



The Duty of Care Regarding Active Shooters, Or, What to Do When the Bad Guys Don't All Look Like Vin Diesel **By Steven A. Adelman, Esq.** **Adelman Law Group, PLLC**

Every year I begin *Risk Management in Venues*, a seminar I teach in Arizona State University's law school, by having my students recite the four elements of a tort. With a mix of dim recollection and boredom, they say "duty, breach, causation, damages." *Oh brother, we know this.*

Next, I ask them to state every person's common law duty of care. A moment of hesitation follows. Then a far smaller number of students mumbles something about being reasonable. Regret now palpably mixes with panic. *Uh oh, we should know this.*

Indeed they should. It is basic common law in roughly half the countries on the planet that everyone has a duty to behave reasonably under the same or similar circumstances. Yet, my students' omission of the critical second prong of the duty of care formula – ***under the circumstances*** – is not unusual. In my practice, the most common error I see is that parties fail to consider what is reasonable under the circumstances. This matters for spectator sports, concerts, corporate activations, and other live events in public places because behavior that would be unthinkable in other contexts may be reasonably foreseeable where people are invited to play. In other words, if reasonable patrons under these circumstances are relatively less attentive to their own safety because they are more focused on enjoying the experience – one of many distinctions between attending an event versus going to the office – then the organizer who collected their admission has a corresponding duty to mitigate the risks made reasonably foreseeable by the circumstances they've created.

Consider the shiny object of our day.

ACTIVE SHOOTERS

Active shooter incidents consume a massively disproportionate amount of attention relative to their number. This is not to minimize their significance, but to observe that an armed gunman is rarely considered reasonably foreseeable as a matter of law. And because third-party violence in public accommodations is still rare,¹ it can be challenging to convince event professionals to address a risk they probably will never experience.

¹ Albeit more common in 2019 than ever before.

<https://www.nytimes.com/interactive/2019/09/21/us/summer-mass-shootings.html?smid=nytcore-ios-share>.

Our government advises us to “Run, Hide, Fight.”² Unfortunately for people who work in or attend live events, this program was devised for office buildings.³ Everything relevant to quickly recognizing gunfire and responding decisively to it is different in event spaces, which are typically dark, crowded, loud, and unfamiliar; patrons are likely with at least one person they don’t want to leave behind; they are excited by the event, the environment, or a controlled substance; and their attention is focused on the show they came to enjoy.⁴

It gets worse. Witness accounts repeatedly show that people do not quickly or correctly identify the sound of gunfire, determine where it is coming from, and run in the opposite direction.⁵ The Department of Homeland Security’s latest national threat assessment describes a profile of active shooters that fits many people walking the halls of an average law firm.⁶ Recent incidents show that no geographic region or type of venue is immune. Run? Hide? Fight? From whom? Where?

THE DUTY OF CARE CHANGES OVER TIME

Back to the law. When considering one’s duty of care for any particular event, the history of similar events is a useful guide. But it’s not the only one. Regarding the rapidly changing circumstances for safety and security at live events, an old case involving newfangled technology is instructive.

In the 1920s, two tugboats lost their cargo in a storm because they lacked working weather radios, which many operators considered a “toy.” Judge Learned Hand wisely wrote,

Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.⁷

At some point, a jury is going to find that an active shooter is so foreseeable in the United States, whether because of frequency or body count or our collective emotional trauma,

² See U.S. Department of Homeland Security Active Shooter pocket card,

https://www.dhs.gov/sites/default/files/publications/active_shooter_pocket_card_508.pdf.

³ See, e.g., Ready Houston’s video, *RUN. HIDE. FIGHT. Surviving an Active Shooter Event*, which has been viewed more than eight million times as of this writing.

<https://www.youtube.com/watch?v=5VcSwejU2D0>.

⁴ See Steven A. Adelman, *Run, Hide, Fight: Why the current version doesn’t work for live events, and how to do better*, Protocol, Summer 2016. <http://adelmanlawgroup.com/wp-content/uploads/2016/07/2016-07-12-Protocol-article-re-Run-Hide-Fight.pdf>.

⁵ See, e.g., *The Unthinkable*, Amanda Ripley (Three Rivers Press, 2008), at 9-10 (one survivor of the World Trade Center attacks described walking in circles in her cubicle until someone screamed at her to evacuate, a typical response to unfamiliar stress called “milling”).

⁶ See E.g., *Mass Attacks in Public Spaces – 2018*, United States Secret Service, National Threat Assessment Center, July 2019, p.2 (half the perpetrators of mass violence in 2018 were “motivated by a grievance related to a domestic situation, workplace, or other personal issue,” two-thirds “had histories of mental health symptoms,” including depression, and over half had “indications of financial instability” in the preceding five years).

⁷ *The T.J. Hooper*, 60 F.2d 737, 740 (2d Cir. 1932).

that any venue or event operator that lacks an emergency action plan and corresponding crowd manager training has failed to reasonably address a threat it should have anticipated. Then there will be a new precedent, that acts of third-party violence *are* reasonably foreseeable. I suggest preparing for that day now. ♦ SAA