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## Point of View

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### SECURITY LIABILITY by Michele A. Rooke, Esq.

The responsibilities of commercial and residential landlords can seem overwhelming. In a time with many areas seeing an increase in crime, a question arises as to the liabilities of landlords when crime and injury occurs on their premises. The following is a highlight of recent Massachusetts decisions addressing a variety of situations.

#### DUTY OF CARE

Generally, there is a common law duty of reasonable care that the owner and occupier of land owes to all lawful visitors. Mounsey v. Ellard, 363 Mass. 693, 707 (1973). An individual owes no duty, however, when a risk is not one that could be reasonably foreseen by that individual. Husband v. Dubose, 26 Mass. App. Ct. 667, 669 (1998). "All the circumstances are examined in defining the scope of duty of care based on reasonable foreseeability of harm," Whittaker v. Saraceno, 418 Mass. 196, 199 (1994). In Massachusetts, under certain circumstances, property owners may be found liable for injuries caused by the criminal acts of third parties. In these cases, the issue of reasonable foreseeability of harm is considered along with surrounding circumstances.

#### FORESEEABILITY

Foreseeability is often at issue when a person has been injured on another's property by the criminal act of a third-party. Ultimately, in Massachusetts, "landlords may be liable for ignoring criminal activities that occur on premises and were known or should have been known to them." Griffiths v. Campbell, 425 Mass. 31, 34 (1997). In Griffiths v. Campbell, 425 Mass. 31, 35 (1997), the Court found that a residential landlord was not liable for the death of a Boston police officer who was murdered in a drug raid on an apartment leased by the landlord where the murder was not within the foreseeable risk of harm based only on the plaintiff's assertion that the landlord should have suspected drug activity within that apartment.

In deciding on the "reasonable foreseeability" of harm,

Massachusetts embraces the "totality of the circumstances" test. Generally, liability is imposed on property owners when "a person legally on the premises is attacked, and the owner or landlord knew or should have known of both the previous attacks and the potential for a recurrence based on a failure to take measures to make the premises safer." Griffiths, 425 Mass. at 35.

A commercial landlord does not have a special relationship with tenants, such as that that exists between a college and its students (Mullins v. Pine Manor College, 389 Mass. 47, 54-55, (1983), between a common carrier and its passengers Sharpe v. Peter Pan Bus Lines, Inc., 401 Mass. 788, 791-792 (1988)), or between a hotel and its guests (Fund v. Hotel Lenox of Boston, Inc., 418 Mass. 191, 1930195 (1994). Although the possibility of a "criminal act is present in daily life, society should not place the burden of all harm caused by random violent criminal conduct on the owner of the property where the harmful conduct occurred, without proof that the landlord knew or had reason to know of a threat to the safety of persons lawfully on the premises against which the landowner could have taken responsible preventive steps." Id. at 200. Thus, there is no duty owed when the risk which results in the plaintiff's injury is not one which could be reasonably anticipated by the defendant [(property owner)]. Foley v. Boston Hous. Auth., 407 Mass. 640, 646 (1990).

#### COMMON AREAS/STORES/HOTELS

A landlord is not free to ignore reasonably foreseeable risks of harm to tenants, and other lawfully on the premises that could result from unlawful intrusions into common areas of the leased premises. (See Foley v. Boston Hous. Auth., 407 Mass. 640, 644-646 (1990), the lack of foreseeability of attack established lack of duty, the property owner was not held liable because the attack of an employee by a fellow employee was not foreseeable. See also Flood v. Southland Corp., 416 Mass. 62, 72-73 (1993), store owner's argument that it owed no duty to plaintiff

failed where store employee knew that teenagers gathered outside the store had used drugs, had weapons and no particular security precautions were taken).

The "totality of circumstances" approach was reaffirmed in Luis v. Foodmaster Supermarkets, Inc., 50 Mass. App. Ct. 575 (2000), in which plaintiff was stabbed in the store by a mentally ill customer who used a knife which was being displayed in a non secured area. In light of all circumstances, plaintiff failed to demonstrate that the presence of a security guard would have deterred that attack of a mentally ill attacker. See also Fund v. Hotel Lenox of Boston, Inc., 418 Mass. 191 (1994), where a hotel was in a high crime area, management was aware of numerous crimes within the hotel but failed to take certain measures to protect guests. The Court found that the risk of a violent attack upon a guest was within the foreseeable risk of harm resulting from the failure to take preventative measures.

### COLLEGES, UNIVERSITIES

Massachusetts Courts have considered the circumstances where a college or university owes a duty of care to its resident students. See Mullins v. Pine Manor College, 389 Mass. 47, 50-51 (1983). In Mullins, the plaintiff was a student who was raped by an unidentified assailant at an on-campus dormitory. The Court found that a special relationship exists between a college and its students. *Id.* at 54-55. Further, the college voluntarily provided campus security and the students and parents likely relied on this undertaking. *Id.* at 53-54. Therefore, "one who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking." *Id.* at 53 quoting Restatement (Second) of Torts § 323. The Court concluded that "[t]hese two principles of law provided a sufficient basis for the imposition of a duty on colleges to protect their resident students against the criminal acts of third parties." *Id.* at 54.

### PARKING LOTS

In Parslow v. Pilgrim Parking, Inc., 5 Mass. Ct. 822 (1977), the plaintiff sought damages for injuries when she was assaulted and raped by an armed assailant after parking her car in defendant's garage. The Court held, in part, that the jury could have found that plaintiff was a business invitee to whom the defendant owed a duty to use reasonable care to keep the premises in reasonably safe condition and that the trial Court did not err in permitting the jury to determine whether defendant took reasonable steps to protect its patrons from injury caused by foreseeable acts of third persons; and furthermore, that the jury could have found that defendant's security guards, while making their normal rounds would have had a sufficient opportunity to observe the plaintiff's assailant who had been loitering in the garage for 25 minutes prior to the assault. *Id.* at 822.

### TAVERNS

In cases involving taverns, in addition to considering the "foreseeability" of the criminal act, the Massachusetts Courts also consider whether or not the assailant was a "known aggressor." See

Greco v. Sumner Tavern, Inc., 333 Mass. 144 (1955); which held the bar liable for assault on a patron by another patron who had been rowdy and drinking for a long time prior to assault. Similarly, in Carey v. New Yorker of Worcester, Inc., 355 Mass. 450, 452 (1969), a bar owner was held liable when a patron was shot by another customer whom the bar owner's employees knew to be drunk and a past troublemaker but who took no steps to remove from the premises or any other preventive measures. In Carey, the Court found that the defendant, as the operator of a restaurant and bar, owed a duty to a paying patron to use reasonable care to prevent injury to him by third persons. The Court found that the defendant's agents should have realized that there was real danger to others and were negligent in failing to attempt to prevent the incident.

### COMMON CARRIERS

In Shapiro v. Peter Pan Bus Lines, Inc., the plaintiff, a passenger, was stabbed by an assailant while waiting in a bus terminal. The Court held that a common carrier owes a duty to a passenger waiting in a station, which the carrier is voluntarily using, even if the station was operated by another company. The Court further found that both the bus company and bus terminal company, as common carriers, failed to fulfill their high duty of care to the passenger, by not having uniformed security officers present at the terminal, especially where that the bus terminal was in a high crime area, was the constant site of criminal activity and where evidence supported a finding that the assailant would have been deterred by the presence of such security officers.

### MOVIE THEATERS

In an action against the operator of a theater by a patron to recover damages for injuries sustained when the patron was assaulted by another patron, evidence sustained the finding of negligence in failing to prevent the assault when the theater had notice that a disturbance was occurring, and did little or nothing to prevent escalation. Rawson v. Massachusetts Operating Co., 328 Mass. 558 (1952).

### CONCLUSION

Although Massachusetts Courts do not expect landlords to have crystal balls, the totality of the circumstances will be considered in determining whether the criminal act of a third-party was reasonably foreseeable by a property owner.



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