TORTS

LIABILITY OF A BUSINESS PROPRIETOR FOR ATTRACTING CROWDS

Shamhart v. Morrison Cafeteria, 32 So.2d 727 (Fla. 1947), posed the interesting question: Is a businessman liable to his neighbors because customers come to his door in such number that they interfere with the entrance of others into the business places of his neighbors?

The Morrison Cafeteria, a popular eating place in West Palm Beach, Florida, did not have adequate facilities to handle the crowds of people waiting to be served. As a result many persons would wait on the sidewalk, starting a line at the entrance to the Cafeteria and extending past two places of business to Shamhart's drugstore, oftentimes extending past both entrances to the drugstore and in some instances extending around the corner to the side entrance. Shamhart complained to the manager of Morrison Cafeteria and both parties requested official police supervision of the lines, but were advised that officers could not be spared for such duty. The cafeteria was prevented from enlarging its premises by the fact that it had only a short-term lease to the front part of its premises. However, it did lengthen serving hours, rearranged the waiting lobby, and employed a superintendent of service whose sole duty was to assure the most efficient handling of the waiting patrons on the property of the cafeteria. This failing, Shamhart brought an action asking for damages and an injunction to restrain the occurrence of the lines in the future.[1] The Special Master reluctantly imposed liability,[2] feeling that he

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1. The court disregarded Shamhart's failure to minimize his loss. If the Cafeteria has any right to police the public sidewalk, then Shamhart would have that right also and could use one or more of his idle clerks to keep the entrances clear. A party generally is required to use all reasonable diligence to mitigate his damages, and in some jurisdictions this principle is extended to the law of nuisance. *Cf.,* Southern R. Co. v. Poetker, 46 Ind. App. 295, 91 N. E. 610 (1910); Cromer v. Logansport, 38 Ind. App. 661, 78 N. E. 1045 (1906). Where an obstruction on defendant's land impeded flow of water to plaintiff, the Indiana court in Chambers v. Kyle, 87 Ind. 83, 87 (1882) said:

> . . . if through inadvertence or negligence, defendant or his employees left rails or wood in the ditch, placed there for a temporary, proper purpose, the plaintiff could not stand by and await the ruin of the crops of the season, expecting to recover the damages from the defendant, but was bound himself to remove the obstruction, as he had a right to do and could recover only for the damages suffered and before he could reasonably expect the removal.

By analogy, it would seem that Shamhart could not be allowed to "stand by and await the ruin" of his trade.

Other jurisdictions imposing a duty to mitigate damages arising out of a nuisance are: Ky.-Ohio Gas Co. v. Bowling, 264 Ky. 470, 95 S. W.2d 1 (1936); Haywood v. Massie, 188 Va. 176, 49 S. E.2d 281 (1948). Jurisdictions not imposing a duty are: United Verde Extension Mining Co. v. Ralston, 37 Ariz. 554, 296 Pac. 262 (1931); Johnson v. City of Galva, 316 Ill. 598, 147 N. E. 453 (1925); Desimone v. Mutual Materials Co., 23 Wash.2d 876, 162 P.2d 808 (1945).

2. "Defendant has done nothing affirmatively to cause the formation of the lines other than to conduct its business in a legitimate, orderly manner and with satisfaction to its customers." Record, p. 323.

should follow *Tushbant v. Greenfield's, Inc.*,[3] a similar case in Michigan, and recommended damages and an injunction. The Chancellor refused to enter the decree, stating that the right to injunction depended upon the violation of a duty imposed by law and he could find no duty upon the part of the cafeteria to police the public streets, that being the duty of the municipality. On appeal to the Supreme Court of Florida, the case was reversed in a 4-3 trial decision and remanded,[4] holding that Morrison's conduct constituted a nuisance. Three justices dissented on the grounds that Shamhart's remedy, if any, was against the City of West Palm Beach.

The law of nuisance is based on the fundamental proposition that one cannot use his property in such a manner as to injure the property of another.[5] It is equally well recognized that a merchant has a right to use the adjacent sidewalk as a means of ingress for his customers.[6] When this right is interfered with, he has a right to damages for diminution in the value of his property or for loss of business. But this rule is qualified by another group of cases upholding the right of the proprietor of a business adjoining the public way to make reasonable and necessary use of the public sidewalk in the ordinary course of his business.[7] Thus, the issue becomes the reasonableness of the owner's use of his property. Reasonableness in cases of this sort depends on the use of the property in the light of the prevailing circumstances, the locality, and usage; and the means and methods employed by a proprietor in the operation of his business. No one would contend that a merchant can deliberately set out on a course of action which will keep others from reaching the doors of his neighbors if he, to achieve such an effect, adopts some ir-

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"It is difficult for me to see how the courts can hold a person responsible for action of the public on the public street simply because that public is waiting to do business with him." Record, p. 325.

3. 308 Mich. 626, 14 N. W.2d 520 (1944).

4. 159 Fla. 629, 32 So.2d 727 (1947). Upon the remand, the Circuit Court entered the following decree:

> Requiring that defendant provide sufficient space upon its premises to accommodate its patrons while waiting to be served at defendant's said cafeteria, so that it will not be necessary for said patrons to stand in line upon the public sidewalk in front of the entrances to plaintiff's place of business. . . .

Defendant cafeteria appealed to the Supreme Court of Florida asking for further review of the decree. The decree as modified read, ". . . affirmed . . . simply to enjoin appellant from blocking passage to and from appellee's store." 160 Fla. 540, 35 So.2d 842 (1948).

5. 1 BL. COMM.* 306.

6. O'Brien v. Central Iron, etc., Co., 158 Ind. 218, 222, 63 N. E. 302, 303 (1901); Indiana, Bloomington and Western Ry Co. v. Eberle, 110 Ind. 542, 546, 11 N. E. 467, 469 (1886). Haynes v. Thomas, 7 Ind. 38, 44 (1885).

7. Wood v. Mears, 12 Ind. 515 (1859).

responsible form of advertising or of business management which accentuates the inconveniences of his neighbors.

However, the New York courts in two leading cases have held that it cannot be an offense merely to operate a business successfully in a sound and conservative manner. In *Elias v. Sutherland*[8] the merchant attracted mobs which obstructed the entrances to nearby stores. These people gathered to watch several famous beauties in the store window who combed their fabulously long tresses for the benefit of the casual passerby. In *Jacques v. National Exhibit Co.*,[9] the proprietor operated a puppet show in a large, second-story window and gathered hundreds of curious spectators. In both cases the New York Court emphasized that it would not tolerate such highly unusual and spectacular advertising devices for the purpose of drawing crowds in the hope that a small fraction might patronize the business. However, the court also made it clear that the merchant would not be held liable in nuisance for ordinary lawful attraction devices. At approximately the time of the *Shamhart* decision the English courts were confronted with the problem of queues.[10] The leading case arising from this problem was *Dwyer v. Mansfield.*[11] There, adjoining businessmen brought an action against a greengrocer outside of whose shop queues of housewives waited to purchase scarce fruits and vegetables, thereby obstructing ingress and egress of the adjoining purchasers. The court declared the greengrocer had done nothing unnecessary or unreasonable in the course of his business and could not be held liable in nuisance. This decision proved to be a conclusive determination in the English law and discouraged litigation of similar claims[12] but was not considered by the Florida court in the *Shamhart* case, though it did consider two English cases which were distinguished in *Dwyer v. Mansfield.*[13]

Shamhart v. Morrison Cafeteria does not present a situation in which a business proprietor has attempted to attract large crowds by unusual or spectacular advertising devices. The Special Master found that Morrison had done only the necessary minimum of institutional advertising and had made no attempt to attract large numbers of persons in the hope of securing their patronage.[14] The persons forming the obstructing queues in front of Shamhart's place of business came of their own volition for the express purpose of doing business with the cafeteria. It would seem that Morrison's scrupulous

8. 18 Abbot N. C. 126 (N. Y. 1886).

9. 15 Abbot N. C. 250 (N. Y. 1884).

10. "More than 10,000,000 British housewives wait on an average of one hour a day in queues outside or inside 600,000 food shops." New York Times, March 2, 1946, p. 16.

11. 2 A. E. R. 247 (1946). *Cf.*, Wilkes v. Hungerford Market Co., 2 Bing. N. C. 281, 132 Eng. Rep. 110 (1835); Harper v. Haden, (1933) Ch. 298.

12. 64 So. AFR. L. J. 91 (1947).

13. Lyons, Sons and Co. v. Gulliver, (1914) 1 Ch. 631; Barber v. Penley, (1893) 2 Ch. 447.

14. Record, p. 323.

care in the operation of its business should have relieved it of the charge that it maintained a nuisance.[15] When the operation of a business results in the queuing up of customers outside the shop of a merchant, the merchant should be liable only where he has employed unusual, spectacular, unnecessary—and therefore unreasonable—means of attraction. The *Tushbant* case, relied upon so heavily by both the Special Master and the majority of the Florida Supreme Court, is the only queue-up case in both the American and English line of authority which has ignored the test of reasonableness in reaching its decision. Unless a type of strict liability is to be imposed for conduct of this nature, the *Tushbant* theory must be regarded as an unsound innovation in the law.

The Florida Supreme Court seems unaware that it has placed the cafeteria in a completely impossible situation. If it fails to control the crowds, it commits a violation of the decree; but if it does in any thorough and effective manner control them, it will be subjecting itself to tort liability. Should the cafeteria send out uniformed personnel to police the sidewalk, this cannot be made effective; for the uniform does not make the policeman, and its possession will not give the right to direct persons passing on the street. An attempt to enforce the command, if ignored, could easily result in the cafeteria's being held liable in damages. In many jurisdictions tort liability is imposed upon a private party appointing special policemen even where the appointment was pursuant to and permitted by statute.[16] The Cafeteria has seemingly been placed in a position whereby it faces contempt liability, tort liability, or retirement from business. This problem requires a solution by some force that can adequately handle it. The powerful dissent of the *Tushbant* case suggests that this power is the municipality,[17] and this position was firmly maintained

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15. Aside from public and private nuisances, some courts have advanced a third classification where there are elements of both—that of mixed nuisance. Weeks-Thorn Paper Co. v. Glenside Woolen Mills, 64 Misc. 205, 118 N. Y. S. 1027 (1909); Deason v. Southern Ry. Co., 142 S. C. 328, 140 S. E. 575 (1927). It is possible that the *Shamhart v. Morrison* situation might be so classified.

16. *Cf.*, Brooks v. Jennings County Agric. Assn., 35 Ind. App. 221, 73 N. E. 951 (1905); Dixon v. Waldron, 135 Ind. 507, 35 N. E. 1 (1893); Matthews v. N. Y., Chi., and St. Louis R. Co., 93 Ind. App. 618, 161 N. E. 653 (1931). Other jurisdictions imposing liability are: McChristian v. Popkin, 75 Cal. App.2d 249, 171 P.2d 85 (1946); Stokes v. Hansberry, 314 Ill. App. 195, 40 N. E.2d 823 (1942); Moore v. Blanchard, 35 So.2d 667 (1948); Empire Oil and Refining Co. v. Fields, 181 Okla. 231, 73 P.2d 164 (1937); Bounty Ball Room v. Bain, 211 S. W.2d 248 (1948). Jurisdictions not imposing liability are: Krowka v. Colt Patent Fire Arm Co., 125 Conn. 705, 8 A.2d 5 (1939); McDonald v. Ogan, 64 Idaho 168, 129 P.2d 654 (1942); Norfolk and W. R. Co. v. Haun, 167 Va. 157, 187 S. E. 481, 482 (1936).

17. Tushbant v. Greenfield's Inc., *supra*. p. 631. Dissent of Reid, J.: "The people have exclusive charge of the matter of conduct of persons on the streets. It is erroneous to order a private party to assume any control of persons on the streets whatsoever."

by three of seven judges in the instant case.[18] In the *Shamhart* case the queues of people obstructing the drugstore entrances were using the public sidewalk as a means of ingress into the cafeteria and thus placed themselves under the control and supervision of the municipality of West Palm Beach. The inability or unwillingness of the municipality to deal with the situation should not be charged to Morrison merely because a great number of those using the street were going to or from the cafeteria.[19] The condition was produced by the traveling public and not by the cafeteria. The duty and authority rests with the municipality, and it alone can effectively deal with the solution of the problem.[20] This problem is bigger than a petty squabble between adjoining landowners. The social interest in the distribution of low cost goods must be considered as well as the interests of the immediate parties. If every successful businessman to whom this may happen will be hampered by damage suits and injunctions, then the success of his establishment in attracting large crowds will be another of the all too many hazards of business enterprise.[21]

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18. *Shamhart v. Morrison's Cafe*, 159 Fla. 629, 637. Dissent of Parks, J.:

> In my opinion Shamhart's remedy, if any, is againhst the city of West Palm Beach. Generally, under our law the power of supervision and control of the streets and their traffic, as well as the power to abate nuisances, is vested in municipalities. This supervision and control is proprietary rather than governmental in its nature. Having such power, the duty to supervise and regulate the conduct of the pedestrian traffic unreasonably obstructing access to Shamhart's place of business as reflected in this record devolved upon the city.

19. Clinton v. Ross, 226 N. C. 682, 40 S. E.2d 593 (1946).

20. It is the law of Indiana that the municipality shall have the exclusive power by ordinance to prevent the incumbrance of streets, alleys, or other public places. IND. STAT. ANN. (Burns 1933) § 48-505. This power cannot be delegated to private parties. Hammond v. Jahnke, 178 Ind. 177, 99 N. E. 39 (1912). This prevention of unnecessary obstruction of the city streets has been called "a plain and continuing duty." Vandalia R. Co. v. State ex. rel. South Bend, 166 Ind. 219, 224, 76 N. E. 980, 982 (1905).

21. The efforts of the cafeteria to comply with the decree are set out in a letter of Mr. Newman Miller, West Palm Beach, Florida, the attorney for Shamhart:

> They are directing their lines to form to the north instead of to the south and are policing the line. In addition, I am reliably informed that they have purchased land and are making preparations for the construction of additional space which can be serviced from another street entrance, using the same kitchen but having two dining rooms.