

Offline Antecedents for Platform Liability

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tl;dr

Background: Legal history offers examples of areas where attempting to apply liability directly to bad actors is likely to be ineffective, but where certain related parties might be able to either control the bad actors or mitigate the damage they cause. In such cases, the common law has long embraced indirect or vicarious liability, holding one party liable for wrongs committed by another. The purpose of this kind of indirect liability is to align incentives where they can be most useful by placing responsibility on the least-cost avoider.

But... The immunity from liability granted to online platforms by Section 230 of the Communications Decency Act is a departure from normal rules governing intermediary behavior. It is impossible to know exactly how a robust common law of online intermediary liability would have developed in a world where Section 230 immunity never existed.

However... Lessons can be drawn from how the offline world has dealt with third-party liability, especially when an intermediary operates under a duty of care. The common law offers several examples of duties that business owners owe to their customers or, sometimes, to the outside world. Central among these is the legal obligation to take reasonable steps to curb harm from the use of a business' goods and services. If the business has created a situation or environment that puts people at risk, it has an obligation to mitigate that risk. It

also can have obligations to prevent risk of harm to customers or others with whom it has entered into a relationship, even if the business did not directly create the risk.

KEY TAKEAWAYS

INNKEEPER LIABILITY

Hotel owners owe a reasonable duty of care to their guests when the owners are aware that a third party is victimizing or will victimize those guests. This concept of “innkeeper liability” dates back centuries, based on the assumption that the owner of a premises has control of the building, workers, and related facilities. Further, the premises owner has some ability to select which guests he allows, further empowering him to afford protection to his guests from the bad acts of other guests.

Over time, this doctrine has evolved differently in [different courts](#), but remains essentially intact in its general outline.

PREMISES LIABILITY

The Restatement (Second) of Torts holds that a property owner who makes his property open to the public for business purposes is subject to liability while they are on premises for such a purpose.

For example, [shopping malls](#) owe a duty of care to invitees who come to shop at their various stores. This means, among other things,

providing trained security personnel and well-lit parking lots.

[Private parks](#) where people can gather and hold social events, camp, or enjoy nature and other outdoor activities owe a similar duty of care to individuals who come onto their property. This includes keeping the property reasonably free of dangerous conditions by performing regular inspections and fixing hazards in a reasonable amount of time, or posting clearly visible warnings.

Sometimes, even guests who come onto a property without any potential commercial relationship are [owed reasonable care](#) to prevent foreseeable injuries. A property owner who allows use of the property without payment still must notify about known hazards.

DUTY TO CONTROL AND DRAM SHOP LAWS

The common law also recognizes situations where there is a duty to control the conduct of certain actors to prevent them from causing harm to others when there is a special relationship between the actor and the third person. For example, this duty arises in the cases of jails controlling prisoners or mental-health professionals protecting the public from threats from patients.

But courts have also imposed duties in other situations with special relationships. For example, a Tennessee court found a duty for an adult hosting a party of underage teens who were drinking alcohol. This is similar to so-called “dram shop” liability—the legal duty of care that applies to tavern owners, bars, and similar establishments to protect others from harmful acts by inebriated patrons.

U.S. courts were traditionally wary of imposing liability on tavern owners for the behavior of inebriated patrons, but some states’ common law did develop responsibilities owed to third parties or to the intoxicated themselves. To date, most states

have either common law dram shop liability or some form of dram shop statute.

[Dram shop liability](#) is similar to premises-liability case law. Tavern owners are uniquely positioned to control how much alcohol they sell to a particular patron, and to cut that patron off when they appear to become intoxicated.

IMPERFECT ANALOGUES

These cases and doctrines do not necessarily offer precise prescriptions for translating offline intermediary liability to the online context, but they do offer several valuable tools. The law has long wrestled with how to frame the legal duties owed by a service provider to its customers and the public, while also policing the bad acts of third parties. These cases demonstrate how to think through the principles of holding intermediaries to a duty-of-care standard. The history of the common law demonstrates that new business models and new technologies are regularly and inevitably incorporated into the law.

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