

LETTER of THE LAW

VOLUME 12, NUMBER 2, APRIL 1998

SOLUTIONS THROUGH RESEARCH

BY JUDON FAMBROUGH

LANDOWNER LIABILITY FOR CRIMINAL ACTS OF THIRD PARTIES

Landowner liability falls into several categories. These include liability for premise defects, children under the Attractive Nuisance Doctrine, employers for employee safety, and liability to and for independent contractors. Even the state of Texas faces liability to the public for special defects on public property.

Another category recently emerged casting liability on commercial property owners for criminal acts of third parties. The impetus stems from the public looking to property owners for protection, rather than to local law enforcement. Commercial property owners must meet the public and legal expectations to avoid liability.

The threshold question in landowner liability cases is the legal classification of the injured party. The status determines the duty owed by the landowner. Excluding children under the Attractive Nuisance Doctrine, three classifications exist under the common law—trespasser, licensee and invitee.

Trespassers enter the property without the owner's express or implied permission or invitation. The owner must avoid injuring the trespasser in a willful or wanton manner or through gross negligence.

Licensees enter the property with the owner's express or

implied permission. Licensees enter for their own convenience and not for the economic benefit of the owner. Social guests are a good example. The owner is obligated to warn or make safe any known dangerous conditions that are not reasonably apparent.

Invitees enter the property with the owner's express or implied invitation for business (economic) reasons. Customers entering a department store exemplify invitees. The owner must warn or make safe any known dangerous conditions or any dangerous conditions that a reasonably careful inspection would reveal.

Liability for injuries rests on the party in possession and control of the premises. This may not necessarily be the owner. In the business setting, it could be the commercial lessee or management company. When criminal activity is involved, the party who controls or has the right and power to control the safety and security of the area is responsible. This can be inferred from lease agreements, logos on safety and security pamphlets, and prior conduct regarding security measures.

Historically, Texas courts have declined to impose liability on landowners for injuries arising from criminal activity.

During the past two decades, however, the courts forged

exceptions to the general rule. For example, in the business-invitee context, the trend began with the adoption of Restatement (Second) Torts, Section 344, that states:

"A possessor of land who holds it open to the public for entry for business purposes is subject to liability to members of the public while they are upon the land . . . for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons."

Invitees who claim the possessor negligently failed to protect them from criminal acts must prove the essential elements of negligence. These elements are:

- a legal duty to protect,
- a breach of that duty,
- resulting injuries and
- compensable damages.

The legal duty owed the injured party is summarized in the Restatement (Second) of Torts, Section 344. The invitor (the possessor who opens the property to the public for business purposes) is subject to liability if someone (an invitee) on the premises is physically harmed by a third person because of the invitor's failure to exercise reasonable care to:

- discover that such acts are being done or are likely to be done or
- give a warning adequate to enable visitors to avoid the harm or otherwise protect them.

Thus, the legal duty to protect an invitee begins when the circumstances indicate possible criminal activity on the property. The courts characterize the rule in terms of *foreseeability*. Business owners' liability commences when criminal conduct is the foreseeable result of the owner's negligence.

In Texas, foreseeability is based on the *totality of the circumstances*. The absence of prior criminal activity on the premises is not determinative. Thus, the first element a victim must prove is that the criminal activity, in the totality of the circumstances, could be reasonably anticipated. In this regard, Texas courts examine the:

- nature of the business activity and whether it is conducive to criminal activity,
- location of the business,
- owner's observations regarding criminal activity and
- owner's past experiences regarding criminal activity.

Generally, Texas courts find most criminal conduct reasonably foreseeable. While this does not establish liability, it makes it difficult for the owners to get summary judgments. For example, a girl was shot while sitting in her vehicle at a drive-through window (*Midkiff v. Hines*, 866 S.W. 2d 328).

Her parents sued the property owner and security company for negligence. The defendants argued the incident was not foreseeable and owed no duty to protect. The summary judgment for the defendants was reversed. The appellate court held the injury was foreseeable even though:

- only seven criminal incidents had previously been reported in the area,
- only one of the incidents involved violence and
- none of the incidents involved murder.

Once the injury is deemed foreseeable and a duty of care established, the victim must then prove the property owner failed to exercise reasonable care to protect the invitee from the foreseeable criminal attacks. The standard for protection is determined on a case-by-case basis. Several factors are used

'Generally, Texas courts find most criminal conduct reasonably foreseeable.'

by the courts to evaluate this standard, including an owner's:

- efforts to ascertain the crime risk and history of the area so preventive security measures may be taken,
- contact with police regarding potential security measures,
- internal procedures for security and compliance with the measures,
- placing of signs or otherwise warning customers and tenants of potential crimes and
- response to negative information regarding security.

Third, the plaintiff must prove that the owner's act or omission

was 50 percent or more responsible. The outcome, in many cases, turns on the jurors' perceived connection between the owner's act or omission and the plaintiff's injury.

The invitee's final step is to prove compensable loss or damage. These include loss of earnings, loss of future earning capacity, past and future medical expenses, mental and physical pain and suffering, disfigurement and physical impairment.

Before the implementation of the Texas Tort Reform Act on September 1, 1995, large compensable awards were possible. A tenant received a \$16 million judgment in *Berry Property Mgmt. v. Bliskey*, 850 S.W. 2d 644. The defendant-management company improperly secured the keys to the plaintiff's apartment. She was sexually assaulted in her townhouse as a result. Punitive damages accounted for \$5 million of the judgment. Now, the

Reform Act decreases the owner's potential exposure to liability. A summary follows.

The Texas Comparative Responsibility Statute (Texas Civil Practice & Remedies Code Section 33.003) allows the jury in premise liability cases to apportion fault among the plaintiff, defendant, settling parties and responsible third parties who could have been, but were not, sued by the plaintiff. This provision presents a substantial obstacle to plaintiffs seeking recovery for criminal acts of the third parties because it also requires a defendant to be at least 50 percent responsible for the injury before joint and several liability arises. Thus, by joining the third-party criminal

perpetrator, the owner may reduce the chances of being held jointly and severally liable for all of the plaintiff's damages.

Note. *Joint and several liability* means each defendant is individually liable for the full amount of the judgment if the other defendants do not, or cannot, pay their proportionate share. Therefore, the defendant with the most money generally has to satisfy the judgment.

Also, the amended Texas Civil Practices and Remedies Code Section 41.005 (a) limits a crime victim's recovery of exemplary (punitive) damages when the defendant did not commit the act. No punitive damages are recoverable in assault, theft or other criminal cases against a defendant **except when the criminal act:**

- was committed by an employee of the defendant;
- occurred at a location where the defendant was maintaining a common nuisance—a place where people habitually go for the purpose of prostitution, gambling or other illegal activity; or
- resulted from the defendant's intentional or knowing violation of a statutory duty regarding the maintenance of the criminal act occurring after the statutory deadline for compliance.

Although the trend has been to expand owner liability for third-party criminal acts, recent cases suggest a waning on some fronts. Primarily, Texas courts are hesitant to impose liability on owners when victims are targeted on the premises but injured elsewhere. The cases focus on the foreseeability of the incident in the absence of similar methods of operation in the vicinity.

A 14-year-old patron was lured off the premises with an offer of money and then molested (*Randle v. Stop-N-Go Market of Texas, Inc.*, 929 S.W. 2d 17 [1996]). The act of engaging another in conversation did not obligate the defendant to protect the youth. No evidence of similar methods of criminal conduct were shown to have occurred. Therefore, Stop-N-Go could not have foreseen the need to protect.

A similar crime occurred in *Holcomb v. Randall's Food Market*, 924 S.W. 2d 374 (1996). Again the court ruled that in the absence of prior incidences, the crime was not foreseeable. Therefore, the supermarket did not have a duty to warn its customers of this potential risk.

In a more recent case, a Wal-Mart customer was abducted and raped by an assailant as she returned to her car in the store's parking lot (*Valdez v. Wal-Mart Stores, Inc.*, 967 F. Supp. 225 [1997]). The customer sued Wal-Mart, claiming it had a duty to protect its customers even though the crime occurred during the day in a crowded parking lot.

The court found otherwise. The customer presented no evidence that Wal-Mart should have foreseen the likelihood of the crime. For the customer to prevail, she would have to show a history of violent acts in the parking lot or in the vicinity of the store, or a known or suspected criminal loitering on the premises. It would be unfair to impose a vague duty on Texas shopkeepers and merchants to anticipate and protect against the sudden criminal acts of unknown and unidentified persons.

The following are steps commercial property owners may take to limit exposure to premise liability for criminal conduct.

- Obtain the statistical criminal history of the business and surrounding area from local law enforcement.
- Assess the security risk for each business location. The assessed risks should include the criminal history of the area, building and business location; the physical characteristics of the location; the lighting; obstructions; potential areas of concealment; the nature of the customer base; the type of business conducted at the location; and nighttime business activity. The initial assessment can be prepared in a fashion protected by the attorney-client privilege. The final assessment, based upon all relevant information, should specify security measures for each location. These measures should then be implemented promptly.
- Assess the need for periodic surveys of transitory security risks, such as lighting and landscaping around parking lots. A system should be in place to identify problems and resolve them. Failure to have the system in place may contribute to the owner's liability.
- Establish regular contact with law enforcement and participate in local business, commerce and trade associations.
- Require all personnel to direct written concerns or recommendations about security to legal counsel. If written measures are first reviewed by counsel, appropriate documentation can be prepared for the records. Inappropriate information in the files can be devastating in litigation.
- Establish procedures for immediate action and

LETTER of the LAW

response to any criminal activity that impacts customer safety. Implement clear guidelines for immediate reporting to ensure appropriate responses are taken. These include legal assessments, investigation and possible additional security features.

- Make sure that signs relating to customer safety are posted and remain in place. Develop procedures to educate and warn customers about safety issues.

This material is based on two articles that appeared in the *Texas Bar Journal*. The first article, "Premise Liability's

Evolution into the 1990's" in the November 1991 issue, was authored by three Dallas attorneys, Jack Anthony, David Vereeka and Melissa Bass Hutts. The second article, "When Sticks and Stones May Break Your Bones" in the November 1997 issue, was authored by George C. Hanks, a Houston attorney.

The Letter of the Law is published quarterly by the Real Estate Center to provide timely legal information that may affect the practice of real estate.

The Letter of the Law is for information only and is not a substitute for legal counsel. Cases should be researched carefully as some may have been repealed, reversed or amended after this issue was printed. The Center will not provide specific legal advice or regulatory interpretations.

R. Malcolm Richards, director; **David S. Jones**, senior editor; **Jenifer V. Hofmann**, assistant editor; **Robert P. Beals II**, art director; **Kammy Baumann**, assistant editor; and **Judon Fambrough**, attorney and member of the State Bar of Texas.

Real estate licensees receive this newsletter free automatically. Send address changes to: **Gary Earle**, Real Estate Center, Texas A&M University, College Station, Texas 77843-2115. For others, a one-year subscription—including the Center's quarterly magazine, *Tierra Grande*—is \$30. To order, call 1-800-244-2144.

© 1998, Real Estate Center. All rights reserved.