Apportionment of Fault in Inadequate Security Cases

By John Elliott Leighton, Esq.

A client stands in your office, having been mugged at a supermarket for a purse containing $66. The client is scared, agitated, hurt, and, most of all, angry. How could this happen to her—she shops there all the time? Why wasn't something done to prevent this kind of attack? The client looks to you for answers.

You try to explain that the law is complicated, and that although the criminal justice system has punished the perpetrator, the civil remedies against the supermarket owners are less certain. The liability of a negligent premises owner for the intentional acts of a criminal varies from state-to-state. Liability in negligent security cases is one of the most bitterly debated issues in tort law.

Inadequate security cases essentially are premises liability cases which arise out of the failure of the possessor of the premises to reasonably maintain the premises. The failure may be a lack of security guards or lighting, or faulty security mechanisms or designs. Although derived from general premises liability theories, inadequate security litigation has developed its own area of case law in most jurisdictions. Many jurisdictions hold that property owners have a duty to take reasonable steps to protect the public from foreseeable criminal acts, and they hold owners liable when no harm would have befallen the plaintiff but for the owner's negligence. These courts note that owners are in the best position to know of a property's risks, and to guard against those risks.

However, premises owners are increasingly trying to minimize their liability for negligence in providing security by shifting blame to the criminal. Such a shifting of blame can make it much more difficult to prove key elements of the plaintiff's case. Much like professional malpractice cases, inadequate security cases require proof that some standard of care existed, that the defendant breached the standard of care, and that the breach was a proximate or legal cause of the damage. A failure to prove each element dooms the case.

Plaintiffs already enter this arena with some automatic disadvantages. Primarily, the problem lies in the fact that the case is being brought against people who did not themselves commit the crime and often were not even present. The jury is asked to award damages against a party for failing to prevent an arguably random act. A plaintiff asks the jury to conclude that the defendant not only should have foreseen this assault, but also should have taken steps to prevent it, and that those reasonable measures in all likelihood would have deterred the crime. Quite a burden.

Safety First?

From a policy standpoint, holding landowners responsible has produced a safer society. Despite the alarming number of violent crimes every year, especially on commercial premises, inadequate security lawsuits have made many commercial premises safer. There are now security guards at shopping malls, hotels, and apartment complexes. Hotels routinely employ better key controls (*e.g.*, automatically changing the code after each checkout) and do not reveal guests' room numbers to the public. Were it not for inadequate security litigation, it is reasonable to assume

that much of the security we see today would not exist. Security is a cost, not a source of profits. Given the choice between spending money and making money, corporate America will usually choose the latter.

For many years, especially in the infancy of inadequate security litigation, commercial premises owners defended their lack of security by claiming that the presence of uniformed guards would "scare off" customers and create a climate of fear that would harm business. This argument, while specious at the time, has since been debunked through focus groups, polls, and simple observation. The American public prefers premises where a security presence exists. This is particularly true in the wake of the September 11 terrorist attacks.

Shifting the Blame

Many people do not realize that a negligent business or landowner might be able to minimize its fault in favor of the person who intentionally committed the crime. However, recent changes in fundamental tort principles have permitted this to happen in a number of jurisdictions. To effectively fight the apportionment of fault between negligent defendants and intentional tortfeasors, it is necessary to understand the three changes in tort law which are necessary before a negligent defendant can try to shift the blame.[1]

The three changes are:

- Abolition of joint and several liability;
- Listing of nonparties on the verdict form; and
- Comparison of negligent and intentional conduct.

If joint and several liability is available, apportionment of fault is largely irrelevant because a judgment that is fully collectable against any one defendant can be recovered from any other, including a negligent premises owner. This is true even when the owner is found responsible for a proportionately small degree of fault. However, since the mid-1980s, many jurisdictions have either abolished joint and several liability or significantly limited its application.[2]

Traditionally, a plaintiff chooses whom to sue. By suing only the property owner, a plaintiff can keep the issue of an intentional tortfeasor's share of fault from going to the jury because the jury is generally allowed to consider only the fault of a party defendant. But in jurisdictions that permit nonparties to be listed on the verdict form, defendants may argue that the nonparty tortfeasor is wholly or partially to blame for the plaintiff's injuries, and the jury is instructed that it can apportion fault among the party defendant, the plaintiff, and the nonparty.

Several jurisdictions have recently interpreted comparative-fault laws to allow comparison of negligent and intentional conduct, allowing negligent premises owners to shift their liability to intentional tortfeasors. In addition, some courts are rewriting time-tested definitions of proximate cause and even usurping the province of the jury in order to apportion liability.[3] This issue is one of the most bitterly fought in tort law today.

Neglect Versus Intent

Inadequate security cases usually involve criminal assaults at commercial premises, including automated teller machines, parking lots, malls, hotels, apartments, parking garages, office buildings, and even school dormitories. Duties owed by owners and lessors of property may differ, and duties owed to different types of plaintiffs—such as tenants, visitors, or other invitees—may also vary. However, the general elements of a claim against a premises owner alleging inadequate security are the same. The plaintiff must show that the owner owed a duty of care to the plaintiff; that the crime was reasonably foreseeable by the defendant; that, in light of the foreseeability, the defendant was negligent in failing to act reasonably to prevent the harm; and that this negligence caused the plaintiff's harm.

Even where an owner's negligence is proven, some jurisdictions allow that owner's liability to be reduced under comparative-fault statutes. Most states codified rules of comparative fault in the 1970s, but retained the common law distinction between negligent and intentional conduct.[4] Pursuant to this distinction, a court cannot compare negligent and intentional conduct. Therefore, when a victim sues a premises owner for negligence, that owner is not allowed to shift blame to an intentional tortfeasor.

As one court stated, "[I]ntentional torts are fundamentally different in nature than negligent torts. . . . [A] true comparison of fault based on an intentional act and fault based on negligence is, in many circumstances, not possible."[5] Many courts continue to uphold this distinction. Regrettably, others interpret comparative-fault statutes to allow comparison of negligent and intentional conduct and, thus, apportion more blame to criminals and less to negligent premises owners.

Apportionment of Fault

The idea of apportioning fault in such cases strikes at the very heart of the tort itself. Clearly negligent defendants have argued that they should be able to minimize or eliminate their own liability by blaming the very person they had a duty to defend against—the criminal. Unfortunately, a number of jurisdictions have embraced this defense, and several more are on the fence.

The problem with comparing negligent and intentional conduct is that perpetrators will, at least theoretically, be found 100% at fault because it was their intentional acts that actually caused the harm ("cause-in-fact").[6] By failing to accurately apply the concept of proximate causation, some courts have eviscerated longstanding law on premises liability, pursuant to which a landowner has a duty to visitors (invitees).

The general statement of law is that one who possesses property (owner/landlord/lessee)[7] owes a duty of care to visitors to eliminate reasonably foreseeable hazards or, if it is not possible to eliminate them, then to warn of any hazards about which the landowner has greater knowledge than the invitee. Thus, when there is a history of violent crime against persons on a particular premises, the possessor is charged with that knowledge and owes a duty to

invitees to protect them from that danger. The owner's failure to protect the invitee is the proximate cause of the harm.

With some courts willing to "compare" the fault of the perpetrators to the negligence of the premises owner, traditional concepts of negligence, accountability, and proximate cause are being bastardized. It had been held that because the commercial premises owner was profiting from the presence of the invitee, it was the owner who should bear the loss as between the two. Now the party bearing the loss is the one from whom the premises owner was supposed to protect the invitee. The possessor is always in a better position to know of and guard against the harm than the invitee.

It is akin to a circus lion that has leaped into the audience and attacked a small child. The circus owner could have put up nets and fences, but chose not to because of cost. When the lion next attacks, do we blame the lion, or instead is it the responsibility of the party profiting from the attendance of this child who should pay the loss? The premises owner who seeks and receives financial benefit from the invitee on his premises, and who could and should have foreseen and prevented the harm to the plaintiff, should be accountable.

The significance of apportioning fault to the perpetrator cannot be overestimated. One court has noted that "such a rule could, in effect, defeat Plaintiff's cause of action."[8] Another judge said that "the assailants' paramount, and probably exclusive, responsibility for the victim's beating will be reflected in the jury's percentage allocation of fault."[9]

The case of *Blazovic v. Andrich* involved a bar patron who was beaten in a parking lot by other patrons. The jury returned a verdict allocating seventy percent of the negligence to the bar owner and thirty percent to the plaintiff. The trial court then took it upon itself to apportion the seventy percent liability among the bar owner and the assailants. The New Jersey Supreme Court affirmed the lower court's ruling, stating that for comparative-negligence purposes, intentional wrongdoing is different in degree, but not in kind, from negligence or wanton and wilful conduct, and thus "does not preclude comparison by the jury."[10]

The practical effect of allowing negligent defendants to lessen their liability in favor of intentional tortfeasors is that the victim's recovery will be only a fraction of what it would be without apportionment of fault. In the first of the handful of reported cases in which the fault of the negligent defendant was compared with the intentional conduct of the assailant, the jury found the negligent landowner's share of fault to be only twenty percent.[11]

In some cases, juries have only partially approved a defendant's attempt to shift responsibility to the assailant. For example, one jury found that the negligent defendant was responsible for seventy-five percent of the fault.[12] However, even where a jury finds that most of the fault rests with negligent defendants, appellate courts have sometimes stepped in and overturned jury verdicts, essentially overstepping the role of appellate court and making findings of fact.

In recent years, California has created a hostile environment for victims of negligence. In *Pamela B. v. Hayden*, a young girl was raped by two men in the underground garage of the "secure" building where she lived. She presented expert testimony that the poor garage lighting, together with the easy accessibility to the garage and a lack of adequate security mechanisms, led to the attack.[13] The jury found that the negligent landlord's share of fault was ninety-five percent, but the appellate court concluded that this finding was not supported by substantial evidence and ordered a new trial. The court claimed: "Just as Justice Potter Stewart knew hardcore pornography when he saw it, we know a blatantly unfair, inequitable and unsupported apportionment of fault when we see it." In another case, an appellate court overturned a jury's finding that the negligent defendant's share of fault was seventy-five percent.[14]

In short, the comparison of fault between negligent defendants and intentional tortfeasors may be devastating to the negligent security cause of action.

Cases Rejecting Apportionment

A number of jurisdictions have expressly rejected the argument that negligent defendants should be able to minimize their liability by shifting blame to intentional tortfeasors. For example, the Florida Supreme Court recently held in *Merrill Crossings Associates v. McDonald* that the apportionment of fault statute was inapplicable and that it was not proper to compare the acts of an intentional actor to the negligence of the tortfeasor who is charged with preventing the incident.[15]

The court based its ruling on a finding that a tort-reform statute enacted to abrogate joint and several liability was inapplicable to actions based on intentional torts. The plaintiff, McDonald, was shot and injured by an unknown assailant in the parking lot of a Jacksonville Wal-Mart.[16] The court agreed with McDonald's interpretation of the statute that negligent acts are fundamentally different from intentional acts. Statutory language excluding actions "based on an intentional tort" gives effect to a public policy that negligent tortfeasors should not be permitted to reduce their liability by shifting it to another tortfeasor whose intentional criminal conduct was a foreseeable result of their negligence.[17]

The U.S. Court of Appeals for the Fifth Circuit reached a similar conclusion when analyzing Mississippi's comparative-fault statute. In affirming a lower court's ruling that the defendant could not apportion liability to a criminal who had abducted a mother and her twelve-year-old daughter from a parking lot and repeatedly raped the mother while forcing the daughter to watch, the Fifth Circuit held that the term "fault" in the statute does not include intentional torts.[18]

Even when courts have interpreted comparative-fault statutes to encompass intentional torts, many have continued to properly recognize the liability of the premises owner. For instance, in a 1994 case involving a tenant who was raped in her apartment, a Louisiana court held that the term "fault" in the state's statute was broad enough to encompass both negligent and intentional conduct—yet

the court refused to reduce the property owner's liability.[19] The court stated that "[a]s a general rule, we find that negligent tortfeasors should not be allowed to reduce their fault by the intentional fault of another that they had a duty to prevent."[20]

Similarly, the Kansas Supreme Court found that "negligent tortfeasors should not be allowed to reduce their fault by the intentional fault of another that they had a duty to prevent."[21] The court conceded that in some circumstances it might be proper to compare intentional conduct with negligence, but not where the negligence was a failure to protect the plaintiff, a mentally retarded six-year-old girl, from sexual molestation by a school bus driver.

Various other courts have agreed, finding that allocating fault to the intentional actor, where the intentional tort is the very risk that the negligent tortfeasor has a duty to prevent, serves as a direct disincentive for premises owners to act with due regard for the safety of people they invite onto their property.[22]

The American Law Institute (ALI) recently readdressed these issues when it drafted the Restatement of Torts (3rd), Apportionment of Liability. The ALI analysis may be persuasive when arguing to a court that does not already have controlling law.[23] A comprehensive law review article makes this point clearly:

> Not all cases involving the combination of negligence and intentional misconduct are alike. There may be exceptional circumstances where, by reason of the unique nature of the duty allegedly breached, it would be inappropriate to allocate fault between a party who negligently exposed another to injury from intentional harm and the intentional wrongdoer. One example would be the liability of an apartment owner for negligently failing to protect tenants from criminal trespassers, such as neglecting to provide sufficient lighting around the building or keeping entrances locked or guarded to discourage burglars or rapists. In that instance, the distinctive nature of the duty of care—to prevent precisely such intentional wrongdoing—is such that the negligent actor should not escape responsibility to the plaintiff by shifting the major share of the blame to the intentional wrongdoer.[24]

Conclusion

The concept of apportionment of fault has a superficial intellectual appeal. It is difficult to argue against the proposition that parties should only have to pay for their share of fault. However, the veneer cracks when this argument is applied to inadequate security cases. Much like a crashworthiness product liability case, it would be irrational and legally disingenuous to compare the fault of the person who caused the crash with the fault of the manufacturer whose car could not protect its occupants in a low-speed accident. The manufacturer owes the user a duty to design the vehicle in a manner consistent with the known risks of operation. Because it is foreseeable that a collision will occur, manufacturers must take that into account in their designs. They owe purchasers a duty to sell a vehicle reasonably safe for its intended and foreseeable use. Similarly, it is intellectually dishonest to compare the intentional act of a criminal perpetrator with the ordinary or gross negligence of a premises owner who allows it to occur.

Ultimately, it will require a tremendous effort on the part of the plaintiff's bar and consumer and victim advocate groups to prevent apportionment of fault in most states. Once big businesses and large insurance companies began having to pay substantial judgments in inadequate security cases, they then began to target basic, long-standing legal principles. We cannot allow this reform—either legislative or judicial—to eliminate the rights of victims of violent crime. We will not see continued reductions in violent crime without private sector security. There will be little incentive to provide such security without consequences for failing to do so.

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1. *See generally* John Elliott Leighton, *Fighting New Defenses in Inadequate Security Cases*, TRIAL, Vol. 35 No. 4, Apr. 2000, pp. 20-25; and John Elliott Leighton, *Apportionment of Fault in Inadequate Security Cases*, TRIAL, Vol. 37 No. 13, Dec. 2001, pp. 18-25.
2. *See, e.g., Whitehead v. Food Max, Inc.*, 163 F.3d 265, 281 (5th Cir. 1998).
3. *Pamela B. v. Hayden*, 31 Cal. Rptr. 2d 147 (Ct. App. 1994); *Scott v. County of Los Angeles*, 32 Cal. Rptr 2d 643 (Ct. App. 1994).
4. *See, e.g., Melendres v. Solares*, 306 N.W.2d 399 (Mich. Ct. App. 1981); *Sieben v. Sieben*, 646 P.2d 1036 (Kan. 1982).
5. *Veazy v. Elmwood Plantation Assocs., Ltd.*, 650 So.2d 712, 719-20 (La. 1994); *see also Burke v. 12 Rothschild's Liquor Mart, Inc.*, 593 N.E.2d 522, 532 (Ill. 1992).
6. This illustrates the difference between legal causation ("proximate cause") and factual causation ("cause-in-fact").
7. For purposes of this article, "possessors," "landowners," and "lessees" are being treated interchangeably. There are often some important distinctions as to duty, which vary state by state.
8. *Bach v. Horizons, Ltd.*, 838 F. Supp. 559, 561 (M.D. Fla. 1993).
9. *Blazovic v. Andrich*, 590 A.2d 222, 225 (N.J. 1991) (citing dissenting judge in court of appeals).
10. *Blazovic*, 590 A.2d at 231.
11. *Weidenfeller v. Star & Garter*, 2 Cal. Rptr. 2d 14 (Dist. Ct. App. 1991).
12. *Rosh v. Cave Imaging Systems*, 26 Cal. App. 4th 1225 (Dist. Ct. App. 1994).
13. *Pamela B. v. Hayden*, 31 Cal. Rptr. 2d 147, 157 (Dist. Ct. App. 1994).
14. *Scott v. County of Los Angeles*, 27 Cal. App. 4th (Dist. Ct. App.1994).
15. *Merrill Crossings Associates v. McDonald*, 705 So.2d 560 (Fla.1997).
16. 705 So.2d at 561.
17. *Id.* at 562.
18. *Whitehead v. Food Max*, 163 F.3d 265, 281 (5th Cir. 1998).
19. *Veazy v. Elmwood Plantation Assoc.*, 650 So.2d 712, 718 (LA 1995).
20. *Id.* at 719.
21. *See Kansas State Bank & Trust Co. v. Specialized Transp. Servs.*, 819 P.2d 587, 606 (Kan. 1991); *see also Turner v. Jordan*, 957 S.W.2d 815 (Tenn. 1997) (holding that an intentional criminal assault on a nurse by a mentally ill patient could not be compared with the negligence of the treating psychiatrist in failing to protect the staff from foreseeable violent acts).
22. *See, e.g., Turner*, 957 S.W.2d 815; *Whitehead*, 163 F.3d 265. *See also* RESTATEMENT (SECOND) OF TORTS § 449, and cmt. b (1963):"The happening of the very event the likelihood of which makes the actor's conduct negligent and so subjects the actor to liability cannot relieve him from liability. The duty to refrain from the act committed or to do the act omitted is imposed to protect the other from this very danger. To deny recovery because the other's exposure to the very risk from which it was the purpose of the duty to protect him resulted in harm to him, would be to deprive the other of all protection and to make the duty a nullity."
23. *See §14: Tortfeasors Liable for Failure to Protect the Plaintiff from the Specific Risk of an Intentional Tort*. (Establishing joint and several liability for those who fail to protect someone from a specific risk.)
24. Gregory C. Sisk, *Interpretation of the Statutory Modification of Joint and Several Liability: Resisting the Deconstruction of Tort Reform*, 16 U. PUGET SOUND L. REV. 1, 30-31 (1992). *See also Merrill Crossings Associates v. McDonald*, 705 So.2d 560 (Fla.1997)(such comparison inappropriate).