

Managing Risk: Liability for the Criminal Acts of Others

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There is an ever-present possibility that a land owner may be held liable in damages for the injuries and consequences of criminal acts of strangers. Many owners or managers of commercial property, leased for retail or office use for example, are either unaware of or at least unfocused on this serious risk. But ignoring this risk can be costly. Long ago such a liability seemed unthinkable. The common law essentially provided that criminal acts could not give rise to such a liability to the property owner. Liability in negligence typically depends upon the existence of certain elements. One of these elements, causation, was deemed missing because the criminal act was not the act of the property owner. So, the criminal caused the harm, and the property owner did not; meaning the property owner was free from blame - or liability, for the criminal act. However, in recent years most state courts have advanced the trend in the law to make a deeper analysis. In cases of harm caused by the criminal acts of strangers upon tenants or others on commercially leased property, the cases permit, in the right circumstances, a finding that the criminal act was foreseeable. Consequently, the negligence of the property owner, such as failing to take reasonable precautions in the face of this foreseeable harm to innocents on the site, can of itself be deemed the "cause" of the harm. This allows the courts to fix blame - and liability - upon the property owner, instead of just the criminal. Obviously, a money judgment against a criminal is far less desirable than a money judgment against a solvent, and insured, property owner. The injured innocent will predictably look for someone to blame. The party more likely to carry insurance and possess liquid wealth is more likely to be sued. Under this line of cases, the courts essentially require property owners and managers to continually ask, how likely does it seem, today, that a criminal act by a stranger will take place on site, today, or tomorrow, or soon; and where might it occur; and why? For Landlords, the liability risk seems difficult to assess and therefore truly unfair, and inequitable. After all, one can always imagine a scenario where, after a criminal act on site occurs, the injured party points to recent events nearby, perhaps even similar criminal events, and argues "you should have known". This is a frustrating turn of events because the property owner or manager knows of thousands of other similar customer or tenant trips to and from the site in that same time period that were utterly uneventful. The cases finding liability are factually intensive - each case turns dramatically upon the precise facts involved. So,

there are no “hard and fast” rules that will guaranty avoidance of this risk. Still, here are a few general suggestions to help the wise property owner or manager manage this risk:

- Remain aware of reported criminal acts on site and near the site;
- Analyze lighting levels throughout the site, especially during night hours;
- Review the “standard” hours of operation, preferring uniform hours calculated to cause most persons to remain on site - and depart from the site - around the same time;
- Consider the condition of, or the necessity of, various fencing or other boundary and access barriers, whether permanent or periodic;
- Review landscaping; consider changes in design or revisions to trimming rules, to help avoid isolated alcoves;
- Engage in routine and periodic maintenance review and assessment. Look for early or minor signs of criminal mischief, or avoidable circumstances (such as burned out light bulbs. malfunctioning lights or equipment, or overgrown landscaping);
- In some circumstances, consider whether some degree of patrolling or roving watchmen or similar or electronic surveillance, or even entering into a contract with off-duty police to visit or patrol the site, or any combination of these strategies, may be warranted; and
- Consider whether you should further consult with professionals, including your insurer, for safety and even security guidance.

It would be impossible to summarize all aspects of the risk analysis an owner may wish to follow. Reason and prudence should guide you. But the owner, who altogether ignores this risk, does so at its peril.

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