority believed that Otis had affirmatively acted by permitting Matheson to operate a vehicle while visibly intoxicated.[41] The court looked to current social policies as the most significant factor in determining whether a duty arose from Otis' acts,[42] and it also relied heavily on the case law from other jurisdictions.[43] The majority dismissed the notion that its opinion was based on dram shop liability or employer nonfeasance.[44]

Justice McGee, writing for a minority of four, reasoned that Otis had no duty to restrain Matheson.[45] The dissent initially determined that the majority had failed to adequately establish why a duty existed,[46] and that a duty, such as that created by the majority, has never been imposed in any jurisdiction where the employer had not contributed to the employee's intoxication.[47] The dissent further reasoned that since Otis played no role in the creation of the danger, no liability was justified.[48] Justice McGee addressed the exceptions to an employer's duty to control his off-duty employees and found that none were applicable under the given

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37. *See id.* at 311.

38. *See id.* at 309. Justice Kilgarlin also noted that this general rule is applicable even where one has the ability to act. *See id.* at 309.

39. *See* RESTATEMENT (SECOND) OF TORTS § 319 (1977), *cited with approval in* Otis Eng'g Corp. v. Clark, 668 S.W.2d 307, 311 (Tex. 1983). The Texarkana court of appeals reasoned that § 319 should not be restricted to cases of institutional custody of harmful persons. *See* Clark v. Otis Eng'g Corp., 633 S.W.2d 538, 542 (Tex. App.—Texarkana 1982), *aff'd,* 668 S.W.2d 307 (Tex. 1983).

40. *See* Otis Eng'g Corp. v. Clark, 668 S.W.2d 307, 309 (Tex. 1983).

41. *See id.* at 309.

42. *See id.* at 310.

43. *See id.* at 309.

44. *See id.* at 309.

45. *See id.* at 312 (McGee, J., dissenting).

46. *See id.* at 312 (McGee, J., dissenting). Justice McGee determined that the failure to provide a reason for imposing liability lead to the inference that the new duty was not the proper relief sought. *See id.* at 312 (McGee, J., dissenting).

47. *See id.* at 312, 318-19 (McGee, J., dissenting).

48. *See id.* at 313 (McGee, J., dissenting).

circumstances.[49] The minority then distinguished the provisions of the Restatement (Second) of Torts by reasoning that the facts of the case did not lend themselves to a custodial relationship.[50] The dissent pointed out that the majority confused the principles of misfeasance and nonfeasance when they stated that "failure to control" was an affirmative act.[51] Justice McGee continued to criticize the majority's decision by illustrating the ramifications of the newly-created duty[52] and in particular found that, contrary to the majority's disclaimer, dram shop liability was being imposed.[53] Additionally, it was believed that the majority's failure to provide the employer with guidance as to the situations in which liability may be extended forces an employer to screen out possibly dangerous employees,[54] or be potentially liable for false imprisonment for attempting to restrain an incapacitated employee.[55]

Texas law has consistently applied the element of foreseeability of injury to proximate cause.[56] The Texas Supreme Court in *Otis,* however, determined that the foreseeability of Matheson's intoxication causing harm to another was substantial enough to impose a duty to restrain upon the employer.[57] In order to support this uncommon application of foreseeability,

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49. *See id.* at 313 (McGee, J., dissenting). Justice McGee illustrated the basic exception of liability occurring when the off-duty employee was upon the employer's premises or was using the employer's chattels. *See id.* at 312 (McGee, J., dissenting). Next, Justice McGee addressed the exception where a true custodial relationship exists between the employer and the off-duty employee. *See id.* at 313 (McGee, J., dissenting).

50. *See* RESTATEMENT (SECOND) OF TORTS § 319 (1977), *noted in* Otis Eng'g Corp. v. Clark, 668 S.W.2d 307, 313 (Tex. 1983) (McGee, J., dissenting). The minority reasoned that there is no rational basis for extending the provisions of § 319 beyond the custodial situations illustrated in the comments to the section. *See id.* at 313 (McGee, J., dissenting).

51. *See id.* at 317 (McGee, J., dissenting).

52. *See id.* at 318 (McGee, J., dissenting). Justice McGee provided the illustration of an employee with a history of heart trouble who is sent home because of chest pains and along the way suffers an attack and loses control of the car, causing injury to another. *See id.* at 318 (McGee, J., dissenting).

53. *See id.* at 311-12 (McGee, J., dissenting). The dissent especially found that the majority had intruded upon the realm of the legislature. *See id.* at 312 (McGee, J., dissenting).

54. *Cf. id.* at 318 (McGee, J., dissenting) (imposition of new duty shall unduly strain employment relations and procedures).

55. *See id.* at 308-09 (McGee, J., dissenting).

56. *See, e.g.,* McClure v. Allied Stores of Texas, 608 S.W.2d 901, 903 (Tex. 1980) (foreseeability is element of proximate cause); Clark v. Waggoner, 452 S.W.2d 437, 440 (Tex. 1970) (foreseeability is consideration of proximate cause); Landreth v. Reed, 570 S.W.2d 486, 489 (Tex. Civ. App.—Texarkana 1978, no writ) (Texas applies traditional concept of proximate cause based on foreseeability).

57. *See* Otis Eng'g Corp. v. Clark, 668 S.W.2d 307, 309, 311 (Tex. 1983). In particular, the majority applied foreseeability to the establishment of a duty by relying upon the alternatives it felt Otis had, thereby incorrectly recognizing the role of the trier of fact. *See id.* at

the court relied upon case law from other jurisdictions which factually differed from the instant case.[58] Specifically, the cases involved no employer-employee relationship,[59] the employer acting in a clearly affirmative manner by supplying alcohol to the employee,[60] or the employer contributing

311. The issue of duty is the threshold question to be considered by the court, whereas, foreseeability, as a traditional factor of proximate cause, is for the jury's attention. *See, e.g.,* Gooden v. Tips, 651 S.W.2d 364, 366 (Tex. App.—Tyler 1983, no writ) (duty is court determination); Oldaker v. Lock Constr. Co., 528 S.W.2d 71, 77 (Tex. Civ. App.—Amarillo 1974, writ ref'd n.r.e.) (duty is question of law for courts); City of Houston v. Jean, 517 S.W.2d 596, 599 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ ref'd n.r.e.) (foreseeability is issue of fact for jury). In varying the traditional Texas tort principles, the *Otis* court found support in their recent decision of *Corbin v. Safeway Stores. See* Otis Eng'g Corp. v. Clark, 668 S.W.2d 307, 310 (Tex. 1983). In *Corbin,* foreseeability was applied to the duty owed by an owner of premises to his business invitees. *See* Corbin v. Safeway Stores, 648 S.W.2d 292, 295 (Tex. 1983). The facts of *Corbin* can be easily distinguished from *Otis,* and, therefore, the logic applied in a premises case should not be readily extended to an employer liability case. *Compare* Corbin v. Safeway Stores, 648 S.W.2d 292, 294 (Tex. 1983) (involving unreasonably dangerous condition on business premises) *with* Otis Eng'g Corp. v. Clark, 668 S.W.2d 307, 308 (Tex. 1983) (involving voluntarily incapacitated employee off premises).

58. *See* Otis Eng'g Corp. v. Clark, 668 S.W.2d 307, 310-11 (Tex. 1983). Despite the clear factual discrepancies between the instant case and the cited cases, the court found the reasoning as a whole to be persuasive. *See id.* at 310-11.

59. *See* Leppke v. Segura, 632 P.2d 1057, 1058-59 (Colo. Ct. App. 1981). In *Leppke,* an obviously intoxicated person, Verrill, was refused service at several taverns. *See id.* at 1058-59. Verrill requested that Segura, the owner of a tavern which was *not* visited by Verrill, jump-start his car, and Segura complied. *See id.* at 1058. Verrill was later involved in an accident in which the plaintiff, Leppke, was injured. *See id.* at 1058-59. The facts of this case are distinguishable from voluntary acts in an employment relation, which is the crux of the new duty imposed by the *Otis* majority. *Compare* Leppke v. Segura, 632 P.2d 1057, 1058-59 (Colo. Ct. App. 1981) (liability imposed based on voluntary act of jump-starting car where no special relationship existed with person) *with* Otis Eng'g Corp. v. Clark, 668 S.W.2d 307, 310 (Tex. 1983) (duty imposed based in part on employment relationship). The *Otis* majority further distinguished *Leppke* by pointing to the obvious affirmative act of providing mobility where conceivably none would have existed. *See* Otis Eng'g Corp. v. Clark, 668 S.W.2d 307, 315 (Tex. 1983) (McGee, J., dissenting). Furthermore, the dissent noted that the Texas Supreme Court is the only court to construe the *Leppke* decision in this manner. *See id.* at 315 (McGee, J., dissenting).

60. *See* Brockett v. Kitchen Boyd Motor Co., 70 Cal. Rptr. 136, 137 (Dist. Ct. App. 1968). Jimmie Huff, a minor, consumed copious amounts of liquor supplied to him at an employee Christmas party hosted by Kitchen Boyd. *See id.* at 137. The defendant placed the inebriated Huff into his car and sent him home. *See id.* at 137. Huff struck and injured Brockett's car. *See id.* at 137. Liability was imposed upon the employer for the affirmative acts of supplying alcohol to a minor and then affirmatively putting him on the road. *See id.* at 139-40. This case may be distinguished from *Otis* in that Otis neither took part in the creation of Matheson's intoxication, nor did Otis affirmatively place him in his car and on the road. *Compare* Otis Eng'g Corp. v. Clark, 668 S.W.2d 307, 309 (Tex. 1983) (Matheson discovered intoxicated by employer and encouraged to go home) *with* Brockett v. Kitchen Boyd Motor Co., 70 Cal. Rptr. 136, 137 (Dist. Ct. App. 1968) (employer encouraged consumption of alcohol and later placed inebriated employee in car and directed him home).

to the creation of the employee's risky condition.[61] Nevertheless, the *Otis* majority created a duty, despite the fact that there is no easily recognized act that may be attributed to Otis.[62] Ultimately, the court failed to clearly state whether it was basing its opinion that Otis had affirmatively acted upon Roy's act of escorting Matheson to his car (misfeasance), or the failure to restrain Matheson from leaving work (nonfeasance).[63] Significantly, the Texas Supreme Court's failure to establish the factors upon which Otis' liability is based offers little guidance to trial and appellate courts and does not supply the necessary criteria to form consistent decisions in later situations involving potential employer liability.[64]

The *Otis* court also supported its decision for imposition of a duty to act as a reasonably prudent employer and restrain an intoxicated employee by considering prevalent social policy.[65] Although the court discussed public

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61. *See* Robertson v. LeMaster, 301 S.E.2d 563, 564-65 (W. Va. 1983). LeMaster was forced to work more than 27 hours at a train derailment site 50 miles from his home. *See id.* at 564-65. LeMaster fell asleep while driving home after his employer refused to transport him. *See id.* at 565. LeMaster struck Robertson's vehicle causing injuries for which LeMaster's employer was held liable. *See id.* at 565, 570. The *Robertson* court found that requiring an employee to work 20 hours more than his usual shift without rest and then putting him on the road was an affirmative act. *See id.* at 568-69. The dissent in *Otis,* on reviewing the majority's reliance upon the logic of *Robertson,* found that the affirmative act of requiring the unreasonably long hours of work had no parallel in *Otis. See* Otis Eng'g Corp. v. Clark, 668 S.W.2d 307, 315 (Tex. 1983) (McGee, J., dissenting). Justice McGee further criticized the majority's belief that failing to restrain or fire Matheson was an affirmative act. *See id.* at 315 (McGee, J., dissenting). The dissent provided 4 cases more similar in facts to *Otis* than those cited by the majority in which no liability was imposed upon the employer for the torts of his intoxicated employee in any of the situations. *See id.* at 316-17 (McGee, J., dissenting); *see also* Edgar v. Kajet, 375 N.Y.S.2d 548, 551 (Sup. Ct. 1975) (state dram shop act not extended to employer supplying alcohol to employee), *aff'd,* 389 N.Y.S.2d 631 (App. Div. 1976); Cognini v. Portersville Valve Co., 458 A.2d 1384, 1387 (Pa. Super. Ct. 1983) (dram shop act not extended to employer who furnished minor employee intoxicating beverages); Halvorson v. Birchfield Boiler, Inc., 458 P.2d 897, 900 (Wash. 1969) (en banc) (liability not extended to employer who provided liquor to known alcoholic employee).

62. *See* Otis Eng'g Corp. v. Clark, 668 S.W.2d 307, 312 (Tex. 1983).

63. *See id.* at 311 (McGee, J., dissenting).

64. *See* Otis Eng'g Corp. v. Clark, 668 S.W.2d 307, 318 (Tex. 1983) (McGee, J., dissenting). The dissent especially emphasized that the lack of guidance will fuel confusion in determining the identity of affirmative acts. *See id.* at 317 (McGee, J., dissenting). Justice McGee also pointed out the tendency of future courts to use the majority opinion as a springboard for imposing liability for the dispensing of alcoholic beverages by any person. *See id.* at 318 (McGee, J., dissenting).

65. *See* Otis Eng'g Corp. v. Clark, 668 S.W.2d 307, 309-10 (Tex. 1983). The court believed that a major part of the decision-making process should be based upon the most recent societal values. *See id.* at 310. Furthermore, the *Otis* majority appeared to be prepared to make more sweeping changes in traditional concepts of duty as evidenced by their citation to *Corbin. See id.* at 310. Where the grounds for finding an existing duty are exhausted, the basic considerations of policy should be turned to in order to determine

concerns for the risks created by intoxicated drivers, it failed to clarify which particular policy reasons required the newly created duty.[66] While the court hints that drunken driver concerns are noteworthy, the majority emphatically stated that *Otis* is not a dram shop case.[67] Alternatively, it is possible that the public's need for enhanced employer liability was considered, but the court clearly announced that *Otis* was not a case of employer nonfeasance.[68] Consequently, the majority's non-specific public policy grounds raise an unanswered question as to what are the demands of society that warrant the new theory of duty.[69]

The ramifications of the *Otis* court's holding are potentially great since cases are not always confined to their facts.[70] While society demands equal and fair employment opportunities, persons with mental, social, or physical disabilities may become ever-present risks to the employer.[71]

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whether the legal rights of the plaintiff require protection from the defendant's acts. *See* D'Ambra v. United States, 338 A.2d 524, 528 (R.I. 1975).

66. *Cf.* Otis Eng'g Corp. v. Clark, 668 S.W.2d 307, 310 (Tex. 1983) (court affirmed logic of case law involving policy considerations of intoxicated drivers). The dissent clearly felt that the majority's primary policy concern was the changing view of society toward drunk driving. *See* Otis Eng'g Corp. v. Clark, 668 S.W.2d 307, 319 (Tex. 1983) (McGee, J., dissenting). Moreover, Justice McGee determined that, in the spirit of public awareness, the basis of the majority's social policy decision should have been established. *See id.* at 312-13 (McGee, J., dissenting).

67. *See* Otis Eng'g Corp. v. Clark, 668 S.W.2d 307, 309 (Tex. 1983). It may be conceded that this is not a true case of dram shop liability as Otis did not supply liquor to Matheson. *See* Brief of Amicus Curiae at 6-7, Otis Eng'g Corp. v. Clark, 668 S.W.2d 307 (Tex. 1983). But, as recognized by the minority, the underlying premise of the new duty is based in part upon concerns stemming from alcohol-related accidents. *See* Otis Eng'g Corp. v. Clark, 668 S.W.2d 307, 319 (Tex. 1983) (McGee, J., dissenting). Of all statewide accidents in 1982, 24% involved drivers under the influence of alcohol, 25% of the statewide fatalities involved alcohol, and 17% of the drivers involved in fatal accidents were reported as driving while intoxicated. *See* DEPARTMENT OF PUBLIC SAFETY, MOTOR VEHICLE TRAFFIC ACCIDENTS 36 (1982). In 1982, 37,055 out of 450,086 total accidents were attributed to driving under the influence of liquor, and of this number 919 fatalities occurred. *See id.* at 38. Because Texas law does not require the performance of chemical analysis tests upon all drivers killed in an accident, these figures may not represent all drivers who were intoxicated at the time of death. *See id.* at 36.

68. *See* Otis Eng'g Corp. v. Clark, 668 S.W.2d 307, 309 (Tex. 1983).

69. *See* Petitioner's Motion for Rehearing at 5, Otis Eng'g Corp. v. Clark, 668 S.W.2d 307 (Tex. 1983) (*Otis* court failed to provide empirical or practical ground for imposition of duty). Generally, society makes its demands for change through the legislature, and, as evidenced by the failure of the bills in the recent session, society is not demanding that anyone other than the intoxicated person be held liable for his acts. *See id.* at 5-6. It has been conceded by certain members of the legislature that there is no support in the Capitol for such liability. *See* Dallas Morning News, Dec. 6, 1983, at 1.

70. *See* Otis Eng'g Corp. v. Clark, 668 S.W.2d 307, 319 (Tex. 1983) (McGee, J., dissenting).

71. *See* Argument of Amicus Curiae, Texas Ass'n of Business, In Support of Peti-

Employers will be faced with the dilemma of screening out potentially risky employees,[72] or of being forced to terminate the employment relationship in order to escape liability.[73] Moreover, the majority seems to impose upon the employer a duty to be a "Good Samaritan," which would encompass a duty to persuade the employee to act contrary to his desires, such as forcing him to remain in a nurse's station or accepting a ride home.[74] In addition to the affect the *Otis* holding will have on the employment relationship, the pronouncements of the Texas Supreme Court may also extend to the social host.[75] Future liability, such as that found in other states, could conceivably be imposed upon the social host who allows his inebriated guest to drive.[76]

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tioner's Motion for Rehearing at 13-15, Otis Eng'g Corp. v. Clark, 668 S.W.2d 307 (Tex. 1983). Any employer who receives federal funds, or is a government contractor or subcontractor, is subject to the Rehabilitation Act of 1973. *See* Rehabilitation Act of 1973, § 504, 29 U.S.C. § 794 (Supp. IV 1980). The Act prohibits employers from denying employment opportunities because of a handicap. *See id.* The definition of a handicapped person encompasses persons with a physical or mental impairment, or those who are regarded as having an impairment. *See id.* § 706(7)(B). This definition has been construed to include alcoholism. *See* Department of Labor Regulations, 29 C.F.R. § 32.3 (1981). Essentially, the definition could include epilepsy, visual disorders, those persons with histories of anti-social behavior, and other impairments which could pose concerns to an employer. *See* Argument of Amicus Curiae, Texas Ass'n of Business, In Support of Petitioner's Motion for Rehearing at 14-20, Otis Eng'g Corp. v. Clark, 668 S.W.2d 307 (Tex. 1983); *see also* Otis Eng'g Corp. v. Clark, 668 S.W.2d 307, 318 (Tex. 1983) (McGee, J., dissenting) (inadequate guidance provided for employers for matters of hiring).

72. *See* Argument of Amicus Curiae, Texas Ass'n of Business, In Support of Petitioner's Motion for Rehearing at 13-14, Otis Eng'g Corp. v. Clark, 668 S.W.2d 307 (Tex. 1983).

73. *See* Petitioner's Motion for Rehearing at 11-12, Otis Eng'g Corp. v. Clark, 668 S.W.2d 307 (Tex. 1983). The majority took into consideration whether Otis acted reasonably by allowing Matheson to leave work early rather than immediately terminating the employment relationship. *See* Otis Eng'g Corp. v. Clark, 668 S.W.2d 307, 311 (Tex. 1983).

74. *See* Brief of Amicus Curiae at 12-13, Otis Eng'g Corp. v. Clark, 668 S.W.2d 307 (Tex. 1983). The Good Samaritan extension of the new duty would pose a hardship upon those employers who could not easily provide for nurse's stations, the loss of a fellow worker to escort the incapacitated person home, or the other alternatives suggested by the majority. *See* Otis Eng'g Corp. v. Clark, 668 S.W.2d 307, 317-18 (Tex. 1983) (McGee, J., dissenting). An employer who recognizes a duty to restrain may be subject to actions in false imprisonment should the employer be unable to persuade the employee to take an alternative course of action. *See id.* at 318 (McGee, J., dissenting). In order to avoid liability for false imprisonment, the employer must be given a legal right to act. *See id.* at 318 (McGee, J., dissenting).

75. *See* Petitioner's Motion for Rehearing at 12-14, Otis Eng'g Corp. v. Clark, 668 S.W.2d 307 (Tex. 1983). The alternatives to imposing employer liability suggested by the *Otis* majority may be transmuted to the social host who, because of providing intoxicating beverages, will be forced to provide a bed for inebriated guests, or find another way to get him home without allowing him to operate an automobile. *See id.* at 13.

76. *See id.* at 12-13. Three states have imposed liability upon a social host. *See* Coulter

A final consideration of the *Otis* holding is the issue of summary judgment.[77] Pursuant to rule 166-A of the Texas Rules of Civil Procedure,[78] the issues to be considered on appeal of a summary judgment are only those presented at the trial level.[79] While the Texas Supreme Court has consistently required a strict reading of this rule,[80] the *Otis* court addressed an issue of misfeasance when the issue before the trial court was nonfeasance.[81] The failure of the majority to recognize the irregular presentment of the issues on appeal is an instance of circumventing the provisions of rule 166-A.[82] Alternatively, the court has perhaps created an exception to the rule when issues as closely related as misfeasance and nonfeasance are before the court.[83] The *Otis* majority determined that an employer may have a duty to restrain an intoxicated employee or be held liable for the employee's off-duty torts.[84]

The court chose to apply the element of foreseeability to their threshold determination of the existence of a duty, and, in so doing, redefined the traditional concepts of negligence actions in Texas by removing this issue from the jury's consideration. Further, the court stated that their reason-

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v. Superior Court, 577 P.2d 669, 671-73, 145 Cal. Rptr. 534, 537 (1978) (passenger in car brought suit against apartment complex for causing driver's intoxication by allowing her to drink excessively at complex party; court reasoned that "all persons" are subject to liability for furnishing alcohol to intoxicated persons); Williams v. Klemesrud, 197 N.W.2d 614, 615 (Iowa 1972) (defendant held liable for purchase of liquor for plaintiff, who brought suit for injuries sustained from driving intoxicated); Ross v. Ross, 200 N.W.2d 149, 153 (Minn. 1972) (liability imposed upon defendant for providing alcohol to under-aged brother who was killed while operating vehicle intoxicated).

77. *See* Otis Eng'g Corp. v. Clark, 668 S.W.2d 307, 311 (Tex. 1983) (court denies summary judgment).

78. *See* TEX. R. CIV. P. 166-A.

79. *See id.* 166-A(c). "Issues not expressly presented to the trial court by a written motion, answer or other response shall not be considered on appeal as grounds for reversal." *Id.* 166-A(c).

80. *See* City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671, 677 (Tex. 1979) (general pleadings may not form basis of summary judgment issues). The answer to a motion for summary judgment must clearly notify the opponent and court of the non-movant's contentions. *See id.* at 678. Neither new grounds nor abandoned grounds from outside of this response may be raised on appeal. *See id.* at 675.

81. *Compare* Otis Eng'g Corp. v. Clark, 668 S.W.2d 307, 311 (Tex. 1983) (failure to restrain is affirmative act giving rise to duty) *with* Plaintiff's Response to Defendant's Motion for Summary Judgment at 2, Otis Eng'g Corp. v. Clark, 668 S.W.2d 307 (Tex. 1983) (failure to act constituted breach of duty).

82. *See* Amicus Curiae Brief in Support of Rehearing at 4-6, Otis Eng'g Corp. v. Clark, 668 S.W.2d 307 (Tex. 1983). By permitting the Clarks to raise new issues on appeal, the court appears to be discounting established principles. *See id.* at 6-7.

83. *Cf.* Otis Eng'g Corp. v. Clark, 668 S.W.2d 307, 314-15 (Tex. 1983) (McGee, J., dissenting) (by failing to establish affirmative acts giving rise to duty and basing holding on failure to restrain (nonfeasance), the court has confused the true issue).

84. *See* Otis Eng'g Corp. v. Clark, 668 S.W.2d 307, 311 (Tex. 1983).

ing was in conformity with current social standards, but their logic specifically excludes the key societal concerns of the employer-employee relationship and dram shop liability. Because of the potential future applications of the *Otis* holding, the employment relationship presently enjoyed will be strained, and the social host will be forced to examine his potential liability before serving alcohol to his guests. Clearly, *Otis* is a case that will not be confined to its facts.[85]

M. Jenifer Osment

85. The *Otis* case was subsequently settled for an amount not yet available at the time of this writing. *See* Otis Eng'g Corp. v. Clark, No. 79-3882-J (Dist. Ct. of Dallas County, 191st Judicial Dist. of Texas, Sept. 17, 1984).