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MEDICAL YOUR HOTEL, RESTAURANT OR EMERGENCIES AT BUSINESS

**AN
ANALYSIS
OF DUTY,
RISK AND
LIABILITY**

PRESENTER



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- **Founding managing shareholder of Hamilton Miller & Birthisel, LLP, a Martindale Hubbell AV rated law firm.**
- **Florida Board Certified litigator who has been named by the South Florida Business Journal as the BEST OF THE BAR.**
- **Recognized by Law & Politics as a Florida Super Lawyer every year since 2006.**
- **Practice dedicated to litigation, including, admiralty and maritime claims, hospitality law claims, transportation, personal injury defense, property and casualty, commercial litigation, medical and professional malpractice, products liability, and mass torts.**

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INTRODUCTION

- Proliferation of lawsuits premised on allegedly inadequate responses to medical emergencies
- Filed against hotels, resorts, restaurants, spas, gyms, sports clubs, etc.
- High exposure
 - Involve death or serious disability
 - Very high potential medical and economic damages
 - Strong emotional component
 - Jury sympathy

INTRODUCTION (cont)

- Lawsuits very costly to defend
 - Numerous fact, medical, and expert witnesses
 - Can span many years
- Complicated medical issues
 - Causation and damages

INTRODUCTION (cont)

- Effective Risk Management is Key
 - To ensure reasonable responses to emergencies
 - Prevent claims
 - Prevent claims from becoming lawsuits
 - Increase likelihood of summary adjudication in event of lawsuit

INTRODUCTION (cont)

- Jurisprudence is instructive
- Court decisions provide insight
 - How to prepare for medical emergencies
 - How to respond
 - How much is too much
 - What to document
 - Preservation of evidence

Duty of Care

- **General rule:** a bystander has no duty or obligation to provide assistance.
- **Exception: When there is a Special relationship.**
 - includes common carriers, innkeepers, and possessors of land who holds it open to the public.

See Restatement of Torts (Second), Sec 314 & 314A

Duty of Care to Guests & Patrons

- To provide first aid and to care for them until they can be cared by others
- Not required to take any action until owner knows or has reason to know that plaintiff is endangered, or is ill or injured.

See Restatement of Torts (Second), Sec 314 A, Comment (f)

Duty of Care to Guests & Patrons (cont)

- Owner will seldom be required to do more than give such first aid as he reasonably can, and
- Take reasonable steps to turn the sick person over to a physician, or to those who will look after him and see that medical assistance is obtained.

See Restatement of Torts (Second), Sec 314 A, Comment (f)

Third Restatement of Torts

- Sec 40 formally adopted May 16, 2012
- Counterpart is Sec 314A of the Second Restatement of Torts
- Identifies new special relationships, including a school and its students, a landlord and its tenants, and a custodian relationship

Third Restatement of Torts (cont)

- Each of these affirmative duties “requires only reasonable care under the circumstances”
 - This represents a more generalized duty of care than that expressed in Section 314A of the Second Restatement, which was limited to providing first aid and temporary care until appropriate medical care could be obtained

Third Restatement of Torts (cont)

- This more general duty of reasonable care recognizes the variety of situations in which the duty may arise
- Additionally, it represents the advancements in medical technology that may enable an actor to provide more than mere first aid

Third Restatement of Torts (cont)

- Courts have yet to interpret the scope of this reasonable duty of care
- A Reporters' Note to Sec 40 of the Third Restatement suggests that the Second Restatement even recognized circumstances in which an actor would have a duty to do more than provide first aid and obtain appropriate medical attention
 - Comment f of the previous 314A provides the actor “will seldom be required to do more...”

Third Restatement of Torts (cont)

- However, the “expanded” reasonable duty of care owed to guests and patrons may include mandates for providing advanced medical technology in emergencies, such as AEDs
- The Reporters’ Note to Sec 40 states that technological advances justify employing a reasonable care standard
 - Viewpoint was revealed in the adoption in 2004 of a regulation by the FAA requiring airlines to carry a defibrillator aboard all aircraft with a flight attendant

Duty of Care when Intervening

- If owner intervenes, he is subject to liability to the guest for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
 - (a) his failure to exercise such care increases the risk of such harm, or
 - (b) the harm is suffered because of the other's reliance upon the undertaking.

See Restatement of Torts (Second), Sec 323

Duty When Taking Charge Of The Helpless

- When taking charge to assist helpless person, an actor the subject to liability by:
 - failing to exercise reasonable care, or
 - discontinuing his aid or protection, if by so doing he leaves the other in a worse position.

See Restatement of Torts (Second), Sec 324

Lundy v. Carlino, 34 F.3d 1173 (3d Cir. 1994)

- Leading case applying the Restatement of Torts analysis.
- 66-year-old man suffered cardiac arrest while gambling at a casino in New Jersey. Filed suit claiming delay in treatment led to permanent injuries.
- Court of appeals affirmed entry of summary judgment in favor of casino, finding that while casino owed duty to provide aid, duty did not extend to a later medical care that could be reasonably foreseeable is necessary.

Pertinent Facts

- Plaintiff received immediate CPR from other guests.
- Casino personnel immediately sounded alarm which prompted swift arrival of security staff and then casino nurse (casino documented times and events)
- Nurse, hired by independent contractor physician, brought medical equipment, but did not bring intubation kit.
- Per casino records, ambulance summoned within 3 minutes of the collapse and arrived 3 minutes thereafter.

Plaintiff's Theories Of Liability

- Casino owed duty to provide medical care pursuant to Sec. 314A
- Casino breached duty by failing to have on-site equipment and personnel to perform an intubation.
- Casino voluntarily assumed a duty and breached it because nurse failed to bring necessary medical equipment to intimidate Plaintiff (per Section 324).

Court's Holding and Analysis

- Noted it was a matter of first impression.
- Casino owed no duty to provide medical services to its patrons.
- However, Casino owed duty to helpless patron to secure medical care
- Casino met duty by promptly summoning medical care.

Court's Holding and Analysis (cont)

- Maintaining on a full-time basis the capability of performing and integration goes far beyond any “first aid” contemplated by Sec. 314A
- Casino did not voluntarily assume a duty under Sec. 324 by hiring the physician that, in turn, hired the nurse.
- Notwithstanding, New Jersey’s Good Samaritan Act shielded casino.

Abramson v. Ritz Carlton Hotel Co., **2012 WL 1632591 (3d Cir. May 10,** **2012)**

- Plaintiff's husband went into cardiac arrest at the Ritz's restaurant. A waitress immediately notified the hotel receptionist, and 911 was called.
- There was no dispute that the Hotel secured medical care for Mr. Abramson minutes after his wife first asked the staff for help. Plaintiff also conceded that her husband was assisted by trained medical professionals from the moment of the collapse.

***Abramson v. Ritz Carlton Hotel Co.*, 2012 WL 1632591 (3d Cir. May 10, 2012)**

- Plaintiff attempted to distinguish *Lundy* by arguing that while intubation is well beyond basic first aid, an oxygen tank and AED are not, and that the restaurant should have provided them
- Court held that *Lundy's* reasoning clearly extended to the case and that a common understanding of “first aid” did not encompass the use of an oxygen tank or AED

L.A. Fitness International, LLC v. Mayer, **980 So. 2d 550 (Fla. 4th DCA 2008)**

- Gym patron died following a heart attack sustained while exercising on a step machine
- Daughter filed a wrongful death action and the jury returned a substantial verdict on her behalf
- State Court of Appeals reversed and remanded with instructions that judgment be entered in favor of gym

Pertinent Facts

- Gym employee immediately ordered a 911 call.
- Gym employee assessed but did not perform CPR
- Witnesses testified that employees merely sat and stared at the deceased
- Witnesses testified paramedics took 10 to 12 minutes to arrive
- Paramedics were unable to revive.

Plaintiff's Theories Of Liability

- Gym breached its duty of reasonable care, in part as follows:
 - Failed to administer CPR
 - Failed to have AED defibrillator and premises
 - Failed to properly train employees to handle metal emergencies
- Assuming no duty to provide CPR, gym voluntarily undertook it but performed negligently

Court's Holding and Analysis

- Issue of duty owed by health club owner to injure patron was matter of first impression.
- Gym fulfilled duty of reasonable care by summoning paramedics within a reasonable time
- No duty to maintain CPR qualified employees or to perform CPR
- No legal duty to maintain defibrillator in premises

Court's Holding and Analysis (cont)

- CPR
 - Skilled treatment beyond the scope of “first aid” required under Section 314A
 - Although relatively simple, requires training and re-certification
 - Nonmedical employees certified in CPR should have discretion in deciding when to utilize procedure.
 - Industry standards concerning CPR did not give rise to an independent legal duty

Court's Holding and Analysis (cont)

- AED Defibrillators
 - Florida statute did not require AEDs placed in buildings or that acquirer of AED have persons trained in its use
 - No common law duty to have AED on premises

Court's Holding and Analysis (cont)

- Negligent Undertaking
 - Gym employee's assessment of the deceased, including taking his pulse, did not commit him to perform CPR
 - Plaintiff did not allege that employee's actions worsened deceased's condition or caused him an affirmative injury
 - Plaintiff did not allege that employee's actions caused others to refrain from rendering aid.

Verdugo v. Target Corp., 2012 WL 6199193 (9th Cir. Dec. 11, 2012)

- Shopper suffered sudden cardiac arrest and collapsed
- Paramedics were dispatched, but took several minutes to reach the store and several more to reach Verdugo inside
- By the time the paramedics arrived, Verdugo was dead and could not be resuscitated
- Target did not have an AED in its store

The Issue

- Verdugos sought the announcement of a common law rule that would require retail establishments across the state to acquire AEDs.
- Target suggested that such a rule would burden it and other similar companies, that California common law does not support such a rule, and that the state's AED statutes preclude the imposition of such a common law rule.
- The state's statutes did not require a building owner or a building manager to acquire and have installed an AED in any building. Whether the AED statutes as a whole preclude a common law duty to acquire an AED was one of the main issues presented.

Decision and Analysis

- As a matter of comity, the Court considered the California Supreme Court better positioned to address the questions
- The existence of California's statutory scheme was not determinative as to whether a common law duty exists
 - If the duty exists, the question would become whether Target had a duty under California common law to have an AED available

Decision and Analysis (cont)

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Court's Holding and Analysis (cont)

- Focused on weighing the foreseeability of the harm suffered by Verdugo against the burden to be imposed on Target:
 - Degree of certainty that the Plaintiff suffered injury
 - Closeness of the connection between the Defendant's conduct and the injury
 - Moral blame attached to such conduct
 - Policy of preventing future harm
 - Availability, cost, and prevalence of insurance for the risk involved

Court's Holding and Analysis (cont)

- No clear answer, but decision strongly suggests that there should be a duty in California
 - If so, the California Supreme Court would create a common law duty to have an AED on site in the event of medical emergencies
 - California's statutes, which do not recognize this duty, would be read as safe harbor limitations for businesses, hotels, etc. that already have the devices on site