



Legal Beat

By MICHAEL SEAN QUINN

Premises Liability and The Insurance Agent—Part III

Editor's Note: This is the final piece in a series examining premises liability. You can find parts one and two in the April 5 and April 26 issues, respectively.

People who own or control premises (i.e., land and buildings) can be liable for injuries caused by defective conditions in the property. This exposure varies with whether the injured person is a trespasser, a licensee or an invitee. Parts I and II explored these themes.

Most liability for premises defects arises out of physical defects in premises. These include rickety steps, holes in the floor, ruts in the ground, dangerous branches on trees, spilled fettuccine on the floor of a restaurant, and so forth. They do not include the presence on the premises of mad dogs or lunatic Englishmen.

Not all defects are physical defects inherent in the property, however. Premises liability arises out of any dangerous condition affecting property.

Every continuing quality of a premises, whether physical or not, can be such a condition. It must be a condition of the premises, but it need not be a condition in of the premises.

It is important to understand the relationship between premises liability and liability for active negligence. A landowner or someone in control of premises has liability for acts of negligence if he negligently performs an act which straightaway (i.e., contemporaneously) causes injury to a person.



Those who own or control premises are normally not liable when a stranger commits a crime on the premises and injures an invitee. Thus, if someone robs a grocery store and shoots a customer, normally, the grocery store will not be liable to the customer.

Keeping lunatic dogs or mad Englishmen chained up in the backyard is active negligence, not a condition of the property. In contrast, that person has liability for premises liability if he creates a condition in or of the premises which (perhaps long after he stops acting) causes injury. Similarly, the tortfeasor (i.e., the bad actor) may not have created the problem at all. He may, instead, have negligently failed to cure it or negligently failed to warn about it. In addition, liability-generating conditions of premises may not themselves directly injure the invitee. They may simply facilitate injury caused by someone else. That someone else may be another invitee, a licensee, or even a trespasser.

Sometimes, the liability of the owner/controller may result from some sort of accident. The pattern is always the same. There is an invitee on premises. A third person comes on those premises, and there is an accident. The accident may or may not involve the negligence of the third person. However, there will always be some condition of the land which the owner/controller has handled negligently. That condition will have facilitated the accident.

A paradigm for this factual situation is a car which crashes through the front picture window of the busy retail establishment. The owner/controller of the store may

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very well have liability if he negligently failed to build the store to guard against this problem.

Some events in this general area may not be foreseeable. For example, if someone driving while drunk crashes through the front of someone's house in a peaceful neighborhood, it is unlikely that the homeowner would be liable even to an invitee. Such events are not foreseeable.

Those who own or control premises are normally not liable when a stranger commits a crime on the premises and injures an invitee. Thus, if someone robs a grocery store and shoots a customer, normally, the grocery store will not be liable to the customer. There is an exception, however.

If there is a condition of a premises which facilitates the crime and thereby creates a foreseeable and unreasonable risk of harm to invitees, then the owner/controller of the premises may be liable to an injured invitee.

Such a risk from crime is foreseeable when the owner/controller either knew or should have known of the general danger (i.e., personal injury from crime) before hand. Here is an example. If an owner of an apartment complex knows that a lock on a young woman's front door doesn't work, the apartment complex may be liable if someone invades her apartment through that door and injures her.

Significantly, the duty an owner/controller may have here to protect invitees is directly proportional to the amount of control over the premises he has. Mostly, only those owners who are in control have any real liability. If an owner has rented the

premises to someone else, the owner is not likely to have continuing liability. One wonders what would happen if a property "manager" had very little control over the property.



In 1997, the Texas Supreme Court decided *Lefmark Management Company v. Old*, a crime case. In that case, a man was shot dead during the robbery of a shopping center store, and his wife sued several parties for wrongful death. One of them was Lefmark Management, the former property manager of the shopping center. The district court had dismissed the widow's claim against Lefmark, the Houston Court of Appeals restored it, so the case came to the Texas Supreme Court.

That court, affirmed the trial court and reversed the court of appeals. The Supreme Court said that even if Lefmark had some clear indication that crime was a danger at the shopping center, it had no duty to the decedent. After all, it had been fired: "on the day of the incident, Lefmark did not own, occupy, manage, possess or otherwise have any control of the shopping center. Absent the essential element of control on the date in question Lefmark owed no duty under the general rule to keep the shopping center safe."

One might hesitate over this case. Why did the property management company have to have control on the day of the killing? Why isn't control at some previous relevant time sufficient? In this case, Lefmark was asked by a commercial tenant before it got fired to conduct a risk assessment with

respect to crime. That request contained some notice to Lefmark that crime might be a worry. Besides, would it really be sensible to release Lefmark from any liability if the shopping center fired Lefmark on the day before the killing? What if it were an hour before?



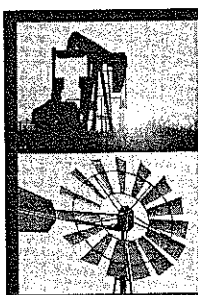
In 1998, the Texas Supreme Court decided *Timberwalk Apartments v. Cain*, which was an apartment house rape case. A lot of these cases are litigated as premises liability cases. All sorts of things can go wrong to set up these cases. In one case, the management company apparently left the key box open and was none too careful about attending the front desk, so that extra keys could be filched—and perhaps were—even by strangers. The issue in this case was causation. Was her key stolen, or was it merely possible that it was stolen?

The issue in this case was whether one of the significant defendants had any duty to the young woman who was raped. It had a duty to protect her if it knew or had reason to know of an unreasonable and foreseeable risk of danger from crime.

There was little indication of such danger. No such crimes had occurred at the Timberwalk Apartments, and they were relatively uncommon in the neighborhood and in the relevant census track. For this reason, the Supreme Court held that the apartment complex did not have a duty to provide additional security.

Moreover, and this is the most significant part of the case, the high court set forth in detail the factors trial courts should use in determining whether a premises owner/controller has a duty to protect invitees. These factors are proximity, temporal recency, frequency, similarity and publicity of previous crimes. All of them must be considered and analyzed. Crimes at or quite close to the property at issue are more significant than crimes which are further away. If a significant number of crimes have occurred within a short period of time, then the general danger might well be foreseeable. The criminal history of the neighborhood must be similar in relevant ways to the kind of crime committed against the plaintiff.

The previous crimes don't have to be identical. A string of assaults or robberies probably make rape more foreseeable. On the other hand, incidents of domestic violence, even in the same apartment complex, do not portend rape, according to the court. For somewhat different reasons, if a number of refrigerators are stolen out of apartments, there is no advance notice of the general dangers surrounding rape. Vandalism is similar. Obviously, if there have been crimes,



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but they have been kept secret, then the owner/controller will not have actual knowledge of the previous crimes, so the crime against the plaintiff will not be made foreseeable by them. "Property owners bear no duty to regularly inspect criminal records to determine the risk of crime in the area." On the other hand, if the fact of crimes is well known, the property owner is deemed to be on notice.

The analysis by the Texas Supreme Court of the similarity of crimes is defective. It claims that incidents of domestic violence do not portend rape. In fact, they might very well, depending on the kind of violence involved. Also, if there is a brisk trade in drugs around an apartment complex, there may be a higher frequency of violence.

W So far, the discussion has concerned the duty of an owner/controller owes to invitees. Sometimes, owners owe duties to others. In one famous case, *Nixon v. Mr. Property Management*, decided in 1985, the Texas Supreme Court held that where a deserted apartment building was in violation of city code ordinances, and someone dragged a young girl into the empty apartment house and raped her, the apartment house had a duty to the child as a consequence of the applicable ordinances. The court also held that the negligence of the apartment house was established automatically by its violation of the city ordinances. The court thought that the child was obviously within the scope of those whom the ordinances sought to protect. Hence, the child did not have to be an invitee.

VI In the first installment of this series, I promised I would hook up the tort law of premises liability with what the activities of insurance agents. I have several points to make.

First, there is nothing special about premises liability. There are no tricks, and CGL policies can be pretty well counted on to provide coverage. Nevertheless, premises liability cases are probably harder to win than act of negligence cases or product liability cases.

Second, landowners probably should engage in some kind of loss control. They probably should inspect for property defects once every so often. Commercial establishments where there is a lot of coming and going should probably obtain risk assessments pertaining to crime. Since much of this is now computerized, it can be done fairly cheaply.

Loss control inspections should be conducted by the people who are in the business of doing that sort of thing. Audits of crimes should also be conducted by pro-

fessionals. Third, it is especially important for the apartment house to know the criminal history of the neighborhood if representations are going to be made to people that the apartment house is safe.

These representations are fairly consistently made, either in advertising literature or by sales agents. Consequently, even though apartment houses have no duty to obtain such information, and may have some liability if they obtain the information poorly, they should probably get and use it.

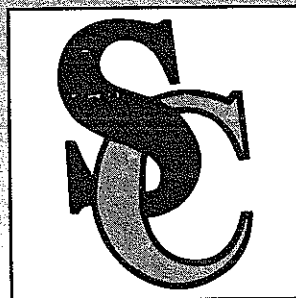
Fourth, no one should place any reliance

on the rule in *Lefmark* which requires a controller to be in charge of the land on the day of the tort. If someone who formerly had control over property, but who relinquished it, knew or should have known about a defect in the premises, but failed to encourage the owner to do anything about it should have liability.

Fifth, insureds should make certain that all of their properties are covered for premises liability exposures. This includes properties overseas. After all, American invitees may show up, get injured, and sue in American courts. E

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