PREMISES LIABILITY AND CRIMINAL ACTS OF THIRD PERSONS
By: Steven W. Bancroft, Esquire

For many years the Virginia Supreme Court has firmly held that if a third person comes on the premises of another and commits a criminal act that causes injury or harm to a person the owner and occupant of the premises is typically not liable. In Golf Boston, Inc. v. Rogers, 215 Va. 155 (1974), the court adopted the Restatement view, that a person owes no duty to control the conduct of a third person in order to prevent physical harm to another, unless a special relationship exists giving rise to the duty of protection. When analyzing a case in this area it is important to first determine whether there is a special relationship between the owner and occupant of the premises and the individual who lawfully enters your property and is injured. The general duty of all owners and occupants is to use ordinary care to keep the premises reasonably safe for their invitees.

In Wright v. Webb, 234 Va. 527 (1987), the court held that an owner of a motel whose method of business does not attract or provide for a climate of assaultive crimes does not have a duty to take additional measures to protect an invitee against a possible criminal assault unless it knows that criminal assaults are occurring or that there is an imminent probability of harm to invitees. In the Wright case, the court held that even though there were a few prior crimes in the parking lot they were insufficient to impose an additional duty on the owner to increase security or to invitees additional protection.

Over the last eighteen years the Virginia Supreme Court has found a number of exceptions to the rule set forth in Wright and it is important to keep these exceptions in mind to evaluate whether or not liability may attach to a particular incident involving a criminal act by a third person. First, you must look to see if the special relationship which the courts have now expanded to include landlord/tenants and employer/employees. If the special relationship is found the owners and occupants of land need to react appropriately if they become aware of criminal acts taking place on their premises that put others lawfully on the premises in danger. You also have to analyze the type of business that is being operated to determine whether or not the business itself may attract individuals who are likely to commit crimes. For example, if you are an owner of a pool hall that is in a rough inner city neighborhood and you become aware of assaultive crimes taking place on your premises you have a duty to increase security to better protect your invitees. This may mean increasing the number of bouncers, installing security cameras, making sure that bartenders and managers do not allow alcohol to be served to intoxicated individuals and to immediately contact the police if trouble starts.

It is important to look at the type of establishment that is in question and this becomes readily apparent in the Virginia Supreme Court’s decision in Dudas v. Glenwood Golf Club, Inc., 261 Va. 133 (2001). In Dudas, a third party criminal came on the premises and shot an individual who was lawfully on the premises playing golf. The court cited Wright and found that the narrow exception did not apply here since Glenwood Golf Club was not the type of business that attracted assaultive crimes and there was no showing that the golf club had knowledge or notice that criminal acts were about to occur or that anyone was in imminent probability of harm. In making this determination the Virginia Supreme Court applied a reasonable person standard and held that the golf course owner should not have reasonably known an assault was imminent because the last act of criminal violence on the premises was years earlier.

Similarly, in Rajeczovsky v. St. John’s Wood Apartments, 261 Va. 97 (2001), the court considered liability of a landlord that had posted a potential lessee that the building was patrolled by police on a regular basis and that no crimes had occurred on the premises for a long time. The representations by the landlord were untrue and the tenant, after he signed the lease, was assaulted when he was walking in the apartment complex common area. The court held that the landlord’s misrepresentations were not sufficient to create additional duties on the part of the landlord. The court held that an owner or an occupant of land is not an insurer of a tenant’s safety. The landlord’s pre-lease statements did not establish liability and the plaintiff failed to carry his burden in proving that the landlord did not use ordinary and reasonable care to keep the premises reasonably safe.

While the law has been very favorable to owners and occupant in this area for many years a number of circuit court judges are beginning to find that the special relationship exists between the plaintiff and defendant and allow for a jury to establish that the owner committed negligent acts toward others, continued to be served. Four employees confronted the patrons and attempted to remove them from the restaurant during the confrontation, physical blows were exchanged. Eventually, the patrons left the building and went into the parking lot. Some of the employees followed, and a violent fight erupted. At this point, the plaintiff left the restaurant. The two intoxicated individuals jumped into a car and began to drive away. As they drove away, the restaurant employees hit the vehicle and its occupants with fists and metal pipes. The intoxicated driver lost control of the vehicle and struck the plaintiff.

The injured person filed suit seeking compensatory and punitive damages against the restaurant. Although the complaint was amended to add the specific employees, the claims against the restaurant were based primarily on negligence. The plaintiff alleged negligent acts which ultimately resulted in the loss of control of the vehicle by the other patrons; negligence in failing to protect the plaintiff from the vehicle, aggressive, and dangerous acts due to consumption of alcohol; negligence in allowing the intoxicated patrons unrestricted access to the premises; negligence in allowing the patrons to remain on the premises; and negligence in allowing the employees to pursue the patrons when they left. Negligence in failing to suppress the fight and in hiring, training and supervision of employees was also alleged.

In determining the applicability of the exclusion, the court noted generally the distinction between an insurer’s duty to defend and duty to indemnify in Virginia. The courts in Virginia consistently have held that the insurer’s obligation to defend is broader than its obligation to indemnify. "Brenner v. Lawyers Title Insurance Corp., 240 Va. 185, 395 S.E.2d 100 (1990)." The obligation to defend arises whenever the complaint against the insured alleges facts and circumstances, some of which, if proved, would fall within the risk covered by the policy. Id. at 189. Only when it is clear that there is no liability under the insurance contract for any judgment that would be obtained based upon the allegations, does the insurance company have no duty to defend. "Travelers Indemnity Co. v. Obenhain, 219 Va. 44, 245 S.E.2d 247, 249 (1978)."

The courts have concluded that “While the duty to defend is, in the first instance, to be determined by the allegations of the notice of motion, and if those allegations leave in doubt whether the case alleged is covered by the policy, the refusal of the insurance company to defend is at its own risk; and if it turns out on development of the facts that the case is covered by the policy, the insurance company is necessarily liable for breach of its covenant to defend…” "Lerner v. Safe & Seco, 219 Va. 101, 245 S.E.2d 249 (1978), quoting。“
NEW COMPENSATION RATES EFFECTIVE JULY 1, 2005

The new maximum compensation rate effective July 1, 2005 will be $790.00 per week. This equals to $38,527.02 per year, or $368,090.00 during the statutory settlement period of five hundred weeks. Most claims are subject to the five hundred week maximum, except where the injured worker qualifies for permanent and total disability under Virginia Code §65.2-508.

The minimum compensation rate is $184.00 per week. Where benefits are awarded, the minimum applies. However, the claimant cannot receive more than his average weekly wage at the time of the injury. In other words, if the claimant was earning $100.00 per week at the time of injury, the compensation rate would be $100.00, and not $184.00.

The rate for cost of living benefits effective October 1, 2005 will be 3.35%. The Virginia Workers’ Compensation website offers a convenient program that can be downloaded to calculate the amount of cost of living or disability benefits that are due for any specific period. The program can be accessed through the following website:

http://www.vwc.state.va.us/rules.htm

LEGISLATIVE DEVELOPMENTS:

1. Bills that passed.

   House Bill 1701 would have amended Va. Code §65.2-406 to allow for the use of demonstrator vehicles by employees of car dealerships, under the rationale that car dealers will restrict the use of such vehicles if car dealerships are liable for the same injury.

   HB2775.

   Commission Now Authorized to Require Professional Employer Organization to Guarantee Payment of Workers’ Compensation Benefits. Va. Code §65.2-803.1 now authorizes the Virginia Workers’ Compensation Commission to require any business entity owning or controlling a professional employer organization to guarantee performance of all obligations under the Virginia Workers’ Compensation Act. A professional employer organization is defined under Va. Code §65.2-2101 as any person that enters into a written agreement with a client company to provide professional employer services. HB190.

   Commission Authorized to Access Civil and Criminal Penalties Against Professional Employer Organizations. Under the amendments to Va. Code §65.2-805 and §65.2-806, the Commission is now authorized to assess civil and criminal penalties against professional employer organizations that failed to guarantee payment of Workers’ Compensation benefits as required by Va. Code §65.2-803.1. The amendments to Va. Code §65.2-805 authorize civil penalties between $500.00 to $5,000.00, while the amendment to Va. Code §65.2-806 provides that an employer who knowingly and intentionally fails to comply with its obligations to provide insurance is guilty of a Class II Misdemeanor. HB 190.

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   Use of Dealer Motor Vehicles. Va. Code §65.2-101 has been amended to provide that any injury, disease, or condition resulting from the use by an employee of a dealer motor vehicle for commuting to or from work or any other non-work activity is not compensable. The Bill was intended to permit continued use of demonstrator vehicles by employees of car dealerships, under the rationale that car dealers will restrict the use of such vehicles if employees are covered under the Act. HB1728 and SB1215.

   Extension of Statute of Limitations for September 11, 2001 Rescue Workers. Va. Code §65.2-101 has been amended to allow employees suffering from diseases attributable to 9/11 rescue and relief efforts additional time for filing an occupational disease claim. Before the amendment, the statute required that the claim be filed within five years from the date of last injurious exposure. That requirement is now eliminated, and the only limitation is that the claim be filed within five years from the date that the employee learns of the disease. HB2775.

   Coverage For First Responders During State of Emergency. This Bill amends Va. Code §65.2-103 by providing that where a state of emergency is declared by the Governor, first responders traveling from home or another location are acting within the scope of their employment. This Bill is significant because police, fire, and other municipal employees may attempt to extend its provisions to all first responders, even where an emergency has not been declared. HB2775.

New Compensation Rates Effective July 1, 2005

Due to the rise of frivolous litigation, manufacturers can no longer expect that common sense will prevent injury.

The following are actual package warning labels:

- Baby stroller warning: Remove child before folding.
- Household iron warning: Never iron clothes while they are being worn.
- Warning on underarm deodorant: Do not spray in eyes.
- Cardboard car sun shield that keeps sun off the dashboards warn: Do not drive with sun shield in place.
- An electric cattle prod warns: For use on animals only.
- In the manual of a chainsaw: Do not attempt to stop the blade with your hand.
- A TV remote controller warns: Not dishwasher safe.

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new laws which you may find noteworthy in addition to the laws we referenced in our last newsletter.

CIVIL REMEDIES AND PROCEDURES:
HB 2010 - Provides that the rate of interest on a judgment is that rate in effect at the time of entry of the judgment, and is not affected by any subsequent changes to the statutory rate of interest. Amends Code Section 6.1-330.54 (The present judgment rate of interest is 6%; the legislature decreased it from 9% last year).

SB 827 - Requires that all subpoenaed documents, rather than only those concerning the other party, be made available to the other party, upon that party’s written request, except for good cause shown. Amends Code Section 8.01-417.

SB 1123 - Allows a plaintiff, in circuit court cases, to ask the defendant for a waiver of service of process in lieu of official service and mandates that a defendant respond so as to avoid any unnecessary costs of service of process. Amends and adds to various provisions of Title 8.01.

INSURANCE:
HB 2410 - Requires insurers to provide no less than 90 days’ notice of a cancellation or non-renewal of, or a premium increase of more than 25% for, a medical malpractice insurance policy. If cancellation or non-renewal of such policy is for nonpayment of the premium, the cancellation or non-renewal will be effective not less than 15 days from the date of mailing or delivery of the notice. For any other liability insurance policies, 45 days’ notice of a 25% increase in the premium, rather than in the filed rate is required. Amends Code Section 38.2-231.

COURTS:
HB 2118 - Makes the written reports or records of blood alcohol tests conducted upon persons receiving medical treatment in a hospital or emergency room admissible in evidence in any civil proceeding as a business records exception to the hearsay rule. The reports or records may be disclosed in accordance with federal regulations, without consent or court order.

Some protections against civil liability for those taking blood and conducting tests now applicable to avoid coverage under the policy, the court noted that the language had to be construed most strongly against the insurer. See Johnson v. Insurance Co. of Northern America, 350 S.E.2d 616, 619 (Va. 1986). If the language of an exclusion is unambiguous, the words are given their ordinary meaning; however, if the language of the exclusion is subject to multiple interpretations, the language is construed in favor of coverage or indemnity and against limitation of coverage. See United Services Auto Assn. v. Webb, 369 S.E.2d 196, 198 (Va. 1988). The burden of proof was on the insurer to prove that the assault and battery exclusion applied.

Applying these principles, the court held that even though the plaintiff attempted to couch the allegations in terms of negligence, the exclusion clearly applied. The plaintiff alleged negligence as an act which purportedly caused the physical alteration or failed to prevent the physical altercation. Either way, the precipitating cause of the injuries was the assault and battery, and there was no basis for coverage under the policy and no duty to defend.

The case is important because it highlights the practice of alleging negligence to obtain coverage for otherwise excluded acts. Each motion for judgment or complaint should be reviewed closely to determine whether, under the four corners of the insurance policy and the underlying complaint, the allegations, if proved, would fall within a risk covered by the policy.

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The Virginia Supreme Court held that the claimant, who had been repeatedly “goosed” by a co-worker, was not entitled to Workers’ Compensation benefits because the assault upon the claimant was of a personal nature, and not in furtherance of the employer’s business. Although the claimant was denied Workers’ Compensation benefits, the court upheld a civil suit against the employer.

Workers who actively participate in horseplay at the workplace face significant adverse consequences. Even if severely injured, their claims for workers’ compensation benefits will be denied. The relatively recent cases exemplify this point. The claimant in Crowder v. Jackson River Enterprises, Inc., VWC File Number 211-37-35 (February 6, 2004) pinched another employee and then took his hat “like he always does.” The claimant was injured when his fellow worker tripped him, causing him to fall. In denying Workers’ Compensation benefits, the Virginia Workers’ Compensation Commission held that the injury did not arise from a risk of the employment, and that the claimant was not a willing participant in the horseplay.

In another case, Mann v. United Parcel Service, Inc., VWC File Number 210-40-44 (August 22, 2003), the claimant and a co-worker were discussing how damage occurred to the co-worker’s car and boat during a weekend fishing trip. The co-worker blamed the claimant and gently nudged him in the chest. The claimant responded by grabbing the co-worker’s shirt. The co-worker then grabbed the claimant, attempting to lift him off the ground. The attempt was unsuccessful, and the claimant fell forward, sustaining a fracture of the lumbar spine.

After citing established precedent, the Virginia Workers’ Compensation Commission denied the claim for benefits, holding: “Certainly, the claimant did not expect to be injured. However, we agree with the Deputy Commissioner that the evidence shows he was a willing participant in the horseplay and therefore is ineligible for benefits.”

The claimant in Dunbar v. RLF Iron Erectors, Inc., Record Number 2451-00-3 (February 6, 2001) sustained a compensable injury when an I-beam rolled onto his foot at work. Following the injury, the claimant went to work with several co-workers and began drinking beer. Another worker offered to drive the claimant to the hospital to have his foot x-rayed. The claimant refused because he did not want to drive after he had been drinking. An argument followed and the claimant and the co-worker “tussled.” During the tussle, they fell off onto a curb, and the claimant aggravated his foot injury. X-rays that were subsequently taken confirmed a fracture.

Even though the initial injury was compensable, the Court of Appeals upheld a Commission finding that the claimant was not a willing participant in the horseplay and therefore is ineligible for benefits.