SAL FELLA,	:	IN THE COURT OF COMMON PLEAS OF
	:	LYCOMING COUNTY, PENNSYLVANIA
Plaintiff	:	
	:	
vs.	:	NO. 05-00,663
	:	
LINCHRIS HOTEL CORP., t/a RADISSON HOTEL,	:	
	:	
Defendant	:	PRELIMINARY OBJECTIONS

Date: June 23, 2005

OPINION and ORDER

Before the court for determination are the Preliminary Objections of Defendant Linchris Hotel Corporation, t/a Radisson Hotel, (hereafter "Linchris") filed April 29, 2005. The court will deny in part and grant in part the preliminary objections.

Background

The present preliminary objections are to Plaintiff Sal Fella's (hereafter "Fella") complaint filed April 8, 2005. The complaint alleges the following facts. Linchris owns and operates the Radisson Hotel located at 100 Pine Street in Williamsport, Pennsylvania. Linchris also owns and operates a tavern, Mango's Tropical Café, which is located within the Radisson Hotel. On August 10, 2003, Fella was a patron of Mango's, as was an unidentified individual. Fella contends that Mango's served this individual alcohol despite his visible intoxication. Shortly after midnight, the unidentified individual struck Fella over the head with a beer bottle. This caused Fella to sustain personal injury in the form of facial lacerations and property damage in the form of broken glasses. Fella's first cause of action

asserts a claim for these injuries based upon Linchris' failure to protect Fella from the assailant.

Fella contends that Mango's had video surveillance cameras present in the tavern. Fella believes that the surveillance cameras captured the attack and would enable him to identify his assailant. Fella has averred that by Linhcris' failure to preserve the videotapes from the cameras he has been denied access to this crucial evidence, which would permit him to identify and sue his assailant. Fella's second cause of action asserts the tort of spoliation of evidence based upon his inability to identify his assailant without the video tapes.

In the preliminary objections, Linchris raises demurrers to both counts of Fella's complaint. Linchris asserts that Fella has failed to plead sufficient facts to establish a negligence claim in Count I of the complaint. Linchris argues that Fella has failed to establish that it owed him a duty to protect against the conduct of his assailant because Fella has failed to allege why or how Linchris knew or should have known that Fella's assailant posed a risk of harm. With regard to Count II of the complaint, Linchris asserts that it is legally insufficient because Pennsylvania does not recognize a separate tort for spoliation of evidence. In support of this argument, Linchris cites to ***Elias v. Lancaster General Hospital***, 710 A.2d 65 (Pa. Super. 1998).

Discussion

Before addressing the merits of the issues, it is appropriate to set forth the standard by which the preliminary objections will be determined. A preliminary objection in the form of a demurrer tests the legal sufficiency of a pleading. ***Ins. Adjustment Bureau, Inc. v. Allstate Ins. Co.***, 860 A.2d 1038, 1041 (Pa. Super. 2004). A demurrer will be granted where the

challenged pleading is legally insufficient. ***Williams v. Nationwide Mut. Ins. Co.***, 750 A.2d 881, 883 (Pa. Super. 2000). That is, a demurrer will be granted when it is clear from the facts that the party has failed to state a claim upon which relief may be granted. ***Sunbeam Corp. v. Liberty Mut. Ins. Co.***, 781 A.2d 1185, 1191 (Pa. 2001).

The demurrer must be resolved solely on the basis of the pleading; no testimony or evidence outside of the pleading may be considered. ***Williams***, 750 A.2d at 883. Furthermore, the court may not address the merits of the matter presented in the pleading. ***In re S.P.T.***, 783 A.2d 779, 781 (Pa. Super. 2001). All material facts set forth in the pleading as well as all inferences reasonably deducible therefrom shall be admitted as true for purposes of deciding the demurrer. ***Willet v. Pennsylvania Med. Catastrophe Loss Fund***, 702 A.2d 850, 853 (Pa. 1997); ***Ins. Adjustment Bureau***, 860 A.2d at 1041. " 'The question presented by the demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible. Where any doubt exists as to whether a demurrer should be sustained, it should be resolved in favor of overruling the demurrer.'" ***Ins. Adjustment Bureau***, 860 A.2d at 1041 (quoting ***Vulcan v. United of Omaha Life Ins. Co.***, 715 A.2d 1169, 1172 (Pa. Super. 1998)).

I. Demurrer to Negligence Claim

The court will first address the demurrer to the negligence claim in Count I of the complaint. A plaintiff must prove four elements to make out a negligence cause of action. A plaintiff must establish: (1) the existence of a duty or obligation recognized by law, requiring the actor to conform to a certain standard of conduct; (2) a failure on the part of the defendant to conform to that duty, or breach thereof; (3) a causal connection between the defendant's breach and the resulting injury; and (4) actual loss or damage suffered by the complainant.

Atcovitz v. Gulph Mills Tennis Club, 812 A.2d 1218, 1222 (Pa. 2002); ***Rabutino v. Freedom State Realty Co.***, 809 A.2d 933, 938 (Pa. Super. 2002). "The primary element in any negligence cause of action is that the defendant owes a duty of care to the plaintiff." ***Althaus by Althaus v. Cohen***, 756 A.2d 1166, 1168 (Pa. 2000); ***Gutteridge v. A.P. Servs., Inc.***, 804 A.2d 643, 655 (Pa. Super. 2002), *app. denied*, 829 A.2d 1158 (Pa. 2003). Whether a duty should be imposed is a question of law for the court to decide. ***Sharpe v. St Luke's Hosp.***, 821 A.2d 1215, 1219 (Pa. 2003); ***Brisbine v. Outside In Sch. of Experimental Educ., Inc.***, 799 A.2d 89, 95 (Pa. Super. 2002), *app. denied*, 816 A.2d 1101 (Pa. 2003).

"Generally, there is no duty to control the acts of a third party unless the 'defendant stands in some special relationship with either the person whose conduct needs to be controlled or with the intended victim of the conduct, which gives the intended victim a right to protection.'" ***Rabutino***, 809 A.2d at 938 (quoting ***Brezenski v. World Truck Transfer, Inc.***, 755 A.2d 36, 40 (Pa. Super. 2000)); ***Brisbine***, 799 A.2d at 93. "Therefore, 'as a general rule, a person is not liable for the criminal conduct of another in the absence of a special relationship imposing a pre-existing duty.'" ***T.A. v. Allen***, 669 A.2d 360, 362 (Pa. Super. 1995) (quoting ***Elbasher v. Simco-Sales Serv. of Pennsylvania***, 657 A.2d 983, 984 (Pa. Super. 1995)), *app. denied*, 676 A.2d 1201 (Pa. 1996). A special relationship exists between a possessor of land who holds it open to the public and those members of the public who enter the land. Restatement (Second) of Torts §318A (1967); *See*, ***Prather v. H-K Corp.***, 423 A.2d 385 (Pa. Super. 1980) (A tavern owner owed a duty to his patrons to protect them from harm caused by other patrons).

In ***Moran v. Valley Forge Drive-In Theater, Incorporated***, the Pennsylvania Supreme Court adopted Section 344 of the Restatement (Second) of Torts to define the duty a possessor of land who holds open his land to the public owes to those who enter the land with regard to the conduct of third persons. 246 A.2d 875, 878 (Pa. 1968). Section 344 states:

> § 344 Business Premises Open to Public: Acts of Third Persons or Animals
>
> A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to
>
> (a) discover that such acts are being done or are likely to be done, or
>
> (b) give a warning adequate to enable the visitors to avoid, or otherwise protect them against it.

Restatement (Second) Torts §344 (1967). Under §344, a possessor of land who holds it open to the public is required to take reasonable measures to control the conduct of third persons or give adequate warning to enable patrons to avoid possible harm. ***Moran***, 246 A.2d at 879. The reason for imposition of this duty was expressed in ***Feld v. Merriam***, 485 A.2d 742 (Pa. 1984). The Pennsylvania Supreme Court stated:

> The reason is clear; places to which the general public are invited might indeed anticipate, either from common experience or known fact, that places of general public resort are also places where what men can do, they might. One who invites all may reasonably expect that all might not behave, and bears responsibility for injury that follows the absence of reasonable precaution against that common expectation.

Id. at 745.

However, a possessor of land is not the insurer of his patrons' safety and is not required to provide an absolute protection. ***Moran***, 249 A.2d at 879.

> Since the possessor is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring, or are about to occur. He may, however, know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual. If the place or character of his business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection.

Restatement (Second) of Torts §344, cmt.f; *See also*, ***Moran***, 249 A.2d at 879; ***Rabutino***, 809 A.2d at 939. Therefore, it is the possessor of land's duty "… take reasonable precaution against harmful third party conduct that might be reasonably anticipated." ***Rabutino***, 809 A.2d at 939.

Pennsylvania has long recognized a duty on the part of tavern owners to protect their patrons. The Pennsylvania Supreme Court stated this duty in the 19th Century case of ***Rommel v. Schambacher***:

> Where one enters a saloon or tavern, opened for the entertainment of the public, the proprietor is bound to see that he is properly protected from assaults or insults, as well of those who are in his employ, as of the drunken and vicious men whom he may choose to harbor.

11 A. 779 (Pa. 1887); *See also*, ***Ash v. 627 Bar, Inc.***, 176 A.2d 137, 139 (Pa. Super. 1961) (A tavern owner has a duty to ensure that a patron is protected from assaults and insults inflicted by other patrons, as well as the owner's employees.). Thus, a tavern owner has a duty to keep his tavern orderly and well policed. ***Ash***, 176 A.2d at 139. The imposition of this duty comes from the common experience of what all too often results from the volatile cocktail of spirituous beverages and human beings. As Justice Musmanno said, "An intoxicated person

amid a group of people is a constant source of danger and hurt to those about him. He is the proverbial bull in a china shop …." ***Corcoran v. McNeal***, 161 A.2d 367, 369 (Pa. 1960).

The complaint sufficiently alleges that Linchris owed Fella a duty of care. The complaint has alleged that Linchris is a tavern owner and that Fella was a patron of that tavern. Therefore, under ***Rommel***and ***Ash***Linchris had a duty to protect Fella from the drunken assaults of other patrons of Linchris' tavern.

Fella is not required to plead that Linchris knew or should have known that this specific assailant posed a risk of harm to Fella in order to establish that Linchris owed Fella a duty. A drunken assault by one patron upon another is a type of harmful conduct that a tavern owner may reasonably anticipate. The character of the tavern business leads to this conclusion. Common experience tells us that drink may turn *any* patron into that bull in a china shop or possibly an even more fearsome beast. It is the democratic nature of alcohol and its sometimes unpredictable and volatile effect necessitates the imposition of the duty to protect regardless of particular patrons' conduct. The duty to protect is not created by the manifestation of harm in the form of a drunken patron running amuck in the tavern. The duty is imposed prior to this so that precautions may be taken to ensure that any such patron does not cause harm to the other patrons.

Accordingly, the demurrer to the negligence claim is denied.

II. Demurrer to Spoliation of Evidence Claim

The court will now address the demurrer to the spoliation claim asserted in Count II. The Commonwealth of Pennsylvania does not recognize a separate cause of action for

spoliation of evidence. ***Elias***, 710 A.2d at 67. Accordingly, the demurrer to the spoliation claim is granted.

A claim based upon the destruction or discarding of evidence sounds in negligence. *See*, ***Elias***, 710 A.2d at 68. As such, Fella's claim against Linchris regarding the alleged spoliation of the surveillance videotapes must be based on negligence. In order to bring a negligence claim involving the destruction or discarding of evidence, it is necessary to establish a duty to preserve the evidence. ***Ibid***. Therefore, the paramount issue would be to establish whether Linchris owed Fella a duty to preserve the videotapes.

The court believes that Fella will be unable to establish this duty as a matter of law in light of ***Stupka v. Peoples Cab Company***, 264 A.2d 373 (Pa. 1970). In ***Stupka***, the Pennsylvania Supreme Court held that a cab company did not owe a duty to its passengers to obtain information from individuals involved in accidents with its cabs to permit the passengers to bring suit against those individuals. In declining to impose such a duty, the Supreme Court was of the opinion that the cab company's primary duty was to ensure the physical safety and wellbeing of its passengers. *See*, ***Id***. at 374. This duty to protect the passengers did not encompass the duty to protect the passenger's financial interests. ***Ibid***. Similarly, a tavern owner's primary duty with regard to its patrons is to protect their physical safety and wellbeing. As with the cab company, this duty does not include that of the patron's financial interests, which would include damages resulting from injury to person or property.

Conclusion

The preliminary objections are denied in part and granted in part.

ORDER

It is hereby Ordered that Preliminary Objections of Defendant Linchris Hotel Corporation, t/a Radisson Hotel, filed April 29, 2005 are DENIED IN PART and GRANTED IN PART.

The Preliminary Objections are DENIED IN PART in that the demurrer to the negligence claim in Count I of the complaint is DENIED.

The Preliminary Objections are GRANTED IN PART in that the demurrer to the spoliation of evidence claim in Count II of the complaint is GRANTED. Count II of the complaint is hereby DISMISSED.

Plaintiff shall have twenty (20) days from notice of this Order to file an amended complaint.

BY THE COURT:

William S. Kieser, Judge

cc: John Butterfield, Esquire
John P. Finnerty, Esquire
Judges
Christian J. Kalaus, Esquire
Gary L. Weber, Esquire (Lycoming Reporter)