

Crime Scene Liability

by John A. Michener

November 24, 2002: a night of socializing fun at a party for teenagers turned into tragedy when a fatal shooting erupted at the event. Hundreds of youths were attending a dance at the Troostwood Banquet Hall in Kansas City, Missouri when Yntrell Duley confronted rival gang members on the dance floor. Duley pulled a handgun, fired into the crowd and fled. Three youths were wounded, and 17-year-old Kristi Carroll was fatally struck in the head.

The shooting was obviously a criminal act, and Duley was later convicted of second-degree murder as well as numerous other charges. He was sentenced to life imprisonment plus 189 years. But the incident also spawned a civil liability trial, which ended with the jury awarding the victim's parents a \$5 million verdict against the banquet hall owners.

The parents' grief, transferred to a lawsuit, is yet another example of how victims of crime are no longer solely relying on the criminal court system for justice. Increasingly, these victims are becoming plaintiffs, suing parties who may have some association with the crime. The most common thread tying a firm to a crime is simply that the crime happened on company property. To prevent your firm from becoming a victim of a damaging lawsuit, it is important to understand how companies are sued for other people's crimes and what can be done to protect a business from unfair liability verdicts.

Crime can occur anywhere: a robbery in a fast food restaurant, a shooting in a plant by an employee's estranged spouse, a rape in a company restroom, or an assault in a private motor home parked on a casino parking lot. The criminal is obviously to blame in all these cases, but that is not stopping victims from asking the courts to decide if the property owner should pay damages to the victim for not preventing the crime.

The criminal is often a complete stranger to the owner of a crime scene location. But what if you know a dangerous person is on your property? What if an employee poses a criminal threat? If a customer, employee, tenant or anyone else is the victim of a criminal attack on your firm's property, then there is a good chance you are going to get sued.



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When a crime occurs on your property, who is responsible?

Is There a Duty to Prevent Violent Crime?

In order to hold a company responsible, the victim must prove three things: the property or business owner had a duty to protect him or her from harm; the owner breached that duty; and the owner and/or property manager contributed to cause the injury. The issue of a firm's responsibility often hangs on whether or not the owner had a duty to prevent the criminal attack. Without duty, there can be no legal responsibility. A judge usually determines if duty exists and can dismiss the case if the company had no duty to prevent the crime. That scenario avoids a jury trial in which a sympathetic jury might award large damages based on the simple notion that a company "could have done something more" to prevent the crime.

There is general agreement on two basic principles when determining if a person has a duty to prevent a violent crime.

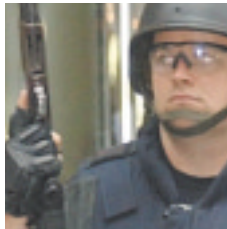
First, a person typically does not have a duty to protect another person from violent crime. Second, there may be a duty if a crime is reasonably foreseeable. Beyond that, there is little agreement regarding what circumstances will create a duty by a property owner to prevent criminal attacks on his or her property. The law continues to evolve as different courts take different approaches from state to state and sometimes even within a state.

Part of what makes a criminal attack foreseeable is the relationship between the victim and the company. There must be some sort of relationship before a company can be held responsible, but it does not have to be much. Customers, guests and generally anyone who comes onto a property with some kind of permission can sue the owner. Once a relationship is shown, then the question is whether the crime was reasonably foreseeable under the circumstances. Remember, the general rule is that a company is not responsible for criminal attacks

that occur on its property. Situations in which an owner can reasonably be expected to foresee attacks are treated as exceptions to the rule. Exceptions tend to incorporate one or more of the following theories:

A "special relationship" between the victim and a company. A victim has to have some relationship with a company in order to sue it. Usually, the victim also must show that the crime was reasonably foreseeable. In some states, a "special relationship" between the victim and a company, by itself, is enough to create a duty to protect that victim from violent crime. Examples

of special relationships include airlines and passengers, hotels and guests, and schools and students. These are situations in which the victim has placed oneself in the care of the company



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and is relying on the company to protect him or her.

History of prior crimes. In a number of states, courts consider a crime reasonably foreseeable based on prior crimes. A duty to protect people may arise if there has been a sufficient number of recent, similar violent crimes on the property. In applying this test, some states only consider crimes that have occurred on the property, while other states also consider crimes that have occurred nearby.

The known violent person. Under this exception, if a person who is known to be violent is on the property, property owners or managers have a duty to warn people on the property or to do something to prevent an attack, such as calling the police. The person may be known as violent based on past behavior or because the owner or managers have been warned about him or her. The known violent person also includes someone unknown to the property owner but who behaves in a way that exhibits to the property

owner he or she is likely to commit a violent crime.

The balancing test. Some states use a "balancing test" to determine whether a crime is reasonably foreseeable. Factors include the type of relationship between the victim and the company, the probability of harm, the magnitude of possible harm and the burden upon the company to prevent violent crimes.

The "totality of the circumstances" test. This theory allows a court to consider a variety of circumstances. The victim is free to suggest any circumstance he or she hopes the court might consider. These circumstances might include non-violent crimes on the property, violent crimes in the neighborhood, a store's hours of operation, whether vagrants sometimes loiter on the property and so forth. The history of prior crimes on the property should be an important component in this analysis, but the court can rely on any combination of circumstances. This test is the least predictable.

The enhanced risk theory. If a company has enhanced the risk of a violent criminal attack on its property, it may have a duty to prevent violent crime there. Victims sometimes point to poor lighting and concealed areas as factors that increase the risk of crime. That said, the "enhanced risk" should be a risk greater than can be found in the surrounding area. If, for various reasons, the property is particularly conducive to criminal attacks, the owner may have a duty to prevent them.

The property defect theory. A variation of this idea is found in landlord-tenant cases. Under standard landlord-tenant law, a landlord is not liable for any injury that occurs inside that leased space. When a tenant who has been injured or attacked inside his or her apartment sues, the claim is usually based on some defect in a landlord-controlled area that may have contributed to the attack or the break-in.

The specific imminent harm test. This approach is the most restrictive to victims and consequently the one most favorable to defendants in a lawsuit. According to this theory, a duty to

prevent violent crime arises only when a present situation creates a risk of imminent harm to a specific person.

Assumption of duty. If the victim cannot show that a company has a duty to protect him or her from violent crime under one of the above rules, he or she may claim that a firm assumed a duty to protect him. A company may be liable if it negligently performs an action that is not required of it.

The true basis of liability for assuming a duty is that the negligent performance causes the injury or increases the risk or that the victim has relied on the owner to do something he or she would otherwise do for him or herself. Simply taking precautions should not create liability; a company should be commended rather than penalized for doing more than the law requires. A business may assume a duty not just by what it does, however, but also by what it says. A victim may justifiably rely on an express assurance of safety. Simply advertising the safety measures a firm has taken, though, is not an assurance of safety. A promise to take steps that may reduce the risk of crime is not a promise to eliminate crime.

Negligent employment. The criminal is usually a stranger, but what if he or she is an employee? Normally, of course, a property or business owner is responsible for employees only when they are acting in the “course and scope” of the company’s business. An exception to this rule is negligent hiring. This occurs when ordinary care is not used in the hiring process, and someone is hired who is likely to hurt other people. These claims usually involve an employee who interacts with the public, such as a bouncer in a bar, or who has special access, such as an apartment custodian. They can, however, involve almost any job.

Determining Negligence

If a victim shows that a company has a duty to prevent violent crime, he or she does not automatically recover

damages. The victim also has to prove that the company was negligent, and that the negligence contributed to causing his or her injury. Negligence is usually defined as failing to use the care an ordinarily prudent and careful person would use under the same or similar circumstances. Unlike the question of duty, which a judge decides, the question of negligence is normally decided by a jury, which considers the history of prior crime on the property and whether the owner has taken reasonable security measures.



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The victim also has to prove that the company’s actions—combined with what the criminal did—worked together to cause the injuries. The mere fact that a crime happened on company property does not mean that the company contributed to cause it. Often, a criminal attack occurs suddenly and without warning. If there is not sufficient opportunity to prevent the crime, the owner has not contributed to cause it. There also may be times when the victim knows as much or more about a dangerous person or situation than a company does. If the victim deliberately exposes oneself to danger, the owner has not caused his or her injuries.

There is no foolproof way to prevent all crime from occurring at a business. There is also no foolproof way to avoid lawsuits arising from these crimes. However, there are steps a company can take to reduce both risks.

Be aware of your history. Not knowing what has happened on your property, you are unlikely to take action. Encourage good incident reporting.


Take reasonable precautions based on your circumstances. No business can afford to take every conceivable precau-

tion, nor should it have to do so. A business that does not employ any security measures, though, risks both crime on its premises and liability in the courts. Identify the security risks you have and what reasonably can be done about them. If you do not have an in-house security expert, consider consulting security professionals for an assessment of your needs. That does not mean you have to do everything they suggest.

Pay attention to particular problems. When something happens for the first time (9/11, for example), it is easy to say it was unexpected, and there was nothing that could have been done. When the same thing happens repeatedly, juries tend to be much less forgiving. The problem could be anything from a series of robberies to a physically aggressive employee to incidents involving unruly or threatening outsiders. If there is a history, you must show that you have taken steps to address that problem.

Use good hiring practices. While reference checking is still a hit-or-miss business, examine how your company conducts background checks on prospective employees and how that process can be revised to give you better information.

Do not give express assurances of safety. Advertising is one thing, but it is a different matter to assure customers or tenants that they will be safe there. You cannot control all crime, so do not suggest that you can.

Crime will always be with us. And while businesses generally are not liable for criminal attacks that occur on their property, that a rule is under attack by crime victims and some courts. Awareness of changing liability laws will help your firm protect people on your property while also protecting your company from liability when a violent crime occurs. 

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