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Negligence - Duty of Care - Liability of Owner of Place of Amusement for Injury to Spectator Caused by Act of Third Person

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NEGLIGENCE—DUTY OF CARE—LIABILITY OF OWNER OF PLACE OF AMUSEMENT FOR INJURY TO SPECTATOR CAUSED BY ACT OF THIRD PERSON—Plaintiff, a spectator at a public wrestling match, sustained injuries when another spectator threw a filled Coca-Cola bottle into the crowd. A disturbance had been in progress for several minutes. The guards hired by defendant, the owner of the establishment, had made no effort to stop it. The bottle was grabbed from the tray of a drink vendor who had been instructed to retain all bottles and to serve drinks in paper cups only. The trial court granted a nonsuit. On appeal, *held,* reversed.[1] The evidence of the owner's negligence in not protecting the spectator from this injury sufficed to send the case to the jury. *Sample v. Eaton,* (Cal. App. 1956) 302 P. (2d) 431.

How can the owner of a place of amusement protect himself from this type of liability? It is an established rule that the landowner is liable to his invitees for injuries resulting from unsafe premises, and that his duty is not restricted to preventing injury from natural or artificial hazards on the premises. It includes liability to patrons for preventable tortious acts of third parties, whether they are trespassers, licensees or invitees.[2] An amusement-place operator is not an insurer.[3] The cases are in accord in requiring the exercise of ordinary care under the circumstances.[4] This duty arises from the owner's control over the premises[5] and is satisfied by controlling the activities of third persons in the establishment. The owner must act whenever he can reasonably anticipate that the safety of patrons is threatened by the conduct of third persons.[6]

The cases agree in requiring foreseeability as the basis of the duty to act, but they diverge on the time factor. One approach is that the owner must have had an opportunity to prevent the incident.[7] Another line of cases, while not stating the contrary, appears to allow insufficient time for an effective intervention, thus paying little more than lip-service to the foreseeability requirement.[8] A third approach is found in cases hold-

1 The trial court's nonsuit as to the operator of the soft drink concession was affirmed.

2 2 TORTS RESTATEMENT §348 (1934).

3 See Fimple v. Archer Ballroom Co., 150 Neb. 681, 35 N.W. (2d) 680 (1949).

4 In Andre v. Mertens, 88 N.J.L. 626, 96 A. 893 (1916), the care required was defined as such care as is reasonably adapted to the practical operation of the business. It appears questionable whether this has any other meaning than ordinary care under the circumstances.

5 Winn v. Holmes, 143 Cal. App. (2d) 501, 299 P. (2d) 994 (1956).

6 See PROSSER, TORTS 460 (1955); 65 C.J.S. 533 (1950). In Hughes v. St. Louis National League Baseball Club, 359 Mo. 993, 224 S.W. (2d) 989 (1949), it was held that observed prior conduct of a regular group gave the owner the duty to anticipate danger to patrons.

7 See Whitfield v. Cox, 189 Va. 219, 52 S.E. (2d) 72 (1949); Ward v. FRA Operating Corp., 265 N.Y. 303, 192 N.E. 585 (1934). In Adamson v. Hand, 93 Ga. App. 5, 90 S.E. (2d) 669 (1955), the owner of a bar was held accountable for not interfering with a fight among patrons in which a pistol was used. It is difficult to see how a presumably unarmed owner could have prevented an armed fight.

8 See Thomas v. Studio Amusements, 50 Cal. App. (2d) 538, 123 P. (2d) 552 (1942); Edwards v. Hollywood Canteen, 27 Cal. (2d) 802, 167 P. (2d) 729 (1946). In both cases the "reckless" activity of the third person had started only minutes before the injury occurred.

ing that there is no duty to anticipate negligent or willful acts of third persons.[9] Since liability in cases of this nature is based on "faulty foresight, rather than hindsight,"[10] the only type of case which would clearly not go to the jury would be the one where a totally unpredictable, sudden act of a third caused the injury.[11] The duty of the owner thus resolves itself into a close control of the behavior of the crowd, coupled with immediate interference when a disturbance threatens. This view appears to create great practical difficulty for the owner of an amusement place, since noisy crowds are frequently part of the attraction.[12] In addition to this, constant interference would create bad will among the spectators. In many situations only hindsight will tell whether noisy and boisterous third persons were of potential danger to patrons. Another basis for the liability of the owner in cases of this type could be found in the availability of bottles and other hard objects on the premises, and the court in the principal case appears to have considered this as a possible indication of negligence.[13]

Defenses of assumption of risk and contributory negligence have been infrequent in these cases. As to assumption of risk, it is generally held that only dangers inherent in the sport are assumed, such as those arising when a hockey puck or baseball is thrown into the stands.[14] Other cases dismiss the issue by stating that a patron has a right to expect safe premises, that the owner is expected to keep the crowd under control,[15] and that a patron probably has no duty to leave a disturbance.[16] A few cases do, however, attempt to incorporate assumption of risk into cases of this type if the dangers from the crowd are a normal incident to the service offered.[17] This last group, in effect, tends to analogize dangers from the crowd with dangers "inherent" in the attraction offered to bring the situation in line with

[9] See Porter v. California Jockey Club, 134 Cal. App. (2d) 158, 285 P. (2d) 60 (1955); Noonan v. Sheridan, 230 Ky. 162, 18 S.W. (2d) 976 (1929).

[10] Dickinson v. Eden Theater Co., 360 Mo. 941, 231 S.W. (2d) 609 (1950).

[11] See Wiersma v. City of Long Beach, 41 Cal. App. (2d) 8, 106 P. (2d) 45 (1940); Hughes v. Coniglio, 147 Neb. 829, 25 N.W. (2d) 405 (1946).

[12] This was recognized in Whitfield v. Cox, note 7 supra, where the owner was not held to keep the crowd quiet, but was nevertheless to protect patrons from foreseeable injury. See also Thurber v. Skouras Theatres Corp., 112 N.J.L. 385, 170 A. 863 (1934).

[13] The prinicipal case relied heavily on Philpot v. Brooklyn Baseball Club, 303 N.Y. 116, 100 N.E. (2d) 164 (1951). In the Philpot case, however, it was not established whether the bottle was thrown or merely rolled and fell on plaintiff. Very probably in the Philpot case the bottle was emphasized to show unsafe premises. It is questionable whether the New York court intended to include hazards from acts of third persons involving bottles.

[14] Murphy v. Steeplechase Amusement Co., 250 N.Y. 479, 166 N.E. 173 (1929); Hammel v. Madison Square Garden Corp., 156 Misc. 311, 279 N.Y.S. 815 (1935).

[15] See Fimple v. Archer Ballroom Co., note 3 supra; Winn v. Holmes, note 5 supra.

[16] Moone v. Smith, 6 Ga. App. 649, 65 S.E. 712 (1909).

[17] See Thurber v. Skouras Theatres Corp., note 12 supra. But see Thomas v. Studio Amusements, note 8 supra.

the baseball cases. Contributory negligence has sometimes been held a factual issue for the trial.[18]

The conclusion that may be drawn from the decided cases is that it will be very difficult for an amusement place owner fully to protect himself from possible liability in cases of this kind. Doing as much as is reasonably possible may still fail to prevent a case "where reasonable men can differ" from arising, and which may therefore go to the jury. In short, he has little choice but to accept the dangers from such suits as a normal incident of his business and to take all possible steps to prevent the occurrence of the accidents which give rise to them.

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[18] Winn v. Holmes, note 5 supra.