"Premises Liability Introduction for Commercial Landlords"

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You are an owner or operator of a commercial building (or counsel to an owner or operator) and you are negotiating a lease with a new tenant. Once the new tenant moves in, you will have given up most control of the tenant's space. What if someone gets hurt in the tenant's space? Can I (or my client) be held liable? If so, how do I protect myself (or my client)?

Just because you give up significant control of a tenant's space, does not mean that you are guaranteed free of liability should someone be injured in that space. To understand why, we must understand what premises liability is.[1] Here is the rule, as stated by the Massachusetts Supreme Judicial Court in Mounsey v. Ellard, 363 Mass. 693, 708 (1973): "A landowner must act as a reasonable man in maintaining his property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk."

Premises liability arises from four theories: strict liability, intentional torts, nuisance and negligence. Strict liability cases generally concern liability for the keeping and escape of dangerous animals or activities unduly dangerous and inappropriate to the place they are maintained. Liability for intentional torts in the residential context generally results from the "spring-gun" cases and the like. The common law rule is that force may be used to defend one's property, but only to the extent it is necessary to repel the party unlawfully thereon. Deadly force is never sanctioned for the defense of mere property. In the commercial setting, liability may lie for such things as false imprisonment and arrest if a vendor, for example, physically detains an alleged thief. Nuisance is parceled out into two categories, private and public. In private nuisance, liability is generally founded on a "nontresspassory invasion of another's interest in the private use and enjoyment of land." See Restatement (Second) of Torts §§ 822 – 29A (1965). Liability here is predicated on some intentional interference which causes significant and unreasonable harm. Public nuisance is an unreasonable interference with a right common to the general public. See id. § 821B.

Liability from negligence is the most common of these theories and the one dealt with in the most depth here. Negligence, as always, is predicated on the breach of a duty of care that proximately and actually causes harm. Negligence cases concern a variety of topics, such as slip-and-fall, negligent security and attractive

[1] We should note up front that premises liability is not uniform in its application throughout U.S. jurisdictions. What follows are general common law themes coupled with the law as it stands in Massachusetts.

nuisances. Slip-and-fall cases are what they sound like—someone is injured on the premises by some inanimate object—a discarded banana peel. This is by far the biggest sub-category of premises liability cases. One of the authors of this article used to do due diligence on litigation and insurance files for a client in the business of buying and selling hotels. It was amazing the range of claims made by guests at these hotels as reported in the insurance loss runs. There seems little limit to the ways people can hurt themselves—and the variety of injuries that they blame on others.

In negligent security cases, the causative agent is a usually unknown, or at least judgment proof, assailant. These are the assault and battery and theft cases in which the plaintiff is looking for deep pockets to sue and hence brings suit against the parties in control of the property where the injury took place. The plaintiff must prove that the parties in control of the property failed to meet their duty to provide reasonable security against acts of third parties, and that had property security measures been taken, the alleged harm would have been avoided. Attractive nuisance cases include injuries in swimming pools and similar factual scenarios.

Given this range of cases, under what scenarios can the landlord be held liable? There are generally two. In negligent security cases, landlords typically get named as a party where the assailant gained access to the leased premises by passing through unsecured common areas. The leading case in this area is Kline v. 1500 Mass. Ave. Apartment Corp., 439 F.2d 477 (D.C. Cir. 1970). One of the authors of this article represented a rape victim a number of years ago who brought suit against the landlord of the office building in which she had been raped. She was cleaning an interior office and was attacked by an assailant who gained access to interior offices by passing through a common exterior door which had a lock, but no system for locking after hours. The insurance company settled the case.

A second scenario was recognized in Massachusetts in residential cases where a person is injured on leased property by a danger known to the residential landlord that the landlord reasonably should have ameliorated. Young v. Garwacki, 380 Mass. 162 (1980), is the leading case in this area in Massachusetts. In that case, plaintiff, a guest of the tenant, was injured by falling off a balcony of the leased premises after leaning on a railing that the plaintiff alleged was negligently maintained. Evidence showed that the landlord had notice of the defect in the railing and though the landlord had warned the tenant, had taken no actions to fix the railing. The Supreme Judicial Court held that if a landlord had notice of the defect in the railing, then the landlord, as the party-in the best position to repair the railing, could be found liable. The Supreme Judicial Court affirmed the judgment for the plaintiff against the landlord. However, the duty of a residential landlord to fix known dangers within a tenant's leased premises has not been extended in Massachusetts to commercial tenancies. See Humphrey v. Byron, 447 Mass. 322, 327 (2005).

In the commercial context, the court considers whether the landlord exercised some type of control over the defect that caused the injury, such as where the lease specifies that it was the landlord's responsibility to repair or maintain the element that caused the injury, even if it is entirely within the tenant's leased premises. Absent such control by the landlord, courts have not found liability. See, e.g., Camerlin v. Marshall, 411 Mass. 394 (1991) (landlord not liable for plaintiff's injury from a slip and fall accident on portion of the premises not under landlord's control); Chausse v. Coz, 405 Mass. 264, 266 (1989) ("low humidity" which caused explosion in workplace injuring plaintiff was not under landlord's control).

Of course, if the person is injured while in a common area, such as a parking lot or common hallway, the landlord surely will be the primary defendant. On the other hand, if there are no common areas and the tenant controls the entire leased premises, such as in a triple net lease, then the landlord should be able to avoid liability. For example, in Sheehan v. El Johnan, Inc., 38 Mass. App. Ct. 975, 975 (1995), an employee of the U.S. Postal Service slipped and fell on ice in the parking lot of leased premises. The Postal Service, as tenant, occupied the entire premises and the terms of the lease did not place responsibility for their upkeep on the landlord. As such, the court reasoned the landlord did not control the premises or contract to perform any maintenance/upkeep of them, and did not therefore, owe any duty to the plaintiff.

So landlords do sometimes find themselves as defendants in premises liability cases. What can the landlord do? Four things to consider:

1. Secure indemnification from tenant
2. Defend against suits on the merits
3. Take remedial measures
4. Buy insurance

This article will address the first two of these options. Insurance is the topic of the companion article.

TENANT INDEMNIFICATION

Can a commercial landlord insulate itself from liability by including a tenant indemnification clause in its leases? In general, no. First, any contract between a landlord and its tenant cannot compromise the rights of non-parties to that contract who may come on to leased property and get hurt. Regardless of what a lease may say, then, the injured individual can still sue the landlord and, more to the point for litigators, not have to worry about a dispositive motion on the basis of release, waiver, or indemnification language in the lease. One caveat, as noted above, is that a lease can be evidence of a landlord's lack of responsibility for repairs or maintenance of a particular injury causing element.

But if indemnification language cannot prevent a plaintiff from suing a landlord, surely it can be used to require the tenant to pay for the landlord's defense costs and any settlement or judgment against the landlord? Not necessarily. In many jurisdictions, including Massachusetts, lease provisions that require a tenant to indemnify the landlord against the landlord's negligence are unenforceable as against public policy. M.G.L. c. 186, § 15. Thus, if the plaintiff's complaint alleges injury due, for example, as we've discussed, to acts of a third party who gained access to the leased space through common areas, or to some element over which the landlord had control, the landlord may not be afforded the benefits of an indemnification clause. On the other hand, if the complaint alleges injury due to elements entirely within the tenant's control, then an indemnification clause likely would be effective, although the landlord would then have a defense to the claim anyway.

Hudson v. Atiniz, No. 915670E, 1993 WL 818715, at *2 (Mass. Super. Nov. 10, 1993), is an instructive case. In Hudson, an employee of tenant slipped and fell while making a delivery at the loading dock for tenant's business. The employee brought suit against the landlord alleging negligence in the ownership, maintenance, control, inspection, repair, construction and design of the loading dock area. Landlord sought indemnification from the landlord, relying on language in the lease:

> Tenant will indemnify and save landlord harmless from and against any and all claims, actions, damages, liability and expenses in connection with the loss of life, personal injury and/or damage to property arising from or out of any occurrence in, upon or at the Leased Premises or any part thereof, or occasioned wholly or in part by any act or omission of Tenant, its agents, contractors, employees, servants, lessees, concessionaires. In the event that Landlord shall, without fault on its part, be made a party to any litigation commenced by or against Tenant, then Tenant shall protect and hold Landlord harmless and shall pay all costs ... in connection with such litigation.

The landlord and tenant cross-moved for summary judgment on the issue of indemnification. The court granted the tenant's motion. The court stated "a landlord cannot contract away any potential liability it may have for injury, loss or damage resulting from any omission, fault, negligence or misconduct *on the part of the landlord*." (emphasis added) See also Massey v. Cloutier, 26 Mass. App. Ct. 1003, 1004 (1988) (agreement that landlord would not be responsible for dilapidated condition of premises was no defense).

Other jurisdictions are less troubled by indemnification clauses, finding them enforceable so long as the lease was not enacted fraudulently or under duress, including a disparity in negotiating power between the parties which would compel the lessee to agree. See Crowell v. Hous. Auth. of the City of Dallas, 495 S.W.2d 887, 889 (Tex. 1973).

But even where enforceable, keep in mind that indemnification clauses are of little value should the tenant-indemnitor become insolvent.

So are indemnification clauses worth putting into commercial leases? Yes, as noted, a landlord, even with a strong defense, still can be named by a plaintiff and an indemnification clause can be used to compel the tenant to pay for the landlord's dispositive motion. Perhaps more important, the lease should spell out the areas of the parties' respective spheres of control and responsibility for repair and maintenance.

DEFEND ON THE MERITS

The news is not all gloomy for commercial landlords; premises liability cases are not easy to win against landlords. In the slip and fall cases in which the injury occurred within the tenant's leased premises, the plaintiff has to allege that the injury causing element was under the landlord's control. Most banana peels or grapes are not left on the floor by landlords. More interesting from the litigator's perspective are the negligent security cases in which the plaintiff alleges access to the leased premises through landlord controlled common areas. To prove its case, the plaintiff must prove by a preponderance of the evidence each element of its cause of action: duty to protect, breach of that duty, direct and proximate causation, and damages. In litigation, each of these elements will be closely scrutinized.

Duty of care: owed to whom?

Although the law varies from jurisdiction to jurisdiction, the law in Massachusetts is fairly typical. The Appeals Court in McKinney-Vareschi v. Paley, 42 Mass. App. Ct. 953, 954 (1997), stated that a property owner, or possessor, is required to "exercise reasonable care in preventing injury to lawful visitor[s] caused by reasonably foreseeable acts of another, whether those acts are accidental, negligent, or intentional." See also, Luoni v. Berube, 431 Mass. 729, 731-32 (2000) (duty predicated on plaintiff's reasonable expectations and reliance that defendant will anticipate harmful acts of third parties and take appropriate protective measures). There is a lot in that statement. A determination of the scope of the duty takes into account the status of the injured individual, what constitutes "reasonable care," and what threats are "foreseeable."

We will categorize this discussion of the duty owed based on where the injured person was located when harm was caused them; persons injured off the premises, and persons injured on the premises.

The duty owed to persons off the premises can be summed up as a duty of reasonable care to not allow some condition or activity on the premises to injure them. A common case example is someone being harmed by snow and ice falling on them while they traverse a public way. The discussion in such a case would be first around who controlled the instrumentality which causes the snow and ice to fall on them, be it a roof, fence, porch, etc. Second, did that party use reasonable care to avoid the harm caused? For example, did they make a reasonable attempt to remove the hanging snow and icicles following a large snow storm?

The duty of care owed to persons on the premises, however, requires a bit more conversation. At common law, the duty of care to an entrant on the property has traditionally been based on the status of the entrant. The general classifications, in order of the level of duty owed, are trespasser (lowest), licensee (middle) and invitee (highest). However, many jurisdictions have either done away with the common law classifications, or adopted a hybrid variant of them. We now discuss each in order.

At common law, the possessor of land owes no duty of care to a person unlawfully on the premises, a trespasser, except that the possessor cannot willfully or wantonly injure them. Many jurisdictions, however, have tailored this duty. States have imposed liability on the possessor for failure to aid a trespasser found in peril or distress. This is particularly true if the possessor placed the trespasser in such position and did nothing to remedy it. For example, a possessor of land cannot purposefully injure a trespasser on the land and then stand idly by as that person succumbs to their injury. In Massachusetts, like many other states, the duty owed trespassers has also been tailored based on their age. See M.G.L. c. 231, § 85Q. "Child trespasser" statutes like this impose liability for harm caused children, even if they were unlawfully on the premises when the injury occurred. This is based on the assumption that children are more susceptible to risk and less likely to know the repercussions of their actions. Massachusetts, however, continues to recognize the relative lack of duty owed to adult trespassers not in positions of peril. See Schofield v. Merrill, 386 Mass. 244, 247 (1982).

A licensee, defined as a person who enters or remains upon land by right or permission, is, at common law, owed no more duty than to that of a trespasser. This, however, has been expanded in many jurisdictions which view the licensee as an equal to the possessor. As such, if a dangerous condition is, or reasonably should be, known, a warning to the licensee is required. However, there is no duty to ensure the safety of a licensee outside of the disclosure of dangers. Some common examples of licensees include: solicitors, loiterers, sightseers, public officials and social guests.

Invitees are owed the highest duty of care: the possessor will take reasonable care to ascertain the actual condition of the property and, if any hidden risks are discovered, make it reasonably safe by repair or give warning of the actual condition. This duty is generally referred to as the "reasonable care" standard. Invitees may be on the premises based on express or implied invitations, and generally the context of an invitee is that of a consumer or business guest on the property of a commercial enterprise. The duty to an invitee is premised on the property being presented as fit for visitation and, therefore, reasonably safe for the invitee's reception. In the landlord/tenant context, the landlord generally owes a duty to invitees to maintain the areas under his or her control in a reasonably safe condition and to warn of hidden dangers known, or reasonably knowable, at the time of leasing.

In the evolution of premises liability law, these rigid classifications have seen much change. For instance, in the seminal case, Mounsey v. Ellard, Massachusetts did away with the distinction between licensee and invitee due to its difficult and confusing application. 363 Mass. at 706. Instead, the duty to entrants in Massachusetts is based on their lawful or unlawful presence. In other words, an owner or possessor of land owes a duty of reasonable care to all persons lawfully on the premises. See O'Sullivan v. Shaw, 431 Mass. 201, 204 (2000). Some jurisdictions have gone even further. In Rowlands v. Christian, 443 P.2d 561, 568-69 (Cal. 1968), the Supreme Court of California abolished the use of classifications entirely, instead creating a duty to exercise ordinary care in maintaining property in a reasonably safe condition for all entrants. Following California's lead, a handful of jurisdictions have also imposed this standard in lieu of rigid status classification. See Smith v. Arbaugh's Rest., Inc., 469 F.2d 97, 100 (D.C. Cir. 1972); Pickard v. City and County of Honolulu, 452 P.2d 445, 446 (Haw. 1969); Cates v. Beauregard Elec. Coop., Inc., 328 So. 2d 367, 371 (La. 1976); Corrigan v. Janney, 626 P.2d 838, 841 (Mont.1981); Ouellette v. Blanchard, 364 A.2d 631, 634 (N.H. 1976); Basso v. Miller, 352 N.E.2d 868, 876-78 (N.Y. 1976); Mariorenzi v. Joseph DiPonte, Inc., 333 A.2d 127, 131 (R.I.1975).

Duty of care: what is reasonable care?

The plaintiff must prove what duty of care the landlord failed to meet. Knowing how to comply with one's duty of care is no straightforward matter; the standard of care is not found in any building code. In litigation, except in the rare cases, it is usually a question for the trier of fact as to whether the defendant complied and the decision may rest on many factors, such as industry standards, similar neighboring properties and

local/state ordinances. In general, the "industry standard" is determined by comparison to similar properties (that may or may not be near by), and to properties that are near by (but that may or may not be of a similar nature—an office building versus a university). The trier of fact will also consider a property's own prior practices.

For example, a commercial office building landlord's duty of care for security standards may be established by looking at other office buildings outside the immediate vicinity. Do they have one security guard? More than one? Is there an identification badge entry system? Furthermore, the duty may be established by comparison to neighboring properties to assess what standards are used for security in the particular geographic area. In today's post-9/11 world, this creates a conundrum for commercial property owners as implementing new security measures expands the realm of foreseeable risk, potentially to their detriment. Not doing anything, however, places them in jeopardy of not meeting the prescribed standard of care. An example of this was the Anthrax mail scare. It has now become more foreseeable that mail might contain harmful biological or chemical agents and, as such, many mail handlers are required to wear gloves. This safety measure changes the standard of care and those property owners not requiring the use of gloves might be liable for failure to abide by this new standard if an injury results.

Duty of care: was the risk foreseeable?

The injured plaintiff must also prove that the particular injury causing risk was foreseeable to the defendant. Foreseeability is proven by showing that the defendant had actual or constructive notice of the type of harm in question. To prove foreseeability, the plaintiff will examine the past history at the property in question. Have individuals been harmed in the same way as the plaintiff at the property in the past? Was the landlord warned in the past of the risk? What do landlord's documents, such as maintenance records, show? Plaintiffs may also seek to introduce evidence of risks at similar properties or other properties from the same neighborhood or vicinity. Defense counsel typically seeks to limit the scope of evidence on foreseeability. Thus, in Popp v. Cash Station, Inc., 613 N.E.2d 1150 (Ill. App. Ct. 1992), the plaintiff was attacked while withdrawing cash from an automated teller machine. With minimal discussion the court found that the plaintiff's offer of nation-wide statistics about criminal attacks on ATM customers was not enough to create a jury question on foreseeability. The court seemed concerned about the remoteness of the statistics.

Causation

A major hurdle for any plaintiff in a negligent security case is proving causation; the burden is on the plaintiff to prove that a different or better security system would have prevented the harm caused by the assailant. Thus, for example, if plaintiff argues that landlord breached its duty of care by failing to employ a security guard on premises after hours, the plaintiff must still prove that the presence of such a guard would have prevented the assailant's act. Thus, in Choy v. First Columbia Mgmt., Inc., 676 F. Supp. 28 (D. Mass. 1987), the court noted that, "[w]ithout evidence as to how the assailant entered the building or at least tending to exclude the possibility that he entered lawfully, it would be purely conjectural to believe that a security guard on the premises would have prevented the entry of the assailant."

REMEDIAL MEASURES

In light of the landlord's duty to provide reasonable security in at least common areas of commercial properties, a landlord may want to consider a professional audit as part of an overall risk management plan. Whether to adopt additional security measures is a complicated question and largely beyond the scope of this article, other than a few observations here. In evaluating whether to adopt additional security measures, the landlord may consider the cost and effectiveness, impact on employee and customer relations, effect on insurance premiums, and litigation benefits.

For example, one of the authors of this article was once asked by a property manager whether he should install closed-circuit televisions in a parking garage. There was not a simple answer. Closed-circuit televisions can be monitored or un-monitored, on-site or off-site, with or without the capacity for rapid response—each factor affecting the cost of the system. Closed circuit televisions may reassure customers—certainly a benefit (by contrast, if the garage decided to inspect every car that entered the garage, the operator could risk losing business from drivers wanting to avoid the hassle). From a litigation risk perspective, installing closed circuit televisions may be an important step to avoid liability if the industry standard, by comparison to similar and proximate properties, dictates the use of such televisions. On the other hand, if you install closed-circuit televisions and normally monitor them, but fail to do so at the time the plaintiff is injured, then the risk of liability may be greater than if the televisions had never been installed.

CONCLUSION

Landlords cannot completely insulate themselves from liability risk from the minute the tenant moves in, but a comprehensive risk management program that includes carefully drafted leases, aggressive litigation strategies, security audits, and insurance, can help minimize that risk.