

LANDOWNER LIABILITY FOR CRIMINAL ACTS

Risk Management for an Unstable World



Submitted By:

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I. Landowner Liability for Criminal Acts of Third Parties

Generally, a proprietor owes an invitee a duty to use reasonable care to keep the premises in a reasonably safe condition for use. *Elko Enterprises v. Broyles*, 105 Nev. 562, 565, 779 P.2d 961, 964 (1989); *Early v. N.L.V. Casino Corp.*, 100 Nev. 200, 203, 678 P.2d 683, 684 (1984). However, this duty on the landowner to protect an invited guest from injury caused by a third person is circumscribed by the reasonable foreseeability of the third person's actions and the injuries resulting from the condition or circumstances which facilitated the harm. *Early*, 100 Nev. at 203, 678 P.2d at 684.

The Restatement (Second) of Torts provides:

Since the possessor is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring, or are about to occur. He may, however, know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual. If the place or character of his business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection.

Restatement (Second) of Torts § 344 cmt. f (1977)

Accordingly, a landowner's duty to take affirmative action to reasonably attempt to prevent the wrongful acts of third persons arises only where there is reasonable cause to anticipate such acts and the probability of injury resulting therefrom. *Morrison v. MGM Grand Hotel*, 570 F.Supp. 1449, 1450 (D.C.Nev.1983).

A review of case law that has considered the specific issue of proprietor liability for attacks on patrons occurring in parking lots reveals that courts have generally followed one of two rules with respect to determining the foreseeability of and hence, duty of a proprietor to protect against such attacks. The traditional rule provides that only proof of the occurrence of prior similar crimes on or in the immediate vicinity of the parking lot will establish sufficient foreseeability to create a duty in its proprietor to protect patrons against subsequent attacks. *See, e.g., Henley v. Pizitz Realty Co.*, 456 So.2d 272 (Ala.1984); *Rogers v. Jones*, 56 Cal.App.3d 346, 128 Cal.Rptr. 404 (1976) (disapproved by *Isaacs v. Huntington Memorial Hospital*, 38 Cal.3d 112, 211 Cal.Rptr. 356, 695 P.2d 653 (1985)); *Washington Rd. Properties, Inc. v. Stark*, 178 Ga.App. 180, 342 S.E.2d 327 (1986) (prior robberies did not constitute notice of dangerous condition where no substantial similarity between prior crimes and robbery and rape of motel patron). The modern trend holds that foreseeability of a violent crime being perpetrated on a **800 patron is not absolutely dependant upon notice of prior crimes of a similar nature occurring on or near the premises, but may also be determined from all of the circumstances present. *See, e.g., Isaacs v. Huntington Memorial Hospital*, 38 Cal.3d 112, 695 P.2d 653, 695 P.2d 653 (1985); *Sharp v. W.H. Moore*, 118 Idaho 297, 796 P.2d 506 (1990); *Shea v. Preservation Chicago, Inc.*, 206 Ill.App.3d 657, 151 Ill.Dec. 749, 565 N.E.2d 20 (1990); *see also* James C. Thomas, Premises Liability—Failure to Protect Parking Facility Patron from Criminal Attack, 9 Am.Jur. *Proof of Facts* 3d 587 (1990), and cases cited therein. *See generally* James L. Isham,

Annotation, *Parking Facility Proprietor's Liability for Criminal Attack on Patron*, 49 A.L.R.4th 1257 (1986 & Supp.1993); *see also* Laura Dicola Kulwicki, Comment, *A Landowner's Duty to Guard Against Criminal Attack: Foreseeability and the Prior Similar Incidents Rule*, 48 Ohio State L.J. 247 (1987).

Doud v. Las Vegas Hilton Corp., 109 Nev. 1096, 1101–02, 864 P.2d 796, 799–800 (1993).

Terrorist acts, both domestic and foreign, within this country have awakened us to the necessity of evaluating our traditional landowner liability laws in the context of this huge commercial risk. There were 174 lawsuits filed against the Port Authority in New York following the World Trade Center bombing and these lawsuits were chiefly predicated upon the landowner's responsibility to protect tenants or invitees against criminal acts of third parties.

a. Theories of Recovery

The law in this area varies from state to state. Consequently, there are several theories that are considered by the courts. The five main theories are (1) strict liability, (2) duty to maintain safe common areas, (3) voluntary assumption of the duty to protect, (4) contract, and (5) negligence.

i. Safe Common Area

Cases employing this theory of recovery, demonstrate that the landlord had control of the area and knowledge of a defective condition that allowed the criminal access. For e.g., defective locks or other accessibility defects can trigger liability. Another example was in *Kline v. 1500 Massachusetts Avenue Apartment Corp.*, 439 F.2d 477 (D.C. Cir. 1970) wherein the court permitted the tenant to sue the landlord when she sustained injuries during a criminal assault and robbery in a common hallway. Other examples are missing locks, missing pass keys, easily accessible ladders or fire escapes, poor lighting and defective burglar alarms. *See* B.A. Glesner, *Landlords as Cops: Tort, Nuisance & Forfeiture Standards Imposing Liability on Landlords for Crime on the Premises*, 42 CASE W. RES. L. REV. 679, 790 (1992).

ii. Voluntary Assumption of Duty

This theory arises when the landlord retains and assume the duty to provide security and does so in a careless fashion. *See* Bob Gibbins & Yii-Chwen (Francis) Pan, *Landlords and Third-Party Criminal Conduct*, TRIAL, Mar. 1986, at 48. Many courts that have adopted this rule cite the Restatement of Torts in support, which states that:

[o]ne who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.

RESTATEMENT (SECOND) OF TORTS § 323 (1977). This is effectively an exception to the "no duty to rescue" rule, which holds that "[t]he fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action." § 314.

It seems like this theory would be difficult to use in the terrorism scenario due to lack of reliance by the tenant and the immense burden on the landowner.

iii. Contract

A prime example of how this theory would work in the context of terrorist criminal acts is found in the claim brought by Dean Witter following the World Trade Center bombing. Dean Witter leased space for over a billion dollars for 20 years and when they entered into the lease they were promised that the security at the center surpassed all comparable buildings in NYC. Dean Witter before signing had raised its concern about safety. They alleged in the suit that the Port Authority had knowledge the parking lot was vulnerable to a terrorist attack.

In today's commercial world which is threatened by domestic and foreign terrorism, more and more tenants are insisting on security protection from threats of terrorism.

In addition to contractual responsibilities, statutes have been enacted in many states mandating proprietors to maintain an emergency response plan in the event of terrorist acts. For e.g., in Nevada, the Legislature passed a law requiring each resort hotel to adopt and maintain an emergency response plan. NRS 463.790. We know that Las Vegas, a symbol of Western decadence and sin from the perspective of many throughout the world is a target city for terrorism. Following September 11, Nevada passed Assembly Bill 250 which related to public safety; making various changes regarding certain acts relating to terrorism, weapons of mass destruction, biological agents, chemical agents, radioactive agents and other lethal agents, toxins and delivery systems; providing for an increased penalty for felonies committed with the intent to commit certain acts of terrorism; establishing as murder of the first degree murder committed with the intent to commit certain acts of terrorism; establishing for the purposes of the death penalty an aggravating circumstance relating to murders committed with the intent to commit certain acts of terrorism; providing that there is no statute of limitations for prosecution of certain acts relating to terrorism; requiring certain

property used to commit certain acts of terrorism to be subject to forfeiture; making various other changes pertaining to certain acts relating to terrorism, weapons of mass destruction, biological agents, chemical agents, radioactive agents and other lethal agents, toxins and delivery systems; providing penalties; requiring resort hotels to adopt emergency response plans; requiring certain health care professionals to obtain continuing education concerning the medical consequences of acts of terrorism; and providing other matters properly relating thereto.

iv. Negligence

This is clearly the most popular and most successful route for plaintiffs to take in seeking recovery for negligent security. Many states have adopted a “totality of circumstances” rule that essentially makes it very difficult for a proprietor to successfully secure a summary judgment prior to trial.

Foreseeability is usually the key issue in a negligence case. Some courts take a very restrictive view requiring that the proprietor actually had notice of the precise risk involved. Most courts use a standard of the landowner knew or should have known of the risk. Some states utilize a totality of circumstances doctrine that allows plaintiffs to introduce a wide array of evidence, not only of prior similar occurrences, but local violent crime statistics in the area, building conditions, threats and warnings from police officials. California adopted this totality of circumstances rule in 1985 in *Isaacs v. Huntington Memorial Hospital*, 695 P.2d 653 (Cal. 1985), but retreated back to a prior similar occurrence rule in the 1993 case of *Ann M. v. Pacific Plaza Shopping Center*, 863 P.2d 207 (Cal. 1993).

The companion cases, *Delgado v. Trax Bar & Grill*, 36 Cal.4th 224, 30 Cal.Rptr.3d 145, 113 P.3d 1159 (2005), and *Morris IV v. De La Torre*, 36 Cal.4th 260, 30 Cal.Rptr.3d 173, 113 P.3d 1182 (2005), essentially brought the prior similar occurrence and totality of circumstances rule back to California. *Delgado* holds, *inter alia*, that only when there is a heightened foreseeability of third party criminal activity on the premises does the scope of the proprietor's duty include an obligation to provide guards to protect the safety of patrons and invitees. Heightened foreseeability is satisfied by a showing of prior similar criminal incidents (or other indications of a reasonably foreseeable risk of violent criminal assaults in that location). It does not require a showing of prior nearly identical criminal incidents. If the circumstances do not establish heightened foreseeability, the special relationship of proprietor and patron/invitee still entails a duty to respond to events unfolding in the proprietor's presence by undertaking reasonable, relatively simple, and minimally burdensome measures. Such steps include calling 911 when it is reasonable under the circumstances. It would appear that since the existence of a duty of care is a matter of law, whether there is heightened foreseeability, also is a matter of law. *Morris* holds, *inter alia*, that the special relationship which gives rise to these duties not only applies to patrons, but also to invitees on the premises.

Other foreseeability tests include “first line of defense” and “tempting target” theorems. For example, a landowner under this first theory might be exposed to liability if it had a duty to warn of a terrorist threat. Tempting targets are not hard to imagine and would include these days, night clubs, abortion clinics, casinos, train stations, airports, and others.

II. Liability When the Third Party is a Terrorist

Clearly, it is much more likely that a landowner would be held accountable for a criminal act of mugging or assault when there is evidence the building location is in a high crime area than being held accountable for a terrorist act. Normally, there is not a history of terrorist acts in the vicinity and normally there is no warning communicated to the landowner.

a. Defining Terrorism

i. Domestic

Traditionally, we have thought of terrorism as being international, but after the Oklahoma City bombing, we realize that it can be domestic and home grown. Recently, we have seen many examples of home grown extremists committing criminal acts of terrorism, like the Boston Marathon bombing, the Orlando night club shootings, and many others.

In Nevada, the definition of terrorism would cover domestic terrorism as follows:

“Act of terrorism” means any act that involves the use or attempted use of sabotage, coercion or violence which is intended to:

(a) Cause great bodily harm or death to the general population; or

(b) Cause substantial destruction, contamination or impairment of:

(1) Any building or infrastructure, communications, transportation, utilities or services; or

(2) Any natural resource or the environment.

2. As used in this section, “coercion” does not include an act of civil disobedience.

ii. Foreign

50 U.S.C. § 1801(c) was upheld against constitutional infirmity attacks in *United States v. Duggan*, 743 F.2d 59, 71 (2d. Cir. 1984). The statute defined “international terrorism” as follows:

(c) "International terrorism" means activities that--

(1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State;

(2) appear to be intended--

(A) to intimidate or coerce a civilian population;

(B) to influence the policy of a government by intimidation or coercion;
or

(C) to affect the conduct of a government by assassination or kidnapping;
and

(3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

b. Preventing the Terrorist Act

When we make the landowner or proprietor liable for terrorist acts, part of this equation is putting them in the position of prevention or protection. Because of the nature of terrorist acts, most believe that the duty of prevention or protection largely rests with the government and not private landowners. What might stop a common criminal, such as an alarm or lighting, would not stop a terrorist. Notwithstanding, when there is a definable risk of terrorism, one might consider structural changes to the building, private security changes and involving government action.

Certainly, we have learned that security can play a pivotal role in minimizing a terrorist attack. Alarms can warn tenants and guests to evacuate.

Metal detectors can be used to reduce the ability of a terrorist to bring weapons to their targeted area.

Possibly, the most interesting issue is warning when the landowner is privy to intelligence. Whether a warning without further acts of prevention is sufficient to bar a recovery by an injured or damaged tenant remains to be seen.

In 1995, Disneyland had received a threat there would be a chemical attack. They chose not to warn guests or employees. Instead, they contacted health officials and a chemical warfare team to investigate. Fortunately, the FBI

found this was a hoax. However, one must wonder what would have happened if it was not a hoax and many died or were injured by a real attack.

III. Understanding Terrorism Insurance

Terrorism insurance provides coverage to individuals and businesses for potential losses due to acts of terrorism as defined by the policy.

a. Standard CGL policies

Prior to 911, standard CGL policies included terrorism coverage as part of the package, effectively free of charge. But today, terrorism coverage is generally offered separately at a price that more adequately reflects the current risk.

Insurance losses attributable to terrorist acts under these commercial policies are insured by private insurers and reinsured by the federal government pursuant to the Terrorism Risk and Insurance Act of 2002 (TRIA). Under TRIA, owners of commercial property, such as office buildings, factories, shopping malls and apartment buildings, must be offered the opportunity to purchase terrorism coverage.

There are long-standing restrictions regarding war coverage and nuclear, biological, chemical and radiological (NBCR) events in both personal and commercial insurance policies.

War-risk exclusions reflect the realization that damage from acts of war is fundamentally uninsurable. No formal declaration of war by Congress is required for the war risk exclusion to apply. Nuclear, biological, chemical and radiological (NBCR) attacks are another example of catastrophic events that are fundamentally uninsurable due to the nature of the risk. Under the Terrorism Risk Insurance Act, if some NBCR exclusions are permitted by a state, an insurer does not have to make available the excluded coverage.

- i. On September 11, 2001, most insurance did not specifically exclude acts of terrorism**
- ii. ISO promulgated terrorism risk exclusion ratified by most states, but not all**
 - 1. the ISO exclusion for a commercial property policy defines “terrorism” as the use or threat of force or violence when the effect is to intimidate or coerce a government or population or to disrupt any segment of the economy, or when the**

intent is to intimidate or coerce a government or promote political, ideological, religious, social, or economic objectives or to promote or oppose a philosophy or ideology.

- iii. To further complicate the insurance landscape, 30 states (including California) are Standard Fire Policy jurisdictions. SFP states require that property insurance cover direct fire damage no matter what caused the fire, even terrorism or nuclear events. Thus, terrorism exclusions in SFP states should not defeat claims for losses resulting from terrorism if the losses arise from an ensuing fire.**

b. Terrorism riders and endorsements

A commercial terrorism policy covers damaged or destroyed property—including buildings, equipment, furnishings and inventory. It may also cover losses associated with the interruption of a business. Terrorism insurance may also cover liability claims against a business associated with a terrorist attack.

Depending on the laws of each state, a terrorism insurance policy may exclude coverage for fire following an act of terrorism. Nuclear, biological, chemical and radiological (NBCR) attacks are also excluded, except in the life, health and workers compensation lines of insurance.

Cyber risks are also an emerging terrorist threat. It is possible that property damage or injuries to employees could be caused by a cyber-attack—for instance an attack that causes equipment to malfunction. On the other hand, most computer attacks are not violent and do not cause physical damage. In general, terrorism insurance is unlikely to cover a cyber-attack, and a small business concerned about this risk should consider purchasing separate cyber liability insurance.

c. Reinsured or “backstopped” by federal government under Terrorism Risk and Insurance Act of 2002 (TRIA)

IV. What is TRIA?

a. President Obama signed the Terrorism Risk Insurance Program Reauthorization Act (TRIPRA) of 2015

- b. TRIA now preempts these state-approved exclusions and requires that the exclusions be eliminated if the losses that are**

insured under the Act are those excluded under the current insurance contract.

c. Significant changes

- i. Insurer deductible set at 20% of insurer's direct earned premium (prior year) and federal share set at 85% of insured losses that exceed insurer deductibles until 1/1/16 then federal share goes down 1% each year**
- ii. Now Secretary of Treasury must consult with Secretary of Homeland Security**
- iii. Program trigger increases from \$100 million to \$200 million in stages**
- iv. Mandatory recoupment of federal share through policyholder surcharges increased to 140 percent**
- v. Reporting requirements for insurers**

- d. In 2007, TRIA amended in extension to include domestic, as well as foreign, terrorism**

V. Mandatory Offer

- a. Under TRIA, owners of commercial property (office buildings, factories, shopping malls and apartment buildings) must be offered the opportunity to purchase terrorism coverage.**
- b. Terrorism coverage trigger – certified act by Secretary of the Treasury**

VI. What is Not Covered?

- a. War risk exclusions**
- b. Nuclear, biological, chemical and radiological (NBCR) events**
- c. If state law permits NBCR exclusions, insurer not obligated to make available excluded coverage**

VII. Business Interruption Coverage

- a. Property damage from a terrorist attack may include business interruption coverage**
- b. Covers financial losses when business forced to be suspended**
- c. Typical to have waiting period**

VIII. Workers Compensation Insurance Coverage

- a. Only type of insurance that does not exclude acts of terrorism**
- b. May not be excluded in any state**

IX. Liability Claims Coverage

- a. Terrorism insurance may cover liability claims associated with a terrorist attack**

X. Broader Coverage Available

- a. No certification required**
- b. Terrorism which covers sabotage, strikes, riots and civil commotion; and malicious damage**
- c. Political violence which helps address insurrection, revolution and rebellion; mutiny and coup d'etat; and war and civil war.**
- d. Business interruption which covers contingent business**
- e. Interruption, loss of earnings and extra expenses, and denial of access issues.**
- f. Terrorism liability which helps address public liability for third-party bodily injury, employer's liability, pollution clean-up and defense costs, and nuclear, chemical, biological and radiological first- and third-party decontamination clean-up costs.**
- g. Corporate protection which covers kidnap, detention and hijacking as well as extortion and products extortion.**

XI. Violent Malicious Acts Coverage

- a. The policy defines a “Violent Malicious Act” as “an unlawful act or series of unlawful acts, involving the use of force or violence (including any unlawful detention by means of force or violence) that causes Physical Damage and/or Bodily Injury by any person or group(s) of persons for any reason.” There must be bodily injury in order to trigger coverage under the Violent Malicious Acts policy.

XII. Catastrophic Violence Response Coverage — Church Mutual Insurance

- a. Addresses violent incidents if they occur during an organized activity on a customer's premises and result in the serious bodily injury or death or hostage situation of two or more individuals, not counting the perpetrator(s).

XIII. Case law

- a. *Weinstein v. Islamic Republic of Iran*, 609 F.3d 43 (2d Cir. 2010)(Court of Appeals had jurisdiction, pursuant to the Terrorism Risk Insurance Act (TRIA), to entertain motion, brought by judgment creditors of the Iranian government, to appoint a receiver to sell property, located in New York, owned by an Iranian bank, where bank was an instrumentality of Iran.)
- b. *Omni Berkshire Corp. v. Wells Fargo Bank, N.A.*, 2003 WL 1900822 (S.D. N.Y. 2003), referring to the definition set forth in § 1002(1).The Terrorism Insurance Program consisting of §§ 101 to 108 of the Terrorism Risk Insurance Act of 2002 does not apply to acts of domestic terrorism.

**XIV. TOP 20 MOST COSTLY TERRORIST ACTS BY INSURED
PROPERTY LOSSES
(2015 \$ millions)**

Rank	Date	Country	Location	Event	Insured property loss (1)	Fatalities
1	Sep. 11, 2001	U.S.	New York, Washington, DC, Pennsylvania	Hijacked airliners crash into World Trade Center and Pentagon	\$25,152 (2)	2,982
2	Apr. 24, 1993	U.K.	London	Bomb explodes near NatWest tower in the financial district	1,215	1
3	Jun. 15, 1996	U.K.	Manchester	Irish Republican Army (IRA) car bomb explodes near shopping mall	996	0
4	Apr. 10, 1992	U.K.	London	Bomb explodes in financial district	899	3
5	Feb. 26, 1993	U.S.	New York	Bomb explodes in garage of World Trade Center	837	6
6	Jul. 24, 2001	Sri Lanka	Colombo	Rebels destroy 3 airliners, 8 military aircraft and heavily damage 3 civilian aircraft	533	20
7	Feb. 9, 1996	U.K.	London	IRA bomb explodes in South Key Docklands	347	2
8	Jun. 23, 1985	North Atlantic	Irish Sea	Bomb explodes on board of an Air India Boeing 747	217	329
9	Apr. 19, 1995	U.S.	Oklahoma City, OK	Truck bomb crashes into government building	195	168
10	Sep. 12, 1970	Jordan	Zerqa, Dawson's Field (disused RAF airstrip in desert)	Hijacked Swissair DC-8, TWA Boeing 707, BOAC VC-10 dynamited on ground	170	0
11	Sep. 6, 1970	Egypt	Cairo	Hijacked PanAm B-747 dynamited on ground	148	0
12	Apr. 11, 1992	U.K.	London	Bomb explodes in financial district	128	0
13	Nov. 26, 2008	India	Mumbai	Attack on two hotels; Jewish center	113	172
14	Mar. 27, 1993	Germany	Weiterstadt	Bomb attack on a newly built, still unoccupied prison	95	0
15	Dec. 30, 2006	Spain	Madrid	Bomb explodes in car garage at Barajas Airport	78	2

16	Dec. 21, 1988	U.K.	Lockerbie	Bomb explodes on board of a PanAm Boeing 747	76	270
17	Jul. 25, 1983	Sri Lanka		Riot	63	0
18	Jul. 7, 2005	U.K.	London	Four bombs explode during rush hour in a tube and bus	63	52
19	Nov. 23, 1996	Comoros	Indian Ocean	Hijacked Ethiopian Airlines Boeing 767-260 ditched at sea	60	127
20	Mar. 17, 1992	Argentina	Buenos Aires	Bomb attack on Israel's embassy in Buenos Aires	51	24