Analysis of Premises Liability for the Criminal Acts of Third Parties

Kenneth M. Dubrow, Esq.
The Chartwell Law Offices, LLP
Philadelphia

A chapter from Tort Law Update
Pub. No. 4848, published August 2007

To purchase this book:
- See the PBI Online Bookstore at www.pbi.org
- Email info@pbi.org, or
- Call 1-800-932-4637

© 2007 Pennsylvania Bar Institute. All rights reserved.
This file is licensed only to the person downloading this file from PBI’s website, for printing and for saving to his or her personal computer. No further use is permitted. This file may not be shared electronically with any other person without the express written permission of the Pennsylvania Bar Institute.

The Pennsylvania Bar Institute does not render any legal, accounting, or other professional services. The Institute’s programs and publications are designed solely to help attorneys maintain their professional competence. In dealing with specific legal matters, the attorney using PBI publications or orally conveyed information should also research original sources of authority.
Biographies

Kenneth M. Dubrow, Esq.

Mr. Dubrow is a partner in the Philadelphia office of the Chartwell Law Offices, LLP, serving as the chairman of the firm’s general litigation department, which also maintains offices in Valley Forge, Harrisburg and Pittsburgh. Mr. Dubrow’s practice focuses primarily upon the representation of defendants (individual and commercial) in personal injury, premises, wrongful arrest, motor vehicle, construction and liquor liability claims. He also handles a wide variety of commercial litigation matters including shareholder, corporate, contract and insurance coverage disputes. Mr. Dubrow received his B.A. in 1978 from LaSalle College and his J.D. in 1981 from Temple University School of Law. He is a member of the Supreme courts of Pennsylvania and New Jersey, the United States Third Circuit Court of Appeals, The United States District Courts for the Eastern and Western Districts of Florida, a member of the Eastern and Middle Districts of Pa, the Northern District of Florida, the District of Colorado as well as the Third Circuit Court of Appeals and the Supreme Courts of PA and NJ, and a graduate of the Philadelphia Bar Association Trial Advocacy Program. Mr. Dubrow has lectured for both PATLA and PBI regarding premises liability and federal practice and procedure.
Table of Contents

Tort Law Update 2007

Chapter Eight:
Analysis of Premises Liability for the Criminal Acts of Third Parties
Kenneth M. Dubrow, Esq. ................................................. 227

I. Introduction ........................................................................ 229
II. Analysis .............................................................................. 229
III. Factual Issues .................................................................... 232
IV. Conclusion ......................................................................... 232
ANALYSIS OF PREMISES LIABILITY FOR THE CRIMINAL ACTS OF THIRD PARTIES

I. INTRODUCTION

When is a property owner liable for injuries resulting from the criminal acts of third parties? Many practitioners will know the foundation of any answer to that question will involve an analysis under the Restatement of Torts (2d), § 344; however, strategies employed in the prosecution and defense of these claims requires an acute understanding of not only the law, but of the landowner’s method of operation, the putative plaintiff’s status and of the locale where the incident occurred. The following serves as an elementary primer in the law. As in life, the devil will always be in the details and every case turns upon its unique set of factual circumstances.

II. ANALYSIS

Restatement § 344 provides:

Business Premises Open to Public: Acts of Third Persons or Animals A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such purpose, for physical harm caused by the accidental, negligent or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to (a) discover that such acts are being done or are likely to be done, or (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

Comment f further provides:

Duty to police premises. Since the possessor is not an insurer of the visitor’s safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of third persons are occurring, or are about to occur. He may, however, know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual. If the place or character of his business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide reasonably sufficient number of servants to afford a reasonable protection.
Thus, under **Restatement § 344**, a landowner is not an insurer that an invitee will not be harmed by third persons. To the contrary, negligence principles apply and to find a landowner liable for the acts of a third party the landowner must either fail in his duty to take reasonable precautions after having notice that such acts are occurring or about to occur or fail to take measures to discover that such acts are occurring. The landowner has no duty to exercise any care “until he knows or has reason to know that the acts of the third person are occurring, or are about to occur.” See, **Moran v. Valley Forge Drive-In Theater, Inc.**, 431 Pa. 432, 246 A.2d (1968); **McMillan v. Mountain Laurel Racing, Inc.**, 240 Pa. Super. 248, 367 A.2d 1106 (1976).

The question of **Restatement § 344** liability often arises in the context of a particular customer’s past conduct. For instance, a bar owner may be liable for the violent acts of a regular patron where the patron is a known trouble maker with a propensity for violence. See, **Prather v. H-K Corp.**, 423 A.2d 385 (Pa. Super. 1980).¹

Where a landowner is aware that potentially dangerous criminal acts are occurring on his premises, a putative plaintiff may seize upon that knowledge to predicate a claim under **§ 344** regardless of exactly where on the premises the criminal acts were occurring. The mere fact that a landowner is aware potentially dangerous acts are occurring on the premises may impose a duty upon the landowner to institute appropriate protective measures throughout the premises. See, **Moran, supra**.

Where the putative plaintiff, however, is not an invitee, but rather a licensee, a landowner has only a duty to warn licensees of known dangers. In the context of **Restatement § 344** cases, this exculpates a landowner from liability where the landowner

---

¹ Although not a subject of this lecture, the evidentiary implications of a claim under **§ 344** should not be ignored.
does not have actual knowledge of the potential threat posed by a third party. For example, in the recent case of *Paskes v. Magyar* (C.P. Centre Cty., June 27, 2007), preliminary objections were sustained in a case where the plaintiff, an alumnus of a fraternity, was injured when attacked by members of a rival fraternity. The plaintiff argued he should have been warned by the fraternity of the potential for an altercation. Absent a special relationship between the plaintiff and the fraternity, there was no duty to warn. Although the fraternity may have known there was a conflict with the other fraternity, the plaintiff did not allege the fraternity actually knew an intrusion and assault were going to occur.

A heightened duty toward invitees may exist where the premises involved is a motel, hotel or similar establishment. See, *Wilson v. Howard Johnson Restaurant*, 421 Pa. 455, 219 A.2d 676 (1966). In these types of cases, the heightened duty stems from the heightened duties owed by these types of establishments and is not peculiar to *Restatement § 344*.

Even if one can establish that a duty is owed, the question then becomes whether the prospective defendant employed reasonable measures in satisfaction of the duty. The determination of whether the measures employed are reasonable is a factual issue for a jury. Reasonable measures could include, depending upon the circumstances, the hiring of trained security personnel, implementation of surveillance equipment, adequate lighting or the use of intercoms or panic buttons positioned in places accessible to invitees. The reasonableness of the measures employed depend entirely upon the circumstances. If the subject premises is in a more dangerous neighborhood, demonstrable by evidence of repeated attacks or other violence, the landowner might
likely be required to employ more security than in a neighborhood perceived to be safer. If a landowner has a large parking lot, adequate lighting of the parking lot is a consideration. The presence or absence of suspicious persons might require more security.

III. FACTUAL ISSUES

Clearly, the merits of any case under this theory is fact sensitive and the measures to be employed depend upon, inter alia, the type of use the landowner is making of the land, the composition of the surrounding neighborhood and the persons who frequent the premises. The duties owed to a particular person depend upon the status of the individual as a business invitee, licensee or trespasser. Whether a landowner will be imputed to have requisite knowledge under Restatement §344 turns upon the character of the neighborhood, prior instances of violence at the premises and the nature of the premises.

IV. CONCLUSION

This outline identifies many of the legal and factual issues a practitioner will face in prosecuting or defending a claim under Restatement §344. In deciding, however, whether to take such a claim or in determining a client’s liability, there are several factors one should consider which may not fit into the rubric outlined above. In the case of an altercation, one should always consider whether the putative plaintiff was the instigator or merely a victim. An attorney should also be wary of representing a putative plaintiff where the plaintiff knows the third party offender. In determining how to best defend these types of cases, an attorney must consider how the incident occurred. Altercations may arise suddenly and irrespective of even the best security precautions. In many cases, an altercation could not have been prevented. Where a landowner caters to a large
number of people, there is a danger that disagreements among the patrons will arise. The distinction must be made whether the claimed injuries resulted from the failure to protect an invitee from another person *ab initio* or whether the allegation involves a claim that the injuries resulted from the failure of the landowner to handle the situation once it arose, i.e. failing to break up the fight or to alert the proper authorities.

The competent attorney will analyze each case individually. First, determine whether the landowner knew, or should have known, that the criminal acts of the third party were going to occur. If not, there is no duty. If so, then one needs to consider the security measures instituted by the landowner and whether they were reasonable in light of the circumstances. If they were not, there may be liability. Always ask yourself what could the landowner have done to prevent the altercation? If the landowner had no reason to know the altercation would occur or if the altercation would have occurred irrespective of reasonable security measures, there is no liability.