THE NATIONAL CRIME VICTIM BAR ASSOCIATION

Civil Actions for Criminal Acts

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Inquiries about the National Crime Victim Bar Association
or requests for additional copies of these course materials can be directed to:

National Crime Victim Bar Association
2000 M Street, NW
Suite 480
Washington, DC 20036
(202) 467-8753
fax (202) 467-8701
victimbar@ncvc.org

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National Crime Victim Bar Association
"Civil Actions for Criminal Acts"

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Tim Titolo[1]
Titolo Law Office
930 Village Center Circle 3-444,
Las Vegas, NV 89134
702-869-5100
tim@titololawoffice.com

Anatomy of an Attack:
Building a Case for Negligence and Overcoming Hubris

Sharon got up early as she usually did and stepped out of her motel room to the small porch area in front. It was just before 6:30 a.m. in January; the morning air was refreshingly cool given that in Las Vegas at the same time of day during the summer months the temperatures could sometimes be over 80 degrees. For the rest of the day one would bake in the micro-wave like heat. As usual the morning was very quiet with only a couple of folks walking their pets across the expansive courtyard before hurrying off to work. It was her favorite time of the day before the entire city came alive with its traffic, tourists and accompanying noise. While standing immediately outside her rental unit located across the street from some local casinos, Sharon's world was about to completely implode changing the lives of both her and her husband Craig.

At first she was not sure if she heard the rustling from behind or the quick blur in the corner of her eye. In any event, the tsunami of stealthy force was sudden and overwhelming. As best as she can recall, Sharon was violently grabbed from behind her neck, and forcefully slammed to the stucco wall causing her to fall to the cement pavement in her alcove, face first. The force of the attack was brutal; it was compounded by the fact that Sharon was a very petite, small framed woman weighing less than 110 pounds at all of five feet and one inch.

The door to the motel room was open and the small family dog began to bark uncontrollably. Upon hearing the combination of the dog barking and Sharon's screaming, Craig, who had been asleep, rushed from the rental unit to Sharon in the alcove. As Craig approached Sharon, she was desperately trying to raise her brutally battered body off of the cement pavement. As he assisted her to her feet Craig found Sharon bleeding profusely from her mouth. He immediately took Sharon inside the motel room and discovered that she was attacked. Her face was bloody, bruised and covered in scratches and scrapes. Her lips were cut badly and even more horrifying her front teeth were broken off completely.

Craig grabbed a cell phone and ran outside searching for the attacker along the perimeter of the building but he could not locate any suspects. Upon returning to Sharon, he called the motel office and requested that a security guard be dispatched to his unit. Shortly thereafter a security guard arrived to the rental unit and commenced with inquiries as to what had happened. In the

[1] Titolo Law Office began in 1990 as a personal injury and wrongful death practice in Las Vegas, Nevada. Over the years, Timothy Titolo has dedicated himself to the study of medical and legal aspects of litigating traumatic brain injury (TBI) cases. As an active member of several brain injury associations, and the American Association of Justice, Titolo has acquired the experience and knowledge required to help clients suffering brain injury and other serious injury. He also works specifically on trucking cases. Titolo Law Office offers clients compassion and understanding, fully aware of how trauma devastates both the victim and family. Timothy Titolo is a respected authority on brain injury law within the professional legal and medical community.

process the guard took several photos of the crime scene memorializing Sharon's handprint outlined in the pool of blood on the cement. One photo actually revealed fragments of her broken teeth lying in the blood. At some point the police and ambulance arrived to the motel complex and commenced their respective duties. Sharon was rushed to a nearby hospital as the area of the attack was sectioned off with crime-scene tape and detectives were called for further investigation.

Aside from all of the obvious and apparent injuries to her face, head and upper body, x-rays revealed something more alarming: Sharon's trauma included fractured vertebrate; her neck may have been broken.

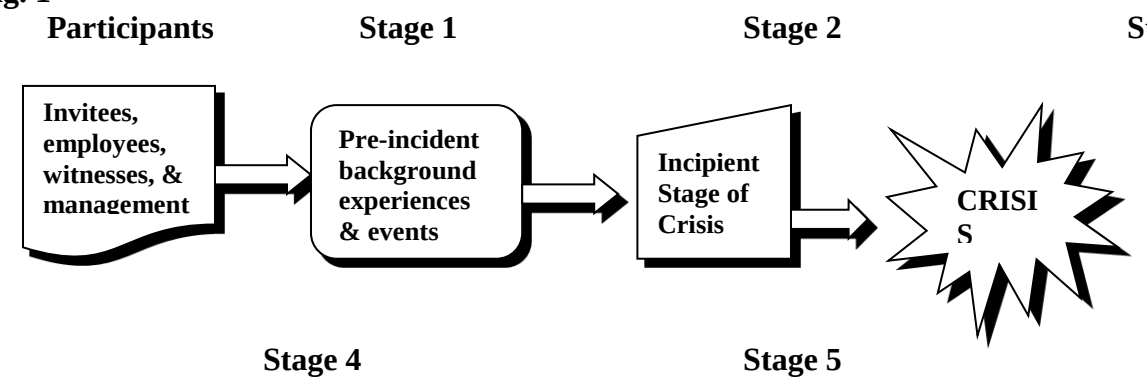
The brutal attack and life-altering trauma amounted to one level of horror in the lives of both Sharon and Craig; dealing with the motel, its management team and the owner of the company was altogether another level of dreadfulness and misery.

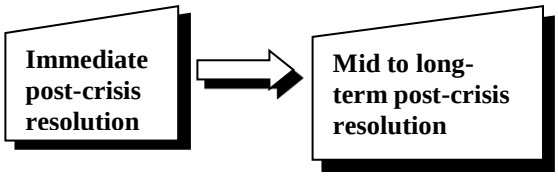
As happens all too frequently, the motel operator maintained that indeed this was a tragic incident, but also it was of such a nature that it was neither foreseeable nor controllable by management. What would ensue over the next two years would rival a Steven King novel. Regarding some of the events, as the saying goes, ***"you just can't make this stuff up***!" As the evidence would uncover, Sharon and Craig would encounter a multi-millionaire owner of the motel chain who was utterly **unrepentant,** a management team that was completely **recalcitrant** and a risk management and general counsel staff that was fully **negligent.** Collectively, these three groups would prove to be a tort trifecta combining malfeasance and incompetence.

As time progressed, and given the extent of her injuries, Sharon and Craig were forced to file a complaint and commence with civil litigation. At first blush circumstances suggested that the defendant was cooperating with the plaintiffs and their attorney. But as time went on niceties were overshadowed by defense subterfuge; and in some instances, outright misdirection and ethical challenges. Nonetheless, plaintiffs and their counsel met each challenge and overcame the roadblocks.

When I was contacted by plaintiff's counsel I laid out a five-stage process for this case. A step-by-step graphic is displayed below as Fig. 1. Put simply, as all of the participants in this case drama were identified and prioritized, their relative roles and participation would be documented and evaluated from stages one through five. Stage One lays the foundation for each actor; Stage Two identifies the actions, whether directly or indirectly involved, of each actor just prior to the critical incident (the attack on plaintiff); and Stage Three is the actual attack [crisis] itself. Stage Four are the actions of all the actors immediately after the attack [usually referred to as the crisis management phase] and Stage Five tracks the actions of these same actors from one day to one year afterwards [typically referred to as the crisis recovery phase].

Fig. 1





By using this **five-phase methodology**, the forensic investigation is managed with discipline and focus. Since most of the information needed to go forward with the case requires looking backwards in time and space, this 'roadmap' keeps the goals of the forensic investigator on track with the findings of the investigation. By the time I am called on these sorts of cases, historical information and personal recollection has deteriorated significantly and sometimes has been deliberately manipulated and obfuscated altogether. Such was the condition with this early morning assault case on Sharon.

In the course of identifying and locating all of the 'players' in this case we experienced several interesting highs and lows. Sharon was the obvious victim of the attack; she and her husband Craig were the plaintiffs, the attackers were never apprehended and there were no percipient witnesses to the event. As we weaved out concentrically from the epicenter of the incident, I focused upon all of the defendant's traditional departments: security, safety, operations, risk and insurance, legal and human resources. And within those departments I explored the typical roles: guards, supervisors, managers, directors, executives, and owners. It was at this stage that we encountered three sub-groups with the defendant's personnel. The **first group** was personnel who were no longer employed and equally no longer accessible via conventional means. The **second group** was employees who, though having a job title, each wore multiple "hats" and had a variety of over-lapping responsibilities. And the **third group** was composed of members of management operating within an ambiguous hierarchy and possessing vacillating duties. Again, we uncovered another trilogy of challenges and hurdles. Moreover there were no clear lines of authority or managerial spans-of-control between supervisors and the guards, as well as between senior management and the owner. This systemic management bewilderment was confusing even within the defendant's own ranks; it was all the more difficult trying to ascertain who was responsible for what and when as an outsider looking back retrospectively.

For example, when zeroing-in on the cadre of security guards working on the morning of the attack, a few were still employed, a couple were mysteriously fired while some were relocated to other motel properties within the franchise. Additionally, trying to determine who was responsible for training the guards fluctuated between several persons depending on the topic being taught and the day of the week. Ascertaining training subjects and methods between multiple persons was extremely challenging; no one would admit assertively that he or she was fully responsible for teaching any given subject. It was always, ***"I may have, I am not sure; I think that subject was taught by Steve***; ***or maybe Bob…"*** when asked during depositions. And finally, endeavoring to establish the identity of the actual **corporate director of security** was no easy task, though it should have been. During discovery it was learned that on some days no one held that rank, on other days it was the general counsel and still on others that duty shifted to the vice president of operations. It was like the old 1960 game show **To Tell the Truth**: *Will the real security director please stand up*!

And lastly, the risk management function was fulfilled by a secretary on some days, an insurance "gal" on others and then by another person claiming to be the actual risk manager. Just

like the previous search for the trail of accountability with the guards and director of security, this was reminiscent of the old 1945 comedy routine by **Abbott and Costello**, "***Who's on first? What's on second***?" Clearly this motel operator was unlike anything that I encountered in my previous 17 years as a forensic liability analyst.

In light of all of the aforementioned perplexity and confusion, trying to get a simple and straight answer to direct questions was like trying to figure out the mechanics of a David Copperfield stunt. However, after months of refining and crafting carefully worded interrogatories and requests-for-admissions, the playing field was populated with the names of key players and actors who could no longer escape their respective job descriptions and responsibilities. Now we knew WHO was on first and WHAT was on second.

In the course and scope of discovering the names and roles of the defendant motel's employees and executives, the plaintiff had to tackle the issues of both missing, and possibly, altered documents. For example, after the complaint was filed the plaintiff's team initiated its discovery by seeking to obtain all pertinent documents relative to the attack upon Sharon. Three of the more important of these in cases of third-party assaults are (**1)** the police and detectives' reports; **(2)** the defendant's security incident report; and **(3)** the emergency room in-take report. Typically, these reports are generated a short interval from one another with the proprietary report preceding the other two, but that was **not** the case here.

Generally when such an incident occurs on private property where there is a security department, the event is memorialized within hours of the occurrence. This is usually followed by the initial police report, then the emergency room report and then the detective's follow up report. In this case the motel's staff did **not** write a report until almost a full year after the attack on Sharon; the incentive to write a report was the filing of the complaint and not any exercise of due diligence in obtaining the required information for future reference.

Upon receiving notice of the litigation the general counsel summoned all of the applicable personnel and went directly to the motel. The personnel included the manager, front desk staff, house-keeping, maintenance staff and security guards. They were instructed to recall the events of January 200X and then proceed to write voluntary statements to the best of their recollection, to wit, they did. The employees struggled to recall the incident, and most, as one would expect, had either large gaps in their respective narratives or uncertain declarations ***("I'm not sure but I think 'this' and possibly 'that'***") or both. These statements were attached to a property manager's report written on the day of the incident; that report contained one sentence in the narrative.

Further discovery revealed that the security guard who responded to the scene of the attack **never** wrote an incident report or ever sought out possible witnesses to the crime. Those omissions were not the fault of the guard; he was dismissed by the property manager sending him home while she "*took over*" his investigation. Moreover, the manager never solicited statements from any of the employees, or near-by occupants of the motel, or the victim's husband; in short, she never actually conducted an investigation as the term is commonly applied. The property manager, having neither direct nor circumstantial evidence, and lacking any real-world training or experience, did decree and opine that Sharon was never attacked, but rather, fell on her own accord onto the cement. Further, before the detectives could even return to the scene of the crime, the manager had the large pool of blood and remnants of Sharon's teeth on the sidewalk washed away with a hose. And that was that, at least as far as the manager was concerned!

With these events the discovery process assumed a carnival-like process. When we requested copies of the security guards' incident reports spanning five years, the defendant only supplied a couple dozen. When the police calls-for-service report showing hundreds of entries for police assistance was compared to the on-site incident reports, it was as if one was looking at two different addresses. Moreover, knowing the neighborhood as I did, I suspected that once again, the true history of the motel was being manipulated. We demanded to see all of the actual reports to ascertain the total number of incidents; the defendant conceded by inviting the plaintiff's team to the corporate office.

Statistical crime analysis and perpetrator profile assessment

When we entered the main conference room we were shown over one dozen bankers' boxes containing hundreds of incident reports; each group of three to four boxes representing a given year. For the next four hours I proceeded to go through each box scanning the documents for specific characteristics. We discovered **97 additional reports** having the similitude of the instant case. Our efforts had paid off.

When the police records were tabulated over a four-year period using a 10-point crime matrix, the totals were most insightful. The motel property in the instant case was a veritable epicenter of crimes against persons and property at both the felony and misdemeanor levels. **Table # 1** below illustrates the findings of the police calls-for-service records.

Table # 1

#	CRIME	TYPE	CODE	2004	2005	2006	2007	2008	Totals / years = mean
1	**HOMICIDE**	F	420	**0**	**0**	**0**	**0**	**0**	**0/ =**	**0**
2	**ROBBERY**	F	407	**4**	**7**	**12**	**11**	**4**	**38/5 =**	**7.6 per yr**
3	**SEXUAL ASSAULT**	F	426	**1**	**4**	**2**	**0**	**0**	**7/5 =**	**1.4 per yr**
4	**KIDNAP**	F	427	**0**	**1**	**0**	**0**	**0**	**1**	**1 per 5 yrs**
5	**ASSAULT & BATTERY + DOMESTICS**	M	415 415 D	**27**	**22**	**28**	**21**	**19**	**117/5 =**	**23.4 per yr**
6	**ASSAULT & BATTERY W/ GUN**	F	415 A	**2**	**0**	**3**	**0**	**0**	**5/5 =**	**1 per yr**
7	**ASSAULT & BATTERY W/ WEAPON**	F	415 B	**2**	**0**	**0**	**0**	**0**	**2**	**1 every three yrs**
8	**BURGLARY**	F	406	**17**	**16**	**3**	**9**	**5**	**50/5 =**	**10 per yr**

9	**GRAND LARCENY – AUTO**	F	411	**18**	**60**	**23**	**26**	**2**	**129/5 =**	**25.8 per yr**
10	**BURGLARY – AUTO**	F	406 V	**12**	**8**	**8**	**3**	**2**	**33/5 =**	**6.6 per yr**
x	**Annual totals**	x	x	**83**	**118**	**79**	**70**	**32**	**382/5 =**	**76.4 per yr**

When the motel security reports were tabulated for **six years**, they were even more insightful than the police records. The totality of all of the security reports comported with the version of the attack given by victim Sharon, namely, that she was attacked by two or three persons who appeared to be young, black males that immediately fled on foot when her dog began barking. The tabulation of the reports reflects the type and elements of each crime and the perpetrators profile. See **Table # 2** for year **2002**

Table # 2 SPECIFIC CRIME INCIDENT ANALYSIS c/o MOTEL SECURITY REPORTS

#	CRIME	TYPE	DATE	ISSUE	METRO Called	SUSPECT Caught	VOLUNTARY Stmnt.	Comment
1	Burglary	F	1-12-02	Attempt break into unit	Y	N	N	**2 BMAs fled**
2	Burglary-auto	F	1-12-02	Break into auto	y	n	n	Suspect gone
3	Aiming ***gun***	F	1-14-02	Firearm aimed at persons	y	n	n	Threat by tenant
4	Burglary	F	1-15-02	Entry into unit	y	n	y	Suspect gone
5	Robbery – ***armed***	F	2-8-02	***Gun*** used in crime	y	y	y	Suspect taken
6	Assault	M	2-19-02	Tenant attacked on prop	y	n	n	**3 BMAs fled**
7	Burglary	F	2-28-02	Tenant returned from work	?	n	y	Suspect gone
8	Burglary	F	3-12-02	Suspect climbed in window	y	y	n	Suspect caught
9	Burglary	F	3-18-02	***Tenant assaulted in unit***	y	n	n	**Door kicked in**
10	Robbery – armed	F	3-26-02	***Tenant robbed in unit***	y	n	n	Gun used
11	Robbery - weapon	F	5-2-02	Tenant robbed in unit w/***bat***	y	n	n	Suspects fled
12	Robbery –	F	6-18-	*Tenant robbed in unit*	y	n	n	**3 BMAs fled**

	armed		02	w/***gun***				
13	Grand theft auto	F	7-1-02	Suspects chased thru prop	y	n	n	**2 BMAs fled**
14	Robbery (attempt)	F	7-3-02	Tenant robbed outside unit	y	y	n	Gun used
15	Grand theft auto	F	7-3-02	Suspects on prop	y	y	n	K-9 & Airborne
16	Grand theft auto	F	7-4-02	Suspects on prop	y	y	n	Juveniles
17	Robbery	F	7-20-02	***Tenant robbed in unit***	y	n	n	**2 BMA suspects**
18	Grand theft auto	F	8-21-02	Auto recovered	y	n	n	Suspects gone
19	Robbery – ***armed***	F	10-6-02	Mother & daughters robbed	y	n	n	Perps fled, auto
20	Robbery – ***knife***	F	10-15-02	Robbed while exiting her car	y	n	n	Perps fled, foot
21	Robbery	F	10-28-02	Robbed VONS, traced 2BSA	y	y	n	Perps lived on prop
22	Robbery – ***armed***	F	10-30-02	Tenant robbed in parking lot	y	n	n	**3 BMA fled**
23	Battery	M	11-20-02	Tenant battered; courtyard	y	y	n	**3 BMJ fled**
2002	*Total: 21 felonies, 2 misdemeanors*			*8 events with* ***weapons***	*23x police called*			***9x Suspects fled***
	9 robberies, 4 burglaries			*5 events crime at apartment*	*1x door kicked in*			***7x BMA perps***

Table # 2 reflects only year 2002. This same process was tabulated for years **2002 – 2008.** A syn-thesis of both police and security reports created a large database reflecting a motel property that was experiencing serious and consistent criminal activity year-over-year. **Table # 3** reflects the total findings of this merged database.

Table # 3

	CRIME PROFILES	**INCIDENTS = THIS CASE**	**POLICE CALLS**	**PERP PROFILES**

	119 felonies 60 misdemeanors **38 robberies 33 burglaries** **1 homicide 4 rapes** **2 attempted homicides** **1 deceased, cause not known** **42 assaults and/or battery**	**<u>46 incidents</u> w/weapons firearms, pellet guns & knives** **<u>40 incidents</u>- tenants in or at rental units at time of attack or break-in** **<u>17 incidents</u> where management, staff or security guards were attacked, battered or threatened**	**<u>143 events</u> involving METRO police** **<u>25 incidents</u>- door and/or frame kicked-in**	**<u>113 incidents</u>- suspects fled, foot or auto** **<u>29 incidents</u>- groups of 2 or 3 BMAs as the perpetrators**

When all else fails, ignore the prolific crime stats…Overall profile at this motel

An examination of the crime stats from years 2004 – 2008 clearly indicated that the motel was operating a HIGH-CRIME property. The monthly average during this five-year period was **6.36 crimes** (all categories) per month, or nearly **two crimes per week**. Given this central tendency for criminal activity, motel management would have had no excuse for not knowing that its property was a magnet for multiple crimes against property and person. Had management conducted an analysis of these crimes as far back as 2004, ’05 and ’06, it should have re-assessed its security policies, procedures and practices.

An examination of the auto thefts and burglaries during this period indicates that an average of 33 crimes against vehicles occurred each year, averaging **2.75 auto crimes** per month. With a central tendency of nearly three vehicle crimes per month occurring in the parking lot, notwithstanding the assaults and batteries not related to auto crimes, a clear inference can be made that the parking lots were extremely vulnerable to crime. In fact, these crimes constituted **34%** of the total volume committed at this motel.

Though separated by only several percentage points, the distribution of crimes against persons and property are nearly evenly balanced. Unfortunately for the victims of each of the successive years, corpor-ate and property management never conducted a year-over-year evaluation of the motel’s security practices and staffing. The record reflects a “*business-as-usual”* approach with no regard for the dynamic criminal environment at this particular motel.

As in the case with Sharon, a full one-third of the criminal attacks upon tenants occurred while the tenants were inside their rental unit or in the vicinity of the doorway. This percentage suggests that tenants were not slightly or even moderately, but HIGHLY vulnerable to predatory attack inside or near the alleged safety of their rental units.

Nearly **40%** of the felonies at this motel were committed with the use of a gun, knife or other weapon. The level of lethality of these reported crimes suggest the type of predator who is willing to exhibit and use deadly force. This level of deadly force is not merely an abstract concept; it was a very real issue as demonstrated by the numerous times security guards heard

gun-shots on the property over the past several years. These types of criminals are not mere opportunists, but are hard-core perpetrators willing to take a life or severely injure their victims in the course of prosecuting their crimes.

Nearly **two-thirds** of the criminal attacks upon occupants of the motel occurred whereupon the perpetrators fled the scene of the crime on foot, auto or sometimes even a bicycle. Clearly the majority of criminals were able to enter the property, commit their crimes and then successfully escape, either by running to the nearby neighborhood, climbing over the back wall or driving from the parking lot.

Nearly **one-quarter of** the felonies were apparently committed by a 'crew' who were regularly and cyclically violating the occupants and their personal property. Had the motel management conducted an analysis of these crimes and the similarity of the perpetrators as far back as **2004, '05, 06 and '07**, it should have re-assessed its security practices with the intent of deterring and detecting this "crew". Unfortunately for the victims of each of the successive years, corporate and property management never conducted a year-over-year evaluation of the motel's vulnerability to the attacks by a particular crew. The "*business-as-usual"* approach displayed no regard for the crime dynamics, especially as it was inflicted by this apparent professional crew.

Property configuration assessment

When the calculation and tabulation of the crime dynamics and statistics were completed, I moved onto an assessment of the motel property itself.

The motel was of a typical open-campus concept and, though appealing to guests, it is widely accepted in both police and security science that such configurations are equally attractive to criminals and predators for several reasons.

Criminals prefer locations that facilitate ease of entry and escape. Open campus layouts are rich in such ingress and egress opportunities. This motel location has no security access-control checkpoints, especially after-hours (darkness). This situation is best exemplified by the far west-side driveway where the connection between the two major streets is straight through and unobstructed. In total, there are five driveway entrances, all of which are part of the on-property drive-loop. For criminal predators this on-property drive-through is an ideal condition for drive on/drive off prosecution of their criminal activities.

The layout and elevation of the buildings at varying angles preclude straight line-of-sight visual observation for singular patrolling guards. Therefore, under such circumstances, established security practices dictate that diminished security manpower allocation should be augmented and supplemented with technological enhancements, such as CCTVs. Closed-circuit TVs are considered a **force-multiplier** in that one guard at a bank of monitors is far more able to see an entire **18-acre** premises that even a dozen guards could on the ground. The record is clear; the motel property had no camera system linking the **22 residential buildings** and the **17 open and closed courtyards**.

The records indicate that there was only **one guard on duty** at night to the early morning hours. Given the size of the campus over such a large acreage, compounded by the crime intensive location, one security guard was woefully insufficient to deter, detect or delay criminal activity. Given the size of the 700+ spaces parking lot and the **23 buildings**, a compliment of three guards would have been appropriate and responsible for this motel property. Such a strategy would encompass one guard on a bicycle for the parking lots and perimeter, one guard

for random and discretionary patrols and one guard to conduct all of the perfunctory duties, such as skip checks and dispatcher responses.

The parking lot can accommodate **700+/- cars** and is the equivalent to most mid-size hotel or retail lots throughout Las Vegas. Many such lots can be seen on a daily basis with security guards on high-visibility bicycles. The progressive practice of private guards on bicycles was borrowed from local law enforcement in Las Vegas as far back at the early 1990s during the second phase of Strip-based mega-resort development and off-Strip hotel/motel expansion. Had defendant motel and its owner incorporated bike patrols, it would have established both dominance and relative-control over its perimeter where criminals typically reconnoiter to assess their susceptibility to detection.

When al else fails, claim to have two guards per shift…Guard force allocation

The defendant maintained that it had two guards on duty throughout the week. But according to the records, two security guards were only partially on duty, and even then, only for fragments of a shift. Our search discovered that there were crossover hours on the day, swing and grave shifts reflecting the following arrangement:

1. The DAY shift peaks for four hours;
2. The SWING shift peaks for 3.5 hours;
3. The GRAVE shift peaks for two hours;
4. There are NO cross-over of guards from 12 am – 6:30 am;

Though there are periodic crossovers of one shift to another resulting in a temporary two-man shift, this coverage was woefully insufficient given the dynamics of this motel's layout, location, logistics, clientele, management structure and crime trends and rates. To have had an affirmative impact upon the criminal environment existing prior to the attack on Sharon, there should have been at least three security guards on duty for each shift in the 24-hour cycle.

Merely creating peaks in the manpower by the slight cross-over on each shift also created valleys. Such an ebb-and-tide schedule eventually becomes very well known amongst all of the motel occupants and locals, both the law-biding and criminally oriented. Added to this ineffective fluctuation model was the total lack of a security presence during the daytime.

The motel management erroneously believed that the mere presence of maintenance, house-keeping, clerical and management personnel roaming the property during the day was, in and of itself, sufficient to constitute an alternative security presence. This rationale for substituting one class of workers for another is totally specious and results in fallacious crime-abatement reasoning. There once was a time when such substitution rationale was widely accepted, but that thinking almost totally evaporated by the late-1970's – early 1980's.

In the universe of security practices and protocols for a property or facility as crime-intensive and ridden as this motel, day-shift administrative personnel may act as an enhancement to a slightly reduced security manpower presence, but never as a total and complete substitute.

The reality is, not only for this motel, for most similar enterprises, day-sift workers are simply too encumbered and pre-occupied with their regular duties to seriously become engaged with issues of criminal abatement and security loss prevention. The motel management applied this severely out-dated and ineffective security allocation process for two reasons:

1. As a cost-savings measure;
2. As a result of ineptitude resulting from not having a qualified or certified security practitioner as a member of the executive management team.

In addition to the security force allocation flaw detailed above, another significant flaw in the security program was the mandatory requirement that the guards patrol for forty-five minutes and return to the office for 15 minutes to perform report writing and other clerical duties.

This long-antiquated practice would have been suitable had there been another guard or two still covering the property for the entire shift (and not just during the all-too-brief crossovers).

More problematic towards achieving an effective security presence is the fact that the 'locals', both occupants and criminals, become accustomed to this predictable routine. As such, security literature informs us that such predictability is often taken full advantage of by those seeking to exploit any weakness in the security armor. I strongly believe that such was the case at this motel, not only occasionally, but systemically. In short, the practice of "45 on-and-15 off" fell below the standard of care for a property of this size that was encumbered with the known crime patterns.

Security training issues at this property

According to the records uncovered during discovery there was no official record of any training being provided to the guards at this motel. There were no class rosters, sign-in sheets, lesson plans, instructor notes, test scores or certificates. Moreover, the defendant claimed that its guards received training at various times and on various topics, yet there was no record; nothing that is indicia of classes, courses or programs taught to the guards or the motel corporate investigators.

In an environment where there is no training relevant to the mission objective or performance expectations, personnel will typically revert back to their best assumptions on how to do their jobs. However well-intended, the guards probably did the best they could with little or no training to impact crime. Management sets the training standards, not the guards. Merely providing guns, batons, radios and yellow shirts does not a competent force make. Had the guards been trained in crime abatement, detection and deterrence, they would have been able to apply those skills to this high-crime motel property.

When all else fails, switch identity from a motel to an apartment

When the volume of discovery was mounting against the defendant, management decided to alter its identity; it claimed that it really was not a motel but rather an apartment. The difference can be import-ant when comparing the legal obligations owed by an innkeeper to a guest versus a landlord to its tenants.

According to representations made by the motel management to the marketplace, as well as interpretations made by the market based upon those representations, this particular motel chain presents and operates as a motel enterprise. The motel offers its services and amenities as an extended-stay facility on a daily, weekly and monthly basis.

Regardless of how long the extended stay, this motel was and still is an INNKEEPER, and as such, its customers are GUESTS. According to the layman literature on hospitality security, as an inn-keeper, the motel owed a duty of care to its customers who rise to the level of guests and not merely tenants. The totality of the record reflects a business operation that fell

below the standard of care for protecting its invitees registered as guests. At the end of the day, this **motel was a motel,** regardless of the transformation attempts by the defendant.

When all else fails, eviscerate the victim…and her husband

The records suggest that the motel management and owner attempted to mischaracterize victim Sharon as someone who had a proclivity to fall while a guest at the property. The defendant claimed to have located a few nearby occupants who had asserted that they thought they saw Sharon fall or trip a couple of times, but they could not recall if these falls occurred before or after the attack in January when she was severely disabled and required a cane to walk. These unfounded assertions were a spurious attempt to infer that since Sharon was known to fall, she must have therefore fallen on the morning of the alleged attack. Further, the defendant asserted another theory: that if she did not fall, then she must have been attacked by her husband. The rationale behind this third theory of what had happened was that since the couple was overheard arguing on a few occasions Craig must have beat up his wife. This maneuver was consistent with character assassination of both Sharon and Craig, and with attempts to creatively spin the facts and thereby present a set of implausible alternative narratives.

When all else fails, metaphorically shoot the guard… or terminate his employment

The security guard who initially responded to the scene of the incident was the official eyes and ears of the company at the time of the attack; his first impressions provided the best record as to what probably occurred. His investigative inquiries were reasonable and prudent, even for an untrained layperson, moreover they were congruent with hospitality practices in the larger casinos having more sophisticated staffs and training. The guard's inquiries were also appropriate given the limited tools at his disposal; and consistent with his investigative practices dealing with dozens of crime scenes at the motel.

The responding guard's overall impression was that he was dealing with a legitimate crime scene and a genuine victim of **no** domestic assault. Moreover, his notion was that there was no fabricated narrative and that the lack of plausibility was strong of Sharon generating enough force (given her weight and mass) to have fallen on the cement and incurring the scope of her injuries.

Based upon the evidence presented and the documents reviewed, I concurred with the guards findings. Drawing upon my security and investigative experiences spanning over 30 years, including several years as a private investigator and several more as a proprietary investigator, I could find little fault with the impressions made by the guard and his limited investigative findings.

Relying in part on the guard's testimony and the totality of the records, the investigation into the attack upon Sharon was, at the very least, corrupted and at worst, outright sabotaged. This contention was supported by the fact that the motel management authorized a complete suspension of the SOP procedures; management abandoned the company's protocols for writing reports and documenting events in an objective manner; and the security guard had the best insight into the nature of the crime scene, its implica-tions and impressions, yet his observations were arbitrarily dismissed by the motel general manager. More-over, there would have been no valid reason for the motel manager to have cancelled the guard's first-and-best impression of the crime scene and of the victim's condition after the attack. And finally, the guard apparently

recalled having written a statement at the time of the incident, yet that document was now strangely missing from the defendant's records.

When the guard was deposed, his testimony was consistent with the facts and evidence in this case; which is to say that his utterances under oath were not favorable to the defendant's position. Within weeks of his deposition the security guard was terminated under highly questionable circumstances, even though his personnel file indicated that he was considered one of the best guards within the defendant's security ranks.

When all else fails, throw the general counsel under the bus

As this case was heading directly to trial the owner of the motel chain terminated the general counsel for a wide range of egregious issues, including use of narcotics, malfeasance and general negligence. It was also discovered before trial that the general counsel was not a legitimate attorney in Nevada and was operating under the auspices of a genuine lawyer on the company payroll.

Upon executing this strategy the owner of the motel chain asked for and received an extension so that a bono fide law firm could take on the case and pursue it.

When all else fails, terminate the new law firm and threaten not to pay for services rendered

When the case finally went to trial, things were not proceeding well for the defendant. A full scale mock up of the motel alcove was constructed, delivered to the courthouse and assembled in court. It was ostensibly meant to demonstrate the implausibility of the plaintiff's claims. Instead, plaintiff's counsel leveraged the large theatrical exhibit to demonstrate that, in fact, the attack could have just as easily occurred in the manner proffered by the victim.

Sitting in the back of the courtroom was a representative of the insurance company taking prolific notes; since the insurer never received notice of the incident, the owner of the motel was on the hook for any potential judgment. The defendant was already preparing the foundation to defer to the insurer in the event that an unfavorable judgment occurred.

Mid-way through the trial the vice president of the motel management company announced in open court that it was terminating the services of the replacement law firm and asked the judge for an extension to search for another firm. The judge said yes provided the vice president could find one within an hour. Needless to say, the nearly terminated firm continued to the end since no replacement was viable within the hour. Differences in payment for services rendered would have to wait until after trial.

When all else fails, appeal the case

The case proceeded for an additional two week beyond what it was scheduled. When the fog cleared and dust settled, the court granted in favor of the plaintiff. And now we wait again for the ruling from the Nevada Supreme Court.

About the author

D. Anthony Nichter is a veteran in the security tradecrafts with 30-years of active service involving research, writing, teaching, consulting, and protecting. He has conducted senior

management-level seminars throughout the United States, Puerto Rico, and Australia on behalf of private organizations and governmental tourism ministries. Further, he has provided consultative and protective services to private companies, corporate executives, high-profile celebrities, and public agencies. He has conducted over 125 security site surveys, threat assessments, loss prevention audits and risk analyses or a combination thereof.

Mr. Nichter has acquired numerous certifications over his career. He is Board Certified in Security Management with the *American Society for Industrial Security* (CPP). He is a Certified Hospitality Educator (CHE) with the *American Hotel and Lodging Association*; a certified Management of Aggressive Behavior (MOAB) Course Instructor from *Professional Safety Training Consultants*; a Certified Defensive Tactics Instructor (CDTI) from *Monadnock International*; a Certified Handcuff Instructor (PATH) from *Personal Protection Consultants*; a Certified Protection Specialist (CPS) from *Executive Security International*; an International Crime Prevention Specialist (ICPS) from the *International Society of Crime Prevention Practitioners*; an Associate in Risk Management (ARM) from the *Insurance Institute of America and a* Tourism Oriented Policing and Protection Services Practitioner (TOPPS) *from the Southern Nevada Tourist Safety Association.*

Timothy R. Titolo is a trial attorney handling serious injury cases. His special interests are traumatic brain injury and spine injury cases. Mr. Titolo has obtained large verdicts and results for clients around the country. He is a member of the Million Dollar Advocates Forum.

Mr. Titolo has contributed to North American Brain Injury Society (NABIS) and the Brain Injury Association of America (BIAA) since 1995 where he served on the planning committee. He also chairs the Legislative Committee of **the Brain Injury Association of Nevada.** He is a fellow with the American Association of Justice. He serves on the executive board of AAJ's TBI Litigation Group, the Interstate Trucking Litigation Group, and the Inadequate Security Litigation Group.

Mr. Titolo began publishing the **Brain & Spine Injury Law Blog** in 2006 to educate and inform the public on relevant issues. He has received numerous media awards of distinction for excellent case presentation.

Mr. Titolo speaks to lawyers, medical and other professionals around the country on issues pertaining to litigation, brain injury and catastrophic injury.

Walter Sipe[1]
Walter E.B. Sipe, M.D.
2120 Market St, Ste 201
San Francisco, CA 94114
415-483-2112
websipemd@gmail.com

The Neurobiology of Trauma

"Traumatic events of the earliest years … are not lost but, like a child's footprints in wet cement, are often preserved lifelong. Time does not heal the wounds… time conceals them. They are not lost; they are **embodied**." –Vince Felitti, forward to Lanius et. al. (1)

Introduction

The Mind-Body Split

The profound impact of overwhelming trauma has long been recognized: modern day soldiers with what is now called PTSD hear the echoes of their experience in the ancient Greek tragedies of Sophocles. But only recently has there been an emerging understanding of how what we see outwardly as the behavioral and psychological effects of trauma, are a reflection of alterations at the level of hormones, nerve cells, and even our genes. Despite the fact that neuroscience tells us that mood, behavior, and social interactions are products of specific (albeit still incompletely defined) neural networks, we still speak in the 17th century language of Rene Descartes, where our physical selves are somehow distinct from our mind. This artificial distinction is reified our tax code: psychological damages are taxed when physical damages are not.

Intention of this Talk

There are extensive book length reviews on the topic of trauma and its effects (1, 2), and more articles are published by the month. The intention of this talk is to provide a brief overview of some the ways in which overwhelming stress and trauma can have life-long consequences on emotional and physical health, and the current research suggesting how the lasting psychological impact of exposure to trauma in childhood might be accompanied by equally enduring changes at the molecular level (3). By examining alterations in several important domains--coping and the stress response; childhood and adult attachment; learning and memory; and cellular aging—participants will have a better sense of how observable social, occupational, medical dysfunction in traumatized individuals may reflect damages of fundamental biological processes.

[1] Walter Sipe, MD, holds joint appointments at the University of California, San Francisco as an Assistant Clinical Professor in the departments of Psychiatry and Pediatrics, in addition to managing a private practice in psychiatry. His medical training includes residencies in pediatrics and general psychiatry, at Boston Children's Hospital and UCSF, respectively, as well as fellowship training in gastroenterology. His clinical and research interests involve using mindfulness techniques to address mind-body interactions in the domains of chronic pain, anxiety disorders, and developmental trauma.

Stress & Trauma

Stress as biologic universal

To be human is to be exposed to stress and adversity. Over 60 years ago the pioneering endocrinologist Hans Selye, recognized the essential nature of an organism's ability to maintain balance in the face of threat: "Anything that causes stress endangers life, unless it is met by adequate adaptive responses; conversely, anything that endangers life causes stress and adaptive responses. Adaptability and resistance to stress [resilience] are fundamental prerequisites for life, and every vital organ and function participates in them." (4). So fundamental is this process of stress, adaptation, and expanded resilience that almost anyone on a jury will recognize some version of it in their own life: for example, a weight lifter who adds a little more weight to the bar every time, or in lessons learned from "The School of Hard Knocks." Indeed, research bears out the notion that early life exposure to stressful experiences that are challenging but not overwhelming, leads to improved coping in adulthood with challenges such as spousal loss, illness, and major accidents (5). This phenomenon—stress inoculation—is likely due to expanded regulation of emotional centers of the brain by the prefrontal cortex (6).

The inverted 'U'

Yet if manageable amounts of stress enhance functional capacity, it is also NOT the case that "What does not kill me, makes me stronger." (7). Lifting weights in the gym will yield a very different result than will trying to catch a falling piano. Similarly, when stress becomes overwhelming and exceeds an individual's coping capacity—as in the case of trauma—the system will still adapt in some way, prioritizing survival at expense of future health. The impact of stress on an individual takes the shape of an 'inverted U.' At very low levels of stress, there is no impetus for performance or adaptation. As stress increases, more resources are called upon, and up until a point (which varies for every individual) adaptation will leave them more resilient and able to more adequately tolerate subsequent stressors. Once the adaptive capacity is exceeded, performance breaks down and any additional stress becomes a trauma in the sense I am using the word: a stressor that induces a negative adaptation. We will go on to explore how these negative adaptations play out the neurobiological level.

The ACE study: Childhood adversity and life long health

Before looking at specific systems, it useful to have a broader context of just how pervasive and enduing the effects early abuse and stressful experience can be. The Adverse Childhood Experiences (ACE) study includes data from over 17,000 individuals receiving primary care services in a major U.S. city(8, 9). Each participant was asked to fill out a brief questionnaire regarding a number of adverse experiences—including neglect, abuse, and family chaos—that may have occurred during the first 18 years of life. For *every* health outcome examined, there was a direct relationship with the burden of adverse experiences. This includes increased rates of psychiatric issues, poor social function, and problematic substance use. The findings were just as striking for medical illness, and perhaps even more provocative. There is a strong association between childhood adversity and greater prevalence of liver disease, chronic obstructive pulmonary disease, autoimmune issues, and coronary artery disease (the leading cause of death the United States). This relationship between adverse experience and disease persists independent of risk factors such as smoking or alcohol use. This relationship between childhood trauma and health is anything but trivial. Analysis of the current data set suggests that, all other

factors equal, individuals with a high burden of adverse experiences have a **lifespan almost 2 decades shorter** than without reported trauma (10).

Cortisol and stress regulation

Critical to our ability to manage our response to stress are the adrenal hormones cortisol and adrenaline, as well as the sympathetic nervous system. Release of these peripheral hormones is largely mediated by the release of corticotrophin releasing factor (CRF) in our brain. When we are subjected to a potential threat—emotional or physical—CRF activates the sympathetic nervous system, and blood stream is flooded with cortisol and adrenaline, leading to increased physical arousal, attention, and vigilance. CRF also activates neurons involved in behavioral and emotional response to stress (11). In the short term this response—while uncomfortable—leads to improved mental performance and ability to deal with physical challenge. (This is the crest of the inverted U). Negative feedback from these hormones back to the brain shuts down the response, and in a healthy system leads to a self-limited, acute stress response. Victims of trauma, however, have a profoundly altered stress response system. With severe stress during a critical period, there appears to be a life long lifelong increase in CRF levels (12) and these changes are the result of programing occurring at the level of individual genes (13). In essence, traumatic events and environments shift what is ideally a system designed to cope with short term stress into a chronically "ON" state—with profound consequences on mood, anxiety and physical health.

Depression, anxiety, and physical health

Women with a history of child abuse are 4 times more likely to develop depression compare to non-abused women, and the magnitude of abuse is correlated with the severity of depression (14). Depressed individuals demonstrate a variety of dysfunctions in the CRF-cortisol system, and these changes may be a biologically distinguishable subtype of depression as function of early trauma exposure (12). Chronic activation of the stress axis by CRF also alters expression of certain serotonin receptors in the brain, also contributing to the onset of anxiety and depression (15).

Individuals with PTSD and a history of child abuse appear to have a toxic combination of abnormally low baseline levels of cortisol while at the same time having an hyperactive response to everyday stress—thereby perpetuating the chronic stress response (16). Indeed, poor resilience to later life stresses may be one of the most important hidden damages of early trauma. For example, data from combat veterans points to early childhood abuse / adversity as a significant risk factor for developing combat-related PTSD (even if there where not prior obvious symptoms of PTSD related to the early trauma itself) (17).

Chronic dysregulation of the stress response is not simply a matter of psychological well-being. Individuals with chronic stress have poor ability to mobilize white blood cells during surgery and subsequently demonstrate poor healing compared to individual who can mount an appropriate acute stress response (18). In addition, poor regulation of stress responses may contribute to alterations in insulin sensitivity (hence obesity), bone metabolism, and acquired immune responses (19).

The Attachment System and Oxytocin.

As social animals, our attachment system—the way in which we seek out and maintain connection with other human beings—is fundamental life. One can barely function in society, let

alone develop meaningful friendships and romantic partnerships, or raise children, without the ability establish social bonds and regulate of emotional behaviors. At the center of this capacity is the hormone, oxytocin, which is released during every imaginable form of pleasant social contact (20).

Impaired trust and stress-regulation

In almost every social mammal studied, oxytocin has been found to be critical for expression of social behaviors, and it plays a seminal role in mediating complex social interactions such as affiliation, attachment, maternal behavior, trust and aggression (21). Experiments demonstrate that oxytocin delivered as a nasal spray measurably increases trust and willingness to take social risks (of exactly the sort that underlie economic exchanges) (22). With actions far more complex than being a general "love hormone," oxytocin specifically appears to modulate cooperation and a sense of group belonging(23).

Oxytocin also is essential for regulation of stress and fear: oxytocin acts directly to reduce activity in the brain's "threat center," the amygdala (24). At a behavioral level, one of the ways that human being regulate stress is to connect closely with another person. When an upset child runs into the arms of a parent, something more fundamental than simple reassurance is taking place. The caring parent is literally helping regulate the child's nervous system. While these care seeking behaviors become more sophisticated in adulthood, the ability to confide and receive support from a valued friend, family member, or lover, is nonetheless an important mechanism by which we regulate stress. The oxytocin response appears to be both necessary to initiate these contacts (one can only approach someone when trust is greater than fear), as well as a product of this connection.

Children exposed to early neglect have lower levels of oxytocin and other attachment related hormones, even several years removed from the deprived environment (25). Even as adults, the fluid surrounding the brain of adult survivors of abuse or neglect have lower levels of oxytocin, which correlated with the severity and duration of the abuse, as well as current anxiety ratings (21). In addition, emotional abuse was especially predictive of lower oxytocin level. Therefore, when victims of trauma—particularly those incidents which involve a violation by a family member or an otherwise trusted figure—speak of having 'trust issues,' they may be speaking of a profound biologically deficit in their capacity to manage all variety of interpersonal interactions.

Decreased sexual sensation in women

For adults, some of the most important attachment dynamics play out in sexual intimacy. Not surprisingly, oxytocin levels increase significantly after orgasm (26), and sexual problems are rife in victims of sexual abuse. In a striking brain imaging study, women who were exposed to childhood sexual abuse actually had a reduction in the size of their brain area associated with processing genital sensations. This suggests a specific protective brain adaptation that may shield a child from the sensory processing of the specific abusive experience at the cost of sexual dysfunction later in life (27).

Learning and memory: hippocampus and amygdala

Much ink has been spilled on the topic of trauma and memory, so what follows is necessarily limited to primarily illustrate how psychological observations have a cellular basis.

Under conventional wisdom, when the average person speaks of "remembering" they typically are referring to the sense of having a conscious recollection of a series of words, images, and

sensations of something distinct that happened in the past—much like watching an internal video. Brain scientists, however, recognize several different types of memory (28). **Explicit memory** is that portion of memory that is associated with the conscious sense of recollection. It can be further divided into **episodic memory**--the distinct sense of recollection of a self and events, in place and time—and **narrative/sematic memory**—heavily language based aspect of memory that includes "facts" but also the story that we put together to put episodic memories in context. There is also implicit memory. When triggered, **implicit memory** has a sense of experiential immediacy devoid of subjective sense of recall or "remembering." In trauma, a classic example would be a sexual assault victim who becomes uneasy and panicked in a dark parking garage, even without any thought of the past assault. And all these different types of memory involve interconnected but still distinct brain circuits.

Moderate levels of stress enhance memory

To again revisit the 'inverted U,' it has long been recognized that memory functions best at moderate level of stress, and that this phenomenon is related to the function of stress hormones and neurotransmitters on the hippocampus (29). Episodic memory requires focal attention for formation and the hippocampus is the part of the brain essential for ongoing storage. Up to certain point increasing arousal of the amygdala (the brain region that activates under conditions of high emotional content) facilitates the hippocampus to encode environmental and sensory information. This part of the reason why major events such as a first-kiss, a graduation, or a scary experience live so easily in memory—and why a potential juror have the thought, "If some thing like THAT happened to ME I would certainly have remembered it." Most people who have not suffered severe stress or trauma will extrapolate from their own experience and not take into account the other side of the 'U'

Traumatic stress impairs memory

But as the level of amygdala activity increases from novelty, past mild anxiety, to abject terror, the enhancing function on the hippocampus peaks—after which overwhelming amygdala activation actually inhibits formation and retrieval of episodic memories. So the result can be absent sense of distinct events in place and time, combined with fragmented implicit sensory impression that are very powerful (2). Not only the magnitude of the stress impacts memory function, but also the duration of the stress response. During stress responses last on the order of minutes, the stress hormone CRH actually primes connections between nerve cells in the hippocampus—the cellular process generally believed to underlie learning and memory. As the exposure to CRH extends to hours, the opposite process occurs, and hippocampal nerves begin to experience decreased function. As stress becomes chronic over days, weeks and beyond (see stress regulation, above) the structural changes become more pronounced(30). Indeed the majority of brain imaging studies in PTSD demonstrate that the volume of the hippocampus is reduced (31). And from a functional perspective, traumatized youth have lower hippocampal activation (32), indicating that learning an memory for all types of information—not just that of traumatic nature may be impaired.

Given the central role that the hippocampus plays in storage and retrieval of episodic memories, it is striking to note that when researchers examined hippocampal brain tissue from men with a history of childhood trauma they discovered widespread alterations in over 350 promoters—regions of DNA that control the expression of individual genes (33). Follow up studies also show changes in multiple genes in the same brain region of individual completing suicide. (34).

There is overwhelming clinical evidence of recovered memories (29), consistent with our current understanding of memory function (35), but a definitive neuroscience account of how recovered memory events occur remains to be established. However, there are compelling accounts emerging of how memory suppression may be mediated by frontal lobe regulation of the hippocampus (36).

Telomeres: The ultimate biological clock

An increasing area of interest in medical science is the role of telomeres—they were the subject of a Nobel prize in 2009. Telomeres can be thought of as the aglets of our genetic material (an aglet being the plastic tip that prevents your shoelaces from unraveling). Every time a cell divides and replicates its DNA, a small piece from the end of the strand does not get copied. If there were not some buffer between the end of a chromosome and region of active very soon important genetic information would get lost as the chromosome "unravel." Telomeres are this buffer and the longer they are, the better they fill this function.

Telomeres shorten with age, and shorter telomeres have been associated with increased incidence of age-associated diseases and poor survival (37). In this way, telomeres can also be thought of as the ultimate 'biological clock' (38). However, the rate of telomere shortening can be dramatically impacted by specific lifestyle factors, with consequent impact on the speed of aging and disease onset. One clear association with shorter telomeres is ongoing stress. In one study conducted at UCSF Women with the highest levels of perceived stress have telomeres shorter on average by the equivalent of at least one decade of additional aging compared to low stress women (39).

Early adversity and premature aging

In addition to current chronic stress, other studies have demonstrated shorter telomeres in subjects with childhood exposure to trauma, neglect, and maltreatment that are independent of any current demographic factors (3, 40). And the impact of dealing with a chronic current stressor was magnified in individuals with past childhood adversity, who demonstrated more pronounced telomere shortening and higher markers of systemic inflammation. These authors suggest that shortened telomeres due to childhood adversity could lead to a 7- to 15-year difference in life span (41). Linking these finding back to the results from the ACE study, a picture emerges of a whole set of hidden damages that reveal themselves at the end of life in the form of premature senescence, early onset of chronic disease, and shortened life spans.

Conclusion

When is a stress a trauma

One pitfall in defining psychological trauma is attempting to quantify what particular level of stressful insult (e.g. what degree of threat, what level of inappropriate touching, etc.) constitutes a "trauma." Yet we do not do this for physical injuries: if an injured patient has broken a bone, we generally do quibble about how many pounds of force the limb suffered. Similarly, myriad variables such as age, social support, temperament, and genetic factors will impact an individual's resilience to any particular set of external stressors. Ultimately any experience on the right side of 'inverted U,' can set in motion biological processes that leave "molecular scars" down to level of our very genes.

Damages: From biology to behavior

Translating findings from the world of medicine and science—where understanding is a constantly unfolding process that rarely yields cause and effect explanations—to the exigencies of courtroom will always be a challenge. But in the case of traumatic stress, the link between fundamental biological changes and real world damages grows increasingly stronger:

- Alterations in the stress regulation system involving cortisol and related hormones become risk factors for subsequent depression, anxiety disorders, physical illness. Decrease resilience to later life stressors may limit the range of employment options, and lead to destructive coping techniques such as drugs and excessive alcohol use, and actually increase the risk of developing PTSD to later stressors (42).
- Disruptions of the attachment system, of which oxytocin is central, may lead to life long deficits in effectively managing social interactions, and lead to the sorts of deficits observed in the ACE study: sexual dysfunction, multiple marriages, and serious job problems.
- Wide ranging impacts the hippocampus, amygdala, and other elements of the memory system can produce distressing phenomena ranging from intrusive and repetitive sensory and emotional flashbacks, to incoherent or inaccessible episodic memories. The neurologic basis of recovered memories continues to be defined.
- Early childhood trauma is associated with shorter telomeres, which are associated earlier onset of the wide range of diseases of senescence. Given that trauma survivors may also be more susceptive to chronic stress via mechanisms described above—further impacting telomere length, the ultimate impact may be 1-2 decades of shortened life span and disease related disability.

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Paul Mones[1]
Law Office of Paul Mones
PO Box 10241
Portland, OR 97296
503-225-1054
pamones@comcast.net

Kelly Clark[2]
O'Donnell, Clark and Crew
1650 NW Naito Parkway, Suite 302
Portland, OR 97209
503-306-0224
kellyc@oandc.com

THE SIGNIFICANCE OF THE BOY SCOUT PERVERSION FILES

IN AROUND 1919, BSA began keeping a national set and list of files, then known as the "Red Flag" files,[3] which indicated BSA knew it had a serious problem with child molesters exploiting Scouting to gain access to victims. Now known as the "Ineligible Volunteer Files" or "IV Files," these serve as a repository of identifying information "in an attempt to prevent any individual who does not meet the high standards of BSA from being able to register within any scouting organization elsewhere." The IV Files System functions as a list of names of banned volunteers or employees that can be cross-referenced to a confidential file under the same name containing information on why that person was banned from Scouting. From the time of their creation, the IV Files have documented a variety of transgressions by BSA members, categorized as follows:

The Perversion files comprise, by far, most of the IV Files. Between 1946 and 1985 alone, BSA created at least 1,502 Perversion files, with at least 1,123 of those created between 1965 and 1985. As an example, between 1920 and 1935, approximately thirty-percent of the files were cases of moral perversion, and the majority of files still existing are Perversion cases. However, any estimate representing the number of Perversion files BSA has created drastically under represents the true picture of the vast problem of child sexual abuse by Scout volunteers. There are at least two reasons for this.

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[1] Paul Mones focuses his practice on advocating for abused children and adults in civil and criminal court. He has been at the forefront in litigating against institutions in which children have been sexually abused and he pioneered the battered child syndrome criminal defense. In 2007 he won an 11.4 million dollar verdict against the Diocese of Rockville Center and in 2010, along with Kelly Clark won a 20 million dollar verdict against the Boy Scouts. He is admitted to the bar in Oregon and California but works on child abuse and adolescent violence throughout the United States

[2] For nearly twenty years Kelly Clark, a trial and appellate attorney, has been a leading national advocate for victims of child abuse. As a legislator, he co-authored Oregon's first child abuse statute of limitations and since then has represented hundreds of people injured by trusted adults including victims of Catholic priests, Boy Scout leaders and teachers. In 2010 he was lead counsel, along with attorney Paul Mones, in a Portland trial against the Boy Scouts of America that that resulted in a $20 million verdict. As a result of that case the BSA's Perversion Files were publicly released as evidence of the history of abuse in Scouting.

[3] The "Red Flag" files' name has evolved since 1920 into the "Confidential Files" and, now, the "Ineligible Volunteer Files."

First, BSA destroyed an unknown number of files. Through at least the 1980s, BSA regularly culled the files to remove the files of deceased and elderly perpetrators. In the 1970s, BSA reviewed all of the IV Files created up to that point—estimated at over 4,000 files—and destroyed a significant portion of them Because of BSA's destruction of files, there is no way to know or even estimate the total number of IV Files on child molesters that BSA created. Also, one file is only created per ***abuser***, yet most perpetrators abused more than one victim.

Second, the IV/Perversion Files represents only the tip of the iceberg because, except for a few possible exceptions, Scout families, Troops, and sponsoring organizations did not know the IV File system existed, how to use it, or that they should use it. The national office of BSA created IV Files based on reports from employees of Boy Scout Councils, usually the Scouting Executives of the Councils. There was no BSA policy, method, or practice of involving the lower levels of the Scout organization in the IV File system. The sponsoring organizations and Troops were not formally informed by BSA about the IV files, and as such, did not participate in creating an IV File on an adult volunteer accused of sexually molesting a Scout, even though the people involved at the Troop level were those with the most immediate information. The BSA only created a file if the matter happened to come to the attention of a Council employee—and that Council employee knew to report the matter to BSA.

The individual files contain many shocking and tragic examples of BSA's decades-long knowledge of the problem of adult men targeting BSA to sexually molest young boys, BSA's appallingly lax attitude towards remedying this problem, the types and frequency of abuse that occurred, and the patterns and practices the abusers used to gain access to victims. The files demonstrate that BSA had a decades-long, detailed knowledge of their child sexual abuse problem and failed to undertake actions based upon their knowledge to protect past, present, and future boys.

The files (which were first used in the 2010 Portland trial of Jack Doe # 4, et al., v. BSA et al., a case I tried with my good friend Kelly Clark and his firm O'Donnell, Clark and Crew) demonstrate that BSA ***knew*** for decades that it had a severe problem with sexually abusive adult men targeting their organization as volunteers only to abuse young boys involved in Scouts, yet BSA failed to use this knowledge to take any meaningful action to prevent Scouts from being abused. And the files further demonstrate that despite its knowledge, BSA failed to warn or educate the families and communities involved in Scouting; failed to create, implement, and enforce adequate child sex abuse protections and policies; and failed to enforce the rules it did have in place that were designed to protect Scouts from abuse.

- In some cases, despite having significant information regarding the man's sexual misconduct with children, BSA delayed in placing the man on the IV Files List or even putting the man in the IV Files at all.
- Even when BSA expelled volunteers from Scouting, supposedly making them "ineligible" to volunteer again, many such perpetrators rejoined other troops and again abused Scouts due to BSA's lax records-keeping policies and failure to tell sponsoring organizations and troops of the existence of the IV File System or require them to use it.
- BSA circulated internal memoranda establishing BSA's awareness and concern regarding the threat posed by pedophiles to the organization's reputation. .
- BSA prohibited councils from keeping copies of IV Files or their contents. Consequently, the councils had no way of keeping track of the information on their own.

Sponsoring organizations and troops were not even informed of the existence of the file system, were never instructed to use it, and had no way to keep track of abusers.

In the final analysis the Perversion Files reveal not just the sheer magnitude of the sexual assault problem in scouting, but also the that the BSA has been aware of the abuse of scouts for nearly a century.

Antonio R. Sarabia II[1]
IP Business Law, Inc.
3463 Tanglewood Lane
Rolling Hills Estates, CA 90274
310-377-5171
asarabia@cox.net
www.calrestitution.com

California Victim Restitution Law

California victim restitution law is probably the most developed victim restitution law in the country. It is a complex web of constitutional provisions, statutes, cases and even official court forms. Because of this complexity and thoroughness it can be a great tool for practitioners in other jurisdictions, from both the standpoint of giving ideas and providing authority.

The original purpose of victim restitution was to rehabilitate the defendant.[2] In California, victim restitution has been transformed from a simple sentencing issue into a powerful right of the victim. Now all persons who suffer losses as a result of criminal activity have the right to restitution from those convicted of that crime.[3] A sentence without victim restitution is invalid.[4]

Types of Losses for Which Restitution May Be Ordered

Under Penal Code §1202.4(f), all types of economic losses are eligible for restitution. Economic losses include the following:

- The value of stolen or damaged property.[5] "Value" is usually replacement value and may be determined by reference to the cost[6], but if the property (*e.g.*, securities) has appreciated, the

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[1] Antonio R. Sarabia II represents individuals who have been harmed by crime, as well as corporate victims of crime, such as Nike, Dooney & Bourke, Calvin Klein Jeanswear Company and Guess. He obtained a restitution order of more than $150,000 for an individual who was a victim of grand theft. For a corporate victim of criminal trademark counterfeiting, he obtained and collected a restitution order of over $500,000. He has worked closely with victims of abuse by medical professionals, with an emphasis on recovering not just past medical expenses, but also the substantial costs of future therapy. He represents a variety of personal injury victims seeking to recover restitution in addition to civil recovery. He works closely with civil counsel to coordinate recovery of restitution with ongoing civil cases.
Mr. Sarabia has written extensively on the subject of victim restitution, including creating the chapter "Victim Restitution" for the leading California criminal law treatise, California Criminal Law Procedure and Practice. He contributes to the Bench Guide on Restitution, a publication for California judges, and regularly writes for publications such as the Los Angeles Daily Journal. Mr. Sarabia was General Counsel of Guess?, Inc. for eight years; he is av rated by Martindale-Hubbell. He is a graduate of the University of Chicago Law School and Occidental College.

[2] *People v Richards* (1976) 17 Cal. 3d 614, 620, overruled on other grounds in *People v Carbajal* (1995) 10 C4th 1114, 1126 n13. See also *Kelly v Robinson* (1986) 479 US 36, 52, 107 S Ct 353. *People v Richards* (1976) 17 Cal. 3d 614, 620, overruled on other grounds in *People v Carbajal* (1995) 10 C4th 1114, 1126 n13. See also *Kelly v Robinson* (1986) 479 US 36, 52, 107 S Ct 353.

[3] Cal Const art I, §28(b); Penal Code §1202.4(a)(1).

[4] *People v Rowland* (1997) 51 Cal. App. 4th 1745, 1751.

[5] Penal Code §1202.4(f)(3)(A).

[6] *People v Foster* (1993) 14 Cal. App. 4th 939, 946.

appreciated value may be considered[7]. The following principles for the valuation of stolen property were developed by the court in *People v Chappelone*[8]: restitution should be based on the market value of the property; the court should consider the costs associated with the property to the victim; and if property is returned, the victim is entitled to any loss in value only during the period he or she did not have the property.

- Medical expenses[9], including future medical expenses.[10]
- Mental health counseling expenses.[11]
- Lost wages and profits.[12] Examples are wages lost because of injury incurred by the victim or because of attending court proceedings, even when testimony was not required[13]; lost sick leave[14]; future lost wages[15]; attending trial[16]; psychological trauma[17]; and profits lost because of criminal counterfeiting[18]. When computing lost profits, the correct measure is gross profits.[19]
- Relocation and security expenses.[20]
- Expenses to retrofit a residence or vehicle, or both, to make the residence accessible to or the vehicle operational by the victim, if the victim is permanently disabled as a direct result of the crime, whether the disability is partial or total.[21]
- Expenses for a period of time reasonably necessary to make the victim whole for the costs to monitor the credit report and to repair the credit of a victim of identity theft.[22]
- Child support to the children of a murder victim.[23]
- Loss of future economic support to surviving spouse caused by murder of spouse.[24]
- Investigative expenses incurred by the victim related to the criminal case[25] or in a civil case between the victim and the defendant based on the same facts as the conviction.[26]
- Loss of use.[27]
- Lost employee time (measured by costs of salary and benefits of employees who must spend time dealing with defendant's crime).[28]
- Government penalties paid by the victim as a result of the crime.[29]

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[7] *People v Tucker* (1995) 37 Cal. App. 4th 1, 4.
[8] (2010) 183 Cal. App. 4th 1159, 1177.
[9] Penal Code §1202.4(f)(3)(B).
[10] *People v Phelps* (1996) 41 Cal. App. 4th 946. See *People v Keichler* (2005) 129 Cal. App. 4th 1039 (defendant properly ordered to reimburse victim for cost of Hmong healing ceremonies, which were Hmong equivalent of Western medical expenses).
[11] Penal Code §1202.4(f)(3)(C).
[12] Penal Code §1202.4(f)(3)(D)–(E).
[13] *People v Moore* (2009) 177 Cal. App. 4th 1229, 1231.
[14] *In re K.F.* (2009) 173 Cal. App. 4th 655, 666.
[15] *People v Millard* (2009) 175 Cal. App. 4th 7, 30.
[16] *People v Crisler* (2008) 165 Cal. App. 4th 1503, 1509.
[17] *People v Brasure* (2008) 42 Cal. 4th 1037, 1075.
[18] *People v Ortiz* (1997) 53 Cal. App. 4th 791, 800.
[19] *People v Thygesen* (1999) 69 Cal. App. 4th 988, 994.
[20] Penal Code §1202.4(f)(3)(I)–(J). See *People v Mearns* (2002) 97 Cal. App. 4th 493, 501 (relocation expenses include difference between cost of new residence and sale price of old residence).
[21] Penal Code §1202.4(f)(3)(K).
[22] Penal Code §1202.4(f)(3)(L); Penal Code §530.5.
[23] Penal Code §1203.1(j); *People v Clark* (1982) 130 Cal. App. 3d 371, 384, overruled on other grounds in *People v Blakeley* (2000) 23 Cal. 4th 82.
[24] *People v Giordano* (2007) 42 Cal. 4th 644.
[25] *People v Ortiz* (1997) 53 Cal. App. 4th 791, 797.
[26] *People v Maheshwari* (2003) 107 Cal. App. 4th 1406, 1409.
[27] *People v Thygesen* (1999) 69 Cal. App. 4th 988, 995.
[28] *In re Johnny M.* (2002) 100 Cal App. 4th 1128.

- Attorney fees incurred by the victim
  - To establish the victim's right to restitution[30];
  - To preserve the defendant's assets so that they may be available to pay restitution[31];
  - To collect on a restitution order in a civil action[32];

To pursue a civil action against the defendant based on the same facts as the crime.[33]

Recovery of Attorneys' Fees in a Related Civil Case

One of the more interesting aspects of California victim restitution law, is the last point above - that a victim may recover attorneys' fees incurred in a civil case based on the same events. If the civil defendant is convicted of a crime - be it infraction, misdemeanor or felony - and that crime caused the injuries that were a subject of the civil suit, victim restitution comes into play. As a victim, the plaintiff is entitled to restitution. While it is true the victim/plaintiff cannot recover twice for the same injury, restitution can still make a huge difference in the take home for the plaintiff. The reason: a victim may recover restitution for the attorneys' fees incurred in his or her civil case against the defendant.[34]

An example will make the financial impact of this right clear. Assume the plaintiff was injured in a car crash. A law firm is hired on a 40% contingency fee. The defendant pleads guilty to driving under the influence. There is a $300,000 civil settlement, comprised half of economic (medical bills, therapy, lost wages) and non-economic (emotional distress) damages. The firm will receive about $120,000 as its fee. After receiving the civil settlement, the plaintiff can go to criminal court and seek a restitution order for one-half of the contingent fee, $60,000. This amount is sought because one-half of the civil settlement was for economic losses. The victim had to pay the firm's fees to get that part of the civil settlement and is therefore entitled to recoup them from the defendant as restitution. The criminal court can order $60,000 restitution. That means the client's net civil recovery of $180,000 ($300,000 less the $120,000 contingency fee) will increase by 33% to $240,000. That is a huge increase for the client.

Some defendants will raise the civil release to argue against a restitution order for the contingent fee. This argument will fail. "[T]he settlement of a civil action and release of the defendant by the crime victim does not discharge the defendant's responsibility to satisfy the restitution order." [35]

Restitution Hearing

No right to Jury. The defendant has no right to a jury trial on restitution.[36]

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[29] *People v Williams* (2010) 184 CA4th 142, 146 (IRS).
[30] Penal Code §1202.4(f)(3)(H).
[31] *People v Lyon* (1996) 49 Cal. App. 4th 1521, 1525.
[32] Penal Code §1202.4(f)(3)(H); *Downen's, Inc. v City of Hawaiian Gardens Redev. Agency* (2001) 86 Cal. App. 4th 856.
[33] *People v Fulton* (2003) 109 Cal. App. 4th 876; *People v Maheshwari* (2003) 107 Cal. App. 4th 1406.
[34] *People v. Pinedo* (1998) 60 Cal. App. 4th 1403, 1406.
[35] *People v. Vasquez* (2010)190 Cal. App. 4th 1126, 1133.
[36] *People v. Chappelone* (2010) 183 CA4th 1159, 1184. *Apprendi v. New Jersey* (2000) 530 U.S. 466, held that an increase in penalties for a crime must be submitted to a jury. *Southern Union Co. v. United States* (2012) 132 S. Ct. 2344, applied *Apprendi* to criminal fines. However, *People v. Kramis* (2012) 209 Cal.App.4th 346, decided after

Burden of proof and admissible evidence. The victim must present evidence showing that there were losses and that the losses were caused by the crime committed by the defendant.[37] The victim must prove that the defendant's conduct was a "substantial factor" in causing the events that harmed the victim; it need not be the sole cause.[38] The principles of proximate causation apply to the determination of victim restitution.[39] Because a restitution hearing is part of sentencing, the rules of evidence do not apply.[40]

The amount of restitution must be proved by a preponderance of the evidence.[41] Documentary evidence such as bills, business records, and "profits lost" is admissible when offered in support of the amount of the victim's losses.[42] A victim's testimony, without supporting documentation, is prima facie evidence of value.[43] Such testimony shifts the burden to the defendant to prove that value is wrong.[44] Professional fees incurred may be proved by declaration, and the victim does not have to make the declarant available for cross-examination.[45]

If the defendant fails to object to the victim's proof at the hearing, any objection is deemed waived.[46]

- **Note:** Despite the relative informality of restitution hearings,[47] these hearings are minitrials. Depending on the types of losses and the evidence needed to establish them, the hearing may take a few minutes, a full day, or more. Testimonial evidence, documentary evidence, and even expert testimony may be needed. Defense counsel should consider the possibility of a full restitution hearing when making fee arrangements.

Restitution order. At the conclusion of the restitution hearing, the trial court must specify the exact amount of restitution and identify the victim's losses.[48] The order should be entered on Judicial Council Form CR-110. The court must clearly state the calculation method used and how that method justifies the amount of restitution ordered.[49] A defendant's ability to pay may not be considered in determining the amount of restitution.[50]

Requirement That Defendant Disclose Assets

No later than the date of sentencing, the defendant must disclose all assets using Judicial Council Form CR-115 (Defendant's Statement of Assets).[51] Unreasonable failure to file the form may be considered in sentencing.[52] Financial information filed by the defendant under Penal

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Southern Union, held that *Apprendi* does not apply to an increase caused by restitution within the discretion of the sentencing court.

[37] *People v Rivera* (1989) 212 Cal. App. 3d 1153, 1162.

[38] *In re A.M.*, 173 Cal. App. 4th at 673, citing jury instruction CALCRIM 240.

[39] *People v Jones* (2010) 187 Cal. App. 4th 418, 426. See also *People v Holmberg* (2011) 195 Cal. App. 4th 1310, 1320.

[40] *People v Prosser* (2007) 157 Cal. App. 4th 682, 692.

[41] *People v Holmberg (2011)* 195 Cal. App. 4th at 1319.

[42] Penal Code §1203.1d.

[43] *People v Gemelli* (2008) 161 Cal. App. A4th 1539, 1544.

[44] **Id** at 1543. See also *People v Goulart* (1990) 224 Cal. App. 3d 71, 83 (defendant has burden of proving inaccuracies in victim's proof). See Evidence Code §813(a)(2).

[45] *People v Millard* (2009) 175 Cal. App. 4th 7, 42.

[46] *In re S.S.* (1995) 37 Cal. App. 4th 543, 547. See also *People v Foster* (1993) 14 Cal. App. 4th 939, 947 (defendant has burden of proving that amount of restitution proposed by the probation report is incorrect).

[47] *People v Foster* (1993) 14 CA4th 939, 947.

[48] Penal Code §1202.4(f)(3).

[49] *People v Jones* (2010) 187 Cal. App. 4th 418, 423; *People v Frey* (1989) 209 Cal. App. 3d 139, 142.

[50] Penal Code §1202.4(g); *People v Draut* (1999) 73 Cal, App. 4th 577, 582.

[51] Penal Code §1202.4(f)(5), (7)–(8).

[52] Penal Code §1202.4(f)(9).

Code §987(c) to help the court assess the defendant's ability to employ counsel may be used instead of the required financial disclosure when the defendant fails to file the disclosure.[53] If this is necessary, the defendant shall be deemed to have waived confidentiality of the information.[54] A defendant who is eligible for probation may be referred to a county financial evaluation officer for an evaluation of the defendant's ability to make restitution. The officer must report the findings to the probation officer.[55]

The Judicial Council has promulgated interrogatories a victim can use to discover a defendant's assets.[56] The victim may serve the interrogatories once a year when there is an unpaid restitution balance.[57] In addition, the prosecutor may conduct a judgment debtor examination of a defendant to find assets.[58] This is a significant exception to the general rule that a prosecutor does not have the right to examine an unwilling criminal defendant.

Procedures for Enforcing Restitution Order

1. Use of Income Deduction

If the trial court determines that the defendant has the ability to pay restitution, it must enter a separate order for income deduction (sometimes called wage garnishment) once restitution has been determined.[59]

2. Availability of Civil Enforcement Procedures

A restitution order is enforceable as a civil judgment.[60] This means that all of the post judgment tools, such as writs of execution, are available to the victim to collect the restitution. A restitution order is a "money judgment."[61] A victim granted restitution is a judgment creditor.[62]

Relation Between Restitution Obligation and Civil Liability

A crime victim has the right to bring a civil action for damages caused by the defendant's criminal act.[63] A victim may recover attorney fees in a civil action against a defendant convicted of a felony.[64]

Restitution paid is to be credited against any civil judgment for the same loss.[65] But not all civil settlements on behalf of a defendant are applied as a credit to a restitution order.

A civil settlement between a victim and a defendant that covers only part of the victim's losses does not preclude an additional restitution award for the balance of losses, even if the settlement

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[53] Penal Code §1202.4(f)(6).
[54] Penal Code §1202.4(f)(6).
[55] Penal Code §1203(j).
[56] See Judicial Council Form CR-200, Form Interrogatories—Crime Victim Restitution; Code of Civil Procedure §2033.720(a).
[57] Code of Civil Procedure §2033.720(b).
[58] Penal Code §1202.4(h).
[59] Penal Code §1202.42.
[60] Penal Code §§1202.4(i), 1203(j), 1214(b).
[61] Code of Civil Procedure §§680.230 and 680.270.
[62] Code of Civil Procedure §680.240.
[63] See Code of Civil Procedure §32 ("When the violation of a right admits of both a civil and criminal remedy the right to prosecute the one is not merged in the other"); Penal Code §9 (civil remedies for criminal acts preserved). See also Penal Code §§679.02, 1202.4(j); Govt C §13963; *Vigilant Ins. Co. v Chiu* (2009) 175 Cal. App. 4th 438, 442. (Penal Code §1202.4 does not preclude victim or assignee from bringing a civil action based on same facts that gave rise to criminal conviction). *Shore v Gurnett* (2004) 122 Cal. App. 4th 166 (no constitutional impediment to punitive damage award in civil suit based on crime of which defendant convicted).
[64] Code of Civil Procedure §1021.4.
[65] Penal Code §1202.4(j).

releases the defendant from further civil liability.[66] "Disposing of civil liability cannot be a function of restitution in a criminal case."[67]

A victim's release of liability to the defendant's insurance company as part of a settlement does not release the defendant from his or her restitution obligation. A release cannot waive the people's right to have a defendant pay restitution.[68]

A prior restitution award does not bar a subsequent civil action for different damages arising from the same events, because civil cases and criminal cases have different purposes.[69] Another reason to allow both cases is that a victim is not in privity with the People in a criminal case.[70] Because the claims are not the same in civil and criminal cases, there is no collateral estoppel.[71]

The Penal Code may provide for an award of compensatory damages and attorney fees in a civil suit.[72] Conversely, a civil statute multiplying damages may be used by the sentencing court to determine restitution when probation is ordered.[73]

Restitution Not Dischargeable in Bankruptcy

Bankruptcy has no effect on restitution. Restitution is not dischargeable in a liquidation or "straight" bankruptcy under Chapter 7 of the Bankruptcy Code.[74] Nor is restitution a dischargeable debt under Chapter 13.[75]

Federal Victim Restitution Law

There are two main federal laws which provide for victims' rights: Mandatory Victims Restitution Act (MVRA)[76] and Crime Victims Rights Act (CVRA).[77] While there are many differences between California restitution law and Federal restitution law, there are many similarities. These differences and similarities are generally outside the scope of this article. However, one significant difference deserves mentioning. While California law provides great flexibility in when a restitution order can be obtained and when a restitution order can be modified, federal law is quite rigid when it comes to timing. Mandatory restitution must be ordered at sentencing.[78] Therefore if one is considering involvement in a federal case to recover

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[66] *People v Clifton* (1985) 172 Cal. App. 3d 1165, 1168.
[67] *People v Richards* (1976) 17 Cal. 3d 614, 620, overruled on other grounds in *People v Carbajal* (1995) 10 Cal. 4th 1114, 1126.
[68] *People v Bernal* (2002) 101 Cal. App. 4th 155, 160.
[69] *Vigilant Ins. Co.*, 175 Cal. App. 4th at 445.
[70] *U.S. v Barnette* (11th Cir 1994) 10 Fed. 3d 1553, 1562. See also *Victa v Merle Norman Cosmetics, Inc.* (1993) 19 Cal. App. 4th 454, 467 (prior EEOC claim does not bar subsequent civil action, because there is no privity between victim and agency).
[71] *U.S. v Barnette* (11th Cir 1994) 10 Fed. 3d 1553, 1560.
[72] See, *e.g.*, Penal Code §502(e) (compensatory damages available to reimburse expense of determining whether computer system was damaged by computer crime).
[73] *People v Baker* (2005) 126 Cal. App. 4th 463 (victim restitution ordered in amount four times loss under Food & A C §21855).
[74] 11 USC §523(a)(7); *Kelly v Robinson* (1986) 479 US 36, 50, 107 S Ct 353.
[75] 11 USC §1328(a)(3). See, *e.g.*, *Warfel v City of Saratoga (In re Warfel)* (BAP 9th Cir 2001) 268 BR 205 (conversion of restitution order to civil judgment does not make it dischargeable under Chapter 7); *People v Washburn* (1979) 97 Cal. App. 3d 621 (Bankruptcy Act does not apply to restitution orders).
[76] 18 U.S.C. '3663
[77] 18 U.S.C. §3771.
[78] 18 U.S.C. '3663A (a)(1).

restitution for victim, one of the first inquiries should be whether the defendant has been sentenced.

Paul Slager[1]
Silver Golub & Teitell LLP
184 Atlantic Street
Stamford, Connecticut
203-325-4491
pslager@sgtlaw.com
www.sgtlaw.com

HOME INVASION: SEEKING CIVIL JUSTICE FOR CONDOMINIUM RESIDENT VICTIMS OF SERIOUS CRIMES

Introduction

Increased population density and the benefits from economies of scale have led many to live in condominium communities, rather than independent homes. While the benefits of condominium community living are considerable, residents of condominiums, like everyone else in modern society, at times face the harsh realities of crime in their communities. At times, condominium residents are victims of crimes committed by other residents; other times, condominium residents are victimized by intruders to the community, perhaps lured by the criminal opportunities offered by a community where a number of people are living close together.

As with any serious crime, victims of crimes in condominium communities may require support from both the criminal and civil justice systems. This paper focuses on pursuing civil justice for these victims. Pursuing civil remedies for a condominium resident victim of crime is complex and requires special considerations related to unique characteristics of condominium ownership. Also, as far as I have discovered, there simply is no way to avoid doing extensive (and expensive) discovery to prove a victim's case. This is because cases involving serious crimes at condominiums are often defensible and usually vigorously defended by defendants and their insurance carriers. There are many ways to lose even the most meritorious of these cases.

[1] Paul Slager has represented many Connecticut victims of serious crimes in civil cases, including the victims of such notorious crimes as: the sexual assault of a mother in front of her children in the Stamford Marriott parking garage; a New Canaan, Connecticut woman who was strangled and beaten nearly to death by her husband, a wealthy former White House legal advisor to President George W. Bush; the family of Annie Le, the Yale graduate student who was murdered in a Yale laboratory; and, recently, the strangulation and sexual assault of a young woman in a condominium complex in southwestern Connecticut. His representation of plaintiffs in catastrophic civil cases has earned him an AV Rating by Martindale Hubbell. He also has received numerous other professional recognitions, including being listed in the Best Lawyers of America, being listed as one of the "Top 50 Connecticut Super Lawyers" and being listed as one of the "Top 100 New England Super Lawyers" in the five state New England region. A more complete summary of his professional background can be found at www.sgtlaw.com.

That said, successfully representing victims of crimes in condominium communities can offer significant rewards, both in helping victims emotionally and financially, and in encouraging reasonable security and safety standards that help provide a safe and secure environment for residents.

Considerations for Intake and Preliminary Investigation

Before you accept the challenge of pursuing civil claims for a condominium resident victim of crime, scrupulously review your potential client and her claims as part of the intake process. This is important in every case, but particularly in cases involving victims of crime. Because these cases are risky and expensive to pursue, spending time, energy and money investigating both your potential client and the circumstances that led to her victimization is a sound investment. Of course, the fact that a terrible crime happened with catastrophic consequences for your potential client does not mean a meritorious civil case exists. To the extent possible, you need to answer this question before accepting the case, not after.

Reviewing your potential client's presence on social media sites, including Facebook, Twitter and LinkedIn, is a critical first step, and one you can take even before meeting with the client. You can be certain that the defendants and carriers involved will carefully review any public entries as soon as they get notice of a claim. Plaintiffs, especially those under 35, seem comfortable publicly posting an array of photographs and editorial comments, and some of those could involve the incident you are assessing or the nature and extent of the victim's injuries. These are things you simply must know about in assessing whether you want to take the client's case.

You should also consider doing public records research on a potential client before accepting the case. A basic public records research on Lexis/Nexis and similar services, which again will certainly be performed by defendants, will reveal information about a client's potential history of arrests, criminal charges and convictions, judgment liens, past addresses and licenses. If your potential client has been convicted in the past of a crime related to untruthfulness, for example, you need to know and evaluate that fact before deciding to pursue the case.

Your meeting and personal assessment of a client's demeanor is particularly important in this kind of case. In assessing the client, keep in mind that in many civil cases involving victims of crime, including condominium resident victim cases, a key element of damages is a claim for post-traumatic stress disorder. More so than with most injuries, a client's credibility is critical to proving this diagnosis, and related impairments, to a judge or jury. And unlike in other civil cases involving crimes, in condominium cases your client may be a key liability witness as well. Your client is likely to have been a witness to the poor security or mismanagement in the condominium community prior to the crime, and you might rely heavily on her testimony to

prove liability. Trust your impressions of a potential client: if you do not find her credible, neither will the defendants or the fact finder.

Of course, your intake investigation should extend well beyond assessment of the client. It is critical to find out as much about the criminal event involving your client as possible before you commit to taking the case. A particular focus should be placed on facts supporting the conclusion that the condominium association had notice of other crimes before your client was victimized. In cases I have handled, a rich source of this kind of information has been comments posted by readers of online news articles about the crime. Although posting readers often do not use their true identities, the character of the comments can be helpful in assessing whether the area was considered by residents and others to be vulnerable to crime before the event involving your client happened. If residents in the communities are concerned and frustrated about the criminal threat at a condominium community, chances are the defendants are (or should be) too.

Another excellent source of information to use during pre-suit evaluation of a potential case is police records, including "call logs" and incident reports. The usefulness of this information will be discussed in more detail below, but these are public information generally available in response to a freedom of information act request. These will provide information about the volume of calls the local police department received from this condominium community, the types of complaints the police received and the specific units involved.

Once you obtain the call logs, you can request specific incident reports for those calls you find particularly interesting or useful. Police departments may redact names or other identifying information out of materials provided, but the nature of the crimes, the evidence uncovered and other information generated by the investigating officer will be included for your review. As you would expect, this can be a treasure trove of information about the climate in the community prior to the event involving your client. If police records reveal a high volume of dangerous crime before your client was injured, the defendants' obligations in ensuring a reasonably safe and secure environment, or in warning residents of the risks of serious crime, are elevated.

Another step to consider during your investigation (and later, during discovery) is whether to interview other residents of the condominium who can provide valuable information about issues relating to notice. This is a complicated discussion that depends largely on the law in your jurisdiction. In some jurisdictions, you will be strictly prohibited from any such discussions with those residents who are condominium owners, because owners are members of the defendant condominium association. In other jurisdictions like my home State of Connecticut, a plaintiff can interview defendants' employees, unless the employee is considered

to be in a managerial position, in the corporate "control group" or is otherwise a person for whose conduct the defendant could be held liable in the case.[2]

Understanding the Universe of Potentially Culpable Parties

Once you have decided to pursue civil claims on behalf of a condominium resident victim of crime, you must give careful consideration to who are potentially culpable parties. The first question to answer is whether to name the criminal defendant as a defendant. Opinions vary on the issue, but my personal opinion is that it is usually a mistake to name the criminal defendant as a defendant in the civil case. Most of the time, in pursuing a civil case involving injuries suffered as a result of crimes in a condominium community, you are likely to have a successful outcome only if someone other than the criminal is responsible for what happened. You need to assess whether meritorious claims exist against a number of potential defendants. In some states, for a defendant to be held liable for a criminal act in a condominium community, there must be special relationship between the victim and defendant(s).

Theories to consider for holding defendants liable for personal injuries resulting from crimes within condominium communities might include breach of contract/covenant by the condominium association, breach of fiduciary duty by the association and negligence actions against the association's board of directors, and against the property manager, security company and landlord.

1. Condominium Association

The most likely institutional defendant in a case like this is the condominium association itself. The association is charged with the knowledge and is legally responsible for the acts and omissions of the association's board of directors.[3] In a condominium community, the board is

[2] *See e.g., Rivera v. Rowland*, 1996 Conn. Super. LEXIS 3398. In *Rivera*, the Connecticut Superior Court considered defendant's motion for protective order against plaintiff, in order to prohibit any contact of defendant's employees by plaintiff's counsel. Defendant contended any such effort by plaintiff's counsel would violate the Rules of Professional Conduct prohibiting counsel from communicating about the subject of the representation with a party the lawyer knows to be represented by another lawyer. The court disagreed, holding that plaintiff's counsel was free to discuss the litigation with nonmanagerial employees who were not named defendants, provided the plaintiffs' counsel immediately identified their role in the case, informed the employee that it was completely up the person whether or not to consent to discussion and inform the person that she could request that defendant's counsel be present for any discussions.] I believe application of these principles would generally permit plaintiff's counsel to contact residents of a condominium community, even those who are members of the condominium association, except for current or former board members.

[3] An early case of condominium association liability is *Frances T. v. Village Green Owners Assn.*, 723 P.2d 573 (Cal. 1986). In *Francis*, the court noted that the association had provided residents with newsletters discussing the relationship between lighting issues and crime in the community. Because the crime was alleged to have been

charged with significant responsibilities. These involve making important budget decisions, including making a determination of the budget devoted to security issues and determinations about whether security cameras or outside security firms are utilized in the community.

Importantly, the association board also entertains complaints from residents about problems, including crimes, taking place in the community. Board members are the most knowledgeable members of a condominium association and also those charged with the responsibility of setting condominium policies, communicating with residents about condominium business, and ensuring a reasonably safe community exists. For these reasons, board members will be the key deponents in any case involving a condominium resident victimized by crime in the community.

There are two critically important things to remember about this. First, condominium board members are lay people with day jobs, not trained board members. Although it is certainly not always the case, board members can be unsophisticated and lacking in basic judgments. Unfortunately, this is one factor that leaves condominium residents vulnerable to crimes. On the other hand, depositions of board members can provide eye-opening admissions and facts that clearly establish the board's culpability for your client's injuries.

Second, most condominium associations require their boards to keep minutes of every meeting. You need to request these meeting minutes in discovery because they provide valuable information about who important witnesses are, what decisions the board has made and what the board's historical knowledge has been about problems and crimes in the community. I have found condominium board meeting minutes to be treasure troves of information, much of which sheds light on how board actions or inactions contribute to resident victimization.

If a condominium board is aware of a recent spate of crime, it may be held liable for failing to warn community residents. The failure to warn deprives residents of pertinent information that would influence conduct. If, for example, the board is aware of a series of recent break-ins, but fails to warn residents, then residents may be more prone to leaving doors and windows open or unlocked, thus unwittingly subjecting themselves to dangerous threats.

2. Property Manager or Management Company

Many condominium associations retain property management companies to assist the board of directors in day to day management of the condominium's operations. Relationships between property managers and condominium associations are typically governed by written

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related to inadequate lighting, the court permitted a negligence cause of action for negligence against the association after a resident was attacked in her unit.

contracts that outline the scope of services to be provided by the property manager. You need to obtain a copy of any such agreement in discovery.

Unlike board members, property managers are professional managers with training and experience managing condominium associations and other properties. This places a higher level of responsibility on managers to understand the ramifications of failing to act responsibly. Board members often will testify they rely heavily on property managers for management advice. Property managers, on the other hand, argue they serve a very limited role in assisting the board (usually for very generous compensation) and defer all judgments regarding security to the board itself.

This can create an interesting and helpful dynamic where two sets of defendants are each blaming the other for lapses. Also, board meeting minutes can reflect attendance of property manager at board meetings, and demonstrate the property manager's knowledge of concerning conditions, which can provide strong support for the injured' s civil claims.

3. Private Security Services Firm

Many condominium associations retain private security firms to provide security services in the community. When a resident is the victim of serious crime, the private security firm often shares responsibility. Private security firms may be appropriate defendants if they failed to provide reasonably competent security services. Remember, security services usually keep (or are supposed to keep) detailed records, including trip sheets, logbooks and incident reports, which reflect patrols and untoward incidents in the community. Again, these should be requested, as they can be fertile ground for discovering evidence revealing notice to the security company of conduct that should have altered the security company's conduct.

In some instances, security personnel attend condominium board meetings to provide security updates or report particularly concerning incidents. Security companies may also recommend changes or enhancements in security services, which reflect their belief that additional security is necessary to maintain a safe community. When these recommendations are ignored or rejected, the security company's liability may be lessened, but the board and/or property manager who rejected the suggestions may face even greater exposure for making the ill-advised decision to reject recommendations of security professionals.

4. Landlord, if Applicable.

In some instances, condominium residents rent condominiums from owners/landlords. When this is the case, a landlord may also be liable for negligence leading to the plaintiff's

injuries.[4] Renters in condominium complexes often do not have access to association meetings and communications from the board to condominium unit owners. If a landlord fails to keep a tenant reasonably informed of security risks he/she is aware of, the landlord may be held liable for failing to do so.

In addition, in many condominium associations, unit owners are responsible for installing window and door locks and other security measures on the individual units they own. If a landlord/unit owner fails to provide a reasonably safe living space for a tenant, they may be liable for their individual failures.

Some courts, however, have held that the landlord-tenant relationship is not a special relationship, so that landlords cannot be held liable for injuries to tenants caused by criminal acts.[5]

Finding and Proving Key Evidence

Pursuing a civil case arising from a criminal event in a condominium community requires extensive discovery. Before taking depositions, be sure to request key paper discovery to shed light on the history of events at the location. You should rely on your security expert to ensure you get all materials he/she considers important. In addition to standard written discovery requests you would serve in another serious personal injury case, consider asking for the following:

<u>Freedom of Information Act requests from the local police department</u>.

- Call logs for police service calls from any address within the condominium community for the five years. These call logs typically provide information about the nature of the

[4] For two examples cases brought by victims of crime against landlords, where summary judgment was requested by landlords and denied, *see Kelly v Norgate Bus. Assoc.*, 2009 NY Slip Op 51961U, 4 (N.Y. Sup. Ct. Sept. 17, 2009 *Caroline A. v. New York City Hous. Auth.*, 2009 NY Slip Op 51111U (N.Y. Sup. Ct. 2009) and *Caroline A. v. New York City Hous. Auth.*, 2009 NY Slip Op 51111U (N.Y. Sup. Ct. 2009).

[5] *See, e.g.*, *Morgan v. 253 East Delaware Condominium Association*, 231 Ill.App.3d 208, 595 N.E.2d 36 (1st Dist. 1992). In Morgan, the court noted that in general Illinois law does not permit claims against defendants arising from crimes by third parties, unless the crime was foreseeable and the plaintiff and defendant had a special relationship, such as a business owner-invitee. The court further held that the landlord-tenant relationship is not such as special relationship so as to impose liability on the landlord for injuries caused by a criminal act, unless the landlord voluntarily undertakes to provide security measures, but performs those measures negligently. The court found as a matter of law that although defendant did voluntarily provide some limited security measures, the record did not establish a genuine issue of fact about whether defendant violated its limited duty. The court further found that the third-party's crime was an intervening act, such that defendant did not proximately cause plaintiff's injuries.

complaint, whether officers were dispatched, whether an arrest was made and for what any arrest was made.

- Once you obtain these call reports, I suggest you select any calls that seem pertinent to your claim, then request investigation reports from each of these potentially important calls.

- Any incident reports involving incidents, in which the person who injured your client was involved.

Requests from the Defendants.

From the Condominium Association:

- Board meeting minutes for the five years preceding the event involving your client.

- Association budgets for the five years before the event.

- Association rules, regulations and/or code of conduct applicable to residents.

- Copies of all communications, including emails, between the board and residents in the five years preceding the event regarding security concerns, the performance of the property manager and/or the performance of any outside security firm.

- Contracts governing the relationship between the association and the property manager for the five years immediately preceding the event.

- Contracts governing the relationship between the association and the outside security firm for the five years immediately preceding the event.

- Emails or other documentation reflecting association residents' complaints to the board about performance of the property manager.

- Emails or other documentation reflecting association residents' complaints to the board about performance of the security guards.

- If the person who injured your client was a resident in the condominium community, the any notices of discipline, warnings or discipline issued by the board to the resident before the criminal incident, including any documentation of the resident's response and final disposition of each matter.

From the Property Manager:

- Contracts governing the relationship between the association and the property manager for the five years immediately preceding the event.

- Any other materials reflecting the nature of the property manager's responsibilities, or limitations in those responsibilities, at the association.

- Emails or other documentation reflecting association residents' complaints to the property manager about performance of the property manager (it is not unusual for residents to direct such complaints to the property manager).

- Billing records or payment information reflecting all compensation the property manager received in the five years preceding the event.

- Materials reflecting any communications between the property manager and any security firms providing services at the property.

From the Security Company:

- Contracts governing the relationship between the association and the security company for the five years immediately preceding the event.

- Materials reflecting the training of any security guards who worked on the condominium property in the five years before the event.

- Materials reflecting the job responsibilities, duties and limitations of security personnel.

- Any communications between the security company and the association about the nature of services offered at the property, including any materials reflecting recommendation for increases in security services offered at the property.

From the landlord:

- Copy of the lease he/she entered into with your client.

- Copy of any materials he provided your client regarding security warnings or the security situation in the community.

Anticipating and Understanding Key Defenses

Even with strong facts, prevailing in a civil case involving a serious criminal act in a condominium community is difficult. Defendants will not be construed as parties who guarantee

the safety of residents.[6] Depending on your jurisdiction, defendants often can exploit laws that make it very difficult to establish duty and proximate cause. Unlike in many personal injury cases, I believe defendants approach these cases with an eye towards winning summary judgment. And in many cases, they will succeed.

Even when the case goes to the fact-finder for ultimate resolution, however, defendants can exploit many defenses that offer some appeal to jurors, including defenses involving duty, proximate cause, and, importantly, the plaintiff's own responsibility. Awareness of these issues before taking discovery can help you overcome the potential obstacles.

Legal defenses generally revolve around whether the crime was reasonably foreseeable such that the defendant(s) had a duty to take reasonable steps to prevent it.[7] A horrendous criminal act, the argument goes, is not reasonably foreseeable, or, stated differently, the criminal act is a superseding cause to any negligent conduct by defendants. You need to be aware of the law in your jurisdiction on this issue, as each state has developed its own body of law. In my home state of Connecticut, the Connecticut Supreme Court has clearly stated that some kinds of criminal acts that cause injury to plaintiffs constitute unforeseeable intentional acts or crimes that relieve defendants from liability under negligence theories.[8]

The key to defeating this kind of legal argument is to gather admissions from the defendants about the reasons security was important, and the fact that it was aware that if it provided inadequate security in the community, residents could be victims of serious crimes.

Finally, no civil case arising from a criminal act seems to ever be complete without defendants attempting to blame the victim for what happened. This tendency is particularly evident in cases involving allegations of negligent security. Defendants will argue your client should have better secured her windows or door locks, or that he/she should have been more aware and wary of his/her surroundings. In some jurisdictions, there is unfavorable case law

[6] *See Feld v. Merriam*, 485 A.2d 742 (Pa. 1984), in which the court refused to extend to extend liability after residents were assaulted by third parties in the parking lot because a landlord should not be held to the standard of an insurer of a tenant's safety, where residents did not allege the association had notice of a particularly dangerous condition on the premises or that the crime was foreseeable in light of the history of crime in the area.

[7] *See Newell v. Best Security Systems*, 560 So. 2d 395 (Fla. App. 1990), in which the court held the foreseeability of criminal conduct existed based on multiple prior crimes in the immediate neighborhood.

[8] *See Sullivan v. Metro North Railroad Company*, 292 Conn. 150, 971 A.2d 676 (2009), in which the court found no liability of defendant for attack in train station parking garage, where the assailant followed the victim from outside the property onto the property before shooting him.

supporting this argument.[9] You need to have your client ready to answer these questions in deposition by explaining why his/her actions were appropriate. Usually, this involves the fact that your client had no idea of the risk of crime in the community, while in contrast the defendants were well aware of it. Your client needs to think about and be prepared to explain how she relied on the information (or lack thereof) that was provided by the defendants.

Civil cases involving crimes in condominium communities can be difficult to win and always take considerable resources to litigate. Armed with some of these principles, and facts and ideas you uncover in your investigation and during discovery, be assured that you can win these cases for your clients.

[9] *See Johns v. Housing Authority*, 297 Ga. App. 869 (Ga. Ct. App. 2009). In *Johns*, the plaintiff sought to hold her landlord liable for damages arising from the assault and rape she suffered. She alleged he had improperly installed a window air conditioner unit, leaving a space that allowed the assailant to enter the unit. The court appeared willing to blame the victim, holding the attack was caused by the tenant's own failure to secure her window: "Even if we were to agree with Johns that the attack in her apartment was foreseeable based on other crimes in the area, that the Housing Authority therefore had a duty to improve security in the complex, and that the Housing Authority breached that duty by not making the repairs or improvements Johns suggests, there is no evidence that any such breach led to her injuries. In this case, the intruder was apparently able to enter Johns' apartment because she left a rear window unsecured, not because the Housing Authority failed to do those acts enumerated by Johns."

DANNY K. SHADID[1]
Danny K. Shadid, P.C.
Waterford Office Park
6301 Waterford Blvd., Suite 110
Oklahoma City, OK 73118
405-810-9999
Danny@Shadidlaw.com

A CASE STUDY OF A GENERAL GROWTH PROPERTIES SHOPPING MALL CASE:
GGP'S TACTICS AND DIRTY TRICKS

I. CASE BACKGROUND.

General Growth Properties (GGP) is one of the two largest shopping mall owners/operators in the United States. GGP owns General Growth Management, Inc. (GGM). Together GGP and GGM operate over 200 large shopping malls. GGP is publicly traded and, therefore, much corporate information regarding its properties and policies is readily available online.

The case from which this discussion emanates is *Grizzle v. General Growth Properties, Inc., et al.*[2], a case involving claims of negligent security at Quail Springs Mall, a large metropolitan shopping mall in Oklahoma City. On February 12, 2010, at approximately 11:18 a.m., the plaintiff, a 42-year-old mother of three, was walking back to her SUV from the main entrance to Quail Springs Mall. Her SUV was parked directly in front of the main entrance doors, about 100 yards out into the parking area. Upon the plaintiff entering the vehicle, a lone assailant attacked the plaintiff, pushed her to the passenger's side of the vehicle. The plaintiff gave fight. During the struggle, the assailant robbed the plaintiff of her $18,000.00 wedding ring (which he pawned for $60.00 a couple of hours later) and attempted to drive away with her. The plaintiff continued to struggle with the assailant and finally escaped via the passenger door and fell onto the parking lot asphalt. The plaintiff suffered severe Post Traumatic Stress Disorder, as well as physical injuries from the struggle and the fall from the vehicle.

Suit was brought against GGP and GGM for negligent security. The action was additionally brought against Mydatt Services, Inc., d/b/a Valor Security Services. Oklahoma is a "totality of the circumstances" jurisdiction, following the common law standards and duties of property owners and persons in control of a premises as set forth in Restatement (Second) of Torts, §344 and Comment f (1965)[3]. More specifically, Oklahoma law imposes a duty on those who control a premise to either provide adequate protection to invitees on the premises or to

[1] Former Asst. A.G, Oklahoma; former Adj. Instructor of Law, Oklahoma City University;Private practice since 1981; Grad. OCU Law School-1979; Handling negligent security and other crime victim cases since 1992; AAJ; NCVBA; excellent results on negligent security cases
[2] No. CIV-10-388-C (W.D. Okla.)
[3] *See Bray v. St. John's Medical Center*, 2008 OK 51 187 P.3d 721, and *Lay v. Dworman*, 1986 OK 85, 732 P.2d 455; *Larkin v. Winthrop Financial Co., Inc.*, No. CIV-92-2461-R, slip op. (W.D. 1994, Aug. 31, 1994).

provide adequate warnings of the dangerous conditions on the premises.[4] The duty to protect or warn emanates from the general history of crime on the premises and/or the nature of the premises itself.[5]

II. DELAY BY DESIGN.

A. Initial Disclosures.

In hindsight, it becomes clear that GGP engages in what can only be termed as deliberate delay in all aspects of discovery response. In *Grizzle*, the delays in the discovery process began with the failure of GGP and GGM to disclose the basic, yet required mandatory disclosures. Fed.R.Civ.P 26 requires initial disclosures to be made by the defendants within 14 days after the parties' Rule 26(f) conference, unless otherwise stipulated by court order.[6] The required disclosures are basic and simple, i.e., (1) the identity of all persons who the defendants believe to possess knowledge of the claims and/or defenses in the case, (2) a list of documents and things which the defendants believe support claims and/or defenses in the case, and (3) information as to the existence of liability insurance available to cover the plaintiff's claims.[7]

In *Grizzle*, GGP and GGM not only failed to provide their mandatory, initial disclosures by the designated deadline, but also failed to provide such information by the time of the initial Scheduling Conference. Rather, the GGP defendants simply, and without care of sanction, advise the Court at Scheduling Conference of local counsel's attempts to make contact with the correct persons to obtain the information and of local counsel's inability to get information. The fact that such claims are untrue was borne out in the fact that when the information was finally provided months later, the vast majority of the persons with knowledge and the documents produced came from the local Mall itself. The persons and the documentation were a few miles away from the offices of local defense counsel.

When GGP's and GGM's initial disclosures were finally delivered, they, of course, provided very limited information.

B. Discovery Responses.

1. Denying Known Facts.

General Growth Properties and General Growth Management had no problem denying in their discovery responses simple, basic facts absolutely known to them to be true. For example, they denied requests to admit that there did not exist video surveillance of the area of the Mall parking lot where the attack at issue occurred. Yet, this was known to the GGP and GGM within one (1) day following the attack.

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[4] *Bray v. St. John's Medical Center*, 2008 OK 51, 187 P.3d at 724, n.2, and *Lay v. Dworman*, 1986 OK 85, 732 P.2d 455, 459.
[5] *Id.*
[6] Fed.R.Civ.P. 26(a).
[7] *Id.*

2. Tell the Plaintiff to Ask the Other Defendant.

GGP and GGM, using the same attorneys as their contract security company, i.e., Mydatt Services, Inc., d/b/a Valor Security Services, both would, at times, respond to discovery requests by telling the plaintiff to ask Valor. As an example, in answering the identical request for admission, instead of simply providing a straight answer (which would have to have been an admission), GGP and GGM claimed no knowledge and directed the plaintiff to ask the defendant security company. For example, the plaintiff posed the following request for admission:

> "Admit that on February 12, 2010, there did not exist any security cameras, whether real time or video recording, covering the area where the plaintiff's vehicle was parked outside of the Mall."

GGP's and GGM's answer: "Defendant can neither admit nor deny this request. This information would be obtainable from Valor Security Services."

3. Just Don't Answer.

When faced with no other alternative, Valor Security Services just submitted no answer whatsoever to the interrogatory.

4. A Planned-for Motion to Compel Production.

a. Delay document production and responses to Requests for Production for months.

b. Tell local personnel to not give documents until told to do so by corporate risk manager.

c. Tell plaintiff's counsel documents are not on the premises.

d. Blame all delays on local defense counsel. (Note: All such blame is a provable falsehood.)

e. Upon receipt of scathing Order from the Court following a Motion to Compel, fire local attorneys.

f. Hire new local counsel, resulting in further delays.

g. Paper plaintiff's counsel to death following the Court's Order to produce, with documents that were always on the premises or printable at the premises.

h. No regard for discovery sanctions**.**

III. DEPOSITIONS.

A. Local Security Director.

1. Depose Security Director.

2. Fire Security Director six (6) days following deposition.

3. Conceal the firing of the Security Director from Plaintiff's counsel. (Promote an office pool as to when plaintiff's counsel will find out.)

4. Use the fired Security Director at trial.

B. "Risk Manager."

GGP instructed its in-house "Risk Manager" to not release any information or documents to the plaintiff's attorney without the consent of Risk Management. Then, the "Risk Manager" affirmatively instructed the local Director of Security not to release any documents without the approval of Risk Management. The local Director of Security acted accordingly and did not provide documents to local defense counsel. In deposition, the local Director of Security confirmed that he had been told by the "Risk Manager" that nothing was to be delivered to the plaintiff without the consent of Risk Management. Later, the plaintiff was forced to travel to depose the "Risk Manager," who actually admitted that he did deliver such instructions to the local Director of Security. At the same time, the plaintiff learned at deposition that the "Risk Manager" was 26 year old junior level claims representative, and all instructions regarding document production were coming from the upper-levels of Risk Management.

C. **Deny Video Depositions of Defendants' Corporate Personnel.**

During the regular course of discovery, the plaintiff took the depositions of the Director of Operations of Valor Security and General Growth Property's Corporate Security Director. The depositions were taken locally in the venue of the forum court, i.e., the Western District of Oklahoma in Oklahoma City. Approximately one (1) month prior to the deadline for submission of the Pretrial Order and discovery cutoff, plaintiff counsel asked for confirmation from defense counsel as to whether the defendants were bringing their corporate security personnel to trial for live testimony. Of course, defense counsel did not know at the time. He needed "to think about it" and consult with his people. He would get back with plaintiff's counsel. After "thinking about it," defendants' counsel decided not to bring his corporate personnel to trial for live testimony ***in the plaintiff's case in chief***. He was still reserving the right to bring them to trial ***for the defendants' case in chief***.

Faced with a clear need to put defendants' corporate security personnel on the stand, the plaintiff inquired of defense counsel as to whether he would present the defendants' corporate security personnel for video trial depositions in the places of their respective homes or offices. Defendants' counsel refused to do so because he had never heard of such a thing as taking a video trial deposition subsequent to a discovery deposition. Indeed, defense counsel of lengthy experience had never engaged in the taking of a video deposition, subsequent to the taking of discovery depositions, in all his years of practice and was dumbfounded at such a request.

In an attempt to lessen the "burden" on the defendants, the plaintiff offered to pay for the expenses of the corporate security counsel to come to Oklahoma City for either live testimony or video trial depositions. No luck. Faced with no other alternative, the plaintiff issued Subpoenas and Notices for the video trial depositions of the corporate security personnel, to be taken in their home venues. Unfortunately, the assigned federal judge was of the minority federal jurists maintaining the position that the Federal Rules allow for only one (1) deposition. No video trial depositions.

A side note, by the end of the third day of trial, the defense determined that they were indeed going to bring their corporate security personnel to trial for live testimony for the defense's case in chief. Seeing that they were faced with a situation of the plaintiff putting on their testimony by deposition, in chief, and then also having the opportunity to cross-examine them live, the defense suddenly chose to allow the plaintiff to put the corporate security personnel on in the plaintiff's case in chief. This became moot, as the defendants settled the case after four days of trial.

Nonetheless, this defense tactic forced plaintiff's counsel to expend multiple, wasted hours in preparing for the defendants' corporate security personnel to be presented by deposition. This was very costly in terms of hours wasted.

IV. LOSE THE VIDEO.

The Oklahoma City Police Department, to its credit, created very detailed reports of all aspects of its investigation. Among its reports was a detailed report of a follow-up visit with Mall security personnel on the day following the attack. As a part of that report, the reporting OCPD officer recited that he had observed viewing a video recording of the assailant hiding under an escalator until the plaintiff passed, at which time the assailant directly her out of the Mall. The fact that an interior Mall security camera focused on the area under the escalator was confirmed during deposition of one of the Valor's security officers. The video was apparently never seen again, and was definitely never turned over to the plaintiff.

V. "GANGS" VERSUS "YOUTHS."

After multiple depositions of Mall and/or Valor personnel, it became clear to plaintiff's counsel that General Growth Properties and General Growth Management have instituted a policy of referring to gangs as "groups of youths." Throughout the depositions, the testimony was the same, i.e., "we don't have a gang problem at Quail Springs Mall." Rather, Quail Springs Mall simple had occasions when large groups of youths were on the property. Similarly, the pertinent Incident Reports, except when a security officer made what appears to plaintiff's counsel to be a mistake, reflect no reference to gangs or gang members. Rather, the consistent language is "groups of youths."

Lest there be any mistaken perception, the "groups of youths" at Quail Springs Mall included many times when groups of 15 or 20 "youths" were fighting among themselves inside of the Mall. Another time, 60 "youths" were fighting among themselves inside of the Mall. But, the most notable "group of youths" was a group of 200 fighting among themselves within the Mall and the parking lots. It took a Oklahoma City Fire Department hook and ladder team (which Mall personnel said just happened to be on the property) to clear the area by spraying the 200 "youths" with high pressure water hoses.

VI. GGP AND GGM *"DAUBERT"* DEFENSE COUNSEL'S OWN FIRM CLIENT.

A. Plaintiff's counselor/therapist was, by pure coincidence, a client of defense counsel's law firm.

B. The counselor's mother was also a client of defense counsel's law firm.

C. The relationship of plaintiff's counselor to defense firm is known to defense counsel.

D. Regardless of defense counsel's attorney-client relationship with the plaintiff's therapist, defense counsel filed and vehemently pursued a *Daubert* motion to exclude the plaintiff's therapist from giving expert opinions at trial. In so doing, defense counsel publicly attacked the credibility, integrity and methodology of his firm's own client. (Somehow, the Court found no violation of ethical, professional standards due to the defense firm's creation of an electronic information barrier between GGP's counsel and the attorney actually representing the therapist. The Court overlooked the point that information sharing and confidentiality was not at issue. The ethical/professional violation was that of doing harm to the interests of an attorney's own client. The Court would not even allow plaintiff's counsel to comment on the pre-existing relationship between the therapist and defendant's counsel, regardless of the therapist being attack by her own retained law firm.)

In its Reply to the plaintiff's Response to the *Daubert* motion, GGP's defense counsel even attached an Affidavit from the actual attorney representing the therapist within the defense firm telling the world the nature of the confidential work the defense firm was performing for the therapist.

VII. MOTION FOR SUMMARY JUDGMENT.

A. Answer and Affirmative Defenses.

1. General Growth Properties owns the Mall (including the parking areas).

2. General Growth Properties operates the Mall.

3. General Growth Management is the manager of the Mall, including parking areas.

B. Responses to Requests for Admissions.

1. General Growth Properties owns the Mall.

C. Sudden Revelations.

1. Sudden discovery of new a document, i.e., a Deed to Sears for a portion of land including the parking area where the attack occurred (without mentioning lease back to General Growth Properties).

2. Sudden discovery of a new witness (who just happens to be in-house corporate counsel for General Growth Properties and General Growth Management).

3. Motion for Summary Judgment on the last day with a new defense, which is contrary to GGP's and GGM's stated position throughout the litigation.

4. General Growth suddenly takes the positions that it is not responsible for security in parking area on which Sears holds title (without mentioning a ground lease back to GGP) and, therefore, security is not the responsible GGP or GGM.

5. Force plaintiff to respond to Motion for Summary Judgment.

6. Force plaintiff to file Motion to Strike.

7. No regard for a sanctions, again.

    a. Frivolous and bad faith findings.

    b. GGP would force defense counsel to pay sanctions.

8. Use defendants' security expert to defeat the Motion.

Carol L. Hepburn, P.S.[1]
Savage Law Firm
2722 Eastlake Avenue East, Suite 200
Seattle, WA 98102
Phone (206) 957-7272
carol@hepburnlaw.net

Securing Restitution for Victims of Child Pornography

The distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children.... [T]he materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation. New York v. Ferber, 458 U.S. 747, 759, 102 S.Ct.

[1] Seattle native Carol L. Hepburn has been a practicing attorney in Washington State since 1978. A graduate of Reed College (1975) and the Lewis and Clark Law School (1978) in Portland, Oregon, Ms. Hepburn has been a lifelong resident of the Pacific Northwest. Her father served as a political appointee in the administrations of four succeeding presidents in the Social Security Administration, Health Education and Welfare Department, and the Administration on Aging. Her mother was a life-long federal civil servant in agencies from the Office of Economic Opportunity to the Agency on International Development. Following law school graduation, Carol was admitted to practice in the State of Washington in 1978, and worked in the King County Prosecuting Attorney's office for four years. Her work as a prosecutor included sex crimes prosecutions, fraud, juvenile cases, felony trials and felony appeals. After leaving the prosecutor's office, Carol started into private practice. Her private practice has focused on personal injury and wrongful death cases. A large part Carol's practice has involved maritime and admiralty cases. Special federal laws and maritime cases protect injured seamen, and Carol has utilized these protections in representing injured fishermen, merchant mariners, ferry workers, tug crews, and others. One of Carol's close family members was a long-time commercial fisherman on the West Coast fishing for rock fish and tuna. Carol has prosecuted maritime cases arising in Washington, Oregon, Alaska, and Texas. Since her early days as an attorney, Carol has also had a special interest in the protection of crime victims. In her work as a civil lawyer, Carol has assisted crime victims in recovering substantial restitution as well as civil money damages. Her clients in this regard have included rape victims, sex abuse victims, victims of child sex abuse, and victims of child pornography. Currently, Ms. Hepburn is one of only a few lawyers who are leading a national effort in the U.S. to recover substantial damages for victims of child pornography. Her client is the subject of one of the most widely distributed series identified to date. Carol was recently featured discussing this case on KING 5 Seattle news: Victim in Child Porn Videos Now Seeking Justice and in the ABA Journal article: Pricing Amy: Should Those Who Download Child Pornography Pay the Victims? In 2003, Carol was invited to be among 48 lawyers chosen from across the United States to attend Gerry Spence's Trial Lawyers College in Wyoming. A unique month-long intensive educational experience, the Trial Lawyers College brings the best trial lawyers in America to teach and practice proven techniques and strategies. Carol was selected to be on the alumni board of the Trial Lawyers College after her graduation and has stayed active in the network of impressive lawyers who are counted among the college's alumni. In 2003, Carol was admitted to practice in Oregon, and has also practiced in Oregon since then. Her practice there has been primarily in conjunction with that of her husband, J. William Savage, who has practiced in Oregon for 32 years. Carol and her husband also represent the victims of medical negligence cases. Mr. Savage has been actively engaged in representing plaintiffs in medical negligence cases for over 20 years in Oregon and Washington. In 2008, Carol and Bill were successful in obtaining the largest malpractice settlement in Oregon's history – exceeding $11 million – for an historic case involving a pediatric brain injury.

3348, 73 L.Ed.2d 1113 (1982)

Trafficking in child pornography has risen exponentially. The number of images traded is going up; the violence depicted is going up; and the age of the victims is going down.

If you have the opportunity to represent a victim of child pornography, take it. Representing these victims is challenging, but compelling, work. The injuries involved are unique. The clients are in great need of assistance; the help that you can provide them is very worthwhile. You can provide hope, affirmation, and the financial means to obtain needed treatment. If we are successful in the current work there will be many more victims of child pornography seeking legal counsel for assistance in obtaining restitution and compensation for their devastating injuries.

This work came to me through serendipity. I had been totally unaware of the vast network of consumers of internet child pornography, and knew nothing of the government's offensive on internet crimes against children through Project Safe Childhood. It all started with a phone call, and a feeling that what the potential client was describing wasn't right; there had to be a remedy.

Background

The term "child pornography" is, in reality, a misnomer. The term leaves open the possibility that there was some voluntariness in the behavior exhibited, that the pictures may be only titillating, "glamour" or modeling photos of overdressed little girls, the product of a creative digital effort with morphed animation, or adults posing as children. In truth, these are crime scene photos that depict graphic child sex abuse. There is nothing voluntary or glamorous about them. These are products of real crimes, and their possession, receipt, and distribution are separate, and very real, crimes with real victims.

Images may depict a child in lascivious poses, child on child sex acts, child masturbation, adult on child sexual penetration, or even bestiality. These crime photos depict rape and sodomy, bondage and torture of teens, tweens, school age children, toddlers and infants. While in some of the images the child may be complacent, what goes on off the screen is often a different story. Many images are the result of ongoing victimization that escalates over months or years.

Government reports indicate that by the mid-1980s child pornography offenses had decreased markedly due to the difficulty of producing, reproducing, and distributing the images. With advances in digital technology and widespread use of the internet, however, the market for child porn "exploded" as online communities sprang up facilitating communication between child porn offenders and normalizing their conduct. (See the website of the Department of Justice Child Exploitation and Obscenity Section *http://www.justice.gov/criminal/ceos/subjectareas/childporn.html* for an overview of information about child pornography.)

The largest number of convictions appears to be for downloading or trading such images. Large volumes of images are obtained by offenders through peer to peer software which searches

the web anonymously for images based upon search terms commonly used by pedophiles seeking these images.
These include terms such as "pthc" for pre-teen hardcore, "lolita," short-hand descriptions of sex acts coupled with the age of the child depicted, or the name of the series of images sought.

"Series" are collections of images, all of the same child. Online pedophiles collect these like one would collect sports trading cards. Images may be stills, or videos. The videos are most often very short--less than a minute, or a few minutes in length. Sometimes a possessor will put together a compilation of stills or videos into a single file in order to aggregate the images and lengthen the viewing time.

The nature of the crimes related to child sex abuse images is voyeuristic.
It is as if the viewer sits in a darkened theatre and watches the crime taking place on the stage. The voyeur shares responsibility with the producer of the image. The production would not occur but for the audience. In my client's case the producer of her images took orders from his fellow pedophiles for the type of "drama" they wished to see. He then scripted it out ahead of time and dressed her up to fit the part. If she did not play it well, he made her do it over and over again until she "got it right."

Child sex abuse images are used by some to groom other children for abuse. It has been reported by victims that they were shown images of other children in sexualized settings prior to their own abuse, ostensibly in order to "normalize" the behavior. For some, a significant part of their injury is the guilt and fear that their images may be used by a pedophile to groom and abuse another child.

These images are used by some parents to advertise online for prostitution of their own children. The predators who respond will then sometimes produce more images while sexually abusing the children again. In some cases undercover agents successfully lure predators to their arrest using this ploy.

In addition to the spread of the images through peer to peer software, they may be posted on private, members-only bulletin boards, passed through
IM chats, sold on commercial websites, or passed via direct email.

Representation

1. Making the connection with the client:

More than other types of cases, the shame and humiliation that accompanies being the subject of distributed child sex abuse images puts multiple overlays on communication with the potential client. Connecting with the client is a delicate task. Because this is a current, on-going crime, the victim is vulnerable to continual re-traumatization. Likely betrayed by a father, uncle, or other close person in their family, this potential client may have trouble coming to trust a legal professional. If you are of the same gender as the abuser, it would be a good idea to have a legal assistant of the opposite gender take part in the initial meeting. If the attorney is male and the

client/victim female, you may find it helpful to have a female paralegal be the primary contact for the client.

Child exploitation crimes have additional dynamics to them beyond the trauma that is suffered by any child sex abuse victim. Posttraumatic stress disorder, insomnia, anxiety, dissociative disorder, eating disorder, somatoform disorder, non-delusional paranoia, and depression are all diagnoses that you may see with this type of victim. Non-delusional paranoia was one diagnosis I had not come across in my practice before. These victims have good reason to be presently concerned and hypervigilent about being sought out by people with bad intentions. My client was stalked by an offender who searched for her online for five years. He finally found her via My Space and her online friends. He sent her emails saying that he wanted to make pornography with her; he chastised her and called her names for reporting her abuser. He was convicted of stalking and transporting child pornography. He was sentenced to five years and twenty years to run consecutively, as well as ordered to pay restitution.

Some victims report being constantly on the lookout for cameras in any venue they may visit. They may have continued panic attacks when in a group of unknown people for even a relatively short period of time in what may appear to others to be a perfectly safe situation.

Unfortunately, some victims have had their legal names connected with the name given to them in the online world. If a search of the legal name is made of the web, among the hits that are listed are long blogs with dialogues about whether she enjoyed the abuse, what she is doing now, whether she is more or less attractive now than she was as a child, the propriety of her reporting her father's abuse, as well as comments extolling the entertainment virtues of the videos of her abuse. It is disgusting, and to her, horrifying. Worse yet, this is the material that a prospective employer, university, or casual acquaintance might find about her should they "Google" her name.

If the potential client has family members who are supportive, include those individuals to the extent you are able consistent with maintaining the privilege. They may be good contacts and sources of information during times when the client is going through emotional turmoil as your representation continues. At the same time, as with many cases involving currently vulnerable clients, be wary of the intentions of family members and close friends lest they be looking to take further advantage.

As much as possible, once you accept a client, give the client the opportunity to make choices and have input in their case. This is a fine line, but recognize that this client has been stripped of all control of critical aspects of their life. To the extent that you can offer choices, and let the client make important decisions for themselves, you will be providing an important affirmation of the quality of an appropriate professional relationship.

2. Assume the burden of the notices:

Jurisdiction of the crime may be in federal or state court. For federal criminal cases, victims benefit from a uniform notification system. There is no similar system for state cases of which I'm aware. (Although I understand that the State of Florida has such a system, I've not yet

been the recipient of any of their notices.) The comments that follow are, therefore, limited to federal cases.

With the client's permission, notices from the US Department of Justice (DOJ) Victim Notification System (VNS) should be sent to you.

The DOJ, on its website, describes the VNS as a joint effort between the FBI, Postal Inspection Service, US Attorney's Offices, and the Federal Bureau of Prisons for those victims who choose to participate to keep them informed of the status of cases which involve them. Once a victim is identified in a particular case, the VNS provides automated notices to victims of the fact of investigation, charging, pending hearings, trial and sentencing. After conviction, a victim is also informed of the status of inmates within the Bureau of Prisons and projected release dates.

A victim might receive six or more notices for a single case. Sometimes it is less if the victims are identified only late in the life of the case. In either circumstance, the notices, while serving a laudable purpose, also remind a victim that there are more and more people viewing their abuse images, and this reactivates the trauma and feelings of violation. Many victims choose not to receive the notices so that they might forget the problem. For others, paradoxically, the anonymity of the crime makes receiving the notices a good thing, a way to be safe through knowing the identity of the people seeking the child abuse images.

A meaningful benefit of your representation can be accomplished at the outset by transferring receipt of notices to your office. If your client is the subject of a "popular" series, this may mean ten to thirty notices a day coming to your office. You may opt to receive the notices via email. I have found though that there is not an exact duplication of the email and "snail mail" notices, and there is often one received in one manner that is not received in the other. I have opted to receive notices both ways, and to set up a separate Gmail account for the email notices, which is only used for this purpose.

3. Mechanics of Obtaining the Decision on Restitution

In general you may work through the prosecutor or the probation officer. The probation officer assigned is not readily ascertainable while the prosecutor assigned is easily determined. For this reason I have most often submitted my restitution requests to the assigned prosecutor and/or the office's victim-witness coordinator. In the vast majority of cases, no appearance is needed by the victim's attorney.

Many restitution orders are entered by agreed resolution pursuant to negotiation with the defense attorney by the prosecutor or the victim's attorney. Depending on the preference of the prosecutor I have negotiated directly with defense counsel, or let the prosecutor take the lead.

Submit your materials as early as you can. If, by ten (10) days prior to sentencing, the amount of claimed restitution is not presented to the Court, the Court may bifurcate the restitution issues and provide for a separate determination so long as it takes place within 90 days after sentencing. 18 U.S.C. §3664(d)(5).

The Crime Victims' Rights Act (CVRA), 18 USC § 3771 provides that a victim has the right to notice of court proceedings, to full and timely restitution, to confer with the Government attorney, and the right to be treated with fairness at both the trial and appellate levels of proceedings. I invoke this statute routinely in my communications with the Assistant US Attorneys. Sometimes we find that actions have been taken without notice to us that negatively affect our client's restitution rights. We have protested arguing a violation of this statute and sometimes been successful in affecting a change of position.

4. Working up the case---REDACT ALL INFORMATION IDENTIFYING THE VICTIM in anything submitted.

The nature of the harm is in large part a violation of privacy. These victims are sometimes stalked by pedophiles. Do nothing that would add to any revelation of your client's identity or location.

A. Victim Impact Statement (VIS).

i. The client's own words. The VIS must be genuine. Consider how articulate and how in touch the client is with their feelings. Even with an intelligent and articulate person, drawing out the feelings and experiences to put into words is a difficult and very painful process. You may want to have the client work with a counselor or psychologist to bring out the feelings and to explore the breadth of the impact this has had on them. This is not a document for an attorney to craft. You would never want the authenticity of the information and emotions questioned in any way.

ii. Provide the VIS to the Child Exploitation and Obscenity Section of the Department of Justice (CEOS.) Once a victim's images are identified in any particular federal prosecution, CEOS sends out the most current VIS on file to the US Attorney's office or the local district attorney prosecuting the case. This is now done via automated process with an online application accessible from a DOJ network.

Neither CEOS nor the FBI give any direction or assistance to a victim or counsel on the content of a VIS, as they believe this would "taint" the process and content.

CEOS states that they track the restitution requests that are submitted. As of the writing of these materials I was informed that CEOS is aware of only four victims nationwide who routinely submit requests for restitution. I personally am aware of one additional victim, making a total of five nationwide.

Any VIS for a child pornography victim may be submitted via hard copy to:

Daniel Mestas
US Department of Justice
Child Exploitation & Obscenity Section
1400 New York Ave., NW, 6th Floor
Washington, DC 20530

Or via PDF to: Daniel.Mestas@usdoj.gov.

Mr. Mestas advises that when submitting a new VIS to his office he would appreciate knowing whether the victim is from an already identified series, whether they desire to be notified of any new prosecutions involving their images, whether they have any preference as to which jurisdictions may use their statements, i.e., state and local only, federal only, or all jurisdictions.

If you end up representing a victim over an extended period of time, consider updating the VIS so that the court knows the current views and experience of your client.

B. Documenting expenses eligible for restitution.

Federal cases (per 18 U.S.C. § 2259): The court is mandated to order the defendant to pay "the full amount of the victim's losses." The "full amount" is defined as including

Medical, psychiatric, or psychological care;

Physical and occupational therapy or rehabilitation;

Necessary transportation, temporary housing, and child care expenses;

Lost income; Attorneys' fees, as well as other costs incurred; and,

Any other losses suffered by the victim as a proximate result of the offense.

State restitution statutes will vary, but likely have provisions in a general restitution statute similar to §2259.

C. Forensic evaluations.

i. Psychiatric/Psychological assessment. The report on the assessment of your client will potentially be submitted to every US District

Court across the nation. It may be quoted in published opinions in multiple cases. It is impossible to overstate how important the quality and integrity of the report must be. We all strive to present the best expert testimony; this is one circumstance in which that consideration must be paramount.

As with many cases, the process of evaluation can be re-traumatizing.
In these cases, remember that the client likely may suspect that every man they meet or see may be a downloader of their images of abuse. Finding an evaluator with the experience and depth of understanding to negotiate this minefield is essential.

You may find the list of symptomology related to the spread of the images is long and varied: insomnia from fear of going to sleep and losing control, nightmares and/or night terrors, shame and embarrassment, reactivation of trauma-related reminders by many more daily or frequent occurrences, distrust particularly of men and/or authority figures, depression, anxiety, anger, academic or occupational dysfunction, relationship dysfunction, dissociation, substance abuse, and/or promiscuity. Consider the need for an assessment of the need for medication, such as for remediating chronic insomnia, or assisting with depression or anxiety.

This client's condition may be more refractory to treatment than a victim who has suffered a time-limited sexual abuse. The continued existence of the pictures and their use by downloaders for personal pleasure and potential grooming of other children for abuse keeps the client's past abuse alive and present for them. Such victims face the potential of a lifetime of victimization given the indefinite distribution and re-distribution of their images.

Future anticipated expenses may be claimed. *United States v. Danser*, 270 F.3d 451, 455 (7th Cir. 2001).

ii. Medical assessment (physical manifestations of emotional distress). Obtain primary care, specialist care, counseling records, school and employment records. The victim will likely have one or a number of physical manifestations of the emotional stress they have endured. Gastrointestinal problems, migraine headaches, dermatological conditions, sleep disturbance and other medical conditions may be tied to the anxiety and other mental health consequences of the proliferation of abuse images online. Consider whether an assessment by a physician of any such physical conditions is appropriate.

iii. Medication, transportation, and/or childcare expenses should not be forgotten. Expenses such as these, which are incident to receiving treatment, are appropriate to include in restitution requests.

iv. Vocational assessment. Building on the psychological evaluation, and considering any medical limitations that may be documented, a vocational evaluation may identify important accommodations needed for education or the work place. Your client may suffer from anxiety or panic attacks such that they are not able to attend regular college or vocational classes. Your client may be able to only take a limited number of classes at a time. They may not be able to work while in school or in a setting which involves meeting the public. Such circumstances will require extra time to complete a post-secondary education, and limit job opportunities.

A teenager may not be able to attend public school, or may not be able to do so on the same schedule as another child without the same burden. Private school or outside tutoring may be necessary, all with the attendant cost.

In either circumstance, educational and vocational counseling may be necessary to help the client choose a path that will not unnecessarily activate the underlying emotional trauma. Your client may have only very limited occupational options, if any.

v. Lost past and future wages and/or income capacity. With the need for extra time in schooling and the avoidance of certain occupations, the client will have substantial wage loss. Be sure to have your psychologist consider the probability of possible breaks in employment due to the encounter of intolerably stressful work circumstances, emotional decompensation, or emotionally mediated illness.

vi. and any other expenses proximately caused.

D. Attorneys fees and expenses.

Keep time records, and documentation of your costs. I submit with my restitution requests a declaration similar to what would be used in any case with a fee-shifting statute. Costs may include travel expenses to meet with client, expert fees, records fees, PACER fees, data base search fees, and other costs normally associated with documentation of damages.

E. Material on the Web.

Some victims have their legal name associated with the series name of their images. If this is the case, there may be websites online which reference their legal name and the fact that they are the subject of circulated sex abuse images. This is very, very devastating. Printing such pages, then redacting the legal name, and including these pages in the restitution package portrays clearly the burden that the victim carries in attempting to interact in society.

F. Current literature from the social science, medical, psychology, or victimology journals.

Because the injuries suffered by these victims are only now being documented and discussed, there may be judges who are not familiar with the unique and far-reaching aspects. Bolster your submission with independent authority. Consider:
Gelber, Alexandra, Asst. Dep. Chief, CEOS USDOJ, "Response to a Reluctant Rebellion" (copy in Appendix) found at http://www.usdoj.gov/criminal/ceos/ReluctantRebellionResponse.pdf

Jenkins, P. (2001) Beyond Tolerance: Child Pornography On The Internet. New York, N.Y.: New York University Press;

Klain, E., Davies, H. Hicks, M.A., (March, 2001) Child Pornography: The Criminal Justice Response, Publication of the American Bar Association and the National Center for Missing and Exploited Children;

Ost, Suzanne, CHILD PORNOGRAPHY AND SEXUAL GROOMING, (Cambridge University Press (2009).

G. Transcripts as available.

If your expert testifies at any time it would be helpful to obtain the transcript for submission in later cases.

H. Transmittal letter-----Persuasive prose, with facts, case law, and argument.

Be mindful of the volume of material you are submitting. Summarize your facts, but tell the client's story emphasizing those experiences and symptomology your client has had which are particularly related to the existence of the internet pornography. Perhaps the client has fears related to online predators, has had to leave a job, or school because of anxiety related to the images being online. Has there been an incident with a teacher or other authority figure in the client's life that is reflective of the client's suspicion that this person may be a downloader. Such incidents cause disruption in an otherwise normal path of development and support the need for therapy or extra time in school.

These victims may drop in and out of therapy. If the client lives outside a major metropolitan area it may be difficult to find an experienced therapist. A large number of clinicians feel that they are not fully prepared to treat such victims.[2] Let the court know of the client's current struggles and current accomplishments as well.

Email a .pdf of the letter and attachments to prosecutors, victim – witness specialists, and/or probation officers.

I. Additional Issues

Question---to submit on every case or to be selective?

Depending on the volume of notices received it may be simplest to submit a request on every case your client is involved with. This avoids the time spent in looking up the docket and trying to make a reasoned selection. If the volume is great then it would likely be difficult to submit on all cases. Being selective would then make sense. You may want to do that based upon the egregious nature of the crime, the number of images of your client involved in the case, the history of orders being entered in the jurisdiction, or any number of factors.

Your status in the criminal prosecution.

You are a non-party. As a non-party you may work through the prosecutor and/or the probation officer. You may submit requests and documentation to prosecutors and/or probation officers and negotiate agreed resolutions though them or directly with defense attorneys. Intervention to appear as a party at the trial court level has not, to this point, been needed as a routine or even infrequent step at the trial court level in my practice. On appeal it is a different matter, as explained below. However, see *United States v. Paroline*, 672 F. Supp. 2d 781 (E.D.

[2] As reported to me by Sharon Cooper, M.D., Adjunct Professor of Pediatrics, Univ. N.C. Chapel Hill School of Medicine, and as referenced in Weiler J, Haardt-Becker A, & Schulte Simone. (2010). Care and treatment of child victims of child pornographic exploitation (CPE) in Germany. Journal of Sexual Aggression. Vol. 16, No 2, pp211-222.

Tex. 2009), in which the victim intervened at the trial court level. Restitution was denied in this case. The victim filed both a petition for writ of mandamus and direct appeal.

Recordkeeping.

Keep track of submissions made and payments received. I have separate Excel charts on submissions pending, judgments and receipts received, and time spent. While not on a chart, I have a folder/directory of all submissions that have been denied or voluntarily withdrawn. Any court may ask you for specifics on these matters. I don't guarantee 100% accuracy when reporting. Many times I am not apprised of orders being entered which grant or deny our requests. We are notified of most of them as they come through on VNS notices. .However, the notification system to victims is fallible, so I hesitate to make absolute statements to a court.

Your representation may involve your own testimony.

Federal prosecutors on occasion request live testimony from experts and/or the attorney. As an attorney fact-witness, the questions posed have provided an opportunity to describe the assemblage of the information supporting restitution, the client's current circumstances - mental health counseling, working or not, being in school or not, and some of the challenges the client faces. Cross examination has included attempts to point out to what extent the client does or does not know about the individual defendant, or the defendant's offense, the amount of restitution received, and that I am a "greedy trial lawyer." In state prosecutions we have appeared as a representative of our client at sentencing and stated our sentencing position, argued for restitution or a compensatory fine, and read our client's victim impact statement along with those of her mother and stepfather. In many counties there have been few if any prosecutions of child pornography crimes, and fewer cases in which victims appear. You will likely be breaking new ground.

J. Entry of Order.

Typically the order providing for restitution is included in the standard Judgment and Commitment. Alternatively, it may be by separate order pursuant to negotiated stipulation or after a separate restitution hearing;

Payment may be negotiated to be payable at sentencing. Otherwise, the standard wording of the Judgment and Commitment makes financial obligations payable "immediately." This allows the U.S. Attorneys' offices the most flexibility in taking collection action on the order. If there are no assets to immediately satisfy the obligation, the payment may be made over the period of incarceration and or post-release supervision.

Payment will most often be required to be made through clerk's office. A minimum 30-day delay in reissuing a check to the victim will occur;

Provide specific payment information to the prosecutor and/or the probation officer such as "paid to Jane Doe Attorney in trust for 'Sally'". The Judgment and Commitment may simply provide for payment to "Victim A." In this case, call the clerk and make sure that they have your

specific payment information. Do this at or near the time of entry of the judgment and follow up with a letter.

K. Potential for conversion of fine to restitution post sentencing.

In one case I did not receive any notice of the proceeding until the week of sentencing. By the time I called the prosecutor about this, sentencing had just occurred. The court had imposed a fine of $12,500.00 that the defendant had been able to immediately satisfy. We agreed with the prosecutor to submit a motion to convert a portion of the fine to restitution.

5. Selected Statutes and Case Law.

Quoted extensively in the relevant Congressional reports as well as case law, the opinion in *New York v. Ferber,* 458 U.S. 747 (1982), describes the long term effects upon victims whose images of childhood sexual exploitation are circulated:

The use of children as subjects of pornographic materials is very harmful to both the children and the society as a whole. It has been found that sexually exploited children are unable to develop healthy affectionate relationships in later life, have sexual dysfunctions, and have a tendency to become sexual abusers as adults.

Pornography poses an even greater threat to the child victim than does sexual abuse or prostitution. Because the child's actions are reduced to a recording, the pornography may haunt him in future years, long after the original misdeed took place.

Ferber, supra, 458 U.S. at 758-60.

In re Amy Unknown, 591 F.3d 792 (5th Cir. 2009), was the first Circuit Court of Appeals decision to consider issues raised under 18 U.S.C. §2259. The decision reversed a denial of restitution by the court below, and held that the statute mandated a grant of restitution in the full amount of the victim's documented losses jointly and severally against a defendant convicted of a child pornography offense. Contrary to the argument by the defendant in that case, the appellate court found that there was no blanket proximate cause requirement in the statute. This opinion was later vacated, and we now await a decision on the rehearing *en banc.*

Possessors, as much as producers and distributors, of child sex abuse images are an integral part of the world market of these images. But for the audience, the images would not be produced. Distribution is often a bartered transaction between two or more collectors. As asserted by the 11th Circuit Court of Appeals in the second appellate opinion, *United States v. McDaniel,* 631 F.3d 1204 (11th Cir. 2011),

Like the producers and distributors of child pornography, the possessors of child pornography victimize the children depicted within. The end users of child pornography enable and support the continued production of child pornography. They provide the economic incentive for the creation and distribution of the pornography, and the end users violate the

child's privacy by possessing their image. All of these harms stem directly from an individual's possession of child abuse images.

McDaniel, supra, at 1208. *McDaniel* affirmed an apportioned award of restitution which included an amount for attorneys fees specific to that individual case.

18 USC §2259 (copy in Appendix) was passed as part of the Violence Against Women Act, and amended as part of the Mandatory Victims Restitution Act in 1996. This statute is specific to victims of child pornography offenses.

Section 2259 mandates reimbursement of "the full amount of the victim's losses" and in so doing seeks to address the devastating harms visited upon a victim of child pornography offenses. It not only uses the word "shall" with regard to the order to be issued by the court, but also, later in the body of the statute, provides "*Order mandatory.* The issuance of a restitution order under this section is *mandatory.*" (Emphasis added.) 18 U.S. C. §2259 (b)(4)(a).

The statute enumerates five categories of losses in its definitional section, 18 USC §2259 (b)(3)(A – E), and the provides a "catch all" in sub section (F) for "any other losses suffered by the victim as a proximate result of the offense." The application of this proximate cause language has been the subject of many varying court opinions and is touched on below. Copies of opinions currently extant from the various Circuit Courts of Appeal are included in the Appendix.

Section 2259 is a remedial statute intended "to make whole . . . victims of sexual exploitation." *United States v. Danser,* 270 F.3d 451 (7th Cir. 2001). See also *United States v. Julian,* 242 F.3d 1245 (10th Cir. 2001).

6. Current federal appellate issues---Strange bedfellows.

Since the beginning of our work on behalf of our client I have found the majority of front line prosecutors to be supportive of efforts to obtain restitution for these victims. For two and a half years we made requests and received orders and payments with prosecutors presenting our materials to the courts, submitting briefing on our behalf and making arguments in favor of restitution. Then in November 2011, purely by chance, I learned through a colleague that the Government had submitted a brief on appeal several weeks earlier in which it reversed this position. The district court, upon the urging of the prosecutor in charge at the trial level had entered an order awarding over one million dollars in restitution to our client. On appeal, without any notice to the victim, the Government's brief agreed with the defense that the award should be vacated and remanded. Since that time, we have learned of and moved to intervene in a handful of other cases where the same "about face" has taken place. In one case pending currently in the Circuit Court for the District of Columbia, the Government and the victim are in somewhat compatible positions once more.

The case law on restitution for victims of child pornography offenses is in a state of flux. The 5th Circuit Court of Appeals is the only circuit to have held that each defendant should be ordered to pay the full amount of the victim's losses as is provided by §2259. The Ninth and Second Circuit Courts of Appeal have rendered decisions that pose a difficult standard for the victim to meet. *See United States v. Kennedy,* 643 F.3d 1251 (9th Cir. 2011), and *United States v.*

Aumais, 656 F.3d 147 (2d Cir. 2011). (*Kennedy*, for example held that the Government must show a causal connection between the specific defendant's conduct and the victim's losses such that his conduct caused her losses or that she could have avoided certain losses had the defendant not committed his offense.) All other circuits, with the exception of the Third Circuit, have issued opinions that pose challenges for the victims but generally result in an apportioned award of a few thousand dollars.

A. Standing.

The victim is not a party to the criminal action. You receive no notice of any appeal other than a generic and non-specific notice through the VNS system that an appeal has been taken. Conversely, (perversely,) the posture we have found ourselves in, is one where the trial court has granted restitution to the victim with the Government's support, and the Government then flip-flops its position to join forces with the criminal defendant and argue for vacation and remand on appeal.

1. Writ of Mandamus

Upon a denial of restitution the Crime Victims' Rights Act, 18 U.S.C. §3771(d)(3) (2004), provides a victim a right to petition the Court of Appeals for review. Recently in xxxx the Ninth Circuit, reviewing on a writ of mandamus, held that the trial court erred in failing to award any restitution to the victims. On rehearing the trial court awarded a reduced apportioned amount of restitution. The victims again filed a writ, but this time the writ was denied with a brief holding that the district court did not abuse its discretion. A petition for certiorari will likely be filed.

2. Intervention or Amicus

There is no provision in the Federal Rules of Criminal Procedure for intervention. Several appellate criminal cases have allowed for intervention by third parties. See e.g. *United States v. Perry*, 360 F.3d 519 (6th Cir. 2004), and *Doe v. United States*, 666 F.2d 43, 46 (4th Cir. 1981).

On appeal, we have moved to intervene, albeit unsuccessfully, in defense of the judgment below in those cases where the government has reversed its position on the legal arguments supporting the victim's restitution award and, for example, confessed "plain error" below to the court on appeal. We argue that the crime victim is the real party in interest, having had the trial court enter a substantial award in her favor (over one million dollars in two cases and over three hundred thousand dollars in a third.) As such, she has a "legitimate interest" in the outcome of the appeal. She has a clear "right" to restitution, which the courts are obligated to protect. We have argued that to deny her right to intervene deprives her of due process in that the Government and the defendant would be allowed to deprive her of a significant asset without a right to be heard. The Government argues that there is no right for the victim to appeal; that victims are limited to the writ of mandamus in order to obtain review. The Government has acceded in more than one case to the victim appearing as an amicus, and in that position the victim has been allowed amounts of time at argument varying from a very small fraction to an equal share with the Government and defendant.

(Copy of Victim's Motion to Intervene in *United States v. Burgess*, 4th Circuit Court of Appeals provided in Appendix.)

B. Proximate Cause

The controversy which has arisen concerning restitution for victims of child pornography offenses centers upon whether or not the victim must show that each individual defendant has proximately caused the victim's harm, and then, if so, whether the victim's losses must be apportioned, or whether an individual defendant is jointly and severally liable for the full amount of the victim's loss. Because so many individuals, separately prosecuted and unknown to the victim at the time the offense is committed, contribute to an individual victim's losses, the facts of these cases lend themselves to the argument by a defendant that his particular offense does not have a sufficient nexus to the victim's harms to warrant imposition of restitution. They argue that because the victim did not know the defendant's name or of his actions there is no way that he could have contributed to the victim's loss. Even if the individual defendant is question had never committed the crime, the victim would still have the same amount of harm and expenses, and so there is no basis for imposing restitution.

The logical extension of this argument would be that, because so many are responsible for contributing to the victim's harm, no one defendant should be responsible for any portion of the harm. Clearly, this is untenable and not what Congress intended.

The clear wording of §2259 requires the court to impose an order for payment of "the full amount of the victim's losses." In drafting the statute in this way Congress implicitly adopted the principal of joint and several liability for all offenders convicted of possessing, receiving, or distributing a victim's images. In this way, the wrong-doer, not the innocent victim, bears the burden of apportioning the appropriate amount of responsibility among a myriad of defendants.

"Rule of the last antecedent." which holds that a limiting clause or phrase should ordinarily be read as modifying only the noun or phrase that it immediately follows.

In subsections (A) through (E) of §2259(b)(3) Congress has defined the "full amount of the victim's losses" to include a series of different types of expenses. The final subsection, (F) provides for reimbursement of "any other losses suffered by the victim as a proximate result of the offense." Courts which have read a proximate cause requirement to apply to all of the claimed losses, have read the statute backwards to apply the requirement of this last subsection back up through all those, which precede it.

Other courts have found distinctions in the wording and punctuation of this statute to compel the conclusion that "proximate result" is a phrase applying only to the catch-all "any other losses" contained the subsection (F). The "rule of the last antecedent" holds that a limiting clause or phrase should ordinarily be read as modifying only the noun or phrase that it immediately follows.

C. "Extreme Apportionment."

Of late the government has come up with a highly formulaic approach to calculating the particular amount of restitution appropriate in any one particular case. They argue that, in any one case, the court should only order a fraction of the restitution amount requested. The fraction is determined by dividing the total amount of restitution requested by the number of offenders previously ordered to make restitution to the victim. This has come to be known as the "divisor" theory.

For example, by the Government's formula, if one hundred defendants had previously been convicted of crimes involving a particular victim's images, then, in the next case involving that victim's images, the defendant should be ordered to pay only one one-hundredth of the total restitution amount.

The Government argues that this approach "has many virtues." It argues that this approach recognizes that many individuals have contributed to the victim's losses, spreads those losses among those whom it is certain have in fact contributed to the losses, avoids exposing any one defendant to a disproportionately large obligation, and ensures that the victim will receive "a steady stream of incoming payments." (Government brief *U.S. v. Gamble,* No. 11-5394, Sixth Circuit court of Appeals, filed March 28, 2012.)

The theory of this approach was aptly criticized by the court in *U.S. v. Veazie*, ---F.Supp.2d---, 2012 WL 1430540 at *5, (D.C. ME. 2012)

> . . . the Government's proposed methodology for calculating restitution in this case is inherently untenable. Over time, awarding restitution based on the average of the restitution awards in past cases involving the same victim will bring down the average restitution award. In other words, if each successive restitution award is based on the average of past restitution awards, the next award will be slightly lower than the preceding award. Eventually, with enough defendants and enough restitution awards, the average restitution award will be just one penny.

In practice there are even more problems. First, many of those convicted of possessing a victim's images will never be ordered to make restitution. In my client's case, there have been many denials of her requests for various reasons. Second, many defendants ordered to pay restitution will simply not ever make a payment. They may be sentenced to so many years in prison that, by the time they are released, they will hardly be able to earn any income. They may die in custody. (This has already happened to at least one defendant ordered to make restitution to my client.) They may be deported as soon as they are released from custody. They may simply never earn any income sufficient to make the payment ordered. Thus, the assumption of a "steady stream of incoming payments" is baseless, and the formula ends up benefitting only those convicted downloaders who have the assets to make restitution and would otherwise be ordered to do so.

Further, the exact number of convicted offenders is an ever-growing number, a moving target which is not easy to keep track of. For example, the Government, in the period preceding

the argument on rehearing en banc in the Fifth Circuit in *In re Amy,* repeatedly proposed the number 150 as the denominator for the fraction in its formula. Yet, it could provide no authority for selecting that number despite repeated requests by Amy's counsel. When Amy provided her own records showing a different number the Government could not sort out the differences. The victim herself is not always apprised of the orders as they are entered and so would not be certain of the exact number either. Thus, there is no certainty of accuracy given the practical problems with the approach.

Despite the practical problems with the "divisor" theory, it has been adopted by a number of courts. Likely it is out of a desire to find a shortcut for the difficult problem faced when it is decided that the award must be apportioned.

D. Right to confer and to be treated with fairness

The CVRA provides generally for restitution for victims of crime—"full and timely restitution as provided in law." (18 USC §3771(a)(6)) (copy in Appendix.) Additionally, within the rights accorded victims by the CVRA are the reasonable right to confer with the attorney for the Government (§3771(a)(5)) and also the right "to be treated with fairness." (§3771(a)(8).)

Two victims have argued that the Government has abandoned on appeal the rights of child pornography victims to restitution on multiple occasions. Further, it is argued, this was done without notice, let alone the courtesy of conferring. The Government has also failed to advise what, if any, amount of restitution it would support in one particular case, and in another failed to substantiate the basis for the arithmetic formula put forth. Attorneys for the victims have argued that this violates both the right to confer and the right to be treated with fairness. A motion in this regard was presented to the 4th Circuit in *US v. Burgess* (No. 09-4584). (Copy in Appendix.) The court denied the motion.

The victim's rights to confer and to be treated with fairness should be asserted repeatedly until these gain full recognition. No crime victim can fully protect his or her rights without proper notice of every action in the proceeding. The VNS system is designed to issue notice to a victim of each and every hearing that is set. The mere fact that a hearing has been set, does not however, advise the victim of substantive positions that the Government may have decided to take that may be adverse to his or her position.

E. Pending Petitions for Certiorari

Currently there are two petitions for certiorari pending in the United States Supreme Court on these issues. The first arises from the writ taken by the victims on rehearing of *United States v. Kennedy,* 643 F.2d 1251 (9th Cir. 2011),reported as *In re Amy and Vicky,* 698 F.3d 1151 (9th Cir. 2012). Here the victims filed a petition for writ of certiorari. In *In re Amy Unknown,* 701 F.3d749, (5th Cir. en banc 2012), the defendant , Doyle Paroline has filed the writ from the Fifth Circuit's opinion favoring the victim. The victim has responded arguing for a grant of certiorari. By the time of the conference it is anticipated that one or more additional petitions may be pending with the Supreme Court. Although the court has previously declined the opportunity to review §2259 (*United States v. Monzel,* USSC No. 11-85, *pet. den.* November 28,

2011) we hope that with a number of petitions being filed from circuits around the country that the need for review will be apparent.

Conclusion

Hopefully, many more victims will come forward to request restitution. As more attention is given these initial efforts by the media, and the plight of these victims, becomes more widely recognized, there is a greater chance that this will happen. When they find their voices, they will need representation.

Peter S. Everett[1]
Blankingship & Keith, P.C.
4020 University Drive
Suite 300
Fairfax, Va. 22030
703-691-1235
peverett@bklawva.com

ANATOMY OF A MALL SECURITY CASE

I. INTRODUCTION

Fundamental to prevailing in inadequate security litigation are at least 3 critical components: 1) the identification, assessment and selection of legal theories capable of successfully establishing a duty to prevent or minimize violent crime 2) investigation of the facts of the crime and the history of the premises apart from the discovery process; and 3) relentless discovery against the defendants, including, above all, very carefully prepared Rule 30(b)(6) depositions of the defendants. Counsel must undertake a myriad of other essential tasks, including identifying and retaining top quality security experts, conducting focus groups and prepare for trial

This paper briefly reviews a variety of legal theories counsel should explore in establishing a duty capable of withstanding the inevitable summary judgment motion.

II. ESTABLISHING A DUTY

[1] Peter Everett is a trial lawyer who devotes his practice to representing persons injured by the reckless or careless acts of others. His practice includes four broad areas. First, Mr. Everett represents clients seriously injured as a result of motor vehicle collisions, with special emphasis on tractor-trailer accidents. He is a member of and has served on the Executive Committee of ATLA's Interstate Trucking Litigation Group. He has represented victims of commercial motor vehicle collisions arising from accidents in California, Pennsylvania, Washington, D.C. and Maryland, as well as in state and federal court in Virginia. Second, Peter represents individuals who have suffered traumatic brain injuries resulting from tractor-trailer crashes, defective products, motor vehicle collisions, bicycle accidents and other circumstances. Mr. Everett is a member of the Brain Injury Association of Virginia and co-authored Counsel's Role in Recognizing the Symptoms of Traumatic Brain Injury and Assisting Medical Professionals in its Evaluation, VTLA The Journal (Spring 1995). In 2005 he lectured at a national conference on brain injury to health care and other professionals, and at a September 2008 retreat of the Virginia Trial Lawyers Association, he spoke on the use of learned treatises in TBI cases, and on trial tractics in TBI cases. Third, he represents victims of violent crimes in inadequate security cases against shopping malls, hotels, apartment buildings and other commercial buildings. He has testified before Congress on legislation designed to regulate the security guard industry and has addressed victim's rights issues on CNN's Larry King Live, ABC's 20-20 and The Oprah Winfrey Show. He has published several works in this area, including articles entitled "Establishing the Standard of Care in Inadequate Security Cases," published in the Journal of the Virginia Trial Lawyers Association, Establishing a Duty, Reaching the Promised Land, "Direct Examination of Security Experts" and "Violence Comes to the Mall," published in Trial magazine. Mr. Everett has served for ten years as a member of the Executive Committee of the Inadequate Security Litigation Group of the Association of Trial Lawyers of America (ATLA) and co-chaired that national litigation group from 1999-2003. He has assisted in the representation of clients in inadequate security matters in Arizona, California, Florida, New York, the District of Columbia, Maryland and West Virginia, as well as in federal and state courts in Virginia. Finally, Peter litigates on behalf of persons injured by defective conditions in buildings or real estate such as defective roadways, balcony railings and recreational trails, with a special emphasis on representing injured children.

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 therefore be constantly evaluating the evidence to determine what theories he or she can establish, and should evaluate alternatives to negligence, particularly in jurisdictions hostile to security claims. Victims of criminal violence traditionally had no recourse against premises owners and operators, with the exception of innkeepers. [2] During the last 50 years appellate courts in many states have revisited the issue, and many states now recognize a cause of action for inadequate security, provided that the defendants could have reasonably foreseen that a violent crime could occur. Doud v. Las Vegas Hilton Corp., 864 P.2d 796, 799 (1993); see also Restatement (Second) of Torts § 344, comment f (1965). 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).

A. Negligence Based Upon Reasonable Foreseeability

Victims of violent crime rely primarily upon negligence to establish a duty in inadequate security litigation. In many 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;[3] more progressive jurisdictions evaluate foreseeability based on the totality of the circumstances. McGuire v. Hilton Hotels Corp., 79 Haw. 110, 899 P.2d 393, 399 (1995); Siebert v. Vic Regnier Builders, Inc., 856 P.2d 1332 (Kan. 1993); Doe v. Dominion Bank, 963 F.2d 1552, 1560-62 (D.C. Cir. 1992) (Ginsburg, J.); Galloway v. Bankers Trust Co., 420 N.W. 2d 437, 439-440 (Iowa 1988) (in mall security case, foreseeability does not require prior crimes against the person; property crimes may prove useful, since they can turn violent). Variations similarly exist with respect to whether only crimes at the Defendant's premises may be considered,[4] or whether the analysis may include the dangerousness of the surrounding neighborhood. E.g., Crinkley v. Holiday Inns, 844 F.2d at 161.

Certain jurisdictions employ neither the prior similars or totality of the circumstances approaches. Virginia, for example, employs a far narrower test, requiring that the invitor's method of business attract crime, or that it knew of an imminent probability of harm. Wright v. Webb, 234 Va. 527, 533, 362 S.E.2d 919 (1987). But see Bass v. Gopal, Inc., 395 S.C. 129, 716 S.E.2d 910, 915 (2011) (recently rejecting imminent probability rule). Tennessee has also rejected the Virginia rule, adopting neither the prior similars or totality rules, but instead a balancing test. McClung v. Delta Square Ltd. P'ship, 937 S.W.2d 891, 900-902 (Tenn. 1996). (the "risk is unreasonable and gives rise to a duty to act with due care if the foreseeable probability and

[2] Kveragas v. Scottish Inns, Inc., 733 F.2d 409, 412 (6th Cir.1984) ("The common law has long recognized the special legal relationship between innkeepers and registered guests. Historically, innkeepers operated under an extreme standard of liability, approaching that of an insurer . . .")

[3] E.g. Hayes v. GGP-Four Seasons, L.L.C., 2011 U.S. Dist. LEXIS 139790 at 16-25 (M.D.N.C. 2011) (granting summary judgment in mall shooting case, ruling, under North Carolina law, that nine robberies, nine assaults, one aggravated assault, and one homicide in three years were insufficient to establish foreseeability)

[4] Scott v. Watson, 278 Md. 160, 359 A.2d 548, 554 (1976) (general rule).

gravity of harm posed by defendant's conduct outweigh the burden upon defendant to engage in alternative conduct that would have prevented the harm.")

Defendants may expressly foresee the danger of crime in internal documents. Small v. McKennan Hospital, 403 N.W.2d 410 (S.D. 1987). In Small, 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. Crime in garages and parking lots may be seen as *per se* foreseeable:

> By their very nature, parking facilities attract crime. Parking lots, usually located in remote, unattended areas, and randomly trafficked by customers, afford criminals the opportunity for vehicle burglaries and opportunistic robberies.

Apo, Allen, (July 1992) *"Security for Parking Facilities*," Crime Prevention Report, American Insurance Services Group, Inc, p. 1

B. Negligence Based Upon Assumption of the Duty

It is axiomatic that defendants can voluntarily assume a duty to act, and that, once assumed, the duty must be discharged with reasonable care. Glanzer v. Shepherd, 233 N.Y. 236, 135 N.E. 275 (1922). In Glanzer, Judge Cardozo annunciated the oft-repeated rule:

> 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.

The United States Supreme Court, the United States Courts of Appeal and state appellate courts have recognized and applied assumption of the duty principles in identifying a duty to protect third persons from crime. Sheridan v. United States, 487 U.S. 392, 108 S.Ct. 2449, 101 L.Ed. 352 (1988)(applying Maryland law); Doe v. United States, 838 F.2d 220, 223 (7th Cir. 1988)(assumption of duty to protect children at day care center); Losinski v. County of Trempealeau, 946 F.2d 544, 552 (7th Cir. 1991); Rogers v. United States, 397 F.2d 12 (4th Cir. 1968).

In Sheridan, several military corpsmen found an obviously intoxicated serviceman "lying face down in a drunken stupor" on the floor of a military hospital. Id. at 2452. They tried to bring him to the emergency room, but he broke away and grabbed a bag in which the corpsmen saw a rifle barrel. Seeing the rifle, the corpsmen fled and never took any action to alert authorities to the danger posed by an inebriated, rifle-toting serviceman. He subsequently shot and injured the plaintiff. Id.

In ruling the assault and battery exception to the Federal Tort Claims Act inapplicable, the Supreme Court observed that the tortious conduct complained of involved the negligence of the corpsmen in not intervening to stop a crime from taking place. 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."

Id. at 2455, quoting Indian Towing Co. v. United States, 350 U.S. 61, 65, 76 S.Ct. 122, 124, 100 L.Ed. 48 (1955)(footnote omitted)(emphasis added).

State appellate courts in a variety of jurisdictions have ruled that defendants can assume a duty to protect people against violent crime. Hemmings v. Pelham Wood, 826 A.2d 443, 457 (Md. 2003)(family of a tenant murdered by an intruder who broke into apartment permitted to sue landlord for not repairing lighting in the common areas, relying upon assumption of the duty principles) Sharp v. W. H. Moore, 796 P.2d 506, 509 (Idaho 1990); Marshall v. David's Food Store, 515 N.E.2d 134, 137 (Ill. App. 1987)(reversing dismissal of action against security company where it "assumed a duty to exercise reasonable care" to protect customers of store).

In Sharp, the plaintiff had been sexually assaulted in an office building by an assailant who allegedly entered the building, after hours, through a door left unlocked by a security guard. The Idaho Supreme Court, discussing the duty issue, ruled that

> [a] landlord, having voluntarily provided a security system, is potentially subject to liability if the security system fails as a result of the landlord's negligence.

Id. at 509, citing Jardel v. Hughes, 523 A.2d 518 (Del. 1987).

C. Negligence Per Se

Apart from common law negligence claims, local ordinances or regulations may impose specific legal obligations (e.g., parking lot lighting requirements, secondary locks on sliding glass doors, dead bolt locks) the violation of which may constitute negligence per se.

D. Fraud

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. See generally, Foster v. Winston-Salem Joint Venture, 281 S.E.2d 36, 40 (N.C. 1981) (misrepresentation by mall manager that security had been increased for Christmas shopping, but in context of negligence, not fraud action).

Fraud theories are most common in landlord-tenant cases in which representations are more frequently made to induce leasing, and in certain states may be coupled with statutory deceptive trade practice counts. See Howarth v. Rockingham Publishing Co., Inc., 20 F. Supp. 2d 959, 970-971 (W.D.Va. 1998) (denying summary judgment on fraud count in action by minor newspaper carrier against newspaper for failing to disclose history of pedophile attacks) ("The plaintiff presents claims of actual or constructive fraud against Rockingham sufficient to survive the instant motion for summary judgment."). [5] See also Elizabeth E v. ADT Security Systems West 108 Nev. 889, 839 P.2d 1308 (1992).

E. Third-Party Beneficiary

In certain circumstances crime victims may credibly argue that they were the intended beneficiary of a contract, the breach of which provides them with a third-party beneficiary contract action. Mall patrons, for example, may be able to demonstrate that they are the intended beneficiaries of a

[5] But see Yuzefovsky v. St. John's Wood Apts., 261 Va. 97, 540 S.E.2d 134 (Va. 2001).

security services contract, and a store employee held up at gunpoint certainly can argue that she is the intended beneficiary of a lease between her employer and the mall, if the lease requires common area security. See Galloway v. Bankers Trust Co., 420 N.W. 2d 437, 440-441 (Iowa 1988) (apparently adopting store patron's argument that he was the beneficiary of a security services contract, since the contract mentioned "the protection of . . . customers"). [6]

F. Security Company Defendants

Establishing a duty on the part of a security guard may entail several theories discussed supra. See Sukhlal v. American Home Products Corp., 163 A.D.2d 160, 557 N.Y.S.2d 378,379 (1990) (holding that security guard company had assumed the duty of assisting with pedestrian traffic flow and accident prevention). See Professional Sports v. Gillette Sec., 766 P.2d 91,95 (Ariz. 1988) ("Reasonable persons would agree that security guards who undertake for hire to patrol a stadium have a duty to exercise due care for the protection, not only of the stadium, but of the stadium's patrons."); See Marois v. Royal Investigation and Patrol, 162 Cal. App.3d 202, 208 Cal. Rptr. 384,388 (1984) ("By contracting with the business to provide security, the security guard creates a special relationship between himself and the business's customers.") (emphasis added) More recently, Wackenhut Security was found to have a special relationship with an employee of a Jeep plant it was hired to secure. Thacker v. Daimler-Chrysler, et al., 2007 U.S. Dist. LEXIS 70685 at 19-21 (N.D. Ohio 2007). Galloway v. Bankers Trust, 420 N.W. 2d 437, 440-441 (Iowa 1988) (rejecting argument that plaintiff had no third-party beneficiary claim against Mall security company); L.A.C. v Ward Parkway Shopping Center, 75 S.W.3d 247 (Mo. 2002).

Perhaps most directly on point is Ward. In Ward, a mall owner hired a security firm to protect mall patrons. The Missouri Supreme Court found that a mall patron was a third party beneficiary of the contract, observing that "[t]here can be no doubt that the Ward Parkway Group contracted with IPC to assist it in its duty to take reasonable measures to protect mall customers from criminal activity."Id. at 260, 262. See also FPI Atlanta, L.P. v. Seaton, 240 Ga. App. 880, 887, 524 S.E.2d 524, 531 (1999) (security company could be liable to apartment tenant as third party beneficiary of security contract with owner of complex).

Finally, the duty of a security company may be viewed as co-extensive with that to the Mall's owner who hired it, as a contractor working on behalf of a landowner. Section 383 of the *Restatement*

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[6] Trial lawyers representing crime victims should assess breach of contract causes of action, but they will more typically apply to apartment, not mall security cases. In Virginia, a jurisdiction in which negligence actions have met with exceptional hostility, the law still provides victims with a contractual remedy, if sufficient facts exist:

> Each of the foregoing cases was an action ex delicto, and in each of them we were faced with the determination whether a duty was imposed by general law upon the defendant somehow to foresee, and to take effective measures to guard against, the danger of criminal acts by a third person. In none of them had the defendant expressly assumed a duty, by contract, to take some specific action to protect the plaintiff from a danger within the contemplation of the parties at the time of contracting.
>
> 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). 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").

(Second) of Torts provides that

> One who does an act or carries on an activity upon land on behalf of the possessor is subject to the same liability, and enjoys the same freedom from liability, for physical harm caused thereby to others upon and outside of the land as though he were the possessor of the land.

Restatement (Second) *of Torts* § 383 (1965). Hopkins v. Fox & Lazo Realtors, 599 A.2d 924, 927 (N.J. App. 1991; *aff'd on other grounds*, 132 N.J. 426, 625 A.2d 1110 (1993); Coleman v. Monson, 522 N.W.2d 91 (Iowa 1994).

III. STANDARD OF CARE

Volumes can and have been written regarding the standards of care mall owners and operators should adhere to in designing and implementing a security program with reasonable care. Outlined below are several examples of the many critical aspects of mall security that warrant examination.

1. Resources Devoted to Security

- How many guards did the Mall hire and assign? How does that compare with other malls?
- Was security increased during evening hours or busier times?
- Were guards paid the minimum wage or close to it? Below the poverty level?
- Backgrounds of guards on duty on day of crime
- Is there any evidence that security resources were cut?
- How does the security budget compare to the marketing budget? The landscaping budget?

2. Security Guard Resources Devoted to Exterior Patrols

Frequently the most critical flaw in mall security operations is the exterior-interior allocation of security resources--both as designed and as implemented on the day of the crime. Typically 90% of the common areas in a mall are outside, and experts in the industry know that exterior crime is the key vulnerability:

> Mall owners agree that the number one security problem in most shopping malls is crime against people and property in parking lots and garages. "Very little really happens in the common areas of the shopping center,' says Lokiec. 'The criminal activity we are most concerned about happens out in the parking lot."

Romano, Ellen, (March/April 1994)*"Making Shopping Centers Safer,"* Journal of Property Management, at 47. In the same vein:

> "Three years ago management conducted a survey that looked at crime statistics for a one-year period on Wal-Mart properties. The survey showed that 80 percent of crimes at Wall-Mart were occurring not in the stores, but outside their walls, either in the parking lots or around the exterior perimeter of the stores."

Gorman, David, (March 1996) *"Loss Prevention Racks Up Success,"* Security Management,

Industry publications confirm it:

> "**Exterior or perimeter patrol** may be the single most important element in the security plan of a shopping center".

"The exterior or perimeter security should be designed and operated in a manner to make customers feel safe, secure and comfortable while making potential criminals feel uncomfortable".

Greene, Donald, (2005), "*Shopping Center Security Perception and Reality",* International Council of Shopping Centers.

3. Security Resources Requested But Refused

In depositions, especially in cases in which mall security is provided by an outside contractor, explore whether the on site security director or security supervisors requested, suggested or in any way communicated to mall owners or management that security should be increased. Often in a parking garage or parking lot crime, one additional vehicle would have increased security coverage dramatically--and counsel may find a wedge issue that produces finger pointing among defendants:

11 Q Before _____ was abducted, did
12 [Security company] ever ask the mall -- not for special
13 events but on a regular basis -- for more than two
14 security vehicles?

15 A I don't know if it's documented, but I
16 preferred to have at least three so I could dedicate
17 a mobile going around and a mobile to each deck.

. . . .

19 So did you ever convey that request or
20 recommendation -- whatever you want to call it -- to
21 [the Mall Manager]?

22 A I'm quite sure I did. . . .

In the same vein security cameras, or more cameras, more effective cameras, more security guard hours, bicycles for exterior patrol, and other resources will likely have been considered, if not formally requested, by security supervisors.

4. Incompetence on the Day of The Crime

With remarkable frequency, security programs are in disarray on the day of the crime. Look for:

- Guards not showing up for work
- Vehicles available for patrol but not in use
- Vehicles needed for patrol but in disrepair
- Guards responsible for exterior patrol hanging around inside the Mall
- Poor record keeping precluding security from knowing where guards were
- Broken security cameras
- Guards not monitoring cameras and yet obvious loitering by perpetrators
- Poor or non existent communication with law enforcement
- Burned out parking garage and parking lot lighting (6-10 foot-candles as standard)
- Broken panic alarms in garages
-

IV. PROXIMATE CAUSE

Establishing proximate cause can prove far more difficult than establishing negligence. Critical to this analysis will be the jurisdiction's proximate cause formulation--will it suffice if security flaws were a substantial factor in the crime, for example, or will a higher burden be imposed? See the excellent discussion of this issue in Nebel v. Avichal Enterprises, Inc. 704 F. Supp. 570, 578(D. N.J. 1989) ("Therefore, the best that a plaintiff can do, with respect to the proximate cause issue in a negligent security situation, is to prove that certain security devices or techniques, had they been implemented, would have reduced the *risk* of harm.") (emphasis in original). See also Kenny v. Southern Penn Transportation Authority, 581 F.2d 351,355 (3rd Cir. 1978) ("the presence of adequate lighting is recognized as a deterrent to violent criminal activity particularly in an area where members of the public may be expected."); Peters v. Holiday Inns, 89 Wisc. 2d 115, 278 N.W. 2d 208, 214 (1979)

Counsel should examine proximate cause from at least two very different perspectives. First, would proper security measures have discouraged the perpetrator[s] from committing the crime? Second, if not, would proper security measures have allowed security to interdict the criminals before the crime was committed? Key considerations are:

1. Evidence the Security Measures the Mall Undertook Were Designed To Deter Violent Crime, If Carried Out Competently

Most mall management witnesses, security company witnesses and documents created by the mall and its security providers (e.g., security manuals) will establish that the security program was designed to deter crime--not every crime, but many, if not most. That concession is quite helpful; otherwise why bother with security?

2. Security Industry Publications Help Establish that Security Measures The Mall Should Have Undertaken Designed To Discourage Violent Crime

Literature in the security field can help establish that security measures the mall should have undertaken would have helped deter Violent Crime As one trade publication notes:

> Highly visible and recognizable patrols trained to effectively move about the parking facility while observing any unusual activity serve a valuable purpose.
> . . . .
>
> Recognizing that all patrols are meant to deter and detect, officers should be trained to insure that they observe people and locations in their assigned area and insure that they are seen as they patrol.

Greene, Donald, (2005), "*Shopping Center Security Perception and Reality",* International Council of Shopping Centers.

3. Timing Is Often (Almost) Everything

Be wary of a case in which the crime took a few seconds, and the perpetrators were neither known to the invitor, nor lingered or loitered on premises before the crime-- a drive-by-shooting, for example. Such cases may be winnable, but the less time the perpetrators were on the premises, the less time security will have had to be seen and deter them, and to see them, and interdict them. In

that regard spoliation letters to mall owners and security providers for all security camera video footage that could possibly show the perpetrators are essential, as well as meeting with the lead detective responsible to determining how the crime unfolded.

4. Intervening or Superseding Cause is Generally Not a Defense in Security Cases

Such defenses, if permitted, would lead to the absurd conclusion that despite a duty to protect a patron from criminal attack, the criminal act precludes a finding of negligence. Edington v. A&P Enterprises, 900 P. 2d 453, 455 (Okla. App. 1994)

5. Experts

Counsel will need to assess the advisability and admissibility of expert testimony on proximate cause, in addition to adequacy of security. Many defendants rely upon former FBI profilers and other experts to testify that "no security measures would have stopped the crime," when, as noted above, that is even not the legal standard for proximate cause in security cases, and accordingly invites a motion in limine to exclude such testimony.

V. CONCLUSION

Trial lawyers given the privilege of representing victims of violent crime at mall should carefully assess the range of theories through which duties to provide security may be established, the breadth of standards that will define reasonable care, and the unique issues applicable to proximate cause in the security context. Through vigorous advocacy, counsel 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.

Mila Ruiz Tecala, LICSW[1]
Center for Loss and Grief
1500 Massachusetts Avenue NW, Suite 39
Washington, DC 20005
202-466-3557
grf3apy@gmail.com

Tips for Applying the Psychology of Trauma to Victims of Crime

Trauma – as defined by the Oxford American Dictionary is 1) Any physical wound or injury, 2) physical shock following this, characterized by a drop in body temperature, mental confusion, etc. and 3) psychological emotional shock following a stressful event, sometimes leading to long term neurosis.[2]

We now live in an era where violence seems to be a daily occurrence. You read it in the newspaper and see it on TV. Since 9/11/2001, we have become sensitive to terrorism and violence. We see violence all around us - Columbine, Newton, CT, Virginia Tech, the Washington, DC sniper, etc. And then there are violent acts that never hit the newspaper or television – rape, molestation, domestic abuse and many more. 9/11/2001 affected the way we travel, but above all, we lost our sense of invulnerability – the belief that tragedy happens to other people. Many of us cling to this sense of invulnerability to avoid anxiety about the future.[3] An example of this is a woman who got raped in an elevator and now avoids using an elevator because she fears it will happen again. She has lost her sense of invulnerability. While this sense of invulnerability is only an illusion, the loss of it is an extremely important one because it is the loss of one of our psychic protective shields. Once breached, it is rarely restored.

Additionally, whether the survivor is a victim of rape, serious physical injury, attempted murder or any other serious crime, the survivor experiences what is called network losses.[4] What this means is a major loss, for example rape, carry with it a network of losses. The act of rape is a violent assault on the body and the psyche of a woman which robs her of her very personhood. This senseless, brutal attack is followed by a network of losses: the threat of loss of life, and within that is threaded the loss of confidence, loss of self-image, loss of security,

[1] Mila Tecala is widely recognized as an international authority counseling persons who have experienced a personal loss. She understands the grieving processes which follows both individual and catastrophic events. Mila possesses a rare combination of academic and counseling skills developed during more than thirty years of clinical experience in treating patients and families facing life threatening illnesses,death and other losses. She has served as Clinical Director for the St. Francis Institute (now the Wendt Loss Counseling Center) and has held positions as Clinical Instructor at Georgetown University Medical School and as a Consultant to the United States Peace Corps. She was also consultant to the nationally televised documentary film "Joan Robinson: One Woman's Story." She served as Consultant to the Philippine government following the 1990 Philippine Earthquake where she trained mental health professionals on disaster intervention. Mila is a graduate of the School of Social Work, University of Michigan and is a licensed clinical social worker in the District of Columbia and Virginia.
[2] Oxford University Press, New York, 1999, 867.
[3] Mila Tecala, Lecture on Complicated Mourning, 1999-2012.
[4] Robert T. Hall and Mila Tecala, *Grief and Loss: Identifying and Proving Damages in Wrongful Death Cases*, (Portland: Trial Guides), 2009, 81-95.

loss of normalcy and stability in the space of a woman's life, the loss of friends and the loss of invulnerability.

When people survive a violent crime, they are left to struggle with the psychological ramifications that can be life altering and long standing. Most of them are diagnosed with Post Traumatic Stress Disorder.

In 2000, the American Psychiatric Association revised the PTSD diagnostic criteria in the fourth edition of its Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR)(1). The diagnostic criteria (A-F) are specified below.

Diagnostic criteria for PTSD include a history of exposure to a traumatic event meeting two criteria and symptoms from each of three symptom clusters: intrusive recollections, avoidant/numbing symptoms, and hyper-arousal symptoms. A fifth criterion concerns duration of symptoms and a sixth assesses function.

Criterion A: stressor[5]

The person has been exposed to a traumatic event in which both of the following have been present:

1. The person has experienced, witnessed, or been confronted with an event or events that involve actual or threatened death or serious injury, or a thread to the physical integrity of oneself or others.
2. The person's response involved intense fear, helplessness, or horror. Note: in children, it may be expressed instead by disorganized or agitated behavior.

Criterion B: intrusive recollection

The traumatic event is persistently re-experienced in at least **one** of the following ways:

1. Recurrent and intrusive distressing recollections of the event, including images, thoughts, or perceptions. Note: in young children, repetitive play may occur in which themes or aspects of the trauma are expressed.
2. Recurrent distressing dreams of the event. Note: in children, there may be frightening dreams without recognizable content.
3. Acting or feeling as if the traumatic event were recurring (includes a sense of reliving the experience, illusions, hallucinations, and dissociative flashback episodes, including those that occur upon awakening or when intoxicated). Note: in children, trauma-specific reenactment may occur.
4. Intense psychological distress at exposure to internal and external cues that symbolize or resemble an aspect of the traumatic event.

[5] American Psychiatric Association. (2000). Diagnostic and statistical manual of mental disorders (Revised 4th ed.). Washington, DC.

5. Physiologic reactivity upon exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event.

Criterion C: avoidant/numbing

Persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness (not present before the trauma), as indicated by at least **three** of the following:

1. Efforts to avoid thoughts, feeling, or conversations associated with the trauma
2. Efforts to avoid activities, places, or people that arouse recollections of the trauma
3. Inability to recall an important aspect of the trauma
4. Markedly diminished interest or participation in significant activities
5. Feeling of detachment or estrangement from others
6. Restricted range of affect (e.g., unable to have loving feelings)
7. Sense of foreshortened future (e.g., does not expect to have a career, marriage, children, or a normal life span)

Criterion D: hyper-arousal

Persistent symptoms of increasing arousal (not present before the trauma), indicated by at least **two** of the following:

1. Difficulty falling or staying asleep
2. Irritability or outbursts of anger
3. Difficulty concentrating
4. Hyper-vigilance
5. Exaggerated startle response

Criterion E: duration

Duration of the disturbance (symptoms in B, C, and D) is more than one month.

Criterion F: functional significance

The disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.

Specify if:
Acute: if duration of symptoms is less than three months
Chronic: if duration of symptoms is three months or more

Specify if:
With or Without delay onset: Onset of symptoms at least six months after the stressor

But many victims of crime die, often a violent, mutilating death. Sometimes the perpetrator is never found which leaves the bereaved at loose ends. Sometimes the bereaved is worried that the predator may come back and kill them. During the DC Sniper Incident in 2001, the snipers killed 13 people in 23 days in October. It caused a great deal of anxiety among the populace wondering whether they're next. People were killed at random and at different places.

In a lecture that Tecala gave, she listed the following as high risk factors for complicated mourning:[6]

1. Sudden, unexpected and traumatic death
2. Multiple deaths in the family and close friends
3. Stigmatized deaths (AIDS, suicide and homicide)
4. Death of a child
5. When death is viewed as preventable
6. Presence of psychiatric problems
7. Past unresolved grief reactions
8. Pre-existing social/marital/family problems (highly conflicted relationship with the deceased)
9. Alcohol and drug abuse
10. Lack of support systems
11. Prolonged legal proceedings

Risk factors 1, 3, 5, and 11 are definitely related to homicide deaths. But all the others are possible factors to survivors of homicide. In murder cases, sometimes it takes years before a perpetrator is caught. Being tried in court may take several more years and sometimes they are never caught. Take for example, Chandra Levy – it took several years before her body was found. And the person who killed her was already in prison for another crime. When a body is not found or takes years to find, the family is not able to grieve because in sudden death, there is a need to see that the person is really dead. Not seeing the body reinforces the denial that perhaps their loved one is not dead. If the perpetrator is not found at all, then the family is left with so much unfinished business and unable to move on. Many will succumb to depression.

Death by homicide is one of the most difficult deaths to heal from. But even those who survive from attempted murder, rape and other violent crimes the survivors will require professional help so it doesn't interfere with functioning.

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[6] Mila Tecala, Lecture on Complicated Mourning, 1999-2012.

Brian Kent, Esq.[1]
Laffey Bucci Kent, LLP
1435 Walnut Street, Suite 700
Philadelphia, PA 19102
215.399.9255
bkent@lbk-law.com

Current Issues in Litigating Civil Cases for Crimes at the Workplace

I. Workplace Violence in the U.S.

Workplace violence occurs each day in this country. According to the Justice Department Bureau of Justice Statistics, *Workplace Violence, 1993-2009* ("Workplace Violence study"), nearly 600,000 nonfatal violent workplace crimes occur each year. This includes sexual assault, rape, robbery and assault-related crimes. The average annual rate of workplace violence is 5 violent crimes per every 1,000 workers, over the age of 16. Between 2005 and 2009, workers between the ages of 20-34 had the highest rate of workplace violence, at nearly 14%.

Many factors increase the risk of workplace violence, such as:

- exchanging money with the public,
- working in isolated areas,
- working alone,
- working late at night,
- working in areas of high crime,
- working where alcohol is served, and
- making deliveries.

According to the Workplace Violence study, between 2005 and 2009, those in law enforcement (police officers, corrections officers, security guards, etc.) experienced the highest rate of nonfatal workplace violence at roughly 19%. Those in retail (bartenders, store clerks, gas station clerks, etc.) had the next highest rate of nonfatal workplace violence (13%), followed by health care workers (10%) and then teachers, including professors and technical/industrial school teachers (9%).

[1] Coming from a family of iron workers, firm founder Brian Kent understands the importance of work safety at construction sites. He has combined his passion for helping those hurt and injured on the job in workplace accidents and those who are victims of crime with his expertise in the courtroom. He's quickly risen up the ranks among the preeminent personal injury lawyers in Philadelphia, having worked on numerous cases resulting in multi-million dollar settlements. In 2008, Brian was one of only 35 attorneys in the state of Pennsylvania to be named a "**Lawyer on the Fast Track**." In 2011, Brian's article *Workplace Safety* was featured in Trial Magazine. Prior to representing personal injury victims, Brian was fighting for the rights of sexual assault victims as a prosecutor in the Sex Crimes Unit of the Montgomery County District Attorney's Office. In addition to representing those injured on the job in workplace accidents, Brian draws upon his experience as a prosecutor to represent victims of crime in civil lawsuits. Brian has a Masters in Trial Advocacy from Temple University's Beasley School of Law and currently serves as a lecturer in the trial advocacy program at Drexel University School of Law.

A. Homicides in the Workplace

According to the Bureau of Labor Statistics, *Census of Fatal Occupational Injuries Summary,* 2011, of the 4,608 fatal workplace injuries that occurred in the United States in 2011, 458 were workplace homicides. In addition, according to the Workplace Violence study, between 2005 and 2009, shootings accounted for 80% of workplace homicides. Roughly 14% of the workplace homicides during the same period resulted from beatings and stabbings.

B. Who are the Offenders?

Between 2005 and 2009, nearly 40% of the offenders in workplace homicides were robbers. Work associates, including co-worker and customers, accounted for roughly 21% of workplace homicide offenders. Spouses, relatives and other personal acquaintances accounted for about 8% of the offenders.

While many states have attempted to combat workplace violence by passing workplace violence prevention laws, workplace violence persists, accounting for many fatalities and even more injuries. In these cases, civil liability of third parties in addition to the employer must be evaluated carefully to ensure just and proper compensation for victims of workplace violence.

II. The Workers' Compensation Exclusivity Bar to Workplace Violence Claims Against the Employer

Workplace violence workers' compensation claims generally fall into three categories:

1. crimes connected to the employment (i.e., assault of bar bouncer, robbery of gas station attendant),
2. crimes not connected to the employment (i.e., random gun violence), and
3. violence imported from an employee's personal life to the employment (i.e., domestic violence).

Civil cases involving workplace crimes are often fraught with pitfalls, some more real than others. The workers' compensation exclusivity principle for instance often scares plaintiff attorneys away from examining the employer's liability, when multiple exceptions to the exclusivity bar may allow the employee to bring a tort claim against the employer.

Every state in the country has workers' compensation laws, although of course, they vary. In general, the workers' compensation scheme operates so an employee can recover for a work accident regardless of who is at fault, although what an employee can recover tends to be limited (i.e., employees generally cannot recover pain and suffering damages). Then, of course, there is the principle of exclusivity of workers' compensation benefits – in exchange for the right to obtain workers' compensation benefits, the employee gives up the right to sue the employer in tort. *See e.g.*, California Labor Code § 3601; *Johns-Manville Products Corp. v. Superior Court*, 27 Cal.3d 465 (Cal. 1980); New York Workers' Compensation Law § 11; New Jersey Statutes § 34:15-8; 77 Pennsylvania Statutes § 481 (a).

The workers' compensation exclusivity bar usually operates by statute and extends to claims based on respondeat superior, negligent hiring/retention, negligent supervision, etc. In exchange for insulation from liability, an employer provides workers' compensation benefits to employees, and therefore employees are protected from losing valued medical and wage loss/disability benefits.

A. Course and Scope of Employment

Generally, the exclusivity principle will bar an employee from bringing a tort claim against the employer where the crime occurred within the course and scope of employment. There must be some connection between the activity and the employment. *See e.g., Maxwell v. Hospital Authority*, 413 S.E.2d 205 (Ga. Ct. App. 1991) (workers' compensation exclusivity barred hospital employee's (EE) claim against employer (ER) where EE was robbed, raped and beaten in EE parking lot; workers' compensation exclusivity applied because the crime occurred within course and scope of employment – walking to car in EE parking lot); *Baptist Memorial Hospital v. Gosa*, 686 So.2d 1147 (Al. 1996) (workers' compensation exclusivity barred EE's tort claim against ER-hospital for shooting in EE parking lot). However, the circumstances of each case must be analyzed against the major exceptions to the workers' compensation exclusivity principle.

B. Exceptions to Workers' Compensation Exclusivity

There are several well-established exceptions to the workers' compensation exclusivity principle, including intentional torts, personal nature, ratification of intentional conduct of employee, dual capacity, failure to insure, etc. In California, certain types of *intentional* employer conduct may subject the employer to liability beyond workers' compensation - intentional conduct which cannot be considered to be a normal risk of employment or is contrary to fundamental public policy. *See Fermino v. Fedco*, 7 Cal.4th 701 (Cal. 1994) (workers' compensation exclusivity did not bar ER liability for false imprisonment of EE because ER engaged in conduct of questionable relationship to employment – store management and security personnel at ER/department store held plaintiff in room for over an hour, refused to allow her to leave, and accused her of theft).

1. Employer's Intentional Conduct/Tort

In addition, an employer may be liable for ratifying an employee's intentional conduct by failing to take appropriate corrective action. *See generally, Hart v. National Mortgage & Land Co.*, 189 Cal. App.3d 1420 (Cal. Ct. App. 1987) (ER aware of another EE's sexually violent and harassing acts towards plaintiff-EE and did nothing, hence, *ratifying the acts* which were of questionable relationship to the employment; plaintiff-EE's intentional infliction of emotional distress (IIED) claims allowed; defendant-ER's motion for summary judgment denied). In addition to tort claims, the injured employee may be entitled to make federal and state employment claims. *See e.g., Little v. Windermere Relocation, Inc.*, 301 F.3d. 958 (9th Cir. 2001) (EE repeatedly raped by client and subsequently discharged from employment after reporting the rapes to ER, who took no action thereby ratifying the non-EE's conduct, the EE's claims for Title VII hostile work environment, retaliation and state claim for wrongful discharge allowed).

In addition to California, many states recognize the intentional tort exception, whether by statute or case law. *See e.g.*, Section 303 of the Pennsylvania Workers' Compensation Act, 77 P.S. § 481; *Martin v. Lancaster Battery Co.*, 530 Pa. 11 (1992) (EE may be able to bring a tort claim against the ER for willful conduct, usually rising to the level of criminal conduct.); *Laidlow v. Hariton Machinery Co., Inc.*, 171 N.J. 334 (2002) (NJ employs a high bar to establish intentional wrong - the ER knows the consequences of an act are substantially certain to result in harm; NJ courts employ a 2-prong test: 1. plaintiff must show there was a substantial certainty of injury; and 2. the injury and circumstances surrounding it cannot be part and parcel of work life); Florida Statutes § 440.11 (1)(b) (Florida requires clear and convincing evidence that an ER "deliberately intended to injure").

2. The Personal Nature Exception

Many states recognize the personal nature exception to workers' compensation exclusivity. Using this exception, an employee may get over the workers' compensation exclusivity bar by proving that the incident was purely personal, not incidental to the work and therefore outside the course and scope of employment. For example, Minnesota workers' compensation law specifically recognizes the personal nature exception. *See* Minnesota Statutes § 176.011 Subdivision 16 [definitions related to the Minnesota Workers Compensation Law]. *Also see Yunker v. Honeywell Inc.*, 496 N.W.2d 419 (Minn. Ct. App. 1993). In *Yunker*, the employer (Honeywell) re-employed a former employee after his release from prison for strangulation of a co-worker. After his re-hire, that employee then developed a romantic interest in a co-worker. He later shot and killed the co-worker despite the co-worker's attempts to obtain a transfer from Honeywell. The court allowed the estate's claim against the employer for negligent retention.

3. **Dual Capacity/Persona Exception**

In some cases, an employer may be sued, not as an employer, but as a result of acting in another, secondary capacity. A common example is where an employee is injured using a product manufactured by the employer. *See* California Labor Code, 3602 (b), recognizing dual capacity liability situations in which an employer may be liable beyond workers' compensation for willful physical assault by the employer, employer's fraudulent concealment of the existence of the injury, or a defective product manufactured by the employer.

Also see Mildred Billy v. Consolidated Machine Tool Corp., 51 N.Y.2d 152 (1980) (deceased EE's estate allowed to sue ER under a dual capacity theory, due to a defective machine); *Tatrai v. Presbyterian Univ. Hosp.*, 497 Pa. 247 (1982) (allowing a premises liability action by hospital EE where the EE was actually being treated as a patient at the time of the injury, and not as an EE); *but compare, Soto v. Nabisco, Inc*., 2011 PA Super 249 (2011) (the court refused to apply the dual capacity exception and dismissed EE's defective machine accident case against ER).

4. Employer's Failure to Obtain Workers' Compensation Insurance

Usually there are hefty penalties for failing to obtain workers' compensation insurance. Also, when an employer fails to secure workers' compensation insurance, injured employees retain tort remedies against the employer. *See e.g.,* New Jersey Statutes § 34:15-79. Penalties for failure to carry insurance; New York Workers' Compensation Law § 11 Alternative remedy.

In addition, if the employer fails to take required statutory action after an employee's report of injury, the employer may be estopped from raising the workers' compensation exclusivity bar in a subsequent tort claim. *See Ocean Reef Club, Inc. v. Wilczewski*, 99 So.3d 1 (Fla. 3rd DCA 2012) (ER failed to report injury to workers' compensation insurance carrier and therefore estopped from raising exclusivity defense).

5. Franchisor Liability for Acts of Franchisee

Franchisors may be liable for the acts of a franchisee under theories of apparent authority and/or vicarious liability. In order to establish vicarious liability, courts often require evidence that the franchisor maintained sufficient control over the relevant procedures and operating protocols.

Proving the franchisor exercised sufficient control over the franchisee requires in-depth review of the franchisor-franchisee contract as well as store operating procedures and protocols, i.e., who wrote them, how they were administered and whether the franchisor retained any ability to control the day to day operations, including the instrumentality at issue (i.e., door locks, video surveillance, etc.).

For example, in *Martin v. McDonald's Corp.*, 572 N.E.2d 1073 (Ill. App. 1st Dist. 1991), multiple minor employees were killed and injured during a robbery/assault. The court found sufficient circumstances to hold the franchisor liable for negligent security: the existence of franchisor's corporate security branch, franchisor's creation of store security operations, franchisor's regional security manager checked for and followed up on security problems. The court allowed the plaintiffs' theories of breach by failing to follow up on a security check of the franchisee to ensure that proper procedures had been implemented. Furthermore, the franchisor's duty was not limited to a duty to inspect and warn, since the franchisor's established security policy unquestionably required a follow up inspection.

Also see, *Decker v. Domino's*, 268 Ill.App.3d 521 (Ill. App. 5th Dist. 1994) (where worker robbed, voluntary-undertaking theory upheld against franchisor; franchisor formed a security committee, adopted a special cash management system, produced literature regarding robbery prevention, employed a franchise consultant to ensure training compliance with the franchisor security and safety standards, and maintained a security hotline); *but compare Hong Wu v. Dunkin' Donuts, Inc.*, 105 F.Supp.2d 83 (E.D.N.Y. 2000) (where coffee shop EE robbed, claim against franchisor dismissed because EE failed to show franchisor's control over the franchisee's day to day operations, including the instrumentality giving rise to the claim).

Therefore, it is absolutely essential to get the franchisor-franchisee agreement in discovery and early on. It not only establishes the franchisor's duties with respect to a negligence claim, but may also create an independent claim of liability whereby the crime victim employee brings a breach of contract claim against the franchisor as a third party beneficiary.

III. Third Party Liability – Non-Employer Party Liability

In any violent crime situation, multiple parties often bear liability. The key is obtaining all contracts relevant to the mechanism or location of the injury. For instance, in a mall security parking lot crime case, it is crucial to review the contracts between any potential parties with the

duty to oversee, maintain or otherwise manage the parking lot. That includes the mall, stores in the mall, mall security, parking lot operating/maintenance companies, etc. In parking lot crime situations, a parking lot security company may be liable to a mall patron who is attacked in the mall parking lot. In addition, the security company, a lighting/maintenance company and/or the parking lot design architect may be liable.

Likewise, in a school violence situation, private schools, charter schools or other organizations operated by outside companies may bear liability. In the case of school violence at a public school, government/sovereign immunity presents a hurdle which can be overcome in some circumstances. For example, Pennsylvania's government immunity laws permit actions against government entities due to defects of real property (i.e., faulty or broken door locks).

Thinking Outside the Box in a Workplace Crime Case – Getting Over the 2 Year Tort Statute of Limitations

One of the challenges in handling workplace crime cases is the general two year statute of limitations for tort claims such as negligent security, negligent hiring, etc. However, a crime victim who brings a breach of contract claim as a third party beneficiary may receive the benefit of a four or six year contract action statute of limitations. Make no mistake, bringing a breach of contract action on behalf of a crime victim is no easy task. The main issues are 1. whether the law extends third party beneficiary status to the crime victim and that usually depends on the express terms of the contract and 2. whether emotional damages are permitted in a breach of contract action.

Many states recognize the right of a third party to sue in tort as a beneficiary of a contract made for his or her benefit. *See e.g.*, *Espinal v. Melville Snow Contrs*., 98 N.Y.2d 136 (2002) (recognizing three situations in which a party to a contract may be liable in tort to a third party: (1) a contracting party fails to exercise reasonable care in the performance of his duties, and thus "launches a force or instrument of harm"; (2) the third party detrimentally relies on the continued performance of the contracting party's duties; and (3) a contracting party has entirely displaced the other party's duty to maintain the premises safely).

The key is the express intent of the parties to the contract. Generally, only intended and not incidental beneficiaries may bring such actions. *See e.g.*, Section 302 of the RESTATEMENT (SECOND) OF CONTRACTS; Michigan Compiled Laws § 600.1405 (rights of third party beneficiaries); *Komajda v. Wackenhut*, 2002 Mich. App. LEXIS 2357 (Mich. Ct. App. 2002) (allowing the deceased EE estate's third party beneficiary breach of contract claim where EE was shot by co-worker, since the contract between ER and security company specifically recognized the latter's duty to protect all EEs; therefore the deceased EE was an intended beneficiary); *Burks v. Fed. Ins. Co.*, 2005 PA Super 297 (Pa. Super. 2005) (recognizing the rule in Pennsylvania that a third party beneficiary has standing when the contract expresses the parties' intent that the third party be a beneficiary).

The issue of whether emotional damages are recoverable in a breach of contract action largely depends on whether there was a physical injury. *See e.g., E.I. DuPont de Nemours & Co. v. Pressman*, 679 A.2d 436 (Del. 1996*)* (finding damages for emotional distress unavailable in breach of contract action in the absence of physical injury or IIED); *Erlich v. Menezes*, 21

Cal.4th 543 (Cal. 1999) (recognizing that in California, tort damages are permitted in contract cases where a breach of duty directly causes physical injury); *St. Charles v. Kender*, 38 Mass. App. Ct. 155 (Mass. Ct. App. 1995) (recognizing that emotional damages for breach of contract resulting in personal injury are permitted in Massachusetts).

IV. Pleading

For purposes of discovery and also ascertaining liability of other entities, it is crucial to file the case immediately. You really have no choice but to employ a shoot first ask later approach when handling a workplace crime civil case. Workplace crime cases are extraordinarily complex, much more than an average motor vehicle accident or premises liability case. Not only is there the emotional component of your victim-plaintiff, but there are workers' compensation exclusivity issues as well as multiple, distinct claims against different types of parties, including the criminal defendant, the employer, other parties, etc.

A. Theories of Liability Against the Employer

There are many claims based on the employer's actions, including employing the perpetrator. There are of course the most common claims - vicarious liability, negligent hiring, negligent retention/supervision, negligent entrustment, etc. However, there are many other claims which must be explored, including:

- intentional/wrongful act of the employer,
- employer's ratification of an employee's intentional/wrongful act,
- "special relationship" between the employer and injured party-employee,
- failure to perform an assumed duty to protect,
- negligent entrustment, and
- tort claims based on the employer's status as a premises owner.

1. Intentional Act

As discussed in section II. B. 1. above, proving an intentional act of the employer or the employer's ratification of an intentional act generally requires evidence of the employer's deliberate, willful conduct:

- intentional conduct which cannot be considered to be a normal risk of employment or is contrary to fundamental public policy (California);
- willful conduct (Pennsylvania);
- consequences of an act substantially certain to result in harm (New Jersey);
- deliberate intent to injure (Florida).

Also see, *Gantt v. Security USA, Inc.*, 356 F.3d 547 (4th Cir. 2004) (EE's IIED claim against ER allowed where EE was ordered to work in an isolated area and was thereafter kidnapped and raped by ex-boyfriend. ER assigned EE to work in the isolated area despite knowing that EE had been threatened and had a restraining order against the ex-boyfriend. Lower court's finding

upheld - the ER's act of ordering EE to work in an isolated area rose to the level of proof of ER's *deliberate intent to injure* under the Maryland Workers' Compensation Act).

1. Special Relationship Between Employer and Employee

In some situations, there may be a special employer-employee relationship which gives rise to a tort action. In *Brun v. Caruso*, 18 Mass. L. Rep. 469 (Mass. Super. Ct. Middlesex, 2004), the decedent-employee (waitress) was killed by a restaurant patron and intermittent handyman of the restaurant-employer. The employer was on notice of the patron/perpetrator's repeated harassment of other waitresses over a 10 year period prior to the murder. The patron/perpetrator frequented the restaurant on a nearly daily basis prior to the murder and also engaged in hostile, bizarre acts against decedent, of which employer was aware, including cutting gas lines at the restaurant. The court held that there was sufficient evidence of a "special relationship" between the deceased employee and employer, giving rise to the tort claim. In addition, the court recognized that the employer-employee relationship may give rise to a duty to protect the employee from reasonably foreseeable third party criminal acts. Id. at 11. *Also see*, *Wanca v. Penn Industries*, 260 F.2d 350 (2nd Cir. 1958) (longshoreman's shooting of co-worker foreseeable where ER had prior knowledge of the longshoreman's violent behavior; therefore ER liable to injured plaintiff-fellow worker); *Circle K Corp. v. Rosenthal*, 118 Ariz. 63 (Ct. App. 1977) (EE shot by robber at convenient store, ER liable despite workers' compensation exclusivity due to breach of promise to EE that EE would not work alone at night).

2. Employer as a Premises Owner

Making a tort claim against the employer as a premises owner rather than an employer is by no means a slam dunk, especially considering that most employment related activity will be deemed to have occurred within the course and scope of employment and therefore within the confines of the workers' compensation exclusivity principle.

However, there is a small chink in the armor of the workers' compensation exclusivity shield, at least in New Jersey. In *Fry v. Pepsi Bottling Group*, 2012 N.J. Super. Unpub. LEXIS 1581 (App. Div. July 3, 2012), the plaintiff worked as a cook for a company which operated a bar/tavern and also owned the building. Plaintiff tripped over canisters of soda delivered by Pepsi and sued her employers, arguing that they owed her a duty independent of the employment, as property owners. Recognizing that New Jersey disfavors the dual capacity doctrine, the court however, noted the plaintiff's claims were not based on a structural defect in the building itself, which was owned by the employer, "Here, the alleged negligence related to a transient condition in the workplace, rather than a structural or similar problem with the building. For that reason, we conclude that Fry's claims against Palroll [employer] and the Rohls are barred by the [Workers' Compensation] Act." Id. at 5.

While this case was an unpublished opinion, the court's reasoning can absolutely be applied to civil workplace crime cases, especially when other factors are present, such as the employer's actual or constructive knowledge of crime, prior knowledge of faulty locks, etc.

I. Pleading and Insurance Coverage

Both commercial and residential liability insurance policies usually exclude coverage for an insured's intentional/criminal behavior. Therefore proper pleading is crucial to avoid an insurer's declaratory action. In the context of workplace violence, it is crucial to plead theories of negligence, if possible, as opposed to theories of intentional conduct. Otherwise, the client may be in a situation where they have a favorable verdict, but no way to obtain recovery. *See generally, State Farm v. DeCoster,* 2013 PA Super 121 (Pa. Super. Ct. 2013) (insured's act of shooting house guest in drunken haze created issue of material issue - whether act was intentional; therefore insurer's motion for summary judgment on duty to defend/indemnify denied).

An insured's criminal conviction does not, in and of itself, insulate the insurer under an exclusion clause. Rather, the relevant inquiry is the insured's intent, and not merely the intent accompanying the act, but rather, the purpose underlying the conduct. *See Spengler v. State Farm Fire & Cas. Co.*, 568 So.2d 1293 (Fla. 1st DCA 1990) (insurance policy exclusionary clause inapplicable where homeowner shot girlfriend believing she was an intruder due to homeowner's lack of intent to harm); *Allstate Ins. Co. v. Merritt*, 772 S.W.2d 911 (Tenn. App. 1989) (where homeowner shot person mistaking him for an animal, the issue was whether the insured reasonably intended the injury); *Curtain v. Aldrich*, 589 S.W.2d 61 (Mo. App. 1979) (exclusionary clause inapplicable where insured mistook brother-in-law for burglar, beating him with a crowbar).

V. Conclusion

Civil workplace violence cases are tough, but absolutely worth the fight. Whether it's the family of a deceased store clerk, a young woman who is sexually assaulted at work or a worker injured in a fight at work, there is no greater satisfaction than helping a crime victim succeed in a civil case. Workers' compensation exclusivity, employer liability, theories of liability and third party liability issues are by no means, static. These issues change with each new case, by crime victims lawyers who are willing to challenge courts and push the boundaries on behalf of those who deserve justice the most – victims of crime.

Philip M. Gerson[1]
Gerson & Schwartz, P.A.
1980 Coral Way
Miami, Florida 33145
877-475-2905
pgerson@gslawusa.com

HOW TO ARGUE DAMAGES IN SEXUAL ABUSE CASES

Much has been written and said by many about closing argument. My own view differs from others because I see this part of the trial much like opening statement which is the first opportunity for the trial lawyer to persuade the jury. Closing argument is the trial lawyer's second and final opportunity to persuade the jury. Though other differences can be pointed out about what is and is not done in each presentation, there is only one basic distinction between these important phases of every trial. Unlike opening statement made to an uninformed jury, closing argument is made to a jury which is knowledgeable about the facts, the parties, the lawyers, the judge, and the law. The process of evidence presentation has been a struggle between the lawyers over what the jury may and may not know about the case. The jurors have witnessed the conflict in evidence and the campaigns to introduce, emphasize, and minimize information in all forms.

Surely every case is different and often when closing argument arrives the evidence and dynamic of the experience differs considerably from what the trial lawyer forecasted or expected. Making adjustments to the tone and content of the closing based upon what has happened between opening and closing is one of the great challenges of trial lawyering. Opening statement begins at the base of a bridge. Crossing the bridge during trial takes everyone over the flow of evidence and courtroom behaviors which go under the bridge. On the landscape of the far side of the bridge closing argument is presented.

My preferred approach is to give the jury credit for being attentive, conscientious, and intelligent. Therefore, I rarely argue evidence or conflicting eyewitness accounts. Instead, I

[1] Philip M. Gerson is a board certified civil trial lawyer who has practiced law in Miami, Florida for more than 40 years. He is a cum laude graduate of the University of Miami Law School, where he was a member of the editorial board of the Law Review, a Moot Court winner and student instructor in legal research and writing. Mr Gerson is admitted to practice in all Florida Courts, the United States Supreme Court, the United States Court of Claims, the United States Court of Appeals for the Fifth and Eleventh Circuits, and the United States District Court for the Southern and Middle Districts of Florida. Mr Gerson is a sustaining member of the Association of Trial Lawyers of America, Dade County Bar Association, and the Dade County Trial Lawyers Association. He is also an EAGLE patron of the Academy of Florida Trial Lawyers and a member of the Continuing Legal Education Committee, as well as an active member of the Florida Bar Continuing Legal Education Committee, Professionalism Committee and Grievance Committee. Mr. Gerson serves on the Board of Directors at St. Thomas Univeristy School of Law. He is also a Guest Lecturer on Responsibility and Remedies for Torts for School Administrators, Florida University, Barry University; a Guest Lecturer, American Society for Industrial Security, Liability for Crime Because of Negligent Security; an Instructor for Hospitality Security Officers Training Program, Barry University. Mr Gerson limits his practice to plaintiffs injury and death cases, with a focus on medical malpractice, defective products, third party liability for criminal acts, and other complex litigation.

simply state the facts as I believe they have been proved. As I see it credibility decisions have already been made and nothing a lawyer can say will move the juror's views. Because the lawyer has seen and heard everything which the jurors have, time for closing argument is better spent explaining why money and the amount requested should be seen as fair. To be effective the trial lawyer must be able to make the jurors understand how the Plaintiff's life and wellbeing have been damaged. To be sure, most all jurors would readily agree sexual abuse is harmful without more being said. Certainly, handsome verdicts can come based solely upon the liability facts without more. However, in my experience carefully planned argument to explain the damages from the almost universally accepted taboo of sexual assault will result in higher verdicts and minimize the risks of disappointing low inadequate verdicts.

Of course, there are many other recommended imperatives and reminders to be stated to the jury such as explanations of legal concepts contained in the instructions as they should be applied to the facts and how the verdict form should be completed. Thus, no comprehensive manual for closing argument is intended to be presented here. Indeed, only the damages discussion and the request for money will be demonstrated.

In the fact patterns below (both real cases) I have presented both the liability and the damages facts so that the listeners have a big picture context from which the damage argument can be understood. Of course some of the concepts of juror roles and juror empowerment are included so as to make the damages request as compelling as possible. Likewise to some extent liability facts must be mentioned to illustrate some elements of damages. Hopefully, these techniques will help other lawyers sharpen their skills in asking jurors for full and fair money damages.

Case # 1 Rape of a mentally challenged young woman

Debra Rubenstein was born in Miami. She has been diagnosed as mildly mentally retarded since she was in elementary school. Debra was a special needs student from elementary school to high school graduation. She has two high functioning sisters who work in the private sector. Only one still lives in south Florida. Debra's parents are in their middle 80's and both are in declining health. They are only able to provide minimal assistance. Both sisters are busy in their own lives. After high school Debra lived in a low security state funded mental health center. In her early 20's she moved to a group home for mentally challenged young adults. She thrived, increased her independent life skills, and socialized with her peers. Although she was sexually assaulted twice as a teenager she understands her limitations and is careful to avoid situations where men could take advantage of her. After two years in the group home Debra shared an apartment with a girlfriend for a year.

Debra worked at the Jewish Vocational Services workshop program 5 days a week. Her job tasks were placing address labels on and sealing envelopes, organizing office supplies, and other simple tasks. Debra got along well with her co-workers. She earned $1.29 per hour for a 40 hour week. Public benefits were paid to supplement her limited earning capacity. Her parents and sisters contributed both cash and in kind goods and services to help her maintain a modest

lifestyle. Debra did not date. Her free time was spent making simple crafts and visiting her parents and sister. She was content and well adjusted to her lifestyle.

When her roommate moved back into her family home Debra's parents found a small apartment for her near their condominium apartment. Debra rented a small first floor one bedroom with a private bathroom in a five story apartment building. Her parents went to inspect the apartment, met with the owner, and explained Debra's history and limited capabilities. The building owner assured Debra and her parents that she would be safe since there were adequate locks and the property was located in a densely populated urban area with similar low-rise buildings. After a few months there was a flood from bad weather. Debra's apartment was uninhabitable until repairs could be completed. She was moved to a second floor apartment which shared a bathroom with the neighboring apartment. Each door to the bathroom had inside locks for privacy so that when in use access could be restricted. Debra's parents were assured this would be a short term accommodation until flood repairs were completed.

The neighboring apartment was rented to a single man who was employed as a store clerk. The lease prohibited occupancy by others. Nevertheless, the store clerk permitted a cousin and his friend to move into his apartment. Debra's parents learned of this situation when she told them there were three men living next door. Mr. and Mrs. Rubenstein complained to the owner about the three men. They told the owner that the neighbors regularly took Debra's toothpaste, soap, towels, and other personal grooming articles. Her parents replaced the missing articles and requested immediate repairs so Debra could move back into her first floor apartment.

Other tenants also complained about the three men because of loud noise late at night, physical fighting between themselves, and rudeness to other tenants and their guests. Unknown to Debra and her family, another female tenant was assaulted by one of the young men. The other female tenant was a martial arts master who successfully defended herself. She reported the incident to a maintenance man but not to the building owner. Mr. and Mrs. Rubinstein were repeatedly assured the occupants not on the lease would be forced to leave immediately and that the flood repairs would be completed within a few more days. The owner also promised to "keep an eye" on the apartments to make sure Debra was safe.

Debra was showering when all three men entered the bathroom. The inside lock was bolted but the door was forced open. The men physically assaulted Debra with their hands and fists, dragged her into their apartment, and raped her orally, vaginally, and anally. After almost two hours of beatings and sexual assaults they put Debra in her own bed in her apartment, closed the bathroom doors and left the property. Debra phoned her parents who called the police. The three neighbors were apprehended and confessed to the crimes. Debra was taken by ambulance to the county hospital rape crisis treatment center. After two days she was discharged home.

Debra moved back into her parents nearby small condominium. She slept on the living room couch while she healed from her injuries. She recovered fully from her physical injuries within three months. Prior to the incident Debra participated in group therapy sessions with other mentally challenged young adults. Afterward, she began private therapy sessions when her parents noticed that she was withdrawn and would not return to her job even though she was physically able. After a few months her parents could no longer afford the cost of $250 per week for three sessions of private therapy. Debra discontinued treatment and after almost a year with her parents she returned to the group home where she was living at the time of trial.

At trial the defendant's lawyers denied liability for negligence in exposing a defenseless young woman to rowdy unauthorized occupants of the apartment next door. They claimed the temporary bathroom sharing was reasonable under the circumstances despite the fact that Debra rented and paid for a unit with a private bathroom. The defendant argued that if any compensation was due it should be a modest amount because her medical bills were small, her past wage loss was likewise small, and her future earning capacity if affected at all was temporary and not a significant amount because of her pre-incident mental status. Though the experience of the attack and sexual assault was conceded to be significant it was claimed that because she had been victimized similarly in the past she had demonstrated ability to overcome any long term effects of the incident so future non-economic damages were argued to be negligible or trivial at most.

Claims for punitive damages were denied before trial. No expert witnesses were called by either side except for the mental health counselor who provided private therapy to Debra in the months after the incident.

Debra's mother testified at trial. For health reasons her father did not. The assailants did not testify. The other female tenant testified about how she easily repelled her attacker. The maintenance man testified he had no recollection of any complaints from anyone about the neighbor tenants. The building owner testified he had no knowledge of any problems with the neighboring tenants and that both he and the maintenance man were present daily working or repairs and watching over the property.

Case # 2 Sexual abuse of a young boy

At age 9, Ivan Torres, came to the United States from Cuba on a homemade raft with a group of refugees including his mother Maria Elena and older sister Sophia. His father Enrique was unable to escape with them but continued working on his plan to flee the Castro regime. While still living in Havana Enrique spoke regularly on the phone and internet with his family after they landed safely in Miami. Like many Cuban refugees Ivan, his sister, and mother, spoke no English when they arrived and had no family to help them establish new lives. After being processed by U.S. government officials and a brief stay at the famous Krome Avenue detention camp they were released to make their way in a new country. Like thousands who had come before them Maria Elena reached out for help from extended family relationships based in Cuba.

Alex Rivera and his wife Carmen had come from Cuba to Miami long before in the now infamous Mariel boatlift during which tens of thousands of Cubans immigrated to the United States with approval from the Cuban government. Within days after their release Maria Elena and her children made contact with the Rivera's. Though not blood relatives, Alex Rivera's parents and Maria Elena's parents were and remain close friends going back decades in Cuba. As youngsters Maria Elena and Alex grew up together as neighbors and classmates until Alex Rivera left for the United States. The two families shared a common background. In Cuba their

children thought of themselves as cousins though they were not. Aunt and uncle were affectionate endearments used to express the closeness and trust between families.

After emigrating Alex Rivera married and had 4 children, all born in Miami. The two youngest Jorge and Isabel were each one year older than the Torres kids. As is customary in Miami's Cuban refugee community, the Rivera's welcomed the Torres family into their middle class home. To recent arrivals Maria Elena, Sophia, and Ivan the middle class suburban house was luxurious far beyond what they had living in Cuba.

Ivan and Sophia enrolled in public school in third and fifth grades. With special programs for non-English speakers and a strong Cuban-American community both children quickly adapted to their new home and adopted American values and lifestyles far more open and enriched than what they had left behind in Cuba. With the Rivera family as their model the Torres immigrants emulated the Cuban-American example and embraced American family customs. They reported regularly by phone and email to their father Emilio in Cuba about their new life.

Within a few months Ivan began to idolize Alex as a surrogate father who gave him gifts emblematic of the richness of middle class American life only rumored to exist in his native Cuba. There was nothing extravagant. Ivan was just given the ordinary things accompanying American boyhood; a baseball glove, a bicycle, and new sneakers. Maria Elena found work in a factory. Sophia and Isabel considered themselves cousins, went to the same school, attended church, and bonded together in ways both expected would last a lifetime.

Wearing his new little league uniform Ivan barely noticed the first time Alex reached over and fondled his genitals driving home from baseball practice. Alex's son Jorge was in the back seat but never noticed what his father was doing to his friend. As the months went by when they were alone Alex fondled Ivan in other settings too without any comment by either of them. It was as if what was unsaid didn't happen. Ivan was confused by this contact but neither resisted, objected, or questioned Uncle Alex; he was his surrogate father and Ivan admired him never questioning anything he did or said even though he had never had any sexual contact with anyone before and didn't understand why Alex did it or whether he should tell anyone.

On his 10th birthday, Uncle Alex invited Ivan to go pick up ice cream for everyone in the household. Alone together in the car Alex parked in the shopping center far away from the ice cream parlor. With no other vehicles nearby Alex told Ivan he loved him as his own son and that he wanted to make him feel special on his birthday. While explaining Alex zipped down Ivan's pants and began to fondle his penis. Once Ivan got an erection Alex put Ivan's penis in his mouth and fellated him. Then, Alex exposed his penis and pushed Ivan's head into his lap. Ivan was confused but followed the directions given until Alex pushed him away and zipped up his pants, and then drove to the ice cream parlor. They went home with ice cream for everyone and never discussed what happened in the parking lot. Ivan didn't understand but said nothing to Alex, his mother, sister or father.

Over the next few months, Alex continued to molest Ivan a dozen times or more as he had on his birthday in the shopping center parking lot. These molestations occurred in the car, at home, and even in public places when others could not observe or detect them. Ivan didn't understand why Alex engaged him in this behavior but assumed it must be something expected

and routine in his new country. Neither Alex nor Ivan ever talked themselves about the sexual contact either during or afterwards.

Before he turned eleven Ivan's father Enrique made it to Miami in a bold escape with his brothers and aged parents. After processing, the new arrivals reunited with Maria Elena, Sophia, and Ivan. The family found an apartment and established their own household. Maria-Elena continued working at the factory. Enrique found work as a landscaper and within months started his own lawn service company with other refugees.

In the car on their way home from a little league baseball game Ivan put his hand on his father's lap and began fondling Enrique's penis. In disbelief Enrique stopped the car and asked Ivan what he was doing. Ivan explained that he and Uncle Alex often fondled each other in the car and elsewhere. After more questioning by Enrique, Ivan described the oral sex with Alex too. When they got home Enrique told his wife what had happened. The next day they explained their family values about both heterosexual and homosexual sexual contact. Ivan listened but said nothing. The Torres family abruptly severed all ties with Alex and Carmen Rivera and their children. A few days later Enrique and Maria Elena took Ivan to the Catholic Church where they attended mass. After hearing their explanation the priest lectured Ivan for an hour. Ivan listened politely but said nothing.

Within a few weeks Enrique and Maria Elaina took Ivan to see a psychologist recommended by his public school assistant principal. After a few therapy sessions it was apparent that Ivan lacked confidence in this counseling though it did seem to benefit Enrique and Maria Elena. To his parents Ivan seemed sullen introspective and withdrawn, not friendly and enthusiastic about school and sports as he had been after coming to Miami. He frequently complained of ambiguous stomach aches though doctors could find no illness or disease. Lacking resources for continued treatment the therapy was abandoned. The family never discussed Ivan's sexual experiences with Alex Rivera again. Somehow Sophie learned the story in general terms but like her parents and brother always avoided the subject both specifically and even general references about the topic.

Ivan matured with his peers and though he seemed quieter and more subdued than he had been as a pre-teen, he went on to live, outwardly at least, just like everyone else in his age group. In junior high school he played on the school baseball team and had friendships with his teammates. The stomach aches continued and to his parents Ivan complained to manipulate them when he didn't want to participate in an outing or activity. Too often he stayed home from school. At age 12 Ivan had his first girlfriend. Their relationship lasted for most of the school year. No obvious behavioral or psychological symptoms manifested to indicate a permanent effect on Ivan from the sexual molestation by Alex. Enrique and Maria Elena felt tension between themselves about Ivan's exploitation. They both felt responsible because of the decisions they made to leave Cuba separately and make the sacrifices needed to establish a new life in the United States. Both parents agreed that if Ivan had not been separated from his father and had not lived in a strange household and new culture and society he would never have been victimized by Alex or anyone else. Over time the family realized they shared a dark secret none of them understood but which all four felt had become part of their life.

Enrique and Maria Elena filed suit against Alex and Ivan and his family testified to all of the facts set forth above at trial. In his testimony Alex denied any sexual contact with Ivan ever occurred. He stated he was affectionate to Ivan but never sexually molested him. There was no evidence of economic losses presented.

Roderick MacLeish[1]
Cecilia Woolverton[2]
MacLeish & Woolverton
55 Cambridge Parkway
Suite 401
Cambridge, MA 02142
617-817-1797
eric@macleishandwoolverton.com
celia@macleishandwoolverton.com

A Proposal for Reducing the Risk of Vicarious Trauma for Advocates & Attorneys Representing Victims of Violent Crime

ABSTRACT

Advocates and attorneys representing victims of violent crime become the key to the success of victims' legal claims and vital support systems for their fragile clients. Over the course of legal proceedings, victims share their traumatic experiences with advocates and attorneys. As a result, many of these professionals begin suffering from vicarious trauma. These practitioners, however, work in environments with little awareness, support and training for vicarious trauma and other mental health issues. The norms of the legal profession perpetuate a legal culture where attorneys ignore their personal feelings and the necessity of self-care. This article suggests practical and realistic solutions to the prevalent problem of vicarious trauma among advocates and attorneys.

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[1] Founding Partner, MacLeish and Woolverton, LLC; Of counsel, Clark Hunt Ahern & Embry B.A. Vassar College, J.D. Boston University School of Law. Mr. MacLeish wanted to thank his research assistant, Sara Elizabeth Burns, for her prompt, thorough, and diligent work. Mr. MacLeish is a nationally known trial lawyer having participated as an advocate in more than a hundred mediations. He was picked as one of the top ten winning trial lawyers by the National Law Journal in 2003 and has regularly appeared as one of Boston Magazine's "Superlawyers." He is a graduate of Vassar College and Boston University School of Law (cum laude). He was a law clerk for U.S. District Court Judge Joseph L. Tauro. He started the Boston offices of two national law firms and was the Co-Head of the Litigation Department of one of the firms. He was elected to senior equity partnerships in both firms. From 2002 to 2004, he was the lead counsel in the Boston priest abuse cases where he and his firm represented more than 300 victims over three years. MacLeish also founded the Massachusetts 9/11 Fund, which provided millions of dollars of financial support to surviving families as well as a host of other services.

[2] *Celia Woolverton LICSW, LCSW, MSW,* has had a private practice in psychotherapy for over 25 years and extensive experience in mediation. She is a Tennessee Supreme Court Rule 31 Family Mediator, and received specialized mediation training which satisfies Massachusetts Rule 8 training requirements for family mediators and the confidentiality requirements in Massachusetts General Laws, Chapter 233, Section 23C. She graduated from The Colorado College and went on to receive a Masters in Social Work. She has a post-graduate certification in advanced psychotherapy and psychoanalysis from the Washington School of Psychiatry. Ms. Woolverton has done extensive work and lectured in the area of child development. She has worked with numerous victims of childhood sexual abuse, and has lectured nationally on the subject. Ms. Woolverton served on the board of Prevent Child Abuse Tennessee, and volunteered for the Tennessee Department of Child and Family Services, supervising cases.

I. INTRODUCTION

In the spring of 2004, I was lead counsel of a team of lawyers, which settled more than 500 clergy sex abuse cases in the Boston Archdiocese. I had just finished settling the remaining cases. Our settlement, including the non-financial child protection provisions, set the stage for world-wide reforms within the Catholic Church that were far from perfect but were a vast improvement from the status quo. By any measure, I was a successful lawyer. I had been named one of the top winning trial lawyers in the country by the National Law Journal and had files filled with thank you letters going back more than a dozen years, when I first started doing sexual abuse cases.

On the surface, there was a great deal to feel good about. Not many of us have the opportunity to "bend history." But that was not how I felt. I was no different from many of the other lawyers and advocates that represent crime victims, experiencing "vicarious trauma" ("VT") because of my close work with these victims.[3] The VT that I suffered had rekindled unresolved issues surrounding my own prior sexual abuse as a child.[4] Within in months, I was diagnosed with Post-Traumatic Stress Disorder and had to stop practicing law until 2010.

II. IDENTIFYING THE PROBLEM

VT, sometimes referred to as compassion fatigue or stress related disorder,[5] can arise from repeated exposure to stories of victims of traumatization.[6] Some commentators refer to it as an "occupational" form of Post-Traumatic Stress Disorder[7] and it can result in serious mental health disorders, which can in turn lead to substance abuse, unprofessional behavior or severe problems at home or with colleagues.[8] It is different

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[3] "Vicarious trauma (VT) refers to the experience a helping professional undergoes in developing personal trauma symptoms as a result of working with victims of trauma." Peter G. Jaffe et al., *Vicarious Trauma in Judges The Personal Challenge of Dispensing Justice*, 45 JUDGES' J. 12, 12 (2006).

[4] In my case, it was one particular case that triggered memories of sexual abuse that I had never adequately processed which caused intrusive thoughts, which became more debilitating. Of course, not all individuals advocating for victims have been subject of trauma, but I have encountered many lawyers and advocates who were victims. There is no doubt that VT can occur with advocates without any prior history of abuse. *See* Andrew P. Levin & Scott Greisberg, *Vicarious Trauma in Attorneys*, 24 PACE L. REV. 245, 250 (2003-2004) (noting that previous trauma did not predict the whether or not a study subject would suffer from VT).

[5] Nancie Palmer, *The Essential Role of Social Work in Addressing Victims and Survivors of Trafficking*, 17 ILSA J. INT'L & COMP. L. 43, 55 (2010-2011).

[6] *See* Joy D. Osofsky et al., *How to Maintain Emotional Health When Working with Trauma*, 59 JUV. & FAM. CT. J. 91, 93 (2008).

[7] Barbara Glesner Fines & Cathy Madsen, *Caring Too Little, Caring Too Much: Competence and the Family Law Attorney*, 75 UMKC L. REV. 965, 986 (2006-2007); *see* Jean Koh Peters, *Habit, Story, Delight: Essential Tools for the Public Service Advocate*, 7 WASH. U. J.L. & POLICY 17, 27 (2001) ("Essentially, vicarious traumatization is a recurring, occupational hazard, as it results from empathic engagement with another person. Since we would never want to lose that empathy, which can be our greatest offering to our clients, we must accept that vicarious trauma will always be with us.")

[8] *See* Shiloh A. Catanese, *Traumatized by Association: The Risk of Working Sex Crimes*, 74 FED. PROBATION 36, 38 (2010) (noting that those suffering from vicarious trauma often resort to alcohol use as a coping mechanism); Barbara Glesner Fines & Cathy Madsen, *Caring Too Little, Caring Too Much: Competence and the Family Law Attorney*, 75 UMKC L. REV. 965, 988-89 (2006-2007) (discussing the various indicators of vicarious trauma).

from burnout, which involves a more general psychological distress.[9]

Lawyers are not the only people that work with victims of violence who experience VT or similar conditions. Advocates, mental health professionals, judges and others in the criminal justice are at high risk as well.[10] Researchers seldom study the rate of VT for attorneys compared to other professionals that work with victims, but one study suggests that the rate is higher.[11] There has been general discussion in literature of well-intentioned solutions to the problem for legal professionals, such as small caseloads, avoiding negative people and reporting others who appear to be impaired.[12]

Though these solutions are logical, they are also unrealistic. During my work in this field, I have noticed an increasing demand for advocates who spend most, if not all, of their time working with victims. It is highly specialized work. For example, most civil lawyers in the church abuse cases work full-time on such cases, in some cases employing other lawyers in the firm. Many prosecutors' offices now have lawyers and investigators who work full-time on child abuse or sexual assault units.[13] While avoiding negative people lowers the risk for VT,[14] our adversarial system of justice involves constant interaction with negative people, most particularly the lawyer on the other side of the case. Further, reporting impaired lawyers is now an ethical requirement,[15] yet some attorneys are reluctant to report their peers.[16] In some cases, attorneys should be reported

[9] Barbara Glesner Fines & Cathy Madsen, *Caring Too Little, Caring Too Much: Competence and the Family Law Attorney*, 75 UMKC L. REV. 965, 989 (2006-2007).

[10] *See* Cynthia F. Adcock, *The Collateral Anti-Therapeutic Effects of the Death Penalty*, 11 FLA. COASTAL L. REV. 289, 295-99 (2009-2010) (discussing death row lawyers and their risk of vicarious trauma); Shiloh A. Catanese, *Traumatized by Association: The Risk of Working Sex Crimes*, 74 FED. PROBATION 36, 36 (2010) ("Professionals working with the victims or offenders of crimes that result in trauma have the potential to be deeply affected by the stories and the images they are exposed to during their work."); Andrew P. Levin & Scott Greisberg, *Vicarious Trauma in Attorneys*, 24 PACE L. REV. 245, 250 (2003-2004) (including mental health providers and social workers in a study of vicarious trauma); Monica K. Miller & James T. Richardson, *A Model of Causes and Effects of Judicial Stress*, 45 JUDGES J. 20, 22 (2006) (stating that judges that empathize with victims are at risk for vicarious trauma).

[11] Andrew P. Levin & Scott Greisberg, *Vicarious Trauma in Attorneys*, 24 PACE L. REV. 245, 245 (2003-2004) ("Compared with mental health providers and social services workers, attorney's [sic] surveyed demonstrated significantly higher levels of secondary traumatic stress and burnout.").

[12] Shiloh A. Catanese, *Traumatized by Association: The Risk of Working Sex Crimes*, 74 FED. PROBATION 36, 38 (2010); Barbara Glesner Fines & Cathy Madsen, *Caring Too Little, Caring Too Much: Competence and the Family Law Attorney*, 75 UMKC L. REV. 965, 984-85, 993 (2006-2007).

[13] *See* Shiloh A. Catanese, *Traumatized by Association: The Risk of Working Sex Crimes*, 74 FED. PROBATION 36, 37 (2010) (noting the increased success rates of prosecution when prosecutors specialize in sex crimes).

[14] Shiloh A. Catanese, *Traumatized by Association: The Risk of Working Sex Crimes*, 74 FED. PROBATION 36, 38 (2010).

[15] *See* MODEL RULES OF PROF'L CONDUCT R. 8.3(a) ("A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.")

[16] Kenneth L. Jorgensen, *Ethical Responsibilities for an Impaired Partner*, 60 BENCH & B. MINN. 12, 12 (2003) (discussing the reluctance of attorneys to report their peers because, in many instances, attorneys consider the causes such impairments as personal problems).

to the appropriate oversight board for blatant ethical violations, but there is no obligation to report competent attorneys that exhibit preliminary VT symptoms.[17]

Undoubtedly, the legal profession inadequately prepares attorneys to cope with VT and other stress related challenges that they will face when they have graduated from law school.[18] Law students are presumed to be stress resilient, and the focus of their legal education is teaching them to research, argue and think like lawyers.[19] Some state bars, such as Massachusetts, do not require continuing education,[20] but those that do usually do not offer stress management or VT prevention courses.[21] Unlike mental health professionals, lawyers do not receive routine supervision that focuses on emotional issues or problems resulting from exposure to trauma.[22]

In addition, the exposure to trauma can be as intense as the exposure of mental health professionals.[23] It is not uncommon for an attorney to be the first person that a victim tells about his or her abuse.[24] These meetings are often emotional and occur at a time when the client is enormously vulnerable and under the mistaken belief that the attorney can actually help in a way other than filing a lawsuit.[25] The truth is that attorneys are not trained to respond to these situations.[26] Like other lawyers who specialized in this

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[17] *See generally* ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 03-431 (2003) (discussing the reporting requirements of Rule 8.3 and suggesting attorneys may report colleagues to lawyer assistance programs even when they are not obligated to report colleagues to an oversight board).

[18] Barbara Glesner Fines & Cathy Madsen, *Caring Too Little, Caring Too Much: Competence and the Family Law Attorney*, 75 UMKC L. REV. 965, 992 (2006-2007).

[19] *See* Marjorie A. Silver et al., *Stress, Burnout, Vicarious Trauma, and Other Emotional Realities in the Lawyer/Client Relationship: A Panel Discussion*, 19 TOURO L. REV. 847, 849 (2002-2004) ("[L]awyers are trained to assume that the only things relevant to their relationships with their clients are how well they know the law and how well they can read and apply it.").

[20] *CLE*, MASSACHUSETTS BAR ASSOCIATION, http://www.massbar.org/cle (last visited July 2, 2013).

[21] Susan Swaim Daicoff, *Expanding the Lawyer's Toolkit of Skills and Competencies: Synthesizing Leadership, Professionalism, Emotional Intelligence, Conflict Resolution, and Comprehensive Law*, 52 SANTA CLARA L. REV. 795, 837 (2012) ("Stress management, meditation, yoga, and other wellness initiatives are occasionally subjects of continuing legal education for lawyers (and some law school curricula).").

[22] *See* Andrew P. Levin & Scott Greisberg, *Vicarious Trauma in Attorneys*, 24 PACE L. REV. 245, 245 (2003-2004) (noting that the lack of supervision of lawyers on issues of trauma causes the difference in secondary traumatic stress levels between lawyers and mental health professionals, with lawyers experiencing higher stress levels).

[23] *See generally* Andrew P. Levin & Scott Greisberg, *Vicarious Trauma in Attorneys*, 24 PACE L. REV. 245 (2003-2004) (comparing the results of a vicarious trauma survey administered to attorneys, mental health providers, and social services workers).

[24] *See* Joseph Allegretti, *Shooting Elephants, Serving Clients: An Essay on George Orwell and the Lawyer-Client Relationship*, 27 CREIGHTON L. REV. 1, 8 (1993-1994) (discussing the deeply personal relationships that develop between attorneys and their clients).

[25] *See* Dana E. Prescott, *The Act of Lawyering and the Art of Communication: An Essay on Families-in-Crisis, the Adversarial Tradition, and the Social Work Model*, 10 LEGAL ETHICS 176, 181 (2007) ("A "web" of socially constructed beliefs and values then frames expectations about lawyers as advocates at any initial conference.").

[26] *See* Dana E. Prescott, *The Act of Lawyering and the Art of Communication: An Essay on Families-in-Crisis, the Adversarial Tradition, and the Social Work Model*, 10 LEGAL ETHICS 176, 190 (2007) (comparing the roles of social workers and lawyers, and advocating that lawyers need better training to meet their clients' needs).

work, I constantly found myself meeting with victims who were in severe psychological distress.

Early in my career, I believed that speaking empathetically with victims, sometimes for long periods of time (including nights and weekends at home) helped them. I quickly realized that, as empathetic as I was, most of my clients needed help from an expert clinician. I put together a roster of mental health professionals to refer clients in need of such assistance. I eventually hired a full-time social worker that served as a case manager for clients and assisted clients in receiving proper care.

Attorneys and advocates drawn to work with victims are, for the most part, compassionate and caring individuals by nature. However, attorneys and advocates are not substitutes for clinicians.[27] When clients ask attorneys for personal e-mail addresses and phone numbers, the attorneys may struggle to refuse. At the same time, if attorneys agree to speak to their clients at all hours of the day and on weekends, they may not be observing proper boundaries and increase their likelihood for VT.[28]

III. PRACTICAL SOLUTIONS TO MINIMIZE THE RISK OF VT AND RELATED DISORDERS

There are scant resources on practical solutions to address the high risk of VT and other disorders for legal professionals and advocates.[29] First, practitioners must understand their motivations for engaging in such work because self-awareness leads to realistic expectations.[30] Second, resiliency is an essential trait in practitioners representing victims of violent crimes, so practitioners must honestly assess their level of resiliency and determine whether or not they are able to take such cases.[31] Third, practitioners must set boundaries with clients, which protect both clients and practitioners alike.[32] Fourth, peer support must be widely accessible to advocates and attorneys suffering from VT.[33] Fifth, practitioners must make self-care a priority in order to adequately and competently represent their clients.[34]

A. Self-Awareness

Attorneys and advocates need to be aware of their own mental maps in order to protect themselves from VT. Practitioners have unique and often very personal reasons for working with victims. Many attorneys that represent crime victims had options for more lucrative and less emotionally challenging careers. Remarkably, however, few attorneys have actually taken the time to reflect on their decision to work in this

[27] Barbara Glesner Fines & Cathy Madsen, *Caring Too Little, Caring Too Much: Competence and the Family Law Attorney*, 75 UMKC L. REV. 965, 983 (2006-2007) (discussing instances where attorneys should refer clients to mental health professionals).
[28] Barbara Glesner Fines & Cathy Madsen, *Caring Too Little, Caring Too Much: Competence and the Family Law Attorney*, 75 UMKC L. REV. 965, 996-97 (2006-2007) (discussing the connection between boundaries and appropriate and productive attorney-client relationships).
[29] *See supra* notes 10, 16-20 and accompanying text.
[30] *See infra* Part.III.A.
[31] *See infra* Part.III.B.
[32] *See infra* Part.III.C.
[33] *See infra* Part.III.D.
[34] *See infra* Part.III.E.

particular field, and it is necessary for attorneys to be aware of their motivations for working with victims of traumatic events.

Everyone is different. In many situations, it is important for attorneys to understand that their goals in this work are not realistic. If attorneys are not aware of this fact, the chances are much greater that they will be adversely affected. While working zealously to achieve some measure of justice is important, the simple fact is that the remedies we are advocating for—accountability in the criminal justice system or money damages in a civil lawsuit—are meaningful yet generally insufficient to completely meet the needs of our clients. In some cases, the process can actually be harmful, as attorneys who have defended abuse victims in court and depositions can attest.[35] I believed for many years that I might be able to "save" a good number of my clients, and the truth is that while I successfully represented clients in court and settlement negotiations, sometimes I could do little to heal the wounds left by their abusers.

B. Resiliency

It is also important to candidly reflect on one of the most important tools to prevent VT and emotional trauma—our capacity for resilience. In this context, resilience is the ability to leave the traumatic stories of victims at work each night.[36] Resiliency is not simply forgetting about traumatic experiences, hiding from the trauma outside of work.[37] Instead, it is, the individual's capacity to prevent the trauma from consuming his or her life outside of work.[38]

The psychological literature is replete with various theories about resiliency, but the truth is that some people seem to have the innate ability to be more resilient than others.[39] With time, those with less resilience may be able to further develop this trait.[40] Attorneys must be aware of where they sit on the resiliency spectrum. Attorneys that are not very resilient must honestly, consider whether starting or continuing with this specialized work is in their own best interests and best interests of their clients.

C. Boundaries

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[35] *See* Marjorie A. Silver et al., *Stress, Burnout, Vicarious Trauma, and Other Emotional Realities in the Lawyer/Client Relationship: A Panel Discussion*, 19 TOURO L. REV. 847, 860-61 (2002-2004) (discussing victims taking legal action causing of retraumatization).

[36] Shiloh A. Catanese, *Traumatized by Association: The Risk of Working Sex Crimes*, 74 FED. PROBATION 36, 36-37 (2010).

[37] *See* Shiloh A. Catanese, *Traumatized by Association: The Risk of Working Sex Crimes*, 74 FED. PROBATION 36, 36-37 (2010).

[38] *See* Shiloh A. Catanese, *Traumatized by Association: The Risk of Working Sex Crimes*, 74 FED. PROBATION 36, 36-37 (2010).

[39] Shiloh A. Catanese, *Traumatized by Association: The Risk of Working Sex Crimes*, 74 FED. PROBATION 36, 36 (2010).

[40] J. Eric Gentry et. al., *The Accelerated Recovery Program (ARP) for Compassion Fatigue*, *in* TREATING COMPASSION FATIGUE 123, 131 (Charles R. Figley ed., 2002) (suggesting that mastering certain emotional skills that allow caregivers to be more intentional and less reactive will help develop resilience).

The lure of becoming deeply enmeshed in the lives of victims of trauma can be too great a temptation for good-hearted professionals, and such a close relationship with clients is fraught with danger. Advocates and attorneys should be required to engage in continuing education and training in maintaining proper boundaries with victims of trauma. Ethical rules do not adequately address the boundary challenges that regular representation of victims of trauma poses. It is necessary for practitioners to maintain an empathic position with clients while at the same time clearly communicating the limits of the relationship. When presented with a horrific tale of abuse and injury, it is a natural tendency for attorneys to believe that they can help in many areas, which include providing psychological help, assisting in the repair of a torn relationship or addressing immediate financial needs.[41] Those who venture down these paths face extreme danger and increased risk of psychological injury when their well-intentioned efforts fall short.[42] Since no state requires such specialized training in boundaries, advocates and attorneys should form their own peer support groups[43] and recruit (even pay) professionals to assist them.

A corollary to the need for proper boundaries is the need for advocates and attorneys to be able to understand and explain to the clients at the inception of the engagement which goals are realistic and achievable.[44] Many goals are not. Our system of laws and court procedures are imperfect, to say the least. For example, our criminal justice system would collapse if it were not for plea bargains. Because of scarce judicial and prosecutorial resources, it is inevitable that some cases are going to end in a disposition that is unfair and unjust, perhaps with little or no incarceration for the perpetrator.[45] On the civil side, many victims will be denied claims for compensation because of procedural rules, such as statute of limitations laws, that fail to reflect the realities of sexual abuse and the legitimate inability of victims to "come forward" in a time-frame that the law deems adequate.[46] Promptly discussing such inherent flaws greatly lessens the likelihood of retraumatized by the process of seeking justice in a court of law.[47]

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[41] *See* Barbara Glesner Fines & Cathy Madsen, *Caring Too Little, Caring Too Much: Competence and the Family Law Attorney*, 75 UMKC L. REV. 965, 995-97 (2006-2007) (exploring the rationale behind boundaries and the consequences if boundaries are not established).

[42] *See* Barbara Glesner Fines & Cathy Madsen, *Caring Too Little, Caring Too Much: Competence and the Family Law Attorney*, 75 UMKC L. REV. 965, 995 (2006-2007) (stating that establishing boundaries protects attorneys from psychological injury).

[43] *See infra* Part III.D.

[44] Fredda Fisher Wolf, *The Difficult Client*, 22 ME. B. J. 24, 29-31 (2007) (discussing the importance of establishing reasonable goals with clients).

[45] *See* Jacqueline E. Ross, *The Entrenched Position of Plea Bargaining in United States Legal Practice*, 54 AM. J. COMP. L. 717, 717 (2006) (stating that plea bargaining is a way for prosecutors to efficiently manage caseloads).

[46] Ellen M. Bublick, *Tort Suits Filed By Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms and Constituencies*, 59 SMU L. Rev. 55, 82 (2006) ("Statutes of limitation … are often short, though they may afford children additional time to file a cause of action once they reach the age of majority, be lengthened by the discovery doctrine, be tolled by fraudulent concealment of material facts, or be waived by defendants.").

[47] *See* Bruce Winick, *Therapeutic Jurisprudence and the Role of Counsel in Litigation*, 37 CAL W. L. REV. 105, 110 (2000-2001) (discussing attorneys' ability to ameliorate their clients' stress during litigation through providing them information about the trial process).

D. Peer Support

In some areas of the country, victim lawyers and advocates are members of organizations that meet regularly to discuss issues of common concern.[48] Far too often, however, these meetings focus exclusively on strategies, developments in the law and "war stories" of successful cases.[49] Usually during social time practitioners receive their only opportunity to speak personally about the emotional and psychological challenges that they face, but often lawyers avoid the topic because of the "macho" milieu of the legal profession.

Peer support meetings are no substitute for proper treatment of mental health issues, but they can be a powerful way to decrease the chances that practitioners will be adversely affected by their work. Many stress management courses emphasize the need for peer participants to meet regularly in small groups to discuss the challenges they face in their work and personal impact of their work.. Stress management teachers (some of whom, like me, are also attorneys) can effectively lead such a group for several sessions until individuals feel comfortable talking more freely with each other, at which point outside assistance is unnecessary.

Some object to peer support for lawyers because of client confidentiality concerns, but I would suggest that issue is easily overcome with similar policies and rules that govern lawyer assistance programs. Bar associations launch organizations to assist lawyers impaired by substance abuse or mental health issues.[50] Further, the numerous benefits to peer support certainly warrant creating the same types of confidential policies for attorneys at risk for VT as attorneys suffering from addiction or mental illness.

Knowing that one is not alone in feeling upset or distressed because of exposure to trauma can be enormously beneficial to dispel the belief that "something is wrong with me."[51] Also, it is absurd to believe that lawyers, advocates or even judges are less likely to be affected by VT and related disorders than mental health professionals, first responders and others who receive peer support, supervision, critical incident debriefing or other preventative measures.[52] Finally, some of the most useful assistance that anyone can receive is from others with similar experiences—fellow professionals who are also

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[48] *See* NATIONAL CENTER FOR VICTIMS OF CRIME, http://www.victimsofcrime.org/training (last visited July 8, 2013) (providing training information for professionals that represent crime victims).

[49] *See* Dana E. Prescott, *The Act of Lawyering and the Art of Communication: An Essay on Families-in-Crisis, the Adversarial Tradition, and the Social Work Model*, 10 LEGAL ETHICS 176, 180 (2007) (discussing traditional legal education, which "war stories" often play a central role).

[50] *See* MODEL RULES OF PROF'L CONDUCT R. 8.3(c) (stating that lawyers and judges are required to report the misconduct of their colleagues, but they are not required to reveal information learned "while participating in an approved lawyers assistance program").

[51] *See* Phyllis Solomon, *Peer Support/Peer Provided Services Underlying Processes, Benefits, and Critical Ingredients*, 27 PSYCHIATRIC REHABILITATION J. 392, 394 (2004) ("[I]ndividuals are attracted to others who share commonalities with themselves … in order to establish a sense of normalcy for themselves.").

[52] *See* Andrew P. Levin & Scott Greisberg, *Vicarious Trauma in Attorneys*, 24 PACE L. REV. 245, 250 (2003-2004) (discussing survey results showing attorneys experienced more symptoms of secondary trauma than the surveyed mental health professionals).

down in the trenches.[53] Since it is likely that there is no peer support group in your geographic area, my advice is simple: start one, preferably with the assistance of a mental health professional or someone experienced in stress management.

E. Self-Care Is Self Ethics

For the past ten years, I have been invited to give an annual lecture at Harvard Law School on the ethical obligation of attorneys to engage in self-care. The lecture is always well-received and second and third year students often ask why they had not learned about self-care earlier in their law school career.

I strongly believe that there is a direct connection between lack of attorney self-care and ethical issues. Once again, it borders on hubris to suggest that attorneys are somehow different from other professions that experience high levels of stress and exposure to trauma.[54] As one commentator recently put it:

> Perhaps it is time for crafters of the Rules of Professional Conduct to adopt a standard similar to that of the American Counseling Association's (ACA) Code of Ethics, which states in its introduction to professional responsibility that counselors are to "engage in self-care activities to maintain and promote their emotional, physical, mental, and spiritual well-being to best meet their professional responsibilities."[55]

There is no longer a scientific debate concerning the evidence which establishes that stress reduction programs, particularly those involving mindfulness exercises, relaxation and mediation, are highly effective in not only decreasing stress, but extending longevity, preventing substance abuse and increasing happiness.[56] A 2011 study from Massachusetts General Hospital established through neuroimaging that there can be significant gray matter changes in the parts of the brain that affect positive emotion through an eight week stress management/mindfulness program involving participants

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[53] *See* Phyllis Solomon, *Peer Support/Peer Provided Services Underlying Processes, Benefits, and Critical Ingredients*, 27 PSYCHIATRIC REHABILITATION J. 392, 394 (2004) (noting that sharing similar experiences with others is one of the benefits of peer support groups for those with a severe psychiatric diagnosis).

[54] *See* Andrew P. Levin & Scott Greisberg, *Vicarious Trauma in Attorneys*, 24 PACE L. REV. 245, 250 (2003-2004) (stating that attorneys experienced more symptoms of secondary trauma than the other professionals surveyed).

[55] Barbara Glesner Fines & Cathy Madsen, *Caring Too Little, Caring Too Much: Competence and the Family Law Attorney*, 75 UMKC L. REV. 965, 995 (2006-2007) (quoting AMERICAN COUNSELING ASSOCIATION CODE OF ETHICS § C (2005)).

[56] *See* Jane Schmidt-Wilk et. al., *Developing Consensus in Organizations: The Transcendental Meditation Program in Business*, 10 J. BUS. & PSYCHOL. 429, 432 (1996) (discussing the benefits of Transcendental Meditation); Felicia A. Huppert & Nick Baylis, *Well-Being: Towards an Integration of Psychology, Neurobiology and Social Science*, 359 PHIL. TRANSACTIONS: BIOLOGICAL SCI. 1447, 1450 (2004) (citing Richard J. Davidson et. al., *Alterations in Brain and Immune Function Produced by Mindfulness Meditation*, 65 PSYCHOSOMATIC MED. 564 (2003)) (discussing the link between mindfulness meditation and greater immune function).

who described themselves as "mediation naïve" before the start of the program.[57] Significantly, the program involves a time commitment of 20 to 30 minutes per day and can often be incorporated into daily activities.[58] Likewise, proper nutrition and exercise have been shown to be highly effective in reducing stress.[59] Repeated exposure to stories of trauma can result in negative and irrational thinking that clouds the practitioner's view of the world and his or her place in it.[60] Taking a short period of time each day to quiet the mind can be a highly effective tool in preventing VT.

IV. CONCLUSION

Advocates and attorneys who represent victims of violent crimes are as likely to experience VT or similar disorders as professionals in other disciplines that serve this population, yet the legal profession has failed to take advantage of proven techniques that could reduce the likelihood of psychological and emotional injury.[61] Unless we as a profession make meaningful changes to the way that we train and supervise attorneys, those that are the most qualified to represent the most vulnerable of parties will suffer in silence and my even leave the legal profession all together. The recognition and treatment of VT among lawyers is vital to our profession and its members.

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[57] Britta K. Hölzela et. al., *Mindfulness Practice Leads to Increases in Regional Brain Gray Matter Density*, 191 PSYCHIATRY RES.: NEUROIMAGING 36, 37, 42 (2011), *available at* http://www.umassmed.edu/uploadedFiles/cfm2/Psychiatry_Resarch_Mindfulness.pdf.

[58] Britta K. Hölzela et. al., *Mindfulness Practice Leads to Increases in Regional Brain Gray Matter Density*, 191 PSYCHIATRY RES.: NEUROIMAGING 36, 38 (2011), *available at* http://www.umassmed.edu/uploadedFiles/cfm2/Psychiatry_Resarch_Mindfulness.pdf.

[59] *See* John L. Romano, *Stress Management and Wellness: Reaching Beyond the Counselor's Office*, 62 PERSONNEL & GUIDANCE J. 533, 534 (1984) (discussing a stress management course that, in part, teaches students about the link between stress and a healthy lifestyle of a nutritional diet and regular exercise).

[60] Fines Barbara Glesner Fines & Cathy Madsen, *Caring Too Little, Caring Too Much: Competence and the Family Law Attorney*, 75 UMKC L. REV. 965, 990-91 (2006-2007); Marjorie A. Silver et al., *Stress, Burnout, Vicarious Trauma, and Other Emotional Realities in the Lawyer/Client Relationship: A Panel Discussion*, 19 TOURO L. REV. 847, 859 (2002-2004) ("Your repeated exposure makes you an expert in the world you are fighting against. Then, your hard work and the inability to create perspective in your life shrinks your viewscreen to encompass only those things. That is how the self becomes disrupted.").

[61] *See* Andrew P. Levin & Scott Greisberg, *Vicarious Trauma in Attorneys*, 24 PACE L. REV. 245, 250 (2003-2004) (discussing survey results showing attorneys experienced more symptoms of secondary trauma than mental health providers and social services workers).

Michael Haggard[1]
The Haggard Law Firm, P.A.
330 Alhambra Circle, First Floor
Coral Gables, FL 33134
305.446.5700
MAH@haggardlawfirm.com

NEGLIGENT SECURITY JURY SELECTION IN THE WAKE OF THE NEWTOWN AND AURORA TRAGEDIES

INTRODUCTION

Jury selection is an art form that few actually master. The techniques and basic principles of jury selection are first learned in law schools across the nation through various texts detailing these tactics and strategies. But, top litigators understand that the method by which we select juries is an evolving process that will continuously change because our jury pool is perpetually changing. It is not until this concept is fully understood and realized that the crime victim lawyer can begin to master the art of jury selection. Additionally, in the negligent security litigation arena, the jury selection methodology will slightly vary. The following discussion will examine negligent security jury selection in the wake of three recent mass tragedies.

UNDERSTANDING YOUR JURY POOL

We've all heard the phrase, "Who is your audience?" For the crime victim lawyer, the answer to that question is a panel of 12 individuals from the local community. Understanding who is in your jury pool is vital to a successful litigation team. Crime victim lawyers will first make generalizations about the potential jury pool based on the venue of the litigation. They will pull from known facts about the community, such as whether it is a conservative or liberal town, whether it is a very affluent area or a more blue collar area, whether the town has a high percentage of minorities or a low percentage, or is the town home to many immigrants. But, these questions are just a starting point. During this selection process, crime victim lawyers will familiarize the jurors with the relevant legal theories and factual notions of the claim at hand to gauge the jurors' attitudes and level of receptivity to their case.

Social science research has contributed greatly to our understanding of how to best master jury selection. Most individuals are emotional and perceive information selectively based

[1] Michael Andrew Haggard, partner of The Haggard Law Firm, handles a broad array of cases, concentrating on negligent security, wrongful death, unsafe premises, products liability, and pool drowning accidents. Haggard gained a significant amount of national exposure in 2003 after winning two back-to-back record setting $100 million verdicts in cases dealing with pool accidents involving children. Haggard obtained his third $100 million verdict in November 2007 in a negligent security case considered to be the largest jury verdict award in history for that genre of case law.

on prior experiences and preformed beliefs. People make conclusions swiftly and naturally resist altering those conclusions. Most jurors cannot absorb every ounce of information that is presented during a trial due to the volume of information and the short amount of time during which to process it. Therefore, they work with far fewer facts and evidence when evaluating a claim—the "information gap". This is important to understand because jurors will fill in the information gaps with prior beliefs, opinions and values to reach ultimate conclusions in a seemingly logical fashion. At voir dire the crime victim lawyer already knows the case inside and out and has spent hundreds of hours getting familiarized with the facts and the pertinent legal arguments. What the crime victim lawyer does not know are those preexisting beliefs, opinions and attitudes of each and every prospective juror—the "information gap fillers". This is imperative to recognize and address in voir-dire.

It is an amazing process throughout the voir-dire of a negligent security case. How many of you have lived in an apartment complex? How many robberies occurred there? How many shootings? Would you have liked to have known if there were ***five previous robberies*** before you moved in? You think it would be reasonable for the leasing agent to inform you of that? Why?

These are the questions and responses that can easily be elicited from a voir-dire panel in an apartment shooting case. The crime rates at premises that are the subject of negligent security cases are sometimes alarming. It is typically the case that the jurors have had exposure to similar apartment complexes, shopping centers and/or gas stations. The comparison that a skilled crime victim lawyer can make with prospective jurors between the subject premises and those that a juror frequents is a must when picking these juries.

While selecting the jury in a negligent security lawsuit I tried resulting in a multi-million dollar verdict, I found that the potential jurors were quite reluctant to speak up in a group setting. The jury pool participants hesitated to divulge biases and opinions that looking back would have negatively impacted our case. The hesitation seemed to derive from fear of being judged by their peers and also perhaps the nature of the information asked of them. Many crime victims are reluctant to speak about the violence they have endured and feel a sense of embarrassment. For that type of juror, empathy on the part of the crime victim lawyer is critical. That type of juror has to understand that it is okay to share and that he or he will not be subject to ridicule and judgment. Other potential jurors with biases towards law enforcement can be hesitant to divulge why that bias exists typically because it stems from a personal experience involving a crime or that of a family member. It manifests a sense of embarrassment and a fear of judgment amongst one's peers. As I worked past those psychological and emotional barriers and began hearing the existing biases and beliefs of a few select jurors, I began strategizing—how to effectively utilize the preemptory challenges. The successful verdict highlighted the notion that crime victim lawyers need more than just knowledge of the law to understand effect voir-dire in the negligent security case—the crime victim lawyer needs a thorough understanding of who his or her jury pool is.

As you've read from the above negligent security jury selection example jury selection is how cases are won. It is a very critical piece to your litigation. The goal is to handpick a pool of jurors that will be unbiased, view you and your client favorably, be responsive to your case and

return a verdict in your favor. To be successful at this the crime victim lawyer must now recognize the changes that are presently occurring and the changes that are still to come after the recent mass tragedies of Newtown and Aurora with respect to the juror pool.

CHANGES IN THE WAKE OF RECENT MASS TRAGEDIES

Unfortunately, America is no stranger to violence and tragedy. With the advances of technology and the widespread media broadcasts Americans are becoming increasingly aware of the horrific and frightening events that plague our cities and our streets. These recent incidents of mass tragedy have turned the spotlight on security and awakened a sense of responsibility and accountability with respect to intentional torts and negligence.

AURORA

On July 20th, 2012 a gunman dressed in costume and donning tactical gear entered the Century movie theater in Aurora, Colorado and then proceeded to set off tear gas grenades and violently spray the audience with gunfire, killing innocent victims and injuring nearly 60 additional moviegoers. When the gunman re-entered the theater in costume, many moviegoers initially believed it was a part of the show—a theatrical publicity stunt. As he opened fire, reality set it that this was not part of any show and instead a deadly real life horror event. As society began to process what had actually happened and analyze the facts and circumstances surrounding this incident, questions were propounded and answers were demanded.

With mass tragedy like the Aurora massacre, the first question is always "Why?" But it is this second question that is changing our standards of security nationwide and affecting the American ethos—how could this incident have been prevented? Society is now more open to stricter security standards. Heightened security is now viewed as a necessity and less of an attack on individual liberties. The idea of placing armed guards at commercial venues, such as movie theaters, concerts, restaurants, shopping complexes is no longer portrayed as extreme and unnecessary. The idea of walking through a metal detector before entering commercial venues is almost comforting to many Americans. A few years ago, these increased security measures would have been laughed off the security plan for numerous commercial establishments. In the wake of Aurora, the American psyche has been deeply impacted and this is changing our jurors' views on reasonable security standards.

NEWTOWN

In the quiet town of Newtown, Connecticut, violence struck again—five short months after the Aurora Tragedy. Another gunman, another mass shooting and another catastrophic death toll, deeming it the second deadliest mass shooting by a single individual since the 2007 Virginia Tech shooting. What is so significant and horrific about this shooting is where it occurred—

Sandyhook Elementary School. Sandyhook is an elementary grade school that enrolls students in Kindergarten through fourth grade, in a town where violent crime is sparse. It is unfathomable that this type of violent crime can occur and did occur on the grounds of an elementary school. It took shooter Adam Lanza less than five minutes to unload 155 rounds killing 20 elementary school age children and six adults.[2]

The proximity in time between these two national headlining massacres struck a chord across this nation. The first question again was "Why?" An elementary school, which should be a sanctuary for learning and education for our children, becomes a place of mass violence and bloodshed. A movie theater, a place of entertainment and enjoyment of the arts, becomes a real life horror flick. Americans again asked the second question—how could this incident have been prevented? This time the focus shifted away from commercial establishments and towards the security needs of schools and gun control. This debate of gun control took off faster than the Concorde. While America is having this debate about gun control, the crime victim has found a new and unusual ally in the courtroom in Inadequate Security cases—the National Rifle Association (hereinafter "NRA"). The NRA has sent millions of mailers to their members advocating that each and every school in America should have an armed guard and/or police officer. Conservative jurors now have been indoctrinated to support manned armed security from the NRA. As this campaign is spread across the nation, many more jurors are becoming less opposed to armed guards and increased security.

Again, due to the proximity in time of each of these two mass violent crimes and also due to the location of each tragedy a third question surfaced—"Are we really safe?" These gruesome and shocking killings did not occur in crime havens or known high crime areas. These tragedies occurred in establishments that we, as Americans, expect to feel safe and places we expect to be free from violent crime and dangerous conditions. It is these exact questions that are ultimately effectuating a higher threshold of reasonable security standards.

BOSTON

On April 15th, 2013, just one month ago and just over four months after the Sandyhook horror, yet another violent tragedy struck American soil—the Boston Bombings. The annual Boston Marathon, an American sporting event that attracts thousands of participants and spectators, including our most vulnerable citizens—women, children and the elderly—became the target of a deadly attack. As athletes finished their 26 mile and 385 yard race, the first bomb exploded near the finish line. Less than 30 seconds later the second bomb exploded causing spectators and runners to flee in terror. The force of the explosions resulted in blown-off limbs and people being thrown down to the pavement. The tragic end result comprised three dead, one of which was an eight year old child. The injured list totaled approximately 264 individuals and numerous were left as new amputees. The physical and psychological impact of the Boston Bombings has been far reaching.

[2] Michael Isikoff, Tom Winter and Erin McClam, *Inside Newtown gunman Adam Lanza's 155-bullet shooting spree*, http://tv.msnbc.com/2013/03/28/inside-newtown-shooter-adam-lanzas-home/.

After this third mass tragedy, the American people placed security and prevention under the microscope. How could something this barbaric have happened on Patriot's Day at an American sporting event with innocent families and athletes succumbing to such injury? Every year the Boston Marathon employs additional manned security, conducts bomb sweeps and tightens its security plan. However, terrorists and hardened criminals are well aware of this and quite educated with the "security routine", allowing them to plan around this predictable schedule. But what if an elaborate Closed-Circuit Television ("CCTV") network that could capture criminal activity well before the Boston Marathon organization and preparation was underway? This idea is far from atypical. New York City has an extensive CCTV network—an idea that was taken from London, England. The NYC CCTV initiative aimed to not only to investigate and apprehend, but more importantly to deter and prevent criminal activity from occurring. This surveillance network has a centralized network of high bandwidth capacity to optimize the transmission and processing of video data. A second component of the CCTV network is the software component which would alert the human element—manned security—to suspicious activity spotted by the cameras.[3] These sophisticated camera networks also have the ability to read license plates and contain sensors to detect chemical, biological and radiological threats.

Every city, particularly every major city, should follow suit and add CCTV networks to their security plans. The first concern and rebuttal is typically the cost involved with implementing new security measures. With the current economic state and budget cuts it is quite understandable that many cities argue financial infeasibility with additional security endeavors. However, there is a simple solution. Why not ask for-profit businesses to cover their own terrain with video surveillance? It is these for-profit businesses that line the city streets, attract more foot traffic and ultimately demand higher security needs from the city authorities. Should they not take responsibility for the safety and protection of their own businesses and consumers?

CONCLUSION

These three incidents of mass tragedy have changed American beliefs and expectations with respect to security standards. Americans now desire and demand heightened security, even at the expense of diminished privacy. Why? Americans need to feel safe and secure. They need to know that their families are safe. It is an innate urge to protect our children and families. After these three unspeakable acts of violence, society mandated change. The pain associated with and felt across this nation during each of these three calamities was so grave that society's view towards security and the responsibility to stop these tragedies from occurring drastically transformed. Suddenly, prospective jurors are more receptive to increased security, including armed guards at various commercial venues—establishments where the placement of armed guards was once thought of as excessive. The media's reporting efforts have fostered a new awareness of responsibility and accountability— more individuals are becoming exposed to the

[3] Chenda Ngak, Boston Marathon Investigation: Are CCTV cameras the answer?, http://www.cbsnews.com/8301-205_162-57579899/boston-marathon-investigation-are-cctv-cameras-the-answer/

idea that a property owner has a duty to protect and keep individuals safe from dangerous conditions on that property. It is important to remember that these changes are happening across the nation and are not limited to one crime plagued city. This is shaping our jury pools on a large scale and changing the Crime Victim's Lawyer's perspectives on jury selection.