

Premises Liability for Third Party Crime (Full Article)

Owners and managers of commercial property (including leased residential properties) can be held liable under civil negligence claims for harm to persons caused by third party crime. For example, the courts held that hotel owners could be held liable where a 19-year old man was shot to death when a gun was fired into a crowd during a party of about 200 guests. The facts established that before the killing, the hotel owners knew or should have known about the dangers presented to the party guests. *Rabutino v. Freedom State Realty Co., Inc.*, 809 A.2d 933 (Pa. Super. 2002).

The Duty of the Possessor of Land:

The liability of the possessor of land is not automatic or certain. The courts will apply a "reasonable person" standard of diligence in securing the property and its anticipated occupants and visitors against "reasonably foreseeable" crimes. Pennsylvania has adopted the standards for establishing liability set forth in Section 344 of the Restatement (Second) of Torts (1965), which reads:

A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to

(a) discover that such acts are being done or are likely to be done, or

(b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

Comment (f): **Duty to police premises.** Since the possessor is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring, or are about to occur. He may, however, know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual. If the place or character of his business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection.

The courts have held that a property owner should have knowledge of recent criminal activity and incidents at or in the vicinity of the property, and such records can create a duty on the part of the owner to ensure adequate and responsive security measures are in place. An owner can also be expected to meet the customary industry standards in the region for similar types of property and premises security. A tavern or bar owner is assumed to be aware that the nature

of its business (the sale and on-site consumption of alcohol) gives rise to a high risk of criminal activity and the necessity for security measures, and is "bound to see that [patrons] are property protected from.....the drunken and vicious men whom he may choose to harbor". *Rommel v. Schambacher*, 120 Pa. 579; 11 A. 779, 782 (1887); 43 A.L.R.2d 628. In the *Rabutino* case mentioned above, a private security provider had told the hotel owner about underage drinking occurring at the party, and had advised the owners that the party was 'out of hand' well before the shooting occurred. The court supported the jury's finding that this was knowledge sufficient to create a duty to take precautions.

Ignorance of the potential for criminal activity in the area is not a reliable defense, as the standard includes whether the land possessor has 'reason to know'. A possessor of land can be found to have a duty to investigate criminal activity in the area in connection with its premises. In *McLung v. Delta Square*, the court reviewed the public criminal records reports the parties *could have obtained*, which would have shown criminal activity in the region where a shopping center was located, and found in denying motions for summary judgment an unfulfilled duty on the part of the owner, and potential grounds for negligence. *McClung v. Delta Square*, 270 F.3d 1007 (6th Cir. 2001) (In the *Mclung* case, the perpetrator car-jacked and abducted a shopper from a retail parking lot, later raping and killing her). The extent of the duty and the adequacy of response are questions of fact for the jury or trier of fact to decide. In both the *Rabutino* and *McClung* cases security measures and personnel were provided to the premises, but the plaintiffs' claims for damages were based on the *adequacy* of the security measures.

Industry standards can be used in defense of claims regarding the adequacy of security. Adequate lighting, security personnel or patrols, emergency call boxes, video surveillance and postings or signage are measures a property owner can implement to provide reasonable security to a premises. Experts in security analysis and services are available for hire to assist parties in analyzing the necessity for security and appropriate security measures. Hiring and relying on an expert, and implementing their recommendations, is a potential defense against allegations of negligence. However, this can backfire if the experts' recommendations are known and not implemented, and such information may support a plaintiff's claim of negligence. If one decides to use an expert, then the owner should carefully research the expert's qualifications and define the scope of the request as specifically as possible, and be prepared to implement the expert's final recommendations.

Claims for damages due to death or severe injuries resulting from third party crime can be for millions of dollars. Plaintiffs will look to every possible 'deep pocket' (and liability insurance provider) in pursuing claims in order to secure some recovery. In addition, the initial defendant will likewise seek to join additional potentially responsible parties in the suit to share in the liability and costs.

Who is Exposed to Liability; Contract Language and Advertising Issues:

The 'possessor of the land" can mean the land owner, a tenant occupying and operating a business on the land, and potentially the duties and liabilities can extend to the agents for the owner or tenant. The Superior Court has adopted the Restatement's definition of "possessor" as "it must be in occupation of the land

with intent to control it, it must have been in occupation of the land with intent to control it if no other party has done so subsequently, or it is entitled to immediate occupation if neither of the other alternatives apply.” Restatement (Second) of Torts § 328E (1965). The question of whether a party is a "possessor" of land is a determination to be made by the trier of fact. *Kirschbaum v. WRGSB Assocs.*, 1999 U.S. Dist. LEXIS 19480 (D. Pa. 1999). A lease agreement can operate to completely and clearly transfer all possession and control of the premises, and liability for security measures, to a tenant. With respect to leased premises in multiple tenant and commercial properties, the landlord/owner often retains some control over common areas, and often structural elements of the property, leaving the land owner with a level of ‘possession and control’ of the property together with the tenants.

The plaintiff in a tort claim for negligence must show (1) a duty or obligation, recognized by law, requiring the defendant to conform to a certain standard of conduct; (2) a failure to conform to the standard required; (3) a causal connection between the conduct and the resulting injury; and (4) actual loss or damage resulting to the interests of another. *Morena v. South Hills Health Sys.*, 501 Pa. 634, 462 A.2d 680, 684 n.5 (Pa. 1983) (citing W. Prosser, Law of Torts § 30, at 143 (4th ed. 1971); *Krueger Assocs. v. ADT Sec. Sys.*, 1996 U.S. Dist. LEXIS 14521 (D. Pa. 1996). A defendant or plaintiff can include additional parties in such a lawsuit based on contract language, where the foregoing duties and responsibilities have been transferred by agreement.

For improved commercial property the relationships and duties of the parties concerning possession, control, management and operation of the property are often established in contracts, such as leases, property management agreements and security services agreements. Pennsylvania has adopted the Restatement (Second) of Torts § 324A with respect to contractual liability to a third party for negligence, which states:

“One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

- (a) his failure to exercise reasonable care increases the risk of such harm, or
- (b) he has undertaken to perform a duty owed by the other to the third person, or
- (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.”

Cantwell v. Allegheny County, 506 Pa. 35, 483 A.2d 1350 (1984); *Thompson v. The Hanna Mining Co., Inc.*, 1987 U.S. Dist. LEXIS 3350, 1987 WL 10123 (E.D. Pa. April 29, 1987); cited in *Kirschbaum v. WRGSB Assocs.*, 1999 U.S. Dist. LEXIS 19480 (D. Pa. 1999)

Contract language in agreements between an owner and a property manager, a landlord and a tenant, or an owner and a security provider, can operate to shift

liability and duties regarding both the duty to determine necessary or reasonable security and the responsibility for providing such security. Parties to such contracts should be clear and cautious in drafting their agreements, and be aware of the duties being transferred and assumed.

To illustrate this point, if a property management agreement contains a clause such as, "...Property Manager shall provide and maintain adequate and sufficient security at the premises..." then the property manager can be deemed to have contractually assumed the duty of determining the reasonable necessity for security and its adequacy on behalf of the property owner, visitors to the center and possibly the tenant businesses. If sued for negligence in providing security, the owner, visitors and tenants will then look to the property manager for damages.

Alternatively, contract language in a property management or security services agreement could expressly state that this liability is not shifting to the property manager, for example, "...provided, however, Property Manager shall not retain responsibility or control of the security service provider, and in no event shall the selection or retention of security personnel at the premises by the Property Manager be deemed a representation or warranty by the Property Manager as to the adequacy of security at the premises, or of the safety of any party, their agents or employees, or of third parties..." In addition, Pennsylvania courts will enforce clear exculpatory clauses in contracts which may release, or limit, negligence claims against a party, such as the following clause:

SECURITY. Management will provide security service 24 hours a day. Security will be in effect during the entire show and will cease at 8 pm on closing day. Dealer agrees to hold management and Lebanon Fair Grounds harmless for any loss, pilfering, theft or damage to dealer's merchandise or other property from all causes whatsoever. Dealer agrees to provide adequate insurance for his own merchandise and other property; and agrees that failure to have such insurance constitutes a waiver of any claim against management or Lebanon Fair Grounds. *Cham's Jewelry Art v. Haefner*, 80 Fed. Appx. 265, 266-267 (3d Cir. 2003).

This exculpatory clause was used by the court to uphold summary judgment in favor of the security provider in connection with a negligent security claim for damages for third party theft.

If an entity is hiring a security services provider and intends to rely on the service provider to determine the necessity for security, and to provide adequate services, then it is in the hiring entity's best interest to ensure that there is no release of the service provider for liability for its negligence or misconduct.

Lease agreements will often contain clauses whereby the property owner retains possession, management and control of the common areas, and landlords may also reserve the right to pass through to tenants costs for security services, equipment and personnel. Landlord's should be cautious in drafting lease language that could imply the landlord is assuming or increasing its duty to provide security for the benefit of the tenant. The lease can include a limiting

clause such as: “The Landlord and Tenant acknowledge and agree that any security services, personnel and equipment provided by Landlord or its agents is not a warranty or representation of the adequacy of such security or of the safety of Tenant, its employees, customers, licensees or third parties, and Landlord shall not be liable for any loss, cost, damage or injury to persons or properties caused by third parties. Tenant shall maintain insurance coverage as required by this Lease to the extent Tenant requires protection against such loss, cost, damage or injury to persons or property.”

Advertising security adequacy, personnel and services can also operate to transfer liability or increase an owner’s or agents liability for third party crime, if it is determined that a person relied upon such advertising in its actions or failure to act. Possessors of land should refrain from advertising their security services, or promising security services, or guaranteeing security services, to tenants, visitors or patrons, as it can expose the possessor of land to a higher standard or duty of care. In addition, posting signage at premises advising patrons and visitors that the possessor of land does not insure their safety, such as owner “assumes no liability for the security of persons, or damage to vehicles or their contents while parked in the shopping center lot” can constitute notice and warning.

Conclusion

There is no way to guarantee, regardless of the measures taken by a possessor of land, that a person will not be sued for negligence in providing premises security. However measures can be taken to defend against such a claim. A property owner or possessor of land must first be aware of the duty to take reasonable care to evaluate the likelihood of criminal activity at the premises, and to appropriately police and secure the premises. In addition, when contracting with other persons the parties should be aware of what duties and responsibilities are being transferred or assumed with regard to security.