LEGAL FORUM

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Winter 2001-2002

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WHAT EVERY LANDOWNER SHOULD KNOW ABOUT PREMISES LIABILITY

Nearly everyone has heard a crazy story about Premises Liability: the golfer who sued his country club when he was struck by lightning; the camper who sued the campground when he got poison ivy; the widow who sued the RV park after her husband crawled underneath their trailer and got stung by fire ants. While these apparently hyperbolic stories are based on real Premises Liability cases, Premises Liability law does not normally lend itself to absurd claims. Instead, it attempts to balance the reasonable obligations of land holders against the reasonable expectations of those who come onto their land.

In fact, Premises Liability is not really so different from other branches of the law. It's really just a special type of Negligence, the generic cause of action pled in nearly every personal injury case. The only real difference between Negligence and Premises Liability is that "premises" cases deal specifically with the legal duties of land holders, while Negligence can involve virtually any legal duty imaginable.

If you don't know this, you should: On the day you buy or lease your house, store, parking lot, or office building, Texas law obligates you to take some precautions to see that the place is safe for others. If someone is injured while on your property, they can sue you, and their suit will be based, at least in part, on the law of Premises Liability.

THE CLASS SYSTEM

In Texas, your obligations to a particular land entrant differ according to the "class" to which he or she belongs. Texas law has traditionally divided land entrants into three classes: "invitees," "licensees," and "trespassers."

Invitees are people who come onto property in response to the land holder's invitation and for the benefit of both parties. A good example of an invitee is the pizza deliveryman – he brings you pizza, you give him money, and you both benefit. Land holders are obliged to "use reasonable care" to protect the pizza man from "foreseeable injuries." If your land has hidden defects, like a broken hand rail on the staircase (if an inspection would have revealed the problem), you have to take precautions to make sure your invitees aren't harmed when they try to climb the stairs.

Licensees enter land with the permission of the land holder, but not for his benefit. Guests at a dinner party are commonly-cited as examples of licensees – they don't do anything for you, but they are friends of yours. As you might expect, licensees aren't as privileged as invitees: You only need warn licensees of "known dangers," for instance, by saying, "I've filled the flower beds with quicksand," or, "That is where we keep the bears."

Trespassers, the third "class" of land entrants, arrive without an invitation, and receive the least legal protection. The only duty that a land holder owes to a trespasser is not to "willfully, wantonly, or through gross negligence" cause injury to the trespasser. The classic cases of "wantonly" harming trespassers involve "spring guns," booby-trapped shotguns that are set to fire when someone unwittingly trips their strings. *Grant v. Hass*, one of the most-cited cases concerning a land holder's duty to a trespasser, contains this laconic statement of the facts, worthy of reporting, if only because the Court said it with a straight face: "Defendant set a spring gun to protect his melon patch, and plaintiff was shot thereby while walking in the edge of a field near the patch, not intending to steal melons." The verdict for the trespasser was upheld. So consider yourself warned: You are not *necessarily* allowed to shoot at trespassers, even in Texas.

INCIDENTALLY, IF YOU FIND THIS FRUSTRATING

Incidentally, if the terms "invitee," "licensee," and "trespasser" sound like empty legal jargon to you, you are not alone. Outside Texas, many states have altered or abandoned the traditional invitee/licensee/trespasser nomenclature. This is because Premises Liability classes tend to be somewhat fluid, leading to result-oriented judgments. For example, if

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you have a dinner party and invite only your clients, are they invitees or licensees? Similarly, if one of your clients/guests gets drunk, and you ask him to leave, but he doesn't, is he now an invitee, a licensee . . . or has he become a trespasser? The outcome may depend on which litigant the judge or the jury prefers. Nevertheless, Texas law retains the invitee/licensee/trespasser system, and Texas land holders have to live with it.

Liability For Crimes On The Premises

Therefore, the basic framework of Premises Liability law in Texas remains (1) look out for your invitees, (2) warn your licensees of known dangers, and (3) don't intentionally harm your trespassers. Here is the bad news that you have been expecting: The recent trend in Texas has been to use Premises Liability law to sue land holders for the criminal acts of third parties. Essentially, plaintiffs sue the owners and the lessees of the parking lots where they've been mugged. In such cases, the "dangerous condition" on the land is actually the mugger, and the land holder is essentially being sued for failing to prevent the mugging.

Texas' Supreme Court has recently handed down two decisions concerning land holders' liability for the criminal acts of third parties. These decisions, *Timberwalk Apartments* and *Mellon Mortgage*, don't claim to alter Texas law (that's actually debatable); they do, however, create a legal standard to be used when determining whether a land holder can be held liable for a third-party's crimes. According to these decisions, the principal question that a land holder must ask himself is, "How likely is it that a crime is going to be committed on my lot?" Actually it's slightly more sophisticated than that. The analysis is backward-looking: After a crime has been committed and the landlord has been sued, the Court will ask, "How likely was it that this sort of crime would happen to this sort of person on this property?"

For instance, in *Timberwalk Apartments*, an apartment complex was sued by a tenant who had been raped there. There was no doubt that a crime had occurred in an apartment unit in Timberwalk. The only matter of debate was whether Timberwalk's owner should have foreseen the rape and acted to prevent it.

A jury found that the complex's owner could not have reasonably foreseen the tenant's rape. On appeal by the plaintiff, Texas' Supreme Court examined crime statistics from the surrounding area in order to determine how "foreseeable" the plaintiff's rape had been: No violent crimes had occurred in the complex in the previous ten years, and only one sexual assault had occurred within a one-mile radius during the prior year. Based on the low incidence of assault, the Court held that Timberwalk's owner could not have reasonably foreseen the rape – the chance of such an occurrence was just too remote. As the Court explained,"If a landowner had a legal duty to protect people on his property from criminal conduct wherever crime *might* occur, the duty would be universal. That is not the law."

A year after *Timberwalk Apartments*, Texas' Supreme Court reviewed the scope of Premises Liability in the state. Like *Timberwalk Apartments*, *Mellon Mortgage*, concerned a sexual assault. However, the plaintiff in *Mellon Mortgage* was not a lessee, as she had been in *Timberwalk Apartments*. In fact, the plaintiff in *Mellon Mortgage* had no relationship with the property owner at all: Mellon owned the parking garage where she was assaulted, but she did not regularly park in that garage. Instead, she had been driving on a nearby street when she was pulled over by a Houston Police Department officer. The officer directed her to turn into Mellon's parking garage. Once she was inside the garage, the officer assaulted her.

Counter-intuitively, the plaintiff in *Mellon Mortgage* did not sue the officer who had assaulted her. Although he was the most obvious defendant, he was also the person least likely to have money. Instead, the plaintiff sued Mellon and the City of Houston. In regard to Mellon, the plaintiff alleged that the company's failure to provide adequate security for its garage led to her rape there.

The trial judge granted summary judgments to both defendants. The plaintiff appealed the Court's ruling, and, eventually, Texas' Supreme Court heard the case. According to the Court's opinion, there was some evidence that rape was foreseeable in the area: In the two years preceding the officer's assault on the plaintiff, 190 violent crimes, including rape and murder, were reported in the area around the garage. Vagrants were known to drink on the premises, and at least one person had complained that security in the garage was poor. Had a person with a parking contract (i.e. an "invitee") been assaulted, perhaps Mellon could have been held liable.

Nevertheless, the Court found that Mellon could not have foreseen the circumstances surrounding *this assault* on *this plaintiff*. Simply put, Mellon could not have foreseen that this particular assault would occur on the premises, since the plaintiff did not park in or frequent the parking garage. The Court held that, "Whether it be a farmer's field, an industrial park, or a twenty-four hour laundromat, placing a duty on landowners to prevent criminal acts on their property simply because criminals could gain access to their land would make landowners the insurers of crime victims, regardless of the lack of connection between the landowner and either the victim or the perpetrator. Courts across the country agree that an owner or possessor of property is not an insurer of the safety of those on the premises."

The *Timberwalk Apartments* and *Mellon Mortgage* decisions don't establish an outer limit for Premises Liability stemming from the criminal conduct of others, but they do indicate

that plaintiffs' attorneys who bring such cases face an uphill battle with the courts. From the land holder's perspective, this should be reassuring. Nevertheless, the fact that some plaintiffs have lost their cases has done nothing to prevent plaintiffs' attorneys from bringing similar cases, and many such cases are currently pending in Texas courts. As one lawyer put it, "You can beat the wrap, but you can't beat the ride."

Liability Of Lessors

Premises Liability law is "hot" right now, and, because of this, it is developing so quickly that a short article cannot convey anything more than the highlights. Here is one last highlight: You can be held liable for injuries that occur on your land even if you've leased it to someone else.

Generally speaking, a property's "occupant" – not necessarily its owner – is the one charged with making the property safe for others. For instance, if a multi-year lease conveys the *entire* premises, a plaintiff injured on the premises would have a better complaint against the tenant/lessee than against the property's actual owner. However, if the landowner retains control over a portion of the property, or if the lease obligates the lessor to provide security for the premises, the lessor can be held liable for injuries – including injuries resulting from violent crime – that occur there.

Typically, the cases exploring the premises liability of lessors concern strip malls or shopping centers. Each shop within a shopping center lets its own floor space, but the landlord retains control over the parking lot and other "common areas." Sometimes the landlord employs the security guards who patrol the shopping center, and so controls security throughout the complex.

One such case, *Thompson v. CPN*, involved a movie theater employee was shot inside the theater where he worked. The theater was leased from CPN, and was situated inside a mall owned by CPN. Although CPN provided security for the mall's common areas, its lease to the theater's owner (AMC) was silent as to who would provide security *inside* the theater. CPN had hired security guards to patrol the mall, but none of them actually patrolled the theater's premises. Based on this fact, Austin's Court of Appeals held that CPN owed no duty to protect AMC's employees, and upheld summary judgment in CPN's favor.

Unfortunately, the Fifth Circuit has decided a similar case in the opposite way. In *Washington v. Resolution Trust Corp.*, the Fifth Circuit interpreted Texas' Premises Liability law. As in *Thompson*, the *Washington* case concerned a shopping center employee who was shot during a robbery. The landowner/lessor was not contractually obligated to provide security for the premises. Nevertheless, because the company was aware of the high incidence of crime in the surrounding area, it had hired an off-duty police officer to patrol the shopping center for a few hours a week. The Fifth Circuit found that, by hiring a part-time guard, the landowner had "assumed responsibility" for security on the premises. This assumption extended inside the individual shops, not just in the common areas. In allowing the case to go to a jury, the Fifth Circuit stated that the fact that the shooter had entered the shop through a common area (as all shopping mall criminals must) weighed in favor of holding the landowner liable. Clearly, this is a dangerous decision for landowners who let their premises, even though its interpretation of Texas law is not binding on Texas courts.

Lessons

As a land owner, what can you gain from all of this? First, be aware that you are, to some extent, responsible for the safety of those who enter your property. This rule should be particularly important to business owners, who are obligated to provide the public with a relatively safe, crime-free environment.

Next, take note of any reports concerning violent crime in your area. Although the law does not require land holders to research crime statistics, if you know that crimes are occurring nearby, you should take precautions to prevent similar crimes on your land.

Finally, if you let property to or from others, be certain about your obligations under the lease: If any clause within the lease obligates you to provide security, you may bear a portion of the blame if a violent crime occurs there. Likewise, if you are a lessor, be cautious about retaining control over common areas or unused areas adjacent to leased premises. If you control land adjacent to the site of a crime, a judge may let the question of your liability go to a jury.

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MOLD UPDATE: Changes To Homeowners' Policies On The Way In 2002

In response to the recent surge in mold claims, the Texas Department of Insurance will modify several of its insurance policies in a compromise between coverage for insureds and unreasonable cost to insurers. The Exclusions portion of the HO-B, HO-C, HO-CT, HO-C-CON, and TDP-3 policies (where there is currently a mold exclusion, except in the case of mold ensuing from covered water damage) will be amended to delete the words "mold or other fungi" from the current mold exclusion and to add a new exclusion to exclude loss *caused by or resulting from* mold, fungi or other microbes. In addition to the exclusionary language in the new exclusions, several other provisions within the exclusion will limit mold coverage, as follows:

a. An exception to the exclusion that provides coverage for "ensuing mold, fungi or other microbial losses caused by or resulting from sudden and accidental discharge, leakage, or overflow of water or steam if the water loss would otherwise be covered under the policy."

b. A provision that clarifies that sudden and accidental includes "a physical loss that is hidden or concealed for a period of time until it is detectable." Further, a hidden loss must be reported to the insurer no later than thirty days after the date that the insured detected or should have detected the loss.

c. A provision clarifying that for purposes of the mold coverage provided in the exception to the general mold exclusion, the ensuing mold losses covered include "reasonable and necessary repair or replacement of property covered under Coverage A (Dwelling) and/or Coverage B (Personal Property)."

d. A provision that limits the mold coverage provided in the exception to the general mold exclusion by clarifying that the cost of remediation, "including testing of ensuing mold, fungi or other microbes," is not covered. Additionally, any increases in expenses for Loss of Use and/or Debris Removal due to remediation and testing are not covered.

e. A definition of remediation as "to treat, contain, remove or dispose of mold, fungi or other microbes beyond that which is required to repair or replace the covered property physically damaged by water or steam. Remediation includes any testing to detect, measure or evaluate mold, fungi or other microbes and any decontamination of the residence premises or property."

For answers to your questions concerning developments in Premises Liability law or mold litigation/coverage, please do not hesitate to call our firm. We commonly deal with such issues and look forward to helping you.

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