December 2002 www.atla.org

# TRIAL

Journal of the Association of Trial Lawyers of America

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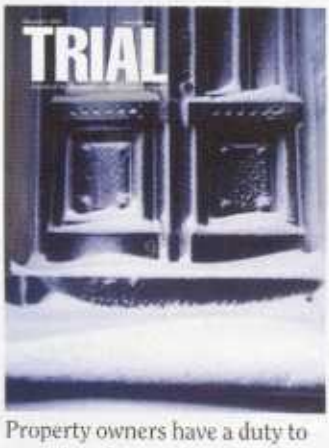
**ON THE COVER**




PICTUREQUEST

Property owners have a duty to provide safe premises for visitors. Those who don't can be held liable when poor maintenance, icy steps, or inadequate security cause injury.

*TRIAL* © 2002 (ISSN 0041-2538) is published monthly, with an additional special issue in October provided to ATLA members only, by the Association of Trial Lawyers of America, The Leonard M. Ring Law Center, 1050 31st St., N.W., Washington, DC 20007-4499; 202-965-3500. Printed in the United States of America. Basic rate $40 when received as a benefit to ATLA members. Subscriptions: $79 annually. Student price $25. Back issues $10 each for issues no older than one year; $20 each for issues more than one year old. Desk Reference issue: $20. Periodicals postage paid at Washington, DC, and additional mailing offices. Postmaster: Send address changes to *TRIAL*, ATLA, P.O. Box 3717, Washington, DC 20007-4499.

# Premises liability

# Finding a remedy for renters

John A. Harris

**When crime occurs in a residential apartment building, a security expert can help you evaluate whether the victim has a viable case against the property owner.**

***Almost 32 million people live in apartment complexes with at least five units,*** according to the National Multi Housing Council.[1] Apartment buildings range from high-rises to garden-style apartments, town houses to duplex, triplex, and quad-style units. Crime and injuries at these properties lead to the greatest percentage of premises liability cases.[2]

Security is one of the foremost problems facing apartment-community owners because apartments have become prime targets for criminals in recent years. Criminals are often drawn to a particular property because they know the owner has not taken adequate security measures. Owners may give security a low priority, choosing instead to focus on "curb appeal" amenities such as landscaping, tennis courts, gyms, and swimming pools to attract and retain tenants.

An apartment complex is often a community of strangers. For many residents—especially young, single adults—an apartment is their first home. These demographics present unique challenges to landlords in providing safety measures for residents and other people legally on the property. Residents are often transient and thus less likely to know one another, visitors and delivery persons come and go at odd hours, and organizations such as Community Watch are more difficult to sustain because residents are not permanent. Frequently, young residents are living away from home for the first time and are naive about the possibility of crime. Also, residents may assume, often incorrectly, that the owner is providing adequate security because the property appears well maintained, well lit, and secure with gates and fences—and because the leasing agent indicated to the residents that the property was safe when they signed the lease.

Despite these challenges, landlords must make security issues a top priority.

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## Standard of care

There are no industry standards for security at apartment complexes. However, the American Society for Industrial Security International[3] and the National Fire Protection Association International[4] are independently developing them. The absence of industry standards does not relieve property owners of their duty to use reasonable care to protect people who are legally on their premises from foreseeable harm.[5]

Circumstances will dictate what is reasonable protection from foreseeable and preventable danger.[6] This determination is based on the specific facts of a case, industry practices, and the defendant's own procedures. The property owner is liable if he or she breached the standard of care and if his or her actions—or lack of actions—were a proximate cause of the incident.

Courts have found that a property owner must take reasonable measures based on the circumstances and conditions on the premises. In *Kline v. 1500 Massachusetts Avenue Apartment Corp.*, for example, the District of Columbia Circuit Court imposed a duty of care on the owner of an apartment building where a tenant had been assaulted

in a common hallway. Crime had been occurring on the premises with mounting frequency. Although the owner could have taken steps, such as installing extra-heavy locks or hiring security guards, the court held that "no individual tenant had it within his power to take measures to guard" against the dangers of crime.[7] The category of criminal danger neither creates nor eradicates duty; it only indicates what conduct may be reasonable to fulfill the duty.[8]

Owners cannot assume that their security is adequate based on the measures taken by other apartment owners in the area. What matters is what a landlord does to secure his or her own property.[9] Failures by other owners to implement sufficient security do not set standards.

Establishing foreseeability is the first step in evaluating the validity of an apartment-complex premises liability suit. Foreseeability generally hinges on the nature and frequency of prior criminal acts committed on the property and in the immediate area. Failure to establish foreseeability is fatal to a premises suit.

Some states require a showing that a crime "substantially similar in nature" occurred on the premises during a reasonable period of time (normally two to five years) before the incident at issue. In states that narrowly interpret this doctrine, a tenant who was raped must show that another sexual assault happened previously under substantially similar circumstances within the court's time limit.[10]

However, "substantially similar in nature" does not necessarily mean identical. The court may find that prior incidents of other types were sufficient to alert the property owner to the dangerous condition. A string of crimes such as assaults and robberies may make the risk of other violent crimes, like murder and rape, foreseeable.[11] For example, in *Sturbridge Partners, Ltd. v. Walker*, the Georgia Supreme Court ruled that the burglary of an unoccupied apartment, burglaries without forced entry, and a daytime burglary were relevant to establish foreseeability of a nighttime forced entry into an occupied apartment that resulted in a rape.[12]

Other states take a "totality of circumstances" approach: To determine the foreseeability of criminal conduct, these courts consider all the circumstances, including the nature or character of the business, its location, and previous crimes that occurred there, if any.[13] This approach avoids the "rigid application of a mechanical" rule[14] that requires "finite distinctions between how similar prior incidents must be" to determine foreseeability.[15]

**Owners may give security a low priority, choosing to focus on amenities such as landscaping, tennis courts, gyms, and swimming pools to attract and retain tenants.**

Still other states, including California and Tennessee, have adopted a "balancing" approach to determine duty. This approach acknowledges that duty is a flexible concept and balances the degree of foreseeability of harm against the burden of the duty imposed. A high degree of foreseeability justifies a more onerous burden than a limited degree does.

The balancing approach recognizes that prior similar incidents are important to determine the degree of foreseeability.[16] One commentator has noted that by establishing a balancing approach that is "more flexible than the strict prior-similar-incidents rule, [a court] avoid[s] the pitfalls of that rule while solving the problems of the more liberal totality-of-the-circumstances approach."[17]

In *McClung v. Delta Square Limited Partnership*, the Tennessee Supreme Court noted that the owner "is in the best position to know the extent of crime on the premises and is better equipped than [tenants] to take measures to thwart it and to distribute the costs."[18] It added that "using surveillance cameras, posting signs, installing improved lighting or fencing, or removing or trimming shrubbery might, in some instances, be cost effective and yet greatly reduce the risk" to tenants.[19]

Before this ruling, the Tennessee Supreme Court held that land owners did not have a duty to protect customers against criminal acts of third parties unless the owner knew, or should have known, that the acts were occurring or about to occur.[20] That changed after *McClung*, in which the court specified the kind of information that the defendant had access to, but had failed to act on:

> We reject defendants' argument that it owed plaintiff's wife no duty because the attack was not reasonably foreseeable. In the 17 months prior to the abduction, the numerous reports of crime to police on or near defendants' premises included a bomb threat, 14 burglaries, 12 reports of malicious mischief, 10 robberies, 36 auto thefts, 90 larcenies, and one attempted kidnapping on a parking lot adjacent to defendants' parking lot. All of these crimes occurred on or in the immediate vicinity of defendants' parking lot, took place within a relatively short period of time prior to the abduction of plaintiff's wife, and involved a significant threat of personal harm. The record also establishes that defendants' premises was located in a high-crime area, and that other nearby major retail centers utilized security measures to protect customers.[21]

In most inadequate-security suits, then, the first step in establishing foreseeability is to examine the criminal history of the property. Review reports of calls for police service to find how many residents reported crimes on the premises and in the immediate vicinity, when and where those crimes occurred, and their similarity or other relationship to the crime involving your client. Reported burglaries are important because future burglaries may lead to assaults against people in the apartment.[22]

After examining the calls for service, obtain police incident reports for those that appear most pertinent. Police reports will yield more detail, including a narrative by the responding officer.

Defendants often criticize calls-for-service reports because they may not accurately reflect the crime or may be unfounded. Also, the reported crime may have been a domestic incident or may have

occurred off the premises. However, without contrary evidence, the defendant should accept the call report at face value.[23]

## Discovery

After establishing foreseeability, use discovery to determine whether the property owner breached the standard of care. Here are some areas to investigate.

**Policies and procedures.** Did the property owner maintain written operating and security policies and procedures? When a defendant adopts a policies-and-procedures manual, it has, in effect, set standards. Self-imposed standards are the strongest kind. Use fact-witness depositions to determine whether apartment personnel adhered to these policies. If employees' practices do not meet the minimum standards set by the manual, they may have breached the standard of care.

**Organizations and publications.** Did the owner join any national, state, or local apartment associations or subscribe to any professional publications that address security issues? Some association publications discuss security measures. For example, the Texas Apartment Association (TAA) publishes the *TAA Bluebook: A Crime Awareness Guide for Apartment Owners and Managers*.[24] These publications are treasure troves of valuable security information for apartment owners.

**Crime-prevention efforts.** Find out what steps, if any, the premises owner took to prevent crime.

- Did the owner request a security survey by local law enforcement or other entity before the incident involving the plaintiff occurred? Most law enforcement agencies have officers trained in crime-prevention techniques who will survey the apartment complex and provide suggestions, free of charge. If a survey was performed, did the property owner implement any of the recommendations?
- Were the premises planned, built, or modified in keeping with the concepts of the National Crime Prevention Institute's "Crime Prevention Through Environmental Design," which advocates measures such as surveillance, access control, and maintenance to reduce the risk of crime occurring at the property?
- Did apartment personnel receive security training? Local law enforcement agencies will often provide security and crime-prevention classes for personnel and tenants, free of charge.
- Did the owner sponsor Community Watch or similar programs? Most law enforcement agencies will provide personnel to help set up and maintain a crime-watch program.
- Was there any graffiti on the premises? If so, what actions did the owner take? Gang members often use graffiti to mark territory and disparage rival gangs. Other graffiti is drawn by street artists. The local police department's gang unit can distinguish one type from the other and interpret the gang-related graffiti. If the police determine the

graffiti is gang-related, the property owner should prepare a permanent record of the incident, photograph the graffiti, and obliterate it by painting over it or sandblasting.

**Crime data.** Before the incident, did the owner obtain crime data from any source? This should be done as part of the due-diligence process before buying the property. Most local law enforcement agencies keep crime data by date, type, and location, and many issue annual reports detailing crimes by zones and beats. This information is often available in Internet databases. Private crime-data companies can conduct an in-depth search for data related to a premises and the surrounding area.

- Did leasing agents answer prospective tenants' questions about crime and security completely and truthfully? What were the prospects told about criminal activity on the premises and in the surrounding area?
- How were leasing personnel compensated? If they received commissions for each executed lease or for meeting leasing goals, the owner may have created a conflict of interest: When a prospective tenant asks about security, the agent must decide whether to be truthful and risk losing a commission or be less than truthful and make the sale.
- Did the leasing agents screen applicants and all residents over age 18, using measures such as background checks, credit checks, prior landlord references, and verification of employment and income? Did they check applicants against lists of registered sex offenders? Did they allow convicted felons to become tenants? Convicted felons can be denied tenancy because they are not a protected class under civil rights laws.
- What were the policies for preparing incident reports regarding crimes occurring on the premises that were reported to building personnel?
- Did the owner or manager notify tenants about reported criminal activity on the premises and in the immediate area? In a national survey conducted in the late 1990s, 92 percent of tenants who responded said they would appreciate being notified of criminal activity that occurred on the premises.[25] Eighty percent said that such notices would cause them to take

**The absence of industry standards does not relieve owners of their duty to use reasonable care in protecting tenants from foreseeable harm.**

extra security precautions. Before the survey, researchers collected crime data for all the apartments surveyed, and all had experienced property crimes and violent crimes within the past five years. However, 40 percent of survey respondents said that when they asked about crime on the premises, they were told there had been none.

**Physical security measures.** What physical security measures, such as those listed below, did the owner provide at the time of the incident? Had he or she reduced any security measures before the incident?

- Access control: What fencing was on the premises? Did gates control vehicle and pedestrian traffic? How were the gates opened? If by code, how often were the codes changed?
- Lighting: On the date of the incident, what lighting existed in the common areas, including parking lots and entrances? Has an illumination audit ever been performed? Lighting should be sufficiently bright, evenly distributed, and nonglaring, and fixtures should have long-life bulbs. The National Crime Prevention Institute recommends that an empty parking lot's surface be illuminated at a brightness level of two foot-candles. In residual areas, lighting should be sufficient to reveal shape and movement.[26]
- Foliage: Were shrubs next to buildings cut to the lower edges of windows? Were plants and shrubs trimmed to less than three feet high? Were the lowest tree limbs cut to seven feet above ground level?
- Security personnel: Did the property have security personnel or patrols? Did management provide them with the complex's security policies, procedures, and post orders? Had security services been reduced before the incident?
- Signs: Did management post signs indicating "No Trespassing" and "No Soliciting"? Were visitors advised that the premises were patrolled?
- Doors and locks: What type of exterior doors did each apartment unit have? Did exterior doors have peepholes? Deadbolts? Privacy locks? Did individual units have sliding-glass doors? What type of locks were on them? Were doors to buildings or individual units on a master-key system? How often was it changed? What were the key-control procedures? What was the policy for replacing lost keys?
- Windows: What type did the apartments have? What type of locks were installed?

After you gather this information through discovery—and after your expert analyzes pleadings, incident reports, crime data, and fact-witness depositions, and visits the site—the security expert should be able to determine whether the security on the premises was adequate.

Based on this analysis, the expert's report should discuss foreseeability, breaches of the standard of care, and proximate cause. It should include a detailed synopsis of the expert's evaluation and the evidence that substantiates his or her conclusions.

Inadequate-security suits are complex and require thorough investigation. A security expert can help determine whether the facts and circumstances support the plaintiff's allegations. Frequently, powerful discovery can make a suit with modest prospects highly successful.

Owners must remember that their decisions to skimp on security can come at the expense of their tenants' lives and well-being.

Property owners should make the safety of their tenants and others legally on their property a top priority in their daily operations. Juries in the future will take a dim view of landlords who do not. ❐

Notes

1. The National Multi Housing Counsel's tabulations of the U.S. Census Bureau's March 2002 Population Survey. *Quick Facts: Residential Demographics, available at* www.nmhc.org/Content/ServeContent.cfm?ContentItemID=1152 (last visited Oct. 29, 2002).

2. Teresa Anderson, *Laying Down the Law: A Review of Trends in Liability Lawsuits*, SECURITY MGMT. MAG., Oct. 2002, at 46.

3. The Commercial Real Estate Council of ASIS International (formerly American Society of Industrial Security International), www.asisonline.org.

4. The National Fire Protection Association International (NFPA) has proposed two standards, NFPA 730—Premises Security Code, and NFPA 731—Installation of Premises Security Equipment, that "cover the overall security program for the protection of premises, people, property, and information specific to a particular occupancy," *available at* www.nfpa.org/Codes/index.asp (last visited Oct. 29, 2002).

5. Kline v. 1500 Mass. Ave. Apartment Corp., 439 F.2d 477 (D.C. Cir. 1970).

6. Martinez v. Woodmar IV Condo. Homeowners Ass'n, Inc., 941 P.2d 218. (Ariz. Ct. App. 1997).

7. *Kline*, 439 F.2d 477, 480.

8. *Martinez*, 941 P.2d 218.

9. HARVEY BURSTEIN, HOTEL & MOTEL LOSS PREVENTION: A MANAGEMENT PERSPECTIVE 201 (2001).

10. Doe v. Prudential-Bache-A.G. Spanos Realty Partners, L.P., 492 S.E.2d 865 (Ga. 1997).

11. Timberwalk Apartments Partners, Inc. v. Cain, 972 S.W.2d 749, 756 (Tex. 1998).

12. 482 S.E.2d 339 (Ga. 1997).

13. Doud v. Las Vegas Hilton Corp., 864 P.2d 796 (Nev. 1993).

14. Isaacs v. Huntington Mem'l Hosp., 695 P.2d 653 (Cal. 1985).

15. Reitz v. May Co. Dep't Stores, 583 N.E.2d 1071, 1075 (Ohio Ct. App. 1990).

16. Ann M. v. Pac. Plaza Shopping Ctr., 863 P.2d 207, 215 (Cal. 1993).

17. Donna Lee Welch, Ann M. v. Pacific Plaza Shopping Center: *The California Supreme Court Retreats from Its 'Totality of the Circumstances' Approach to Premises Liability*, 28 GA. L. REV. 1068 (1994).

18. 937 S.W.2d 891, 903 (Tenn. 1996).

19. *McClung*, 937 S.W.2d 891, 902.

20. Cornpropst v. Sloan, 528 S.W.2d 188 (Tenn. 1975).

21. *McClung*, 937 S.W.2d 891, 903-04.

22. "If a burglar may enter [an apartment], so may a rapist." Aaron v. Havens, 758 S.W.2d 446, 448 (Mo. 1988).

23. *See* KARIM H. VELLANI & JOEL D. NAHOUN, APPLIED CRIME ANALYSIS 28-30 (2000).

24. TEX. APARTMENT ASS'N, HANDBOOK: THE TAA BLUEBOOK: A CRIME AWARENESS GUIDE FOR APARTMENT OWNERS AND MANAGERS (1995).

25. Unpublished national survey of apartment residents conducted by Larry Talley & Associates in 1998 (on file with author).

26. NAT'L CRIME PREVENTION INST., CRIME PREVENTION THROUGH ENVIRONMENTAL DESIGN: A 40 HOUR BASIC TRAINING *available at* www.louisville.edu/a-s/ncpi/courses.htm (last visited Oct. 29, 2002).