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Title: Shots Fired? – Liability To Fleeing Guests

In an era of heightened awareness of terror attacks and mass shootings, just the report of it can trigger a response. Even if the report turns out to be false, liability may attach. Pandemonium can set in, giving rise to injury claims. Property owners, their managers, security contractors, and tenants can face claims of negligent supervision; excessive use of force; negligence in hiring, training and supervising of personnel; negligent security and negligence in controlling the pandemonium.

Join us as we discuss important issues which arise in the presence of an actual or potential shooter, including at least, potential parties in the case; duties owed; third party responsibility; responsibility for crowd control; and foreseeability of such acts.

I. Setting The Stage

Location

Where and when the incident takes place sets the stage for whether such an event can be anticipated, what duties, if any, may be owed, who culpable parties may be and what the responsibilities are among the involved participants.

Likewise, risk increases as people increase. Holiday time is a busy time in shopping centers, and when a threat of a potential or actual shooter arises, it may be predictable that pandemonium will break out. What duties are there on landowners to predict and prevent an active or potential shooter, and to protect and prevent injury to fleeing guests?

Participants

When the inevitable lawsuit arises, it is important to quickly identify the participants and to join them in the action. Retailers and shopping centers are often loath to aggressively blame their customers. However, where a customer is responsible for the incident and ensuing rush to the exits, and an injured party is blaming the retailer, a shopping center or their vendors, there is little to be lost and

much to be gained by identifying the party responsible. Blaming local law enforcement who may be present on the premises is a more difficult decision, with special legal requirements based upon the relationship between local law enforcement and the injured party. Having those additional parties on the verdict sheet and the liability limitations that may be available in the event liability is found, create great incentives to join other potentially responsible parties in the action.

The Incident

False reports of “shots fired,” have almost become a regular occurrence. A simple Google search for “false reports of shots fired” pulls up pages of such incidents. Given the frequent false reports of “shots fired,” such an event can be said to be foreseeable. However, even if it could be said to be foreseeable and in fact had occurred at a specific location prior, is there anything that can be done to prevent it and the ensuing injury and who, if anyone, can be held responsible to an injured guest.

Our incident takes place in a large store having its own security attached to a mall with its own security. There is an argument over a popular item, two shoppers turned aggressors battle for the item and knock over a large display. A shopper not seeing the incident yells “Gun Shots.” The police, having a presence in the mall, are on the scene almost immediately.

Duty

In any case with injuries because of an active shooter, caused directly or as the result of flight, the issue of foreseeability should be primary. Was the risk foreseeable? How has the publicity of other similar incidents in this area or others effected the foreseeability of such activity.

Once the shooter has entered the scene, the prior planning of the security company or the owners becomes important. Plaintiff attorneys have traditionally focused on dangerous conditions of the property which exist and are foreseeable to the owner in order to establish a duty of the owner. However, more recently claims have attempted to establish that a duty is created for failure to anticipate and properly plan for a dangerous condition which should have been anticipated by such an event. We have seen complaints where duty has been asserted for liability resulting from the failure to plan appropriate retreat avenues, duty to lock down the facility, improperly locking down the facility, failure to plan properly for organized retreat, the adequacy of exits and inadequacy of security response.

The Injury

In our scenario, the guest is able to flee, but the path he chooses leads him to a crowded exit. The fleeing shopper is injured when he is shoved by fellow guests trying to exit and trips over a raised rug.

Applicable Contracts

When examining relationships between any parties and determining responsibilities, the first place to start is with applicable contracts, including lease agreements, service contracts and insurance policies. They not only govern legal obligations among the parties but may also provide a limitation of liability from third party actions.

Leases and service contracts normally include defense and indemnity provisions as well as insurance procurement requirements. They must be reviewed carefully. Even when a contract requires insurance for the lessor, the lessee often does not maintain such insurance, or does not have sufficient insurance to cover the issue. When this occurs, the landlord has some remedies including subrogation, indemnity or breach of contract and can attempt to exercise its remedies from the breach, but the lessee is unlikely to have the assets to cover such a loss if they did not bother to protect the landlord

In addition to requirements that lessees must procure insurance for the owner, it is of paramount importance that the landlord or lessor must obtain insurance in their own name and for their own acts of negligence to obtain proper protection from these claims, which are often substantial.

Insurance policies must also be carefully reviewed. Frequently insurance procurement obligations are fulfilled with a blanket additional insured endorsement. They provide additional insured status "as required by written contract." That requires a close review of the additional insured requirement, as well as the scope of services. Homeowner's policies should not be overlooked. Where the aggressor has a homeowner's policy and the conduct can be said to be negligent, coverage may be available.

Applicable Law

Generally, a case review show that caselaw focuses on duties owed to the injured parties, the ability to control the actions of third parties, the proximate cause of the defendant's actions, the foreseeability of the occurrence, the crowd as actor and the nature of the event where the plaintiff was injured.

Some states have broadened those duties.

Florida:

Florida recognizes the duty of care owed to an invitee by a place of public entertainment to keep the premises in a reasonably safe condition. In Hilgenhurst v. Knight-Ridder Newspaper, Inc. Florida's District Court of Appeal for the 3rd District had opportunity to review a case by a theater goer knocked down and injured as she walked to her seat. The trial court had directed judgment in favor of the theater. On appeal, the court affirmed, holding that the duty to supervise does not require the operator to furnish each patron with an usher or to guard against the risk created by a specific patron, unless the operator has actual or constructive knowledge of the need for specific supervision and a reasonable opportunity to exercise it. Hilgenhurst v. Knight-Ridder Newspaper, Inc., 400 So.2d 523 (1981).

New York:

Where a plaintiff's negligence claim is premised on the theory that his or her injuries were caused by overcrowding and inadequate crowd control, the plaintiff must establish that he or she was unable to find a place of safety or that his free movement was restricted due to the alleged conditions. Palmieri v. Ringling Bros. and Barnum and Bailey Combined Shows Inc., 655 N.Y.S.2d 646 (2nd Dep't 1997); Ganapolsky v. Barnes & Nobles, 747 N.Y.S.2d 391 (2nd Dep't 2002); Madden v. Pine Hill-Kingston Bus Corp., 732 N.Y.S.2d 459 (3rd Dep't 2001).

In Palmieri, the injured plaintiff was allegedly pushed from behind by an unidentified person while descending a crowded stairway leading to the exit doors. The circumstances showed that plaintiff's daughter was three to four steps ahead of her prior to the accident and that the daughter was only bumped into by others a few times while standing next to the plaintiff after the accident. This was sufficient evidence for the Supreme Court to rule that no evidence showed that the plaintiff's freedom of movement was unduly restricted or that she was unable to find a place of safety. *Id.*

In Madden v. Pine Hill-Kingston Bus Corp., 288 A.D.2d 600 (3d Dep't 2001), the Court made clear that even where a person is in a crowd, with everyone "rushing, pushing and shoving," and such overcrowding precludes a person from seeing the curb that caused her fall, such allegations "fall far short of establishing that the alleged overcrowding restricted her free movement or prevented her from reaching a place of safety." *Id.* Thus even under these extreme conditions, a defendant is entitled to summary judgment. The Appellate Division Second Department has similarly held in Greenberg v. Sterling Doubleday Enterprises, L.P., 240 A.D.2d 702, 660 N.Y.S.2d 33 (2d Dep't, 1997).

Moreover, in Futterer v. Saratoga Assn. for Improvement of Breed of Horses, 31 N.Y.S.2d 108 (3rd Dep't 1941), the court went even further in saying that the incident was one "...which the defendant could not have prevented by any reasonable means." Plaintiff was a patron at the defendant's race track when he was jostled and pushed with great force and violence by other patrons who were trying to place last minute bets. There was no evidence that the grandstand was overcrowded. Plaintiff asserted that the negligence of the defendant in failing to provide gates or chains in the box entrances, and in failing to provide proper supervision and guards was the proximate cause of her injuries.

Texas:

In Fair Stores, Inc. v. Lane, plaintiff sought recovery when she was injured due to a large crowd that had gathered as a result of the store's advertising campaign. A large crowd had gathered shortly after the advertised hour and plaintiff was shoved into the glass doors before they were opened. Plaintiff alleged that the store had been in business for a long time, knew that a large crowd had gathered and that they were pushing and shoving and that similar instances had occurred in the past. In the court below, the

plaintiff recovered. However, on appeal, the court held that since no one could have reasonably foreseen that the crowd would become unruly and push members against the windows, the action of the crowd acted as a new and independent cause of the plaintiff's injuries. Fair Stores, Inc. v. Lane, 240 S.W.2d 373, 376 (Tex. Civ. App.), rev'd sub nom. Lane v. Fair Stores, 150 Tex. 566, 243 S.W.2d 683 (1951).

California:

California takes a more guest friendly approach towards these cases. In McGarry v. Sax plaintiff was injured when exhibit goers gathered in hopes of catching a prize skateboard deck thrown into the crowd. A group of people attempting to catch the skateboard deck, together with the plaintiff, toppled to the ground and the plaintiff was injured. The court found that a business owner may have an affirmative duty to "control the wrongful acts of third persons which threaten invitees where the [owner] has reasonable cause to anticipate such acts and the probability of injury resulting therefrom." McGarry v. Sax, 158 Cal. App. 4th 983, 995, 70 Cal. Rptr. 3d 519, 530 (2008). The fact that the harm was inflicted by third parties acting badly does not insulate defendants from liability. "If the likelihood that a third person may react in a particular manner is a hazard which makes the actor negligent, such reaction whether innocent or negligent does not prevent the actor from being liable for the harm caused thereby." McGarry v. Sax, 158 Cal. App. 4th 983, 998, 70 Cal. Rptr. 3d 519, 533 (2008). In this case the court found that the effort to catch the skateboard deck was tantamount to a sporting event and found for the defendant under the doctrine of primary assumption of the risk.

Takeaways/ Lessons Learned:

- 1) Prompt identification of parties is key;
- 2) Contracts must be reviewed to determine responsibility among the parties and determine any limitations on third party liability; and
- 3) Even in the face of a foreseeable incident, no reasonable measures may be available to prevent the injury.