# ESTABLISHING A DUTY IN INADEQUATE SECURITY LITIGATION: THE PROMISED LAND

## I. INTRODUCTION

1. Fundamental to prevailing in inadequate security litigation is the identification, assessment and selection of legal theories capable of successfully establishing a duty to prevent or minimize violent crime.

2. Unlike motor vehicle cases, product liability actions and many other areas of tort litigation, in inadequate security litigation trial lawyers constantly face challenges to the very existence of a duty on the part of defendants. Counsel must evaluate alternatives to negligence, particularly in jurisdictions hostile to security claims.

3. Today we are going to look at but also BEYOND negligence and to reward those souls who didn't sleep in, we'll be discussing newer cases not in the outline.

4. NEVER FORGET THE BOTTOM LINE---FINDING A THEORY THAT WILL SURVIVE the inevitable summary judgment motion.

## II. ESTABLISHING A DUTY

1. Most states now recognize a cause of action for inadequate security, provided that the defendants could have reasonably foreseen that a violent crime could occur.

2. Others are far more restrictive, particularly with regard to negligence claims. Wright v. Webb, 234 Va. 527, 362 S.E.2d 919 (1987). See Henley v. Pizitz Realty Co., 456 So.2d 272, 277 (Ala. 1984) (one battery, two robberies and a dozen thefts in ten years insufficient to establish duty).

3. Still others fall in between, allowing negligence claims only in limited circumstances. Let's see if we can navigate the web of theories you should consider, in seeking justice for victims of violent crime

### A. Negligence Based Upon Reasonable Foreseeability

Victims of violent crime rely primarily upon negligence to establish a duty in inadequate security litigation. In most states, the fundamental inquiry focuses on whether the crime was reasonably foreseeable, and different states establish different criteria for proving Foreseeability.

Certain jurisdictions still cling to the restrictive view that victims must establish that “prior similar crimes” occurred at the premises, while more progressive jurisdictions evaluate Foreseeability based on the totality of the circumstances. For example Justice Ginsberg’s opinion while on the DC Circuit in Doe v. Dominion Bank, 963 F.2d 1552, 1560-62 (D.C. Cir. 1992) (Ginsburg, J.) Even in jurisdictions employing a “totality” approach, identification of prior criminal activity at the defendants’ premises will be important. Many other factors may also influence Foreseeability, including the nature of the premises, particularly if the crime took place in a parking garage. I did cite a case called Gomez v. Ticor, 145 Cal. App. 3d 622, 628, 193 Cal. Rptr. 600, 604 (Cal App. 1983) & wanted to caution you that Caution—this case may have been disapproved…

B. **Negligence Based upon Foreseeability Stemming From Defendants Own Recognition of Danger**

1. In some states, you can prove forseeability at least in part by proving that the Defendants expressly DID foresee the danger of crime. In Small v. McKennan Hospital, 403 N.W.2d 410 (S.D. 1987). the South Dakota Supreme Court determined that a hospital had foreseen the risk of violent crime in its parking garage when it published crime advisories in staff newsletters. Id. at 413

2. The practical effect of this Disarmingly simple Theory is That a Theoretical Forseeability Analysis is mooted by evidence that the defendant had in FACT Foreseen the Danger….

3. There is a relatively recent case from Maine not in your materials you should look at, esp if you ever have a case involving a college:Maine Supreme Judicial Court. Stanton v. University of Maine System, No. Cum-00-513. June 26, 2001.

   a. The case involved the sexual assault of a high-school student while she attended a summer soccer program on the campus of the University of Maine

   b. I MUST CAVEAT MY DISCUSSION –I’ve only read a blurb from Lawyers Weekly.

   c. The Maine Supreme Court reversed the grant of summary judgment, even though the last reported sexual assault on campus had occurred six years earlier.

   d. The university argued that it didn't have a duty to protect the student because her rape wasn't reasonably foreseeable.

e. But the court said, "That a sexual assault could occur in a dormitory room on a college campus is foreseeable and that fact is evidenced in part by the security measures that the university had implemented . . . ."

f. "[T]he concentration of young people, especially young women, on a college campus, creates a favorable opportunity for criminal behavior, [in] that many of the students tend to be away from home for the first time and may not be fully conscious of the dangers that are present, and thus . . . the threat of criminal behavior is self-evident . . . [W]e find that the university owed a duty to reasonably warn and advise students of steps they could take to improve their personal safety."

You also might look at 3 more cases not in the materials:

5. Garcia v. City of New York, 646 N.Y.S.2d 508 [App. Div. 1996]

    a. Written security procedures indicated awareness by school that young students were at risk p. _____

6. Stewart v. Federated Department Stores, 234 Conn. 594,611, 662 A.2d 753 (1995)

    a. Court looked at recommendations of def's own security supervisor in assessing Foreseeability. p. 613

7. The Green Cos. v. Divincenzo, 432 So. 2d 86, 88 (Fla. App. 1983)("the owner in fact foresaw—not should have foreseen—the likelihood of crime, took certain steps calculated to guard against it, and thereafter determined to abandon those steps. . .")

**C. Negligence Based Upon Assumption of the Duty**

1. From law school we all know that defendants can voluntarily assume a duty to act, and that, once assumed, the duty must be discharged with reasonable care. This doctrine is really a Wonderful old chestnut from Justice—then Judge—Cardozo in a case I cite in the materials Glanzer v. Shepherd. It is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all. 135 N.E. at 276.

2. This is an important concept, esp in States in which your appellate courts take a narrow view of Foreseeability,

3. The United States Supreme Court, a number of lower federal Courts and state appellate courts have recognized and applied assumption of the duty principles in identifying a duty to protect third persons from crime. Cases

cited in the outline at page ____, including the US Supreme Court's opinion in Sheridan. In Sheridan, The Court expressly premised its opinion upon the determination that liability could be established through assumption of the duty to control the acts of others:

By voluntarily adopting regulations that prohibit the possession of firearms on the naval base and that require all personnel to report the presence of any firearm, and by further voluntarily undertaking to provide care to a person who was visibly drunk and visibly armed, the Government assumed responsibility to "perform [its] 'good Samaritan' task in a careful manner."

Folks---this is the US Supreme Court. Admittedly it was construing one state's law—Maryland---but this principle is ingrained in our common law. USE IT
I discuss cases from other jurisdictions in my paper, including ones as diverse as Idaho, Illinois, Louisiana and Minnesota, New York and Arizona.

Cases NOT in the materials that you may want to look at include 2 more recent cases:

- Alabama Raburn v Wal-Mart Stores, 776 So.2d 137 (Ala. App. 2000)
- Funchess v Newman Corp (Minn App 2000)

"But even if Newman had no duty to protect Hayes by providing reasonable security measures, it did have a duty to maintain the security measures already undertaken for the protection of its tenants."

Particularly Wanted to mention important new case decided a month ago, in Maryland: Hemmings v Pelham Wood LLP June 16, 2003 2003 WL 21377594 Maryland's highest Court, the Court of Appeals.

***** The family of a tenant who was murdered by an intruder who broke into the apartment at night could sue the landlord for not repairing lighting in the common areas, Maryland's highest court has ruled in reversing a summary judgment for the landlord.

**D. Negligence Per Se**

Let's look at a 4th Approach…
Apart from common law negligence claims, local ordinances or regulations may impose specific legal obligations (e.g., parking lot lighting requirements) the violation of which may constitute negligence per se.
LOOK FOR Ordinances such as

• Statewide or local building codes addressing sliding glass doors in Apt Buildings requiring charley bars or some other secondary locking device
• Other ordinances requiring certain types of locks
• Ordinances establishing required lighting levels

WE litigated a case in which an apartment management company failed to install a secondary lock on a sliding glass door in violation of a local ordinance; the defendants moved to dismiss the suit and the trial court overruled the motion on the negligence per se count.
There are a few cases out there relying upon this idea. I didn't get a chance to read it but I think the Alabama Supreme Court addressed the issue in

1. Brock v Watts Realty, 582 So.2d 438 (Ala. 1991)

2. Try Funchess v Newman Corp as well (Minn App 2000) (broken door lock in apt case)

**E. Fraud**

1. In certain circumstances defendants make representations regarding safety, security, patrols, CCTV cameras, crime levels, or any of a host of other topics. If such representations are made and reliance can be established, a fraud theory should be pursued.

2. Fraud claims can arise whenever the defendant and the plaintiff have discussed security-related issues in a meeting, a phone call or through correspondence. Counsel should be especially alert to fraud based claims in residential landlord tenant and commercial office building cases, since prospective tenants may have specifically inquired about security and/or criminal activity when looking at an apartment, and leasing agents pressed to move apartments may misstate key facts to induce rentals. I have handled 4 such cases.

3. In some states fraud counts may be coupled with statutory deceptive trade practice counts.

= = We represented a young woman who was assured by the leasing agents of an apartment complex that no break-ins had taken place and that it was safe. In reliance upon those statements, she moved into a second floor unit. In fact, just 3 months earlier a serial rapist had broken into the apartment next to hers, which shared her balcony. The perpetrator returned, used the same balcony to break into her apartment, and sexually assaulted her. WE resolved that case for well over 1,000,000---even in Virginia.

4. Remarkably, despite the in terrorem effect of litigation on behalf of crime victims, defendants continue to make representations regarding safety,

security, patrols, CCTV cameras, crime levels, or any of a host of other topics.

5. In one case we handled, the former resident manager of a large apartment complex testified that she had heard leasing agents tell prospective tenants that the complex had 24-hour security when it did not, and had to instruct them to stop misrepresenting security measures:

6. Misrepresentations may also arise when security or burglar alarm companies make inflated claims about the nature of their security services or the existence of certain alarm features, especially panic alarms.

7. One interesting case not cited in the materials, I believe, is Shah v. PAN AM Servs., 148 F.3d 84 (2d Cir. 1998), cert den. 1999 U.S. LEXIS 1077, a case in which relatives of passengers killed by armed hijackers sought to prove willful misconduct to avoid the strictures of the Warsaw Convention. >>>> Pan Am had advertised a new security Alert program, representing to the public that Pan Am had made or was making airport security improvements. In reality, evidence existed to show that the 'Alert' Security Program . . . was neither related to security, nor was it a program. Instituted by Pan Am in May 1986 during a period of sharp decline in international travel due to terrorist attacks, the program was a misleading public relations ploy designed to make would-be travelers feel more secure.

Id. at 93 (citation omitted).

The Second Circuit ruled that fraud claims could proceed under the willful misconduct exception, but only if "[1] the fraudulent misrepresentations induced . . . [the plaintiff] to use the carrier and [2] . . . the damages would not have occurred if the carrier had performed as promised." Id. at 95. The plaintiffs did not prove that the promised security program would have stopped the hijacking and therefore were denied recovery -- a Draconian view of proximate cause.

8. In the right case, Fraud can be a valuable weapon, elegant in its simplicity and its ability to motivate jurors.

**F. Contract**

Beyond traditional tort causes of action, trial lawyers representing crime victims should assess contract causes of action. In Virginia, a jurisdiction in which negligence actions have met with exceptional hostility, the law still provides victims with a contractual remedy:

Contracting parties are entirely capable of assuming duties toward one another beyond those imposed by general law and, in fact, do so in nearly every

contractual arrangement. It follows that those authorities which define the duties imposed by general law do not restrict the enforcement of additional duties assumed by contract. Richmond Medical Supply Co. v. Clifton, 235 Va. 584, 587, 369 S.E.2d 407, 409 (1988). I have used contract theory successfully in a landlord tenant case in which the landlord promised to repair a burned out exterior floodlight; the court found that a cause of action existed for breach of contract. See also Flood v. Wisconsin Real Estate Investment Trust, 503 F. Supp. 1157, 1160 (D. Kansas 1980) (express warranty to provide security created in part by "conversations between the plaintiff and the managers of the apartment complex").

**G. Third-Party Beneficiary**

1. In certain circumstances crime victims should be able to argue that they were the intended beneficiary of a contract, the breach of which provides them with a third-party beneficiary contract action.

2. Employees of mall stores, for example, may be able to demonstrate that they are the intended beneficiaries of a security services contract, or a lease between her employer and the mall, if the lease requires common area security.

3. I love this theory, but unfortunately the courts have not been too terribly receptive

4. I do cite two cases---The Iowa Supreme Court’s opinion in Galloway v. Bankers Trust Co., apparently adopting store patron's argument that he was the beneficiary of a security services contract, since the contract mentioned "the protection of . . . customers")…. and . Wooldridge v. Echelon Service Co., a trial court opinion in Virginia.

5. Happy to report that I have caught wind of a new decision from Missouri that may help as well. NOT in your materials: New: LAC v Ward Parkway Shopping Center, 2002 WL 1051977 (Mo. May 2002)

**H. Nuisance**

Counsel should also explore nuisance as a means of establishing a duty. The prototypical case might entail an apartment building that had become a crack house, and attracted criminal activity. Lew v. Superior Court, 25 Cal. Rptr.2d 42, 46-47 (Cal. App. 2d 1993) In Lew, the court ruled that a landlord could be liable under a nuisance theory to tenants for emotional distress arising from drug dealing on the premises. See also Moreland v. Cheney, 479 S.E.2d 745 (Ga. 1997) (nightclub operation enjoined as public nuisance); Afton Place Associates, L.P. v. Richmond Redevelopment and Housing Authority, 31 Va. Cir. 322 (Rich.Cir Ct. 1993) (denying motion to dismiss nuisance count in case in which

plaintiff alleged that “defendant has allowed its complex to be frequented by drug dealers and users and that crime on defendant's property endangers the safety of surrounding residents.”)

## III. CONCLUSION

Trial lawyers given the privilege of representing crime victims should carefully assess the range of theories through which duties to provide security may be established. The creative use of traditional legal theories may ensure that the civil justice rights of victims of violent crime are protected, and that property owners responsible for poor security are held accountable.