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**Lawyers, Guns and Money: Negligent Security Claims in the Age of Gun violence**

## I. The back drop

There has been, in this age of gun proliferation and concomitant gun violence, gaining acceptance of considering whether commercial landowners should now account for that risk as one for which the bear a duty to protect. What was an aberration 30 years ago is now not at all too uncommon common. One need only look to current news stories of Texas churches having armed congregants in place. There are now a growing number of examples where businesses are being held to account for the increased risks of gun violence.

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- $46.4 million dollar settlement with Denny's in King County Washington Serving after hours after the bars closed.
- $1.2 Million. Broward county Florida verdict popular night club who shot and beaten within an inch of his life
- $1 million against waffle house for a robbery at t crime infested restaurant, their defense was that the plaintiff should have just given up his wallet.
- Confidential settlement in a Vermont lawsuit against a bar which .confiscated a patron's gun when he arrive but gave it back when he left. This particular patron had spent the night chatting with another patron the things they had in common, i.e., the same girlfriend-

  and finally
- $800,000,000 settlement with MGM for letting a guest stockpile weapons.

To contextualize the emergence of a duty to protect business invitees from the threat of gun violence, one can see parallels in the judicial hardening of the 2nd Amendment. In 1939 the Supreme Court in United States v. Miller unanimously held that Congress could prohibit the possession of a sawed-off shotgun because that weapon had no reasonable relation to the preservation or efficiency of a "well-regulated militia." Seventy years later the same court in District of Columbia v. Heller, held that there was an individual right to bear arms. The point being societal acceptance of a near

absolute right to bear arms erodes any rational basis for the argument that possession and discharge such weapons are an unforeseeable event in the landscape of risk.

Not all of our clients are going to have the kind of deep pockets of MGM, but if you are sitting here, it probably means, whether you realize it or not, you are on the cutting edge of the law; and on the firing lines to defining the rights and obligations at stake.

## II. The History and evolution of the risk

Common law imposed no duty on a landowner to protect others from the criminal actions of unknown third persons. Only certain classes of classes of relationship were viewed as imbued with a duty to safeguard for the criminal acts of third persons. Namely, common carriers of passengers and innkeepers were held to a higher standard. Thus, as George Baily would classify it in "It's a wonderful Life" the sounds of anchor chains, plan motors and train whistles" impart a duty which passes on to the hotel once the passenger arrives. In 1965 the Second Restatement of Torts first recognized a duty which attached to the safeguarding against the criminal conduct of third persons against invites and couched that duty in the foreseeability of the very harm.

Prior to the 1990's the majority rule has been that a crime was considered "foreseeable" only if similar crimes had occurred on the premises. This combined with Dean Prosser's assertion that one might "…reasonably proceed upon the assumption that others will obey the criminal law..." serve to insulate landowners from liability for the acts of third parties. Every rule has its exception and duty often is determined by the likelihood of harm.

Foreseeability sets the table. As it has been developed, there are four tests employed which weigh foreseeability:

i. imminent harm Test
ii. Prior similar acts test
iii. Totality of the circumstances test (majority)
iv. The balancing test

Imminent harm limits the duty to when the landowner becomes crimes are taking place or about to be. The landowner can meet the burden by either warning the customer of summoning the police. Prior similar acts limits the duty to circumstances where there has been prior criminal activity of similar quality. Under this test a car being broken into doesn't mean a murder is foreseeable, but it might mean a purse snatching of even a mugging might be. The next logical extension given in most states is the Totality of Circumstances. Under this test, the character of the geographical area is evaluated and the jury question arises about whether the escalation criminal conduct in the area gives rise to a reasonable a criminal act is foreseeable. Of area and takes into account an increase in criminal activity.

The balancing test was the Californian response to what it viewed as expansive basis of liability invited under the Totality of Circumstances Test. In Sharon P. v. Arman, Ltd., 989 P.2d 121, 123 (Cal.

1999) the California Supreme Court rejected the view that parking garages are “inherently dangerous” or pose “an especial temptation or opportunity for [crime],” Acknowledging the endemic of violence in society the court held “...it is difficult, if not impossible, to envision any locale open to the public where the occurrence of violent crime seems improbable.” Thus one additional factor to be considered in the imposition of a duty would be balancing the imposition of the burden of the duty imposed. .

**Comparing the fault of the intentional Tortfeasor**

At common law contributory negligence was available only where ordinary negligence of the Tortfeasor was involved, and not where there actions were different in kind, i.e. intentional tort. The policy considerations were based on contributory negligence cannot be used as a bar to recovery from an intentional tort. This would be tantamount to a defense of “I would not have been tempted club you over the head and rob you if you didn’t flash a wad of cash. As applied to the defense of comparative negligence, however, there are two views. The majority of states which do not permit a commercial landowner to offset its liability to an intentional actor once a duty to protect is established. The minority view is to permit the allocation of “fault” regardless of kind (negligence or intentional) to a Tortfeasor a subject to the applicable rules of joint and several liability. The trend it seems is not to permit the allocation of fault to an intentional actor once a duty is established but to permit a separate allocation for the purposes of contribution between the inadequate security defendant and the intentional Tortfeasor. A

**Part Two: Nuts and Bolts of defending Negligent Security Claims**

**I. Know your neighborhood**

In defending security claims, it is important to quickly determine the type of neighborhood in which the incident at issue has occurred. Is it a high crime area or a gated community? The answer will determine the appropriate level of security, if any.

Although the general perception or physical appearance of the area in which the crime was committed is important, most cases will turn on the history of relevant crimes in the neighborhood. What constitutes the “Relevant Surrounding Area” will most likely be determined by the court. Plaintiff’s counsel will seek to include as much crime as possible and defense counsel will seek to limit the geographical scope. A police grid will need to be obtained for that area. It is important to go behind the grid and check the actual police reports that make up the grid. Many incidents which appear to be crimes against persons on the police grid turn out to be instances of domestic violence or theft from unoccupied automobiles, and should not be admitted as relevant crimes by the court. A motion in limine is usually necessary to limit the admissibility of prior crimes to prior violent crimes against persons.

One of the best ways to determine the violent or non-violent nature of a particular neighborhood is to talk to the people who live there. Often, people who live in a particular area do not perceive it to be

as dangerous as those who live outside in safer communities. If that's the case, you will know that local people will make better jurors and also be able develop some witness testimony regarding the safety of that neighborhood.

## III. Expert Testimony

Most negligent security cases require retention of an expert. The choice at the outset is whether to use an academic expert or an industrial expert. Academic experts, such as professors and writers, are very helpful in explaining criminal theory. They are often useful in educating a jury regarding the motivation of criminals and make persuasive arguments that the criminal in a particular crime could not have been deterred by various security measures.

Industry experts, such as former law enforcement officers and corporate security directors, are instrumental in addressing the standard of care. Former law enforcement officers seem to carry more weight with the jury when discussing the appropriate level of security on a particular premise. Corporate security directors, based on their experience, lend insight into practices and procedures in retail premises and the requisite level of security necessary, if any.

When attacking the other side's expert, it is important to determine the nature of the criminal involved. Organized criminals, such as professional hitmen or gang members, may be deterred by the presence of a security guard or other security measures. However, many of the criminals involved in the incidents you will litigate are disorganized criminals, either seeking money for drugs or simply committing a violent crime of opportunity. These disorganized criminals cannot be deterred as they have not planned their crime nor taken time to assess the presence or non-presence of security.

It is important to note that the industry standard in regard to commercial premises is to have non-armed security guards where security guards are needed. This is important because these guards will admit in deposition that they are not armed and that they are taught not to intervene in any kind of crime. In fact, they are taught to call law enforcement and stay out of harm's way. Obviously, this information is very important for a jury to consider in determining causation as it relates to the presence of security. Finally, make sure that your expert has extensive experience in regard to that particular type of premises. For instance, a former corporate security director may not be very persuasive in a case involving a home invasion.

## III. Jury Selection

Jury selection is the most important part of any trial. It is imperative that you determine the predisposition of potential jurors to find liability on the part of a premises owner for a crime by a third person. It is important to determine jurors' opinions regarding the Second Amendment. Gun owners and concealed carry permittees make great jurors. It seems that men make better jurors than women in these cases as they tend to believe that they are responsible for their own safety and do not believe that

they need to rely on others for protection. In particularly high crime areas, local residents make better jurors than outsiders. While outsiders may perceive an area as being very dangerous, people who live in that area will often not share that same feeling. Not only do local residents make better jurors in these cases, they can also make great witnesses in discussing their neighborhood.

Big government and multi-regulation proponents think that we should rely on others for services, including protection. They generally do not make good jurors. Defense counsel should also eliminate people who believe that all unfortunate incidents can be prevented. In cases with significant exposure, a jury selection expert should be consulted.

**Part Three**

**Duck for Cover-Where are we going?**

The expanding exposure for gun related harm and the increasing foreseeability of that harm should be of special concern. No longer is it safe to assume Dean Prosser's Weltanschauung that "others will obey the criminal law..." As applied to hospitality risk, it is becoming abundantly clear that ancient feuds and modern weapons don't mix. For instance bringing together combustible groups to watch cage match fights or World Cup matches is fraught with a potential for an escalation of tensions. New tensions are also injected by the extension of the right to openly carry weapons.

**Texas: Closed Doors and Open Carry**:

In Texas, and please don't quote us on this, it would seem you can now mount a Howitzer in the flat bed of your Pick-up. Since 2016 a licensed person can openly carry provided the gun is holstered. It's not an absolute t right as under Texas Law Section 30.07, it is a criminal offense for a license holder to openly carry a handgun on the property of another person if the person (1) does not have effective consent; and (2) has received notice that entry on the property by a license holder openly carrying a handgun was forbidden. The sufficiency of Notice under 30.07 requires a sign with express include the specific language, in both English and Spanish; AND in contrasting colors with block letters at least one inch in height be displayed in a conspicuous manner clearly visible to the public at each entrance to the property, Noting the cumbersome imposition of these requirements the law alternatively permits the business owner to print the same express language on index card, in English and Spanish, for their employees to hand out. Ironically, the same employee no charged with the duty of letting the gun toting patron on table 4 that he has to leave has no independent right to bring a gun to work under the same law. Presumably this provision was at the insistence of the lobbyist for Tavern owners who rightfully concluded said employee would rather shoot the owner than approach the table.