

BY KEVIN G. FALEY

## Commercial Owner's Liability for Assaults Between Patrons

**C**ontrary to the pervasive belief in the underwriting community, it is actually difficult to hold owners of public establishments liable for unanticipated assaults among patrons that occur on their premises. The liability for such incidents is quite circumscribed in New York.

Owner liability is premised on a common law theory of negligence rather than on any statutory scheme. Generally, owners of public establishments, such as a bar or a nightclub, owe a duty to protect any patrons on the premises from risks of foreseeable harm. For a proprietor to be held liable for the intervening criminal acts of another, including assaults, those acts must have been foreseeable. Whether or not these acts are foreseeable depends on the unique facts of each case.

Obviously, an owner will not be legally responsible for an extraordinary event which it could not have prevented.<sup>1</sup> An owner is only responsible for controlling the conduct of persons on the premises only if he is reasonably aware of the need for such control and has the opportunity to do so.<sup>2</sup> According to a majority of New York courts, the owner's duty to protect customers does not encompass preventing unforeseen or spontaneous assaults.

### Spontaneous and Unexpected

In *Silver v. Sheraton-Smithtown Inn*,<sup>3</sup> the plaintiff and another patron had a confrontation in the defendant cocktail lounge in which the plaintiff was pushed into a shelf containing empty glasses and sustained injuries. The court held that:

[A]n unexpected altercation between patrons which results in injury is not a situation which could reasonably be expected to be anticipated or prevented. Accordingly, although innkeepers are required to exercise reasonable care in the protection of their patrons, they cannot be held to be insurers of the safety of those patrons (Emphasis Supplied).<sup>4</sup>

The court found that the barroom altercation was outside the scope of any duty owed by the owner. The assailant acted suddenly and unexpectedly and the innkeeper was absolved from liability.

The *Silver* holding is often cited for the proposition that an owner will prevail when the assault was both sudden and unexpected. An element of uncertainty or surprise must typically be present for an owner to maintain a suc-



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cessful defense. If the facts of a case include a sudden and unexpected occurrence, the courts will likely dismiss the case on a summary judgment motion. If, however, there is evidence of an escalating situation on the premises, the motion will likely be denied. It then becomes a question of fact for a jury whether the owner breached his duty to protect persons on his premises and to protect patrons from risks of foreseeable harm.

### Escalating Situations

In *Shank v. Riker Restaurants Assoc.*,<sup>5</sup> the court reiterated the principle that an owner is not an "absolute insurer" of the safety of all on his premises. Nonetheless, the owner was found liable to the plaintiff.

After the manager of the defendant diner observed the assailant to be noisy and belligerent, including "drop kicking" a glass of water, the owner was deemed to be on notice of a potentially dangerous situation. The manager told an employee to call the police after the first few minutes, but then the assailant

promised to behave and the call was never made. However, he continued to yell and verbally abuse customers, culminating in an attack on the plaintiff. In finding for the plaintiff, the court held that the owner was on notice that the assailant constituted a source of danger to defendants' patrons.<sup>6</sup>

In contrast, the court in *Campbell v. Step/Lind Restaurant Corp.*,<sup>7</sup> granted the defendant's motion for summary judgment. The facts of this case are distinguishable from *Shank* in that the plaintiff and the assailant had purchased drinks for one another prior to the shooting. The court focused its attention on the unforeseeable nature of the incident as a whole. The fact that the victim and his assailant had been amicably interacting moments before the assault seemed to support the

court's reasoning. The court held that the plaintiff was the victim of a "sudden and unanticipated" shooting which could not have been prevented.<sup>8</sup>

In *Lee v. Durow's Restaurant Inc.*,<sup>9</sup> a member of the bridal party at a wedding reception was bowled-over on the dance floor when many of the male guests were engaged in a "wheelbarrow race." As a result, she sustained a broken leg. Although, there were several instances of raucous behavior throughout the reception, the court found this race to clearly be both spontaneous and inappropriate and not the result of an escalating situation. The defendant restaurant was entitled to summary judgment as there was no evidence that anything could have been done to stop the races.

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Plaintiffs in unanticipated assault cases often make arguments peripheral to the foreseeable nature of the assault as most assaults are clearly not foreseeable. Such alternative arguments predominantly focus on the issue of notice as it circumstantially relates to the expected nature of an assault. However these arguments generally do not succeed.

In *Elba v. Billie's 1890 Saloon, Inc.*,<sup>10</sup> the court granted the defendant's motion for summary judgment, dismissing the complaint. The plaintiff was elbowed in the nose by another bar patron involved in an altercation. The attorney for the plaintiff argued that the incident was a result of overcrowding of the bar, for which the defendant owner should be held liable. The maximum legal occupancy of the bar was 144 persons, yet the plaintiff estimated the number of persons in the bar at the time of the altercation to be 400 to 500. He described the crowd as mostly college-age and as having "boisterous and raucous fun."<sup>11</sup>

The Second Department held that the altercation was unexpected and "the mere fact that the bar was overcrowded and that the crowd was having boisterous and raucous fun" was insufficient to raise a triable issue of fact as to whether the injury was foreseeable.<sup>12</sup>

In *Lindskog v. Southland Restaurant, Inc.*,<sup>13</sup> the court dismissed a negligence claim against a restaurant owner despite the existence of a prior similar incident. The plaintiff sustained injuries after being struck on the head with a bottle and stabbed in the neck by an unidentified assailant while in the men's room of the defendant's restaurant. The court characterized this incident as so extraordinary in nature as to fall outside of the defendant owner's duty to protect his patrons, dismissing the plaintiff's argument relating to the prior occurrence. The court stated:

The mere fact that a single similar incident, involving different patrons, may have occurred in the defendant's restaurant approximately five months prior to the incident involved in this case does not, without more, establish that the defendant owed a duty to protect the plaintiff against such an unexpected and sudden assault.<sup>14</sup>

Impliedly, the court suggested that in order to hold an owner liable under similar circumstances, there must have been either multiple prior incidents or that the prior incident must

have occurred within a shorter time span than five months.

The Second Department, in the recent decision in *Browne v. GMRI, Inc.*,<sup>15</sup> further circumscribed the effect of prior incidents. In *Browne*, the plaintiff was shot and killed in a Red Lobster restaurant. On the average, five fistfights occurred there annually. Despite these prior violent incidents, the court concluded that the plaintiff failed to raise a triable issue as to whether Red Lobster had notice of prior criminal activity on the premises so as to make the shooting foreseeable. It determined that these prior fights were too dissimilar from the shooting to make it predictable. The court reiterated the legal requirement necessary to recover from an owner under these circumstances, that is, there must be evidence indicating that the owner knew or should have known of the probability of conduct on the part of third persons which was likely to endanger the safety of those lawfully on the premises. An owner has a duty to control the conduct of persons on its premises only when it has "the opportunity to control such persons and is reasonably aware of the need for such control."<sup>16</sup>

The First Department, in the novel decision in *Djurkovic v. Three Goodfellows Inc.*,<sup>17</sup> introduced an additional factor in the analysis of owner liability. The plaintiff was assaulted at the defendant's hip-hop club by another patron carrying a box cutter. The court held that there was no evidence of any prior criminal activity at the club, and even if "the anticipated presence of large crowds of young people consuming alcohol at a 'hip-hop' club in the early morning hours made this type of targeted criminal attack foreseeable,"<sup>18</sup> the court found that the defendant owner did not breach his duty to take reasonable security measures.

The owner hired state-licensed security guards who were present throughout the nightclub in significant numbers. These guards also conducted patdowns and monitored metal detectors that were placed at the club entrance. The court determined that no inference of the defendant's breach of duty to patrons could

be made merely because the box cutter used to assault the plaintiff slipped through the metal detector.

In *Ricard v. Roseland Amusement & Development Corp.*,<sup>19</sup> the complaint was also dismissed for failure to establish a breach of the minimal precautions standard. The plaintiff was injured at defendant's dance club, however, he was unable to show that the defendant breached his duty to take minimal precautions. The court noted the plaintiff failed to introduce the testimony of a qualified security expert, whereby the jury was left to speculate as to possible security deficiencies.

Liability for unanticipated assaults between patrons in commercial establishments is very difficult to establish. A plaintiff must demonstrate that the owner was on notice that such an assault could occur and that the owner was negligent in failing to protect his patrons from such an assault.

The majority of cases turn on the facts and circumstances surrounding the assault in question which are unique to these incidents. Showing that an assault is not "spontaneous and unexpected" is a high threshold to cross. Prior incidents do not alone provide a basis for notice. Appropriate security precautions taken by the owner are prima facie evidence of compliance with legal standards.

From a defense perspective, the key to defending such cases lies in directing a prompt, thorough initial investigation and subsequently crafting a motion for summary judgment. In the event that an action proceeds to trial, a security expert may help to bolster a defense. Essentially, the patrons of a commercial establishment party at their own risk.

1. See, e.g., *Martinez v. Santoro*, 273 A.D.2d 448, 710 N.Y.S.2d 374 (2d Dept. 2000).

2. See *Scalice v. King Kullen*, 274 A.D.2d 426, 710 N.Y.S.2d 632 (2d Dept. 2000).

3. 121 A.D.2d 711, 504 N.Y.S.2d 56 (2d Dept. 1986).

4. *Id.* at 712.

5. 28 Misc.2d 835, 216 N.Y.S.2d 118 (N.Y. Sup. Ct. 1961).

6. *Id.* at 837; accord *Betancourt v. 141 E. 57th St. Corp.*, 56 A.D.2d 823, 393 N.Y.S.2d 35 (1st Dept. 1977).

7. 143 A.D.2d 111, 531 N.Y.S.2d 576 (2d Dept. 1988).

8. *Id.* at 111.

9. 238 A.D.2d 384, 656 N.Y.S.2d 321 (2d Dept. 1997).

10. 227 A.D.2d 438, 644 N.Y.S.2d 278 (2d Dept. 1996).

11. *Id.*

12. *Id.*

13. 160 A.D.2d 842, 554 N.Y.S.2d 276 (2d Dept. 1990).

14. *Id.* at 843.

15. 775 N.Y.S.2d 184 (2d Dept. 2004).

16. *Id.* at 184, (Citing *D'Amico v. Christie*, 71 N.Y.2d 76, 85).

17. 1 A.D.3d 210, 767 N.Y.S.2d 108 (1st Dept. 2003); accord *Lewis v. Jemanda New York Corp.*, 277 A.D.2d 134, 716 N.Y.S.2d 58 (1st Dept. 2000).

18. *Id.*

19. 215 A.D.2d 240, 626 N.Y.S.2d 186 (1st Dept. 1995).