Will owners of licensed premises soon find themselves liable to patrons and employees injured by glassware, because a safer alternative to the traditional glass should have been adopted? What factors are considered in deciding whether and when technology should be adopted, and whether a licensee falls below the required standard? Can a licensee ever be liable for injuries caused deliberately by a patron using a glass?

In the United Kingdom, there are some 87,000 violent glass-related incidents annually, including 5,500 ‘glassings’, where glass is used as a weapon. The annual cost to the National Health Service of one million alcohol-related violent incidents is estimated at £2.7bn. Alcohol-related violence is a major challenge for government.

The Home Office, as part of its ‘Design Out Crime’ initiative, is considering design-led approaches to reducing the risk and extent of glass injuries, and recently announced that a specialist design consultancy has developed revolutionary glass-based prototypes as safer alternatives to the traditional pint glass. The prototypes comprise resin which binds together potentially dangerous shards of glass if broken, similar to laminated car windscreens and almost eliminating the risk of injury.

Will licensees soon need to adopt alternatives to the traditional pint glass? Should they be doing so already?

There are 3 main issues. Liability might arise to:

- Patrons injured accidentally by glass;
- Employees; and
- Patrons injured deliberately by another patron using glass.

**Liability to patrons injured accidentally by glass**

Patrons may sustain injury from broken glassware, perhaps knocked over at a table or dropped by other patrons or staff on the floor of a crowded bar. Injured patrons may face difficulty identifying the culprit, who may lack the means to pay compensation, and so may try to claim against the licensee, on the basis of an alleged negligent failure to put in place a reasonable system of inspection and cleaning up. A reasonable system, however, in a bustling environment, does not necessarily require constant inspections and immediate clear-ups, and so licensees might not have breached their duty. Is there an alternative claim – that glass should not be used in the premises anyway?

The starting point is that licensees owe a duty of
care in negligence to take reasonable care for the safety of their patrons. In continuing to serve drinks in traditional glasses, rather than a safer alternative, does a licensee fall below the standard expected?

When determining the appropriate standard, courts consider several factors, the most significant of which are the likelihood of harm, the seriousness of the consequences and the practicability of preventive measures.

The more likely it is that harm will result, the higher the standard of care expected. In Glasgow Corporation v Muir [1943] AC 448, a case in which guests were injured when a hot urn was dropped, Lord Macmillan noted:

... it may be said generally that the degree of care required varies directly with the risk involved.

In licensed premises, the likelihood of harm increases over the course of an evening, as patrons consume alcohol, become less appreciative of risks and hazards, take less care for their safety and that of others, and the risk of aggressive, disorderly, or offensive behaviour increases: see, for example, the South Australian Supreme Court’s decision in Lanahmede Pty Ltd v Koch [2004] SASC 204.

Over 126 million pints are served each week in pubs and clubs. The recorded data on glass-related violence represent a tiny proportion of the number of pints served. The likelihood of harm, statistically, is low indeed. But that is not the end of the matter.

The courts consider the seriousness of the harm. The more serious the harm, the higher the standard expected. As Singleton LJ pithily put it in Beckett v Newalls Insulation Co Ltd. [1953] 1 WLR 8:

... the law expects of a man a great deal more care in carrying a pound of dynamite than a pound of butter

Might the same be said of a licensee supplying traditional glassware to its patrons rather than a safer alternative? Broken glass obviously has the potential to cause very severe, sometimes fatal, injuries.

The next factor considered is the reasonable practicability of preventive measures. What is reasonably practicable depends on the cost of the measures (Latimer v AEC Ltd [1953] AC 643), the ease with which the measures could be implemented (Paris v Stepney Borough Council [1951] AC 367) and when any preventive measures would or should have been available (Davies v Global Strategies Group Hong Kong Ltd [2009] EWHC 2342).

There is a vibrant ongoing debate in the hospitality industry about the challenges of any move away from traditional glassware. Much debate focuses on polycarbonate vessels made of toughened plastic (rather than the safer glass-based prototypes recently announced). Aside from practicality issues of customer loyalty, 'look and feel' and storage/stability, the estimated cost of a quality polycarbonate does not compare well either with that of a traditional toughened glass or cheap tempered pint glass.

With safer glass-based solutions, such as the new prototypes, disruption for volume glassware manufacturers should be minimised, and their designers estimate that it would be broadly cost-neutral. That remains to be seen. With many venues closing in the present straitened times, any additional cost burden is unwelcome.

The average lifespan of the traditional glass is estimated at just 3 months. If a safer, cost-neutral alternative was to be commercially available, it would seem viable to phase introduc-
tion of any new glasses gradually as they needed to be replaced.

Not only costs incurred, but also costs saved, need to be considered. One director of the UK’s largest nightclub operator has suggested the company had saved £200,000 after introducing polycarbonates, because of reduced insurance claims by customers injured by glass.

There are other considerations which increasingly play a prominent part in fixing the appropriate standard. In the Australian case of Western Suburbs Hospital v Currie (1987) 9 NSWLR 511, McHugh JA noted:

Negligence is not an economic cost/benefit equation. Immeasurable ‘soft’ values such as community concepts of justice, health, life and freedom of conduct have to be taken into account.

These ‘soft’ values can be significant, and show that likelihood of harm, seriousness of harm and practicability of preventive measures are not determinative. In Tomlinson v Congleton Borough Council [2004] 1 AC 46, Lord Hoffman noted that the balancing exercise, taking into account those factors:

... may lead to the conclusion that even though injury is foreseeable ... it is still in all the circumstances reasonable to do nothing about it.

One feature in determining the expected standard is whether a common industry practice is being followed. Following such practice may be strong evidence of there being no breach: Luxmoore-May v Messenger May Baverstock [1990] 1 WLR 1009, but not necessarily: Thompson v Smiths Shipyreappers (North Shields) Ltd [1984] QB 405. In the leading employers’ liability case of Stokes v Guest Keen and

Nettlefield Bolts and Nuts Ltd [1968] 1 WLR 1776 Swanwick J said:

... where there is a recognised and general practice which has been followed for a substantial period in similar circumstances without mishap, he is entitled to follow it, unless in the light of common-sense or newer knowledge it is clearly bad; but, where there is developing knowledge, he must keep reasonably abreast of it and not be too slow to apply it; and where he has in fact greater than average knowledge of the risks, he may be thereby obliged to take more than the average of standard precautions.

Common practice and the expected standard of care evolve with developments in knowledge, business and technology. In Donoghue v Stevenson [1932] AC 502, Lord Macmillan noted that legal responsibility:

... may develop in adaptation to altering social conditions and standards. The criterion of judgment must adjust and adapt itself to the changing circumstances of life.

The courts apply different standards of care at different times: Thompson v Smiths Shipyreappers (North Shields) Ltd [1984] QB 405, where Mustill LJ reflected on the related duty (in that case on employers) to keep up to date with changes in trade practice:

... the standard of what is negligent is influenced, although not decisively, by the practice in the industry as a whole. ... The employer must keep up to date, but the court must be slow to blame him for not ploughing a lone furrow.
Inevitably, innovations take time to gain usage and acceptability, and an employer ‘is not bound at once to adopt all the latest improvements and appliances.’ (per Sir Arthur Channell in the Privy Council decision in *Toronto Power Company Limited v Paskwan* [1915] AC 734 at 738).

Courts are increasingly less deferential to common practice, and show increasing willingness to decide for themselves whether a practice is reasonable or not. It is clear that the traditional pint glass still prevails as common trade practice, but there are some growing signs of changes in practice.

There are other drivers of change, towards reducing risks of glass-related injury. In some areas, local licensing authorities, with the backing of police, have used powers in the Licensing Act 2003 to impose conditions on premises licences that require drinks to be served in non-glass alternatives. Considerable industry and consumer opposition has sometimes prompted a more tailored approach, restricting the conditions to ‘problem’ establishments or for drinks served after a certain time. Drinks are almost always provided in non-glass alternatives at live music venues and sporting events. Rather than imposing a mandatory licensing condition, some local voluntary codes of practice contain similar provisions to the licensing conditions discussed above. This risk-based approach recognises the increased likelihood of harm from glass-related accident, attack and injury in the later evening. It also recognises the ‘soft’ values of personal freedom (to use pint glasses where the risk is lower, in the earlier course of the evening) and the need to avoid disproportionate interference where the risk is lower. Industry practice is slowly showing signs of change towards an increasing recognition of the benefits of safer alternatives to traditional glass.

### Liability to employees

Another dimension of a licensee’s potential liability is its responsibility to employees. In 1994, a study noted that 40% of accidental injuries to bar workers were as a result of broken glass, one third of which needed hospital treatment (Luke, L.C. [2002] ‘A little nightclub medicine: the healthcare implications of clubbing.’ 19 Emergency Medical Journal 542-545).

There are two core duties owed to employees: a duty in negligence to provide a reasonably safe system of work, workplace, equipment and colleagues, and duties under health and safety legislation. The duty in negligence mirrors closely the issues described earlier, although the courts have considered ‘system of work’ broadly, finding employers liable for working practices which put employees at risk of attack by others (for example *Rahman v Arearose* [2001] QB 351).

Space does not permit here an analysis of the employers’ duties under health and safety legislation, but there are well-known requirements to undertake suitable and sufficient assessment of risks to the health and safety of employees and to take steps to control those risks, using ‘principles of prevention’ in Schedule 1 to the Management of Health and Safety at Work Regulations 1999 which include ‘adapting to technical progress’, ‘replacing the dangerous by the non-dangerous or the less dangerous’ and ‘developing a coherent overall prevention policy which covers technology, organisation of work, working conditions, social relationships and the influence of factors relating to the working environment.’
Liability to patrons injured deliberately by glass

Can a licensee be liable for a deliberate attack by one patron on another, using glass as a weapon?

A claimant faces a practical uphill struggle in claiming against an assailant – who, even if identified, will be uninsured for such liability and probably not be to meet any sizeable award of compensation. The claimant may have some limited redress under the Criminal Injuries Compensation Scheme, or may try to bring a claim against someone else, such as a licensee.

Courts very rarely find in favour of claimants making claims against persons other than the assailant. In Mitchell v Glasgow City Council [2009] 1 AC 874, Baroness Hale noted that attackers:

... are presumed to be grown-ups with minds of their own who can make their own choices about how to behave. The liability is theirs and the fact that they may have no means to pay is not by itself a good enough reason to transfer the liability to someone else.

In an earlier tour operator case, Williams v First Choice Holidays and Flights Limited [2001] CLY 4282, unreported, Warrington County Court, the claimant was injured at a ‘Greek Night’ organised by the defendants, when a fellow guest smashed a fragile china plate into her foot (rather than the safer plaster plates provided). The Judge dismissed the claim, finding it unfair to transfer the burden of liability to the tour operator, in circumstances where the other guest was clearly personally liable. (For a discussion of this, see Bates, J. ‘Not so duty free’ [2009] TLQ 127).

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The situation may be different, however, in very extreme cases where the attacker is provided with the means to carry out the attack. In Attorney-General of the British Virgin Islands v Hartwell [2004] 1 WLR 1273, the Privy Council held a police authority liable for allowing an officer access to a firearm which he then misused to injure others. Closer to home, in Cunningham v Reading Football Club Ltd [1992] PIQR 141, Drake J. found the defendant club liable to policemen injured in attacks by football hooligans using concrete from the decaying structure of a stadium. In both cases, there was very strong evidence that the defendants knew of the particularly high likelihood of injury in the specific circumstances, and failed to take reasonable steps to abate it.

Conclusion

Times are changing, and the serious social problem of alcohol-related violence is fuelling a political will, at national and local government, for change towards safer alternatives to traditional glass, to reduce the risk and extent of injuries from glass. This risk-based approach dovetails with the considerations the courts will apply in determining whether a licensee falls below the standard expected by serving drinks in traditional glassware. Inevitably, technological changes and the establishment of a market in new safer alternatives will take time, and, whilst
no imminent change in the standard of care in negligence is likely, other drivers, including insurance risk concerns and the imposition of risk-based licensing conditions are powerful pressures with greater capacity to change practice more quickly. The direction of travel seems settled. Is it time to think about changing your glasses now?

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