

CHANGING INNKEEPERS' STANDARD OF CARE: CRIMINAL BACKGROUND CHECKS FOR PROSPECTIVE EMPLOYEES

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As a traveler, hotel guests have come to expect quality service, cleanliness, and safety as part of a pleasant and satisfying hotel stay. During the past several decades, safety and security have become more important to travelers. When staying at a lodging facility, guests expect the owners, managers, and/or operators of hotels to provide a reasonable degree of protection from guest injury or harm. In the United States, this determination of "reasonable" varies widely among state statutes and judicial interpretations. In an attempt to improve protection of guests who secure paid lodging accommodations, a Mt. Lebanon, Pennsylvania, couple has initiated a grass-roots-level crusade to nationalize the standard of care innkeepers must take when hiring employees. The murder of their daughter has spurred a national movement with the goal of improving guest safety and security. This research examines the importance of an employer conducting criminal background checks on prospective employees and examines the role of Nan's Law in the hospitality industry.

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As a traveler, hotel guests have come to expect quality service, cleanliness, and safety as part of a pleasant and satisfying hotel stay. During the past several decades, safety and security have become more important to travelers. Incidents including the bombing of Pan Am Flight 103 over Lockerbie, Scotland (Harris, 2003), the German tourist murders of the early 1990s in Miami, Florida (Ruggless, 1994), and the September 11th 2001 terrorist attacks made world headlines. Trepidation while traveling due to these well-publicized events is omnipresent across cultures, age levels, and traveler personal demographics.

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In an attempt to improve protection of guests who secure paid lodging accommodations, a Mt. Lebanon, Pennsylvania, couple has initiated a grass-roots-level crusade to nationalize the standard of care innkeepers must take when hiring employees. The murder of their daughter has spurred a national movement with the goal of improving guest safety and security.

"In 1996, Nan Toder was murdered at age 33 in a suburban Chicago hotel by the facility's maintenance manager. Investigators said Christopher Richee used his master key to enter an unoccupied room next to hers, rig the door between her room and the empty one, and then slip in and bludgeon her to death" (Silver, 2003).

After Nan Toder's death, her parents filed a civil lawsuit against the owners of the Hampton Inn in Crestwood, Ill. alleging that the owners and managers had been negligent in failing to do a background check on employees, had ineffectual security systems, and had no method of controlling room keys. In mid 2003, the Toders agreed to a \$4.6 million settlement with the defendants (Silver, 2003). The Toders contend that a background check would have turned up Richee's criminal record and might have led the Hampton Inn to think twice about hiring him as their maintenance manager and giving him access to all rooms.

During the murder investigation, it was learned that Richee had a history of criminal behavior, including the unlawful use of a weapon and allegations of stalking a female co-worker (Carrino, Migdal, & Norman, 2004). In addition, according to the www.nanslaw.org webpage (2004), Richee was known to the local police for harassing girlfriends. His former employer suspected him of a major burglary. The Hampton Inn's manager even recounted to police that the murderer told her he liked to pull the wings off birds to watch them die, and throw cats into wood chippers.

Although none of the latter allegations would have shown up on a criminal background check, the unlawful use of a weapon and stalking of a female co-worker would have.

Currently, there are no federal or state laws requiring innkeepers' to conduct criminal background checks on employees and no industry-wide safety standard on this subject. While many hotel chains do indeed perform such checks, smaller "mom and pop" operations may not have the budget to implement such a practice. Further, criminal background checks may be local, regional, statewide, national, or international with a larger scope commanding a higher price per individual check (Silver, 2003). The Toders contend that a nationwide background check would only cost about \$40.00 per individual. Hotel operators and owners would be obligated to pay for the criminal background checks on applicants for each of many positions that have guest room access.

Given that, historically, the hotel industry has suffered from high turnover rates, often exceeding the rates of other industries (Ricci & Milman, 2002), innkeepers required to perform a criminal background check on every prospective employee who would have access to a guest room would have a heavy burden to bear. It is quite common for hotel employees from all departments such as housekeeping, front desk, engineering, food and beverage, as well as sales and marketing to need guest room access at various times to perform their duties. However well-intentioned the motive, such a law could cost hotel operators and owners tens of thousands of dollars a year.

According to Nan Toder's father, Sol, many hotel guests erroneously think this type of law is already in place. As part of their criminal background check crusade, Sol and his wife enlisted the help of Pennsylvania State Representative Tom Stevenson, R-Mt. Lebanon (Silver, 2003) to draft a bill on this issue. Recently, their movement achieved what might be construed as the first step on the road to setting a national criminal background check requirement on innkeepers. On January 21, 2004, the Pennsylvania State General Assembly heard testimony on Pennsylvania House Bill 1350 that would require lodging establishments to perform criminal background checks on job applicants who would have access to guest rooms, if hired (Toder & Toder, 2004). The bill, currently under review by the Pennsylvania House Tourism and Recreational Development Committee, if passed, will be referred to as "Nan's Law."

Respondeat Superior and Negligent Hiring

While many travelers would agree that conducting criminal background checks on employees in certain job capacities appears to be reasonable on its face, the question of whether lodging establishment should be *required* by law to perform background checks on employees is not as

simple as it may appear. The concepts of respondeat superior and negligent hiring have long been used to impose civil liability on employers for the tortious acts of their employees. Suing an employer under the principle of respondeat superior is more limited than suing under the theory of negligent hiring because in order for a plaintiff to win against an employer under respondeat superior, the plaintiff must show that the employee committed the tortious act “while in the scope” of his employment (Restatement Second of Agency, 1958). This can be problematic at times since the scope of an employee’s job is not always clearly delineated.

In determining if an employee’s act was indeed within the scope of his employment, courts have generally looked at whether the employee’s act was in furtherance of the employer’s goals, authorized to be done by the employer, or specifically stated as part of the employee’s job description (Restatement Second of Agency, 1958). If these conditions do not exist, then the concept of respondeat superior will not be applied and the employer will not be held responsible for an employee’s act done outside of the scope of his or her employment. A prime example of this is when an employee commits a crime, especially a violent one against a third party, while on duty at work. Presumably, the employer did not authorize nor dictate that the employee commit such an act. In this instance, although the concept of respondeat superior would not be applicable, the theory of negligent hiring might.

As distinguished from respondeat superior, the concept of negligent hiring imposes civil liability on an employer for the acts of its employees if the employer knew or should have known that the employee was likely to behave in a dangerous manner. What makes the concept of negligent hiring so powerful is that the employer may still be liable to a third party even if the employee committed a crime while off-duty. In addition, even if the employer did not actually know about the employee’s propensity toward criminal behavior, under the theory of negligent hiring, the employer may still be liable because he or she was under a duty to exercise reasonable care in the selection of his or her employees. In some instances this may mean that in order to be free from liability under the theory of negligent hiring, employers will have to demonstrate that they conducted criminal background checks on prospective employees.

In order to reduce the liability that the concept of negligent hiring may impose on employers, two States, Louisiana and Florida, have passed laws (Fla. Stat. §768.096; La. R.S. Title 23 §291) that protect employers from civil liability if the employer has conducted a background check on a job applicant and such employee commits a tortuous act on a guest or customer. The laws do not bar a lawsuit on the basis of negligent hiring; but, the laws do create a presumption in favor of the employer that the employer was not negligent in hiring its employee. According to the Florida law, in order to create such a presumption, the employer must fulfill certain requirements:

1. Obtain a criminal background check from the Florida Department of Law Enforcement, and
2. Make a reasonable effort to contact references and former employers of the job applicant, and
3. Require the applicant to give information regarding prior criminal convictions on the employment application, and
4. If relevant to the applicant’s job, check the employee’s driving record, and
5. Interview the applicant (Fla. Stat. §768.096).

Under both the Florida and Louisiana laws, if an employer complies with the requirements of the law, and the employer finds no evidence suggesting an employee has a criminal record or a propensity for criminal acts, then the employer will be presumed innocent of negligent hiring, even if the employee did commit a crime on a third party. Nonetheless, neither Florida, Louisiana, nor any other state currently imposes the obligation on innkeepers to conduct a criminal background check of their job candidates. In certain other fields, however, such as with child-care and school employees,

employers have long been required to conduct criminal background check for all prospective employees. Since this Florida law and others like it exist, is there a reason to have Nan's Law?

Nan's Law

Although Nan's Law may appear at face value to be a good law, certain questions arise. One challenge to the proposed law is that it is too costly and cumbersome for employers to conduct thorough background checks on all prospective employees who have access to guest rooms. In addition, many criminal background checks are conducted on a local level that may not be sufficient for criminals who have moved from one location to another. Indeed, an international background check would hold the highest potential value but would also likely be the most costly.

Another difficulty of the proposed law is that, as it currently stands, Nan's Law would only mandate that innkeepers conduct a criminal background check but it does not say what the employer should do if the employer discovers that a prospective employee has a criminal record (Nan's Law, 2003). The choice to not hire an applicant who has a recent or even lengthy criminal record is easy; however, should an employer automatically reject an applicant who has one criminal conviction for an act committed many years ago, especially, if the applicant has already served his penalty? What about the case of a one-time felony conviction that is not related to the applicant's prospective job, such as a housekeeper who has in the past been convicted of involuntary manslaughter due to drunk driving? Should the employer refuse to hire such applicant?

Two dilemmas arise here: since a housekeeper does not usually operate a motor vehicle for his or her job, there is no real link between a housekeeper's job and the prior criminal conviction; unless, of course, the housekeeper will be driving a laundry truck or other vehicle around the property (1). In addition, if the applicant claims that he was an alcoholic and no longer drinks, can an employer hold such conviction against the applicant (2)? In this instance, the issue of violating the Americans with Disabilities Act (ADA) of 1990 comes into play. According to the ADA, alcoholism is considered a disability. Therefore, an employer cannot discriminate against an applicant if he or she is otherwise qualified to perform the essential functions of the job, especially if the applicant claims that he or she no longer drinks. In many instances, the ADA would even require an employer to provide reasonable accommodation to an alcoholic in the form of allowing such employee one chance to rehabilitate himself or herself while knowing that his or her job is waiting when the employee finishes the rehabilitation program. Nonetheless, an employer can still discipline, discharge, or deny employment to an alcoholic whose use of alcohol would adversely affect job performance or conduct (U.S. Dept. of Justice, 2004).

Could an innkeeper choose to not hire an applicant for a guest contact position (almost every position in a hotel) solely based on the applicant's alcoholic status? If the applicant is seeking a position as a housekeeper, the essential functions of the job are to clean guest rooms, where arguably, the applicant's alcoholic status should be irrelevant. An innkeeper could argue that an alcoholic presents a greater risk to its guests than a non-alcoholic, however, does an alcoholic necessarily have a greater propensity for committing violent criminal acts on guests than a non-alcoholic? The real question, of course, is whether or not it would be considered negligent on the part of an employer to hire a person who did not have a criminal record but who admitted to being an alcoholic and who later committed a criminal act against a guest or customer?

The authors chose to discuss past criminal behavior and to provide just one example of a hypothetical employee who has been convicted of the criminal act of DUI so the reader can compare this analogy. Our point is that not all past criminal behavior is necessarily violent or potentially detrimental to a guest. Thus, performing a criminal background check should only serve to isolate

certain people from getting jobs where those individuals may indeed pose a risk to guests, employees, owners, operators, or any other individual involved with the operation of a lodging facility.

Case Law and Reasonable Care

Historically, reasonable guest protection has not been dictated by statute, but rather through case law, which of course, varies somewhat among states. At one end of the spectrum is the Illinois landmark case of Fortney v. Hotel Rancroft (1955), which holds an innkeeper to an extremely high standard of care for its guests. In the Fortney case, a long-term guest of a hotel was assaulted and injured in his guest room when a stranger wrongfully gained access to Fortney's guest room. The hotel claimed that it had exercised reasonable care in attempting to keep trespassers away from the guest rooms and that this was all it was required to do. In reversing the lower court's verdict in favor of the hotel, the Appellate Court maintained that a *high degree* of responsibility rested with the hotel operator for the guest's protection. Indeed, the opinion included a broad statement indicating that,

A guest, who is either asleep in his room or about to enter his room, should not be subjected to the risk of an assault by a stranger. A guest has a right to rely upon the innkeeper doing all within his power to avoid or prevent such an assault, and to that end should be required to exercise a high degree of care (Fortney v. Hotel Rancroft, Inc., 1955).

This case is important because, even though it was decided in 1955, it is still valid law in Illinois, and because it differs from conventional tort law that states that an innkeeper's duty is only to take reasonable care to protect its guests against unreasonable risk of physical harm (Restatement Second of Torts, 1965) and not to do "all within his power" to protect guests from being injured. The Illinois case specifically requires an innkeeper to go beyond the norm of using reasonable care and requires its innkeepers to "exercise the highest degree of care." Although this may seem like semantics, there is a big difference between "exercising the highest degree of care" and "reasonable care". With the term "exercise the highest degree of care", the court is obligating an innkeeper to almost guarantee against all harms that may befall a guest even if the harm was not foreseeable. While the term exercising "reasonable care" only requires an innkeeper to use as much care as a "person of ordinary prudence would exercise in the same or similar circumstances" (Black's Law Dictionary, 2000). In addition, the obligation to exercise reasonable care is only imposed upon the innkeeper if a harm was foreseeable and generally speaking, a crime committed by a third party is not foreseeable (Restatement Second of Torts, 1965). Thus, an innkeeper is not usually required to guard against such unforeseeable events. The Kline v. 1500 Massachusetts Avenue Apartment Corp. (1970) court stated such principle very clearly:

Specifically, innkeepers have been held liable for assaults which have been committed upon their guests by third parties, if they have breached a duty which is imposed by reason of the innkeeper-guest relationship. By this duty, the innkeeper is generally bound to exercise reasonable care to protect the guest from abuse or molestation from third parties, be they innkeeper's employees, fellow guests, or intruders, if the attack could, or in the exercise of reasonable care, should have been anticipated (Kline v. 1500 Massachusetts Avenue Apartment Corp., 1970).

Kline has persuasively stated that the innkeeper should not have to guarantee that a crime will not be attempted or committed. However, even though the Kline decision is from a U.S. Court of Appeals, it is from the court of appeals for the District of Columbia, therefore, it is not applicable across states. While it occurred in 1970 and may appear on its surface to be somewhat dated, it is

not a state court decision, limited to only one state, and has broader appeal to innkeepers nationally. In addition, the authors contend that a federal appeals court decision is often more persuasive than a state appellate court's decision.

The prevailing point of view on the issue of how much care should be taken by innkeepers for their guests is best explained by the Florida court in Fennema (1990) when it stated that "It is settled in Florida that an innkeeper owes the duty of reasonable care for the safety of his guests' person and property, that generally speaking, 'it is peculiarly a jury function to determine what precautions are reasonably required in the exercise of a particular duty of due care'" (Fennema v. The Howard Johnson Co., 1990).

Of course, an exception to the general principle of not being responsible for the criminal acts of third parties is if the innkeeper knew or should have known about an assailant's special propensity for criminal activity. Fennema v. The Howard Johnson Co., 1990 has been cited mostly for the principle of equitable estoppel where the court refused to rule in favor of the hotel because it had misrepresented the risk of the guests getting their property stolen when the hotel knew of such risk (in advance) and misrepresented such risk to its guests. Hence, Fennema illustrates the duty of an innkeeper when a risk is foreseeable or known. The Fennema (1990) case recognized this as it acknowledged that "an innkeeper's knowledge, as here, of prior criminal activity on or around the grounds of his inn imposes a duty to take adequate security precautions for the safety of his guests and their property."

Likewise, in the Texas case of Walkoviak v. Hilton Hotels Corp., (1979), a hotel invitee had attended a business conference at a Hilton Hotel. While in the hotel's parking lot near his vehicle, the invitee was beaten, stabbed, robbed, and left unconscious in his automobile by two unknown assailants. Walkoviak sued the hotel alleging that the hotel had failed to supply adequate protection and warning for use of the hotel's parking facility. Initially, the lower court held in favor of the hotel because under Texas law an innkeeper is not an insurer of the safety of his guests and an innkeeper's responsibility to his guests consists only of the duty to exercise ordinary or reasonable care (Walkoviak, 1979). However the Court of Civil Appeals of Texas declared that:

The proprietor of a public business establishment has the duty to exercise reasonable care to protect his patrons from intentional injuries caused by third persons if he has reason to know that such acts are likely to occur, either generally or at some particular time. Liability for injuries may arise from the failure of the proprietor to exercise reasonable care to discover that such acts by third persons are occurring, or are likely to occur, coupled with the failure to provide reasonable means to protect his patrons from the harm or to give a warning adequate to enable the patrons to avoid the harm (Walkoviak).

Hence, liability may be imposed upon an innkeeper if he knew, or should have known, an employee's inclination toward criminal behavior against a guest. While these cases do not deal with employee behavior, they do instead deal with the issue of foresee ability and crimes. As stated earlier, generally, crimes are not seen as foreseeable, therefore an innkeeper is not deemed to be negligent for not preventing such unforeseeable crimes. In the past, where a court has found an innkeeper liable to an injured party it is because the innkeeper either they knew or should have known of the criminal risk and did not take reasonable care to eliminate such risk.

In essence, this is the basis for Nan's Law, which asserts that a hotel which fails to conduct a criminal background check and hires someone who has a criminal history and will have access to guest rooms will be liable for the crimes the new employee commits on guests. Thus one finds the relevancy of these cases in a discussion of Nan's Law. The question arises: if the prevailing legal principles already hold an innkeeper accountable for criminal acts carried out by third parties on

guests when the innkeeper was negligent in carrying out the duty to protect his guests, is Nan's Law needed? The Pennsylvania courts have previously declared through case law, that innkeepers are subject to liability for the accidental, negligent or intentionally harmful acts of third persons (Moran v. Valley Forge Drive-In Theatre, Inc., 1968; Rabutino v. Freedom State Realty, Inc., et al, 2002). As such, the Pennsylvania courts already require innkeepers to take reasonable precautions against that which might be reasonably anticipated to harm a guest. In Rabutino (2002), a guest at a Travelodge Hotel was accidentally shot to death by another guest of the same hotel. The shooter was part of approximately 200 partygoers under the age of 21 years who were drinking and partying on several floors of the Travelodge. The Superior Court of Pennsylvania (an appellate court), held that the owners of the Travelodge owed the deceased the duty to take "reasonable precaution against harmful third party conduct that might be reasonably anticipated" and concluded that the owners of the Travelodge "could have reasonably anticipated harm flowing from the" shooter's conduct alone without needing a history of past criminal activity occurring at or near the Travelodge.

Given that the courts and statutes have addressed the issue of an innkeeper's duty to protect its guests, is it redundant to have another statute stating the same thing? The main contribution of Nan's Law to the prevailing body of law is that it would specify a particular action, that of conducting a criminal background check, as meeting the standard of "reasonable care." Given that American laws tend to be ambiguous because of the freedom they offer to judges and juries to make decisions on a case by case basis tailored to specific facts, Nan's Law would constrict such freedom by imposing an explicit act across the board on one particular industry.

Conclusion

Where do we turn from here? Today's travelers have a higher and higher expectation for safe and secure travel. American travelers, for example, have adjusted during the past three years to long waits at airports and to extra heavy baggage scanning and observation. The hotel industry is rebounding and revenues are once again on the increase (Higley, 2004). With increasing room revenues and profitability, hoteliers will have a more difficult time convincing the traveling public that a \$13.00 - \$60.00 background check is not a worthwhile endeavor to improve guest security and protection. Just ask Nan Toder's parents. As Nan's father, Sol, stated, "What we hope for is legislation ensuring that travelers in Pennsylvania and then elsewhere cannot only feel safe, but be safe" (Silver, 2003).

Concern for guest safety remains an issue of paramount importance. Is Nan's Law the answer to all aspects of an innkeeper's responsibility for reasonable care? Definitely not. But it may very well be yet another tool toward the provision of reasonable care and protection for guests as determined by U.S. courts.

The authors neither stand for nor against the Nan's Law in terms of its usefulness, practicality, or potential benefit to guests and/or innkeepers. Instead, the question arises as to what remains the best method of protecting guests and providing reasonable care to ensure the practice of such care. Providing reasonable care to guests is undoubtedly in the best interests of owners, operators, managers, and the lodging industry. If Nan's Law adds to prevailing law toward a stricter standard of reasonable care, then it may be strongly supported by the public at large. However, if the cost to implement such a law does not yield significant improvements in the protection of guests and, instead, burdens hoteliers with additional costs, procedures, and paperwork, the benefits and support will most surely lessen. The final word on Nan's Law has not yet been stated within the lodging industry. The issue of criminal background checks for lodging employees continues to evolve and change with differing opinions, levels of contention, and justifications.

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