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Assault and Battery: Emerging Trends in the Hospitality Industry

I. Assault and Battery Overview

Assault and Battery

To establish the tort of assault, a plaintiff must prove that the defendant acted with intent to cause a harmful or offensive contact or imminent apprehension thereof. *Garcia v. United States*, 826 F.2d 806, 809 n.9 (9th Cir. 1987). To establish the tort of battery, plaintiff must show that defendant "intentionally caused a harmful or offensive contact" with plaintiff's person. Johnson v. Pankratz, 196 Ariz. 621, 623 P.3d 1266, 1268 (Court App. 2000) (citing RESTATEMENT (SECOND) OF TORTS §13 (1965)). Contact is offensive if it "offends a reasonable sense of personal dignity. RESTATEMENT (SECOND) OF TORTS §19 (1965).

Typical Scenarios

The typical scenarios where this comes into play in the hospitality setting are patron v. patron, security/employee v. patron, and police v. patron. In patron v. patron, we will often see allegations against the bar/restaurant/hotel for negligent security or premises liability. In the security/employee v. patron context, we typically see claims of negligent security/training/supervision, and assault/battery through respondeat superior, if the employee was acting within the scope of his employment. Under the Police v. Patron scenario, we often see negligent security and premises liability claims.

Defenses

For a premise liability action, a plaintiff must prove: (1) an unreasonably dangerous condition existed at the time of the accident; (2) the owner of the premises ***knew or should have known*** that the condition existed; (3) the condition was not discoverable by the plaintiff; and (4) the owner failed to exercise reasonable care in either providing a remedy or warning of the condition. The defense in the assault and battery context

would be that the bar/restaurant/hotel had no notice and/or it wasn't foreseeable that the assault/battery would occur.

For assault/battery through the *respondeat superior* context, assault/battery claim defenses are typically that the security guard or employee was acting in self-defense or defense of others. In order to assert self- defense, typically, a person is justified in threatening or using physical force against another when and to the extent a reasonable person would believe that physical force is immediately necessary to protect himself against the other's use or attempted use of unlawful physical force. The same standard would apply to the defense of another person. A scenario where an establishment could potentially dispute *respondeat superior* would be if a security guard acted outside the scope of his employment by assaulting his girlfriend's ex for coming to his bar.

Another defense that can be a bit of a Catch-22 is if the Plaintiff is intoxicated. In Arizona, A.R.S. §12-711 allows a jury to bar a Plaintiff who is found 50% or more at fault from any tort recovery if found to have also been intoxicated. Florida (768.36) also has an intoxication defense, which states a plaintiff is prevented from recovering for their injuries if the defendant can show that: (1) the plaintiff was under the influence of drugs or alcohol to the extent that their facilities were impaired (or the plaintiff had a blood-alcohol content of .08 or greater); and (2) as a result of the plaintiff's intoxication, they were determined to be 50% or more at fault for the accident resulting in their injuries. Most states will require that the intoxication is relevant to the harm. *Bedford v. Moore* (Tex. App. – 2005) 166 S.W.3d 454.); *Hernandez v. County of Los Angeles*, 226 Cal.App.4th 1599, 1613-1616 (2014). It is a fairly simple connection that intoxication contributes to assault and battery situations. However, if it is clear that the bar/restaurant over-served the Plaintiff, this can potentially inflame a jury.

II. Coverage Pitfalls and Other Insurance-Related Issues

Assault and Battery Exclusions/Sublimits

One of the most common risks associated with operating a bar or a restaurant that serves alcohol are claims arising out of fights. Because of this, premiums for insurance that fully covers claims arising out of assault and battery can be quite high. Often times, smaller or newer businesses may opt for cheaper policies as a cost-saving measure, meaning they purchase a commercial general liability policy containing an endorsement outright excluding coverage, or providing only a small dollar sub-limit, for claims arising out of an "assault or battery." These Assault or Battery Endorsements are generally written so broadly that they even apply to claims alleging negligent hiring, training, and supervision of security staff alleged to have resulted in the injury.

In 2010, the Arizona Court of Appeals examined and upheld such an endorsement as unambiguous, and thus, enforceable on its face. *See Tucker v. Scottsdale Indem. Co.*, No. 1 CA-CV 09-0732, 2010 WL 5313753, at *1 (Ariz. Ct. App. Dec. 21, 2010). Further, the Court of Appeals found that the insured's reliance on the expertise of her agent to provide adequate insurance was insufficient to overcome summary judgment under the reasonable expectations doctrine. *Id*. While *Tucker* was an unpublished memorandum decision, as one of the first Arizona cases to examine assault and battery endorsements, it gave insurance carriers a sense of certainty concerning the enforceability of assault and battery endorsements, even when broadly worded, and gave them a seemingly-firm legal basis for coverage denials or limitations based on such endorsements. It appears, however, that the certainty afforded by *Tucker* may be less certain, and that the decision might not be the "last call" on the enforceability of such endorsements.

A recent case in the United States District Court for the District of Arizona may have opened the door to new attacks on the validity of assault and battery endorsements. In *Fall v. First Mercury Ins. Co.*, the District Court agreed with the *Tucker* court's conclusion concerning the ambiguity of an assault and battery endorsement, finding that the policy was not ambiguous despite not clearly defining "assault," "battery," and "arising out of." 225 F. Supp. 3d 842, 847 (D. Ariz. 2016). The Court emphasized that as long as an endorsement's language is clear, courts will be unwilling to create ambiguity to create coverage. The *Fall* Court also found, however, that under the facts alleged in that case, the insured bar had a reasonable expectation of coverage for a claim stemming from a "physical altercation between a patron and its bouncers who were trying to protect other patrons." *Id*. at 848. Under this analysis, evidence pertaining to reasonable expectations – such as prior negotiations, circumstances of the transaction, whether the terms are bizarre and oppressive or eviscerate the non-standard terms of the policy, or if the endorsement applies only in limited circumstances – is sufficient to show a dispute of material fact. The Plaintiffs in *Fall* presented evidence that the bar manager was a long-term bar owner who always insisted on liability coverage for bar fights and the like, and the Court agreed this evidence was sufficient to prevent dismissal of the claim for coverage by summary judgment.

Although application of this doctrine requires more than the insured's "fervent hope," of coverage, the *Fall* opinion highlights the potential pitfall carriers may find themselves in if they rely solely on the limitations or exclusions from coverage provided by the assault and battery endorsement, without additional investigation. The lack of specific, authoritative case law on coverage combined with the potential for excess exposure can leave Defendants in a precarious situation, and more than happy to assign their rights against the carrier to an injured party. Practically speaking, in cases where the Plaintiff's primary injury was caused or related to any contact with other patrons or bar

employees, confirming the existence of any sub-limits or exclusions is the first step in a carrier's coverage analysis, but it should not be the last step.

Instead of relying on the lack of ambiguity of an endorsement, a claims handler has to watch out for the reasonable expectations of coverage and should also investigate and review the underwriting of the policy, before denying coverage, to determine if the insureds discussed the costs and coverage options regarding assault and battery endorsements, or if they asked for and were promised coverage "for bar fights." In situations where the insured also has policies on other bars or restaurants, carriers should identify if those other policies contain similar endorsements, to avoid arguments that they expected the coverages in all of their policies to be equivalent.

Moving forward, to ensure the validity of endorsements limiting or excluding coverage, carriers may want to consider requiring additional signatures for these endorsements, similar to the specific waiver that is required to turn down UM/UIM coverage in automobile policies. A signed waiver would allow carriers to continue to offer lower premiums to small or newer businesses without fear of a subsequent coverage and bad faith case based on the reasonable expectations of the insured.

Drawing attention to these endorsements also benefits the insureds themselves. On one hand, if an insured specifically waives coverage, or agrees to a limitation, then they at the very least were given notice concerning the parameters of their coverage, and ostensibly have the opportunity to preemptively prepare for accidents and claims that may not be covered. They could do this by saving for additional self-insurance, or by mandating additional security training and oversight on behalf of their employees in regard to bar fights. On the other hand, more risk-averse insureds may opt instead to spend the additional money in higher premiums for policies without exclusions or with higher sub-limits. Either way, fully informing insureds about the contents of their commercial liability policies from the start protects both the insureds and carriers in the long-run while also preventing further "after the fact" reasonable expectation attacks on assault and battery endorsements.

In general, assault and battery does not need to be specifically plead. In California, *Century Transit Sys., Inc. v. Am. Empire Surplus Lines Ins. Co.*, 42 Cal. App. 4th 121, 127, 49 Cal. Rptr. 2d 567, 571 (1996), Insured employer sought declaratory judgment that general liability insurance policy covered claims against it for negligent hiring, supervision, and retention of employee who committed assault and battery. Court found that Assault and Battery exclusion precludes coverage of any claim based on assault and battery irrespective of the legal theory asserted against the insured. Similarly, in Florida, in *Miami Beach Entm't, Inc. v. First Oak Brook Corp. Syndicate*, 682 So. 2d 161 (Fla. Dist. Ct. App. 1996), Insured night club's liability insurer sought declaration of no coverage for negligence action brought against insured by patron who was struck in head with

champagne bottle thrown by unknown brawlers. In Texas, in *Acceptance Ins. Co. v. Walkingstick*, 887 F.Supp. 958 (S.D.Tex.1995), the plaintiff in the underlying suit was shot at a nightclub, and the family sued the nightclub for negligence. The nightclub's insurance company sought a declaratory judgment that it had neither the duty to defend nor indemnify the nightclub, due to the insurance policy's assault and battery exclusion, and Court agreed.

Other Relevant Policy Provisions

Similar to Assault and Battery Exclusions are Intentional Act Exclusions. Defense counsel will need to be careful in their defense strategy when these exclusions exist. For example, in Florida, in *State Farm Fire & Cas. Co. v. Marshall*, the Court found, "[w]e align ourselves with the majority of jurisdictions, which hold that self-defense is not an exception to the intentional acts exclusion and the clear terms of the policy control. In such cases, the sanctity of the parties to freely contract prevails. Members of the public may wish to insure themselves against liability incurred while lawfully defending themselves, but they must bargain for such coverage and pay for it. We will not rewrite a policy under these circumstances to provide coverage where the clear language of the policy does not; nor will we invoke public policy to override this otherwise valid contract." 554 So. 2d 504, 505–06 (Fla. 1989). As such, using the defense of self-defense may preclude coverage.

Another common exclusion in a General Liability policy is a Liquor Liability Exclusion. Given that many claims arise out of allegations of over-service combined with assault and battery, this can create coverage problems. For this reason, it is very common for bars and restaurants to obtain a separate Liquor Liability policy, which should be tendered to in claims where alcohol appears to be a factor.

Firearm Exclusions are fairly common in liquor liability policies. Here is an example of how these exclusions can create a serious problem for a bar: the bar has a GL policy with a liquor liability exclusion and a liquor liability policy with a firearm exclusion. An allegedly overserved patron shoots someone in the bar. Coverage becomes questionable on all accounts.

A more obscure exclusion is the Flying Object Exclusion, which prevents coverage in a case involving a thrown drink. Another bar-focused exclusion is the Promotional Exclusion which prevents coverage in claims of over-service due to happy hour or other types of drink promotions.

Another issue that can arise is if there is a Assault and Battery sub-limit. These sub-limits typically have limits far under the general limits of the policy and can be tricky for

defense counsel to navigate. Additionally, if the policy is wasting, defense costs will drain the policy limits before defense counsel can obtain a reasonable settlement.

III. Emerging Issues

Surveillance Footage

One of the most common issues we deal with in defending bar security assault cases is that there is no surveillance footage of the incident, which could resolve a lot of the "he said, she said" disputes. Either no cameras point to the area where the incident occurred, footage was only a livestream and not recorded, or footage was purged pursuant to a cyclical retention policy. If an incident occurs and recorded footage existed at one point, establishments can run the risk of an adverse inference/spoliation instruction if they dispose of the footage. While it is typical for surveillance footage to be purged every 30-90 days in order to save footage, if an incident occurs at an establishment that would rise to the level of writing an incident report or the establishment is on notice that litigation could arise from the incident, the establishment should err on the side of caution and preserve the surveillance footage from the entire night. This would apply to all documentation, particularly incident reports, as discussed further below.

Often times, if police are involved and request to review footage, they may determine on the spot not to charge anyone from the establishment. This can give the establishment a false sense of security, and that the matter is over and can be purged. However, police are usually only reviewing the surveillance footage to determine whether criminal activity occurred, and do not concern themselves with civil liability.

Internal Policies

Policies, written or otherwise, are going to come out in the discovery process. Many bars or restaurants have a "hands off" policy when dealing with uncooperative or unruly patrons. As such, when a security guard physically escorts someone off the premises, Plaintiff's counsel can point to the "hands off" policy to demonstrate that the establishment breached its own policies. Additionally, if there is a policy regarding when to engage police assistance, this can also present scenarios where the Plaintiff's counsel can demonstrate a veer from an establishment's policies.

Another major issue is incident reporting. When an establishment has "incident reporting" forms, this can create a red flag in discovery when no incident report exists. Except in cases where Defendants are alleging an incident did not happen altogether, the

absence of an incident report now leaves the jury thinking that the establishment has something to hide.

Some establishments have a policy where periodic "secret shopping" is done. This is where an establishment will have a person unknown to employees come into the establishment to report to management on how things are being run. A great example of this would be the show "Bar Rescue". This is a terrible idea when brought into the context of litigation. The reports that the secret shoppers generate are often discoverable and can suggest a pattern of bad behavior, depending on the issues that particular establishment may have.

Police Body Camera Footage

In 2020, the majority of police forces across the country require officers to wear body cameras. When incidents occur at a bar, police body camera can have footage of a fight if police arrive while an incident is still occurring. An important thing to note is that police will typically interview all relevant witnesses with their body cam turned on. Oftentimes, counsel will review the police report (written with criminality in mind) without attempting to obtain the body camera footage. The wealth of details that can be obtained in this footage is in stark contrast to the police report. Additionally, while a statement in a police report can be neutral in tone, video will demonstrate tone of voice and body language. If alcohol is involved, the jury can make their own determination on whether a party is intoxicated.

Advanced POS Systems

What used to be the old cash register (still used in some bars), has now become highly advanced point of sale (POS) systems. These systems will store a wealth of information that can both help and hurt the insured. For example, these systems will know who ordered what, how many, and when. This can help track timing or confirm whether someone was at your establishment, if those facts are in dispute. Additionally, it can show a pattern over time, such as if someone is a "regular" at the establishment.