Guns, Shootouts, and Liability

What's a Shopkeeper to Do Now?

By Anandhi Rajan, Dania Haider, and Anthony S. Hearn

When a retailer does confront unfortunate events, its best bet is to have an attorney on hand who understands the legal approaches taken by courts around the country analyzing these claims, and in particular in the retailer's jurisdiction.

Incidents of gun violence in public places have become an almost weekly occurrence in America. In 2013, the FBI released a study that analyzed active shooter incidents in America from 2000–2013. The study categorized the shooting incidents by the various locations in which they occurred, such as educational institutions, commercial areas, and others. The study identified 160 active shooter incidents resulting in 1,043 casualties, and it included people who were killed or wounded (except for the shooter). An average of 11.4 incidents occurred annually. However, with only 6.4 incidents per year from 2000–2007, that number increased to 16.4 incidents per year from 2007–2014. The study found that 70 percent of these incidents occurred in either a commerce or business or educational environment. Additionally, the shootings were not isolated by region and occurred in 40 out of the 50 states, as well as in the District of Columbia. Blair, J. Pete, and Schweit, Katherine W., *A Study of Active Shooter Incidents, 2000–2013,* Texas State University and Federal Bureau of Investigation, U.S. Department of Justice, (Washington D.C. 2014).

Perhaps one of the most shocking shootings in recent history occurred in 2012 in Aurora, Colorado, at a midnight screening of the film *The Dark Knight Rises*. The aftermath was brutal: 12 people were killed and 70 others were injured. The legal question presented by this tragedy and many other similar tragedies in public spaces asks, was the incident "legally foreseeable" to the premises owner or lessor so that it should bear some responsibility for the crimes committed? As expected, the shooting victims and their families filed lawsuits against the theater owner in Colorado. The federal court in Colorado hearing



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the cases and considering motions to dismiss filed by the theater owner, similar to many in the public, queried, "How could a theater be expected to prevent something like this?" *Traynom v. Cinemark USA, Inc.*, 940 F. Supp. 2d. 1339, 1342 (2013).

Whether a crime is "legally foreseeable" to a premises owner forms the crux of the legal analysis when determining whether any liability will arise from shootings. The increase in the number of guns (both concealed and open) being brought onto premises due to ever-expanding gun laws in the United States poses a challenge to premises owners to maintain safe and secure environments for their patrons, without imposing onerous burdens on their patrons or causing alarm.

This article will address the primary legal approaches taken by courts around the country analyzing negligent security claims and is not intended to be a state-by-state review of the legal standard for those claims. Considering those approaches used around the country in various jurisdictions, this article will propose best practices for premises owners or lessors to follow to prevent, when possible, or to defend against negligent security claims and lawsuits.

For a state-by-state summary, please refer to Eric G. Young, *Cause of Action Against Tavern Owners, Restaurants, and Similar Businesses for Injuries Caused to Patrons by the Criminal Acts of Others*, 26 Causes of Action 2d 1; §8 (2004, updated Oct. 2014).

Different Approaches to Negligent Security Claims

Typically, in negligent security cases, to establish a prima facie case, a plaintiff must show that a defendant had a duty to exercise reasonable care to protect the plaintiff from general harm or the specific harm that caused injury, the defendant breached that duty, and the defendant's breach of that duty was the cause of the injury sustained by the plaintiff.

In almost all jurisdictions, a plaintiff must prove an element of foreseeability—an inquiry that focuses on a defendant's knowledge of circumstances that might give rise to the crime that resulted in the injury. Foreseeability is evaluated differently depending on the jurisdiction where the claim for negligent security is brought. Courts have adopted four approaches when analyzing foreseeability related to negligent security: (1) analyzing the totality of the circumstances; (2) evaluating the existence of prior similar incidents; (3) determining whether there was a "special relationship" present; and (4) undertaking an inquiry into whether the aggressor was known and imminent danger was present. Some states have taken a clear stance and adhere to only one of the aforementioned approaches, while other states have adopted a hybrid consisting of two or more approaches. Regardless of the approach, however, each test focuses on various factors indicating whether owners could have foreseen security threats or that unfortunate events would take place to determine whether a premises owner had a legal duty to a plaintiff.

Totality of the Circumstances

The totality of the circumstances approach is a popular method of evaluating negligent security claims. This approach espouses a broader view of a premises owner or lessor's duty toward its patrons, and it allows plaintiffs to introduce a variety of different forms of evidence to establish foreseeability. *Young*, *supra*, at §8.

One jurisdiction that uses the "totality of the circumstances" approach is Colorado. In the suits that resulted from the theater shooting in 2012, the court interpreted the Colorado Premises Liability Act (CPLA) and Colorado case law to hold that the "totality of the circumstances" had to be considered in answering the question of whether it was foreseeable to the theater owner that such a heinous crime would occur. *Traynom v. Cinemark USA, Inc.*, 940 F. Supp. 2d. 1339, 1357 (2013). Therefore, the movie theater's motion to dismiss the plaintiffs' claims under the CPLA was denied. *Id.*

Likewise, Georgia has also adopted a "totality of the circumstances" approach in analyzing negligent security claims. A landowner's duty to keep its premises safe may derive from knowledge of prior criminal acts or from the foreseeability of the particular act in question, even when there is no knowledge of prior criminal acts or in the absence of such prior criminal acts. Thus, in Georgia, the foreseeability of a risk sufficient to support a claim for negligent security involves an inquiry not only based on prior similar incidents, but also can be based solely on the conduct of persons on a premises that places the landowner on notice of imminent danger to its invitees. So if a premises owner has reason to anticipate a criminal act, even in the absence of prior criminal incidents, it has a duty to exercise ordinary care in its response to knowledge of the potential criminal act. For example, constructive knowledge of an employee has been held to suffice in a case in which the premises owner was deemed to have knowledge of a drunken patron who collided with and caused injury to another patron of the bar. *Borders v. Board of Trustees, Veterans of Foreign Wars Clubs, 2875, Inc.*, 231 Ga. App. 880, 881, 500 S.E.2d 362 (1998) (en banc). Likewise, discussions with upper level management regarding the potential for criminal acts at the site in question are evidence of the foreseeability of an attack on a plaintiff. *Shoney's Inc. v. Hudson*, 218 Ga. App. 171, 174, 460 S.E.2d 809 (1995), *overruled on other grounds*.

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The District of Columbia has adopted a particularly expansive approach to evaluating negligent security under the "totality of the circumstances" approach. In *Doe v. Dominion Bank of Washington, N.A.*, 963 F.2d 1552, 1553 (D.C. Cir. 1992), the court found that in analyzing whether there was adequate security, foreseeability was determined by considering all relevant circumstances. The court also referred to a "combination of factors" approach as the appropriate approach for determining foreseeability. *Dominion Bank of Washington, N.A.*, 963 F.2d at 1560. Under the "combi-

nation of factors" approach, "virtually all evidence that the owner or proprietor knew or should have known is relevant in determining foreseeability of harm." *Young, supra*, at §14.

Florida has also committed to using an expansive version of the totality of the circumstances approach. In *Holiday Inns, Inc. v. Shelburne*, 576 So. 2d 322, 325–326 (Fla. 4thDCA 1991), *dismissed*, 589 So. 2d 291 (Fla. 1991), *disapproved of on other grounds by Angrand v. Key*, 657 So. 2d 1146 (Fla. 1995), the district court of appeals held that to prove foreseeability plaintiffs injured in a shooting outside a bar were not limited to presenting evidence that prior similar incidents of criminal activity occurred on the premises to sustain their claims , nor were they limited to presenting evidence demonstrating situations in which the aggressor was known beforehand to sustain the claims. In *Shelburne*, a patron of the hotel bar was shot in the hotel parking lot, which was at a remote site, not located on the hotel premises. *Id.* at 324. The appellate court held in part that the evidence sustained a finding that the shooting incident was foreseeable and that a jury could find the franchisor liable for failing to provide adequate security and affirmed the jury verdict entered in favor of the plaintiffs. *Id.* at 322. *See also Stevens v. Jefferson*, 436 So. 2d 33 (Fla. 1983) (affirming Florida's commitment to the totality of the circumstances approach in a case involving a shooting at a bar).

So if a premises owner has reason to anticipate a criminal act, even in the absence of prior criminal incidents, it has a duty to exercise ordinary care in its response to knowledge of the potential criminal act.

Prior Similar Incidents

The "prior similar incidents" approach focuses the foreseeability analysis on the existence of prior similar incidents to determine whether certain criminal activity is foreseeable. A plaintiff must show that these incidents are sufficiently numerous to provide adequate notice to a reasonable individual that violent crimes may occur. 4 Modern Tort Law: Liability and Litigation §39:13 (2d ed.)

New York follows a broader version of the "prior similar incidents" approach. In New York, once a business owner has reason to know of the likelihood that a criminal act would happen on his or her property, a duty arises to protect business patrons. *Nallan v. Helmsley-Spear, Inc.*, 50 N.Y.2d 507, 519, 429 N.Y.S.2d 606 (1980). To establish the foreseeability of criminal acts of third parties, there is no requirement that previous criminal activity be of the same kind as that which a plaintiff experienced. Rather, the criminal conduct need only be reasonably predictable based on prior occurrences of the same or similar criminal activity at a location sufficiently proximate to the subject location, and it need not occur at the subject location. *Bryan v. Crobar*, 65 A.D.3d 997, 999, 885 N.Y.S.2d 122, 124 (App. Div. 2009); *Jacqueline S by Ludovina S. v. City of New York*, 81 N.Y.2d 288, 598 N.Y.S.2d 160 (1993). In *Haire v. Bonelli*, 107 A.D.3d 1204, 967 N.Y.S.2d 475 (App. Div.), *appeal denied*, 22 N.Y.3d 852, 998 N.E.2d 399 (2013), individuals who sustained injuries when a shooter entered a shopping mall and fired off approximately 60 rounds of ammunition sued the shooter, the shopping mall, and various individuals and entities associated with the shopping mall. The court held that criminal conduct is foreseeable if it was "'reasonably predictable based on the prior occurrence of the same or similar criminal activity at a location sufficiently proximate to the subject location." *Haire*, 107 A.D.3d at 1205, 967 N.Y.S.2d at 478 (citations omitted). Furthermore, the court held that without any proof of notice of prior criminal activity, a duty to protect patrons on a premises does not even arise. *Haire*, 107 A.D.3d at 1207, 967 N.Y.S.2d at 479 (citations omitted). Therefore, absent a sufficient showing of prior similar incidents, the court affirmed summary judgment as to some of the defendants. *Id.*

Existence of a Special Relationship

While this approach is not nearly as prevalent as the application of the "totality of the circumstances" test or the "prior similar incidents" test, some states adhere to analyzing whether a special relationship existed between the landholder and the plaintiff. Recognized special relationships often include (1) carrier-passenger, (2) innkeeper-guest, (3) business inviter-invitee, and (4) voluntary custodian-protectee.

In California, a business' duty to maintain its premises includes duties based on its "special relationship" with invitees, patrons, and tenants. *Delgado v. Trax Bar & Grill,* 36 Cal. 4th 224, 229, 234–241 (2005); *Ann M. v. Pacific Plaza Shopping Center*, 6 Cal. 4th 666 (1993); *Sharon P. v. Arman*, Ltd., 21 Cal. 4th 1181, 1188–1199 (1999); *Castenada v. Olsher*, 41 Cal. 4th 1205, 1213 (2007). In *Castenada*, the California Supreme Court explained that a balancing test determines the scope of the proprietor's duty to protect invitees, patrons, and tenants from third-party misconduct. *Castenada*, 41 Cal. 4th at 1214. Specifically, a proprietor's duty is determined "in part by balancing the foreseeability of the harm against the burden of the duty to be imposed." *Ann M.,* 6 Cal. 4th 666 (1993) (quoting *Isaacs v. Huntington Memorial Hospital*, 38 Cal. 3d 112, 125 (1985)). For example, recognizing that the costs of hiring private security guards is not insignificant, a high degree of foreseeability is required to find that a proprietor's duty includes hiring security guards. *Id.* at 679. This burden is usually met by showing a history of prior similar criminal incidents, although not necessarily showing prior nearly identical criminal incidents. *Delgado*, 36 Cal. 4th at 236–240. On the other hand, "when harm can be prevented by simple means, a lesser degree of foreseeability may be required." *Id.*

Illinois is another state that relies on the "special relationship" approach and recognizes the four aforementioned special relationships as imposing a legal duty to warn or to protect a person from harm. *Landeros v. Equity Prop. & Dev.*, 321 Ill. App. 3d 57, 64, 747 N.E.2d 391, 398 (2001). In Illinois, a

possessor of land does not generally owe a duty to protect lawful entrants from criminal attacks by third parties unless a special relationship exists between the entrant and landholder to warrant imposing this duty. *Id.* Once the existence of a special relationship is established, Illinois courts address whether a criminal attack was reasonably foreseeable. *Hills v. Bridgeview Little League Assoc.*, 195 Ill. 2d 210, 228–229, 253 Ill. Dec. 632 (2000). In *Landeros*, shopping center patrons sued the entities that maintained and operated the shopping center for failing to provide adequate security in a parking lot where one patron was shot by a third party and another patron was pushed to the ground. *Id.* 321 Ill. App. 3d at 57, 747 N.E.2d at 391. *Id.* at 64, 747 N.E.2d at 399. The court described Illinois' commitment to the special relationships approach, but held that the existence of a special relationship does not, by itself, impose a duty upon the possessor of the involved land. *Id.* The court affirmed a defense summary judgment in part on procedural grounds and because the plaintiffs failed to establish that the defendants had a legal duty to prevent a criminal attack by a third party. *Id.* 321 Ill. App.3d at 65, 747 N.E.2d at 399.

Known Aggressor or Imminent Danger

Under this outlier approach, an owner or a proprietor is generally not liable unless he or she had a reason to know that a particular assailant was aggressive, belligerent, or prone to violence against other patrons. *Young*, *supra*, at §17. For example, in Arkansas, a business owner or proprietor owes a duty to provide reasonable protection to patrons in the security context only "where the owner or its agent was aware of the danger presented by a particular individual or failed to exercise proper care after an assault had commenced." *See Boren v. Worthen Nat. Bank of Arkansas*, 324 Ark. 416, 425, 921 S.W.2d 934, 940 (1996). *See also Heathcoate v. Bisig,* 474 S.W.2d 102 (Ky. 1971) (applying the known aggressor approach in a negligent security case against a Kentucky tavern owner).

In light of these varied approaches that are applied in different jurisdictions across the country, how does a premises owner with operations in multiple states protect its patrons from violence and defend against premises liability claims? In the next section, various best practices are proposed to assist in answering these questions.

Best Practices for Avoiding Premises Liability Claims

While there is no panacea for premises liability claims arising out of third-party violence, there are certain best practices that can be implemented to mitigate the risk posed by such claims. As a first step, premises owners who operate in a multitude of states across the country should become familiar with each state's premises liability laws.

Second, implementing corporate policies and procedures that encourage law-abiding, responsible actors who come upon premises to continue to behave responsibly is important. One way to do this is to maintain a "don't ask, don't tell" policy with respect to the possession of guns and weapons on premises, regardless of whether the jurisdiction allows open carry or concealed carry of weapons. Requiring people to surrender firearms only affects the law-abiding gun owner because an individual with criminal intent is not likely to surrender her weapon regardless of any signage or prohibition against possessing or carrying firearms on a premises.

Third, maintaining policies and practices that are intended to maximize detection, deterrence, and prosecution of criminal acts on premises will serve to nullify any claim that a premises owner or operator chose to take a proverbial "head in the sand" approach by ignoring indicia of criminal activity. Some examples of carrying this out include networking and maintaining relationships with local law enforcement, such as providing resources and space for law enforcement to take breaks at its hotels. This can serve to build loyalty with law enforcement and simultaneously provide a premises with a law enforcement presence while building relationships. Of course, this should be done discreetly to avoid alarming guests or patrons, who upon seeing the uniformed law enforcement presence, may incorrectly assume a heightened level of criminal activity happens on a premises and thus avoid the premises.

Fourth, it is valuable for premises owners to collaborate with other business owners, competitors, and local law enforcement to enhance safety for their customers. For example, participating in industry trade groups to develop better responses to burgeoning risks (*e.g.,* liberal open carry or concealed carry gun laws) is helpful. A premises owner can also exchange non-confidential information regarding local risks with immediate local competitors and local law enforcement as a method to enhance detection of criminal activity. This has been referred to as the "power of ground-up information." For small businesses, this is the community watch and community bulletin approach to addressing crime. When effectively implemented, collaboration along with a healthy relationship with local law enforcement expedites the dissemination of information to benefit all participants with access to the most current conditions of local criminal activity. In other words, there is a multiplier effect of maintaining good relationships with the authorities and collaborating with the community. Business owners should share and share alike information with the community regarding suspicious activity and crime.

Fifth, multifaceted personnel training can prove effective. This is the front line of detection. Personnel should be trained to identify suspicious behavior (*i.e.,* nervousness, unwarranted agitation) and unusual clothing and attire (*i.e.,* out of season clothing). The importance of cultivating an environment that trains personnel to voice their concerns about suspicious behavior may help avoid criminal activity. In addition to training personnel to detect, they must be trained to report sightings of criminal paraphernalia (*i.e.*, guns, weapons, ammunition, among other things). Once an employee identifies a threat, the employer must know who to take the information to. On many premises, the recipient of such information is the director of security. In facilities without a director of security, the general manager often assumes this responsibility. In any event, all personnel should understand who the individual responsible for alerting the authorities is. Finally, it is critical that personnel be trained to follow the prescribed procedures.

To summarize, employees should be trained to identify threats, to report threats to the appropriate person, how to behave when responding to threats, and to follow internal procedures consistently to maxi-

mize personnel as a detection tool and to reduce rates of incidents.

A premises owner or operator may also rely on unarmed security guards to assist with both deterrence and detection of problematic activity on a premises. These employees' roles can be supplemented by third-party security vendors. As a complement to these on-site security personnel, CCTV is a broadly used tool in business security but it should not be relied on exclusively for either detection or deterrence, although it clearly has some deterrent effect. CCTV is primarily a tool used for the prosecution prong of the three primary security objectives of deterrence, detection, and prosecution. It can also be particularly useful in developing timelines of events and identifying parties once claims or litigation have commenced, and as such, CCTV video must be managed, preserved, and controlled to avoid claims of spoliation in subsequent legal proceeding.

It remains to be seen whether the gun legislation enacted in many states will curb such incidents or increase them and how the business community will respond to such legislation.

In addition to these best practices, it is of paramount importance that business owners confer with local legal counsel to become familiar with the laws and the regulations of their particular jurisdictions. Policies related to addressing those local concerns should be designed to supplement the best practices outlined above.

Conclusion

While premises liability claims arising from third-party criminal activity are by no means limited to claims due to gun violence, based on national statistics, incidents related to gun violence remain at the forefront of premises liability claims that arise from third-party criminal activity. It remains to be seen whether the gun legislation enacted in many states will curb such incidents or increase them and how the business community will respond to such legislation. The effect of recent gun laws enacted around the country may affect how the courts analyze "foreseeability." This will no doubt shape the legal landscape for these premises liability claims related to third-party criminal activity in the future. FD