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LITIGATION REVIEW



High-Flying Tort Decisions

BY KEVIN SCHLOSSER

On consecutive days in February, two well-reasoned and instructive tort decisions with opposite results, yet consistent reasoning, were rendered in the Nassau County Supreme Court. While both rulings involved claims of negligence arising from flying objects, one resulted in summary judgment in favor of the defendant, while the other not only denied the defendant summary judgment, but, *sua sponte*, dismissed a number of the alleged defenses. Both carefully crafted decisions are worthy of close review by personal injury practitioners.

One of the most fundamental principles of tort law is that a defendant will not be held liable for negligence unless there is a legal duty of care owed to the plaintiff. *Palsgraf v. Long Island Railroad Co.*, 248 N.Y. 339 (1928). Significantly, while issues of negligence are intensely fact specific, and therefore most often left to the trier of fact for resolution, the question of whether a legal duty exists is within the province of the court. *Di Ponzio v. Riordan*, 89 N.Y.2d 578, 657 N.Y.S.2d 377 (1997). Thus, it is the court that plays the weighty role of gatekeeper in determining whether to impose a legal duty upon a defendant and thereby create enforceable rights in the injured plaintiff.

As the oft-quoted words of Judge Benjamin N. Cardozo in *Palsgraf* so eloquently

explained: "The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension."

It is against this legendary backdrop that the two recent Nassau decisions were rendered.

The T-Shirt Launch

Attending a fair amount of sporting events, it never ceases to amaze me the lengths to which grown adults will go to get a hold of one of those \$5 white cotton t-shirts launched into the stands by cheerleaders or mascots during certain breaks in the game. Indeed, recognizing the resulting fan reaction, Madison Square Garden aptly flashes signs of "mayhem" on the big video screen during its t-shirt launches.

The case of *Curran v. CXR Holding*, Index No. 11118/02, arose from such a sponsored t-shirt "launch," but, significantly, it was not at a sports stadium or facility, but at Jones Beach during a July 4th fireworks presentation, where many of the spectators were on blankets. Plaintiffs, an 11-year-old girl at the time of the accident and her grandmother, alleged they were both seriously injured when "a large, rowdy male beachgoer descended upon [their] blanket in an attempt to grab a 'flying' t-shirt" that was launched into the crowd by the defendant radio station.

Plaintiffs alleged that their injuries were "a

reasonably foreseeable consequence" of the t-shirt launch. On the other hand, defendant moved for summary judgment to dismiss the entire complaint, arguing that "the proximate cause of the plaintiffs' injuries was the unforeseeable actions of an intervening third party" — the unidentified "rowdy male beachgoer" who actually fell on the plaintiffs.

In a tightly reasoned decision, acting Supreme Court Justice Lawrence J. Brennan denied the defendant's motion for summary judgment. Characterizing it as a "chaotic t-shirt distribution event," the court reasoned that the "permission granted to the defendant radio station to stage this event impliedly, if not expressly, obligated it to insure that reasonable, common sense safeguards were used" to avoid the "foreseeable risk of harm to uninvolved, third-party beachgoers, such as the plaintiffs."

The court distinguished plaintiffs from "spectators at a hockey or baseball game," noting that the plaintiff grandmother had seven of her grandchildren, ages 14 through infancy, with her sitting on the beach blanket when the t-shirt launch was suddenly commenced and, therefore, could not be expected to wade through "a gauntlet of frenzied rowdies" to avoid the risk of injury.

In denying defendants' motion for summary judgment, the court observed that the "defendant, a commercial radio station in furtherance of its economic interests, organized an event which triggers an analysis of traditional common law principles — negligence, duty undertaken, proximate cause, and foreseeability of injury" — raising

Kevin Schlosser is a partner and co-chair of the Litigation Department at Meyer, Suozzi, English & Klein, P.C., Counselors at Law, Mineola, New York (516) 741-6565

"transparently clear factual issues which must be resolved by a jury."

Defense Wake-Up Call

Significantly, the court also issued a rather loud wake-up call to defense counsel in negligence cases where there are potential issues of the plaintiff's assumption of risk. The defendant alleged as a separate defense that each of the plaintiffs "were fully aware of the dangers and risks inherent [in the activities in which they were involved] and voluntarily assumed all said dangers and risks."

The court found that this separate defense constituted a "formal judicial admission" and that defendant thereby "conceded, that this event, which it created and managed, resulted in inherent dangers and risks."

This important portion of the decision shows that defense counsel must be careful in articulating and pleading defenses of this nature to avoid having them backfire and thereby be construed against the defendant as an admission.

One possible way of avoiding such an admission would be to make clear in the pleading that "the defendant has denied and is denying the existence of any foreseeable danger or risk, but, if such risk is found to exist (by the court and/or trier of fact), such risk, if any, was assumed by plaintiffs."

In fact, in several other portions of the answer in *Curran*, the defendant did couch its defenses in such a way as to avoid admissions — for example, the second separate defense ("That whatever damages, if any, were sustained by the plaintiff herein, were caused and/or contributed to by reason of the carelessness, recklessness, negligence and/or other culpable conduct on the part of the plaintiffs and each of them") and the cross-claim ("That the defendant . . . denies that it is guilty of fault as alleged in the Complaint but alleges that, if the plaintiffs recover a verdict against this defendant then this defendant, on the basis of apportionment of responsibility . . . is entitled to contribution and/or indemnification from [the other]

defendant . . . for all or part of any verdict or judgment that the plaintiff may recover against this defendant").

Obviously, as *Curran* shows, this is a tightrope that must be carefully navigated by defense counsel.

Ketchup Bottle Incident

The other recent Nassau County decision was rendered by Supreme Court Justice Geoffrey J. O'Connell in *Esposito v. Golden Reef Diner*, Index No. 14428/03.

Here, the plaintiff alleged he was injured while seated and eating at the defendant diner when a man who was part of a group arguing with another group of patrons threw a ketchup bottle that hit the plaintiff in the head. The plaintiff testified at his deposition that the defendant diner's personnel intervened between the two arguing groups of men "when it became obvious there was going to be an altercation," about five minutes before the plaintiff was struck with the bottle.

The plaintiff also testified that he was hit with the bottle after the diner's staff intervened approximately three to four minutes after he first observed water and french fries being thrown between the two groups. Plaintiff alleged that the diner was "unsafe," that the defendant "was negligent in training of its personnel, who inadequately intervened" and that defendant failed to notify the police timely.

On the other hand, the diner's manager testified that when he heard the arguing between the two groups, "he told the cashier to call the police and two waiters on his staff were already between the groups trying to quell the disturbance."

He also testified that as the one group left, he and another waiter tried to restrain the group of men who were still seated and who had begun to throw things. Finally, he testified that there was "no history of any such incidents in the [d]iner before."

In response to defendant's motion for summary judgment, the court found that "whether the

[d]iner's personnel intervened or not is not the issue," but, rather, "whether the defendants were on notice of assaultive behavior of third parties."

The court observed that there was no evidence of prior assaults or fights within the diner and rejected the rather curious attempt by plaintiff's counsel to offer his own "personal observations of drunken or disorderly persons being present" at the diner during his own prior visits there, finding that counsel's "personal claims" were "not properly before the Court" and were "conclusory and speculative."

In contrast to the factual scenario described by Justice Brennan in *Curran*, Justice O'Connell found in *Esposito*: "While the proprietor of the restaurant has an ordinary duty to protect patrons, a sudden and unexpected hurling of an object during an altercation is not an act which a proprietor could have been expected to have foreseen and guarded against."

Thus, the court concluded that it could not find "that the defendant breached a duty to the plaintiff in failing to provide safeguards from foreseeable danger." Recognizing that summary judgment "is granted infrequently in negligence actions," the court nevertheless observed that summary judgment should be awarded "without hesitation" when an accident is caused "by acts of a person for which a defendant is not liable."

Curran and *Esposito* demonstrate, among other things, that while negligence cases are typically fact-sensitive and often require a full plenary trial, courts continue to play the significant role of gatekeeper in determining just when to open the courthouse doors to injured plaintiffs to hold only legally responsible defendants liable.