NEGLIGENT SECURITY LAW IN THE COMMONWEALTH OF MASSACHUSETTS IN THE POST-SEPTEMBER 11 ERA

By Daniel P. Dain and Robert L. Brennan, Jr.*

I. INTRODUCTION

In the aftermath of the events of September 11, 2001, terms such as "security" and "homeland defense" have become national watchwords. In the many months that have passed since that cataclysmic day, the concept of security has arguably been elevated in the American psyche to the level of "the economy," "the environment," "education," and other issues that are the substance of both election debates and coffee shop discourse. The average American may not be directly in touch with the macro workings of security on an international level such as border integrity, foreign policy, or the proliferation of weapons of mass destruction; however, most Americans have asserted, or at least been confronted with, more control over matters of personal security, including security within the buildings and homes they inhabit and the airlines on which they travel. Not surprisingly, lawyers confronted issues concerning personal security long before September 11.

Negligent security law, a subset of premises liability law, is the basis on which an individual injured by another—such as a terrorist—seeks to hold liable the owner or possessor of the premises on which the individual was

*Daniel Dain is an attorney in the Litigation Department at Goodwin Procter LLP, where he is a member of the firm's Product Liability and Land Use Litigation Practice Areas. His practice focuses predominantly on complex commercial litigation, product liability defense and land use litigation. Robert Brennan is an associate in the Environmental Department of Goodwin Procter LLP, where he is a member of the firm's Real Estate Development Practice Area. His practice focuses on a wide range of development, regulatory compliance and environmental litigation issues with an emphasis on land use permitting, property operations, development review under state and federal environmental policy acts, Superfund site remediation and "brownfields" redevelopment. The views expressed by the authors in this article are solely their own and do not necessarily reflect those of Goodwin Procter LLP.

injured, rather than the perpetrator. The injured party has standing because the law imposes a duty on owners and possessors of land to provide reasonable security measures and to protect lawfully present individuals from foreseeable harmful acts (e.g., crimes) of third parties.

In the aftermath of September 11, 2001, greater security measures were put into effect in American office buildings (measures such as personal identification systems and other controls on access); the media widely reported on lawsuits brought by the families of victims against airlines for inadequate security; the government created compensation funds for victims; and airline travelers came to accept travel inconvenience and delay due to increased security measures after recognizing that what was once unthinkable must now be treated as foreseeable.

Obviously, negligent security law pre-dates September 11 and has been attractive to plaintiffs both because the owner or possessor of property is often easier to identify than a lone perpetrator, and because the owner or possessor usually has the deeper pockets. Historically, plaintiffs brought these civil lawsuits to recover for injuries caused by a wide range of criminal acts, such as assaults and batteries, robberies, rapes, and murders. September 11 reminded property owners and possessors and potential plaintiffs that an act of terrorism, if foreseeable, may also form the basis for premises liability. The impact of this date on negligent security law in the coming years, however, will likely prove to be greater than simply highlighting an additional basis for which a property owner or possessor could be held liable. Thus, for the property owner, manager, and occupant, the state of negligent security law merits a closer look today.

To begin, negligent security law is both frustrating and fascinating in part because it is counter-intuitive. A person is assaulted in the hallway of an office building and sues not the assailant, but ... the landlord? Negligent security law is premised on the principle that crime is preventable, and that the law places a duty of care upon the party in the best position to take security measures to prevent foreseeable crimes—the property owner or possessor. Many or even most owners or possessors of land are surprised that they can be held civilly liable for crimes committed on their property.

In addition to being counter-intuitive, the law is nebulous. No book containing a code of security measures exists for landlords. Liability is premised on a series of considerations or elements that a jury gets to weigh, and juries may weigh those considerations or elements differently in each case. The absence of clear rules or standards governing what level of security is reasonable makes apparent the need for legal counsel in this area.

Our perspective on negligent security law stems from our experience as litigators who have tried negligent security cases, and from our work as counselors who have advised property owners or possessors before any act

giving rise to potential liability occurs. Whether acting as a counselor or litigator, the lawyer must know how to prove a negligent security case and how to defend against one. This article provides guidance to lawyers, examines how the events of September 11, 2001 are likely to affect negligent security law, and how such cases are tried. Knowing the law permits the lawyer to advise his or her clients on how to minimize the risk of liability in making security decisions on a particular property.

The lawyer as counselor also needs to know his or her limitations. Whether an owner or possessor of land should adopt a particular security measure goes beyond a simple litigation risk analysis. The decision-maker must also consider whether adopting a particular security measure makes sense from (1) a business perspective, (2) an employee or customer relations perspective, (3) a harm prevention perspective, and (4) an insurance perspective are some of the considerations *in addition to* the perspective of minimizing litigation liability risk. Each of these considerations overlap; weighing and balancing them may require expertise exceeding the lawyer's ability.

The following example highlights these points. A parking garage owner approaches his lawyer and asks whether he should purchase a closed-circuit television system for the garage. 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. An un-monitored system may not be able to prevent harm, but it may help to later identify and prosecute a perpetrator. As we will see, the lawyer can help the parking garage owner identify the applicable standard of care (e.g., whether other parking garages in the area or garages of a similar size have closed-circuit televisions) and may also help identify down-side risks (e.g., if you install closed-circuit televisions and as a practice monitor them, but fail to monitor them at the time a violent act is committed on the premises, a jury may be more likely to find a breach of the duty of care than if the televisions had not been installed in the first place).

The decision-maker should also weigh factors that are presumably beyond the lawyer's expertise. For example, to what extent can closed-circuit televisions help prevent harm? Apart from their effectiveness in deterring crime, do closed-circuit televisions help reassure customers, and therefore positively affect business? The answer to these questions may require consultation with other experts. For example, a client may want to hire a security firm to conduct a security "audit." However, the client, with the lawyer's assistance, should consider whether the security consultant's "audit" is motivated by an interest in selling security-related products.

With these caveats about the lawyer's role as counselor in mind, we now turn to the law governing the provision of security on property. We set forth below a framework for negligent security law. Negligent security law

is based in the common law, and with the exception of injuries occurring in federal buildings or in national parks, state law governs these claims. This article focuses on the negligent security law of the Commonwealth of Massachusetts, and cites cases from other jurisdictions for illustrative purposes. The Commonwealth is fairly representative of negligent security law across the nation. We also offer observations as to how the events of September 11, 2001 are likely to affect negligent security law. We conclude this article with a discussion of some strategic decisions that lawyers should consider in presenting a case to, or keeping a case away from, a jury.

II. THE ELEMENTS OF A NEGLIGENT SECURITY CLAIM

According to the Restatement (Second) of Torts:

> A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to (a) discover that such acts are being done or are likely to be done, or (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.[1]

Thus, a plaintiff pursuing a negligent security claim must prove: (1) the defendant is an owner or possessor of land; (2) the plaintiff was lawfully on the defendant's premises; (3) the defendant breached its duty of care to provide reasonable security for the plaintiff; (4) the plaintiff was injured as a result of acts committed by a third party that were foreseeable to the defendant; (5) the plaintiff would not have been injured but for the defendant's breach of its duty of care; and (6) the plaintiff was in fact injured. We will examine each of these six elements, but the third and fourth elements—the foreseeability of harm and the reasonableness of security in light of foreseeable harm—are perhaps most interesting in light of the September 11 terrorist attacks.

1. RESTATEMENT (SECOND) OF TORTS § 344 (1965). Massachusetts courts generally have formulated the rule somewhat more simply. *See, e.g.*, Whittaker v. Saraceno, 418 Mass. 196, 198 (1994) ("[T]he common law imposes on [the possessor of land] a duty to take reasonable precautions to protect persons lawfully in [areas controlled by the possessor of the land] against reasonably foreseeable risks."); McKinney-Vareschi v. Paley, 42 Mass. App. Ct. 953, 955 (1997) ("[A] property owner [has a duty] to protect a lawful visitor from foreseeable injury inflicted by a third party.").

A. The Defendant Must Be the Possessor of Land or Property

The law tells us that a negligent security claim can only stand if brought against a possessor of land. But who fits into this category? For one, owners of property fit squarely in this category. Also within the category of appropriate defendants are property managers. Possessors of both commercial and residential property may be subject to liability for providing negligent security (although their respective duties of care may differ).

What happens when there are multiple units on a property? The general rule in such a situation is that the landlord is responsible for common areas, such as parking lots, exterior doors, lobbies, and hallways. The most often cited case for the policy behind imposing a duty on the lessor for common areas is *Kline v. 1500 Massachusetts Avenue Apartment Corp.*[2] There, the United States Court of Appeals for the District of Columbia Circuit wrote:

> No individual tenant had it within his power to take measures to guard the garage entranceways, to provide scrutiny at the main entrance of the building, to patrol the common hallways and elevators, to set up any kind of a security alarm system in the building . . . . The duty is the landlord's because by his control of the areas of common use and common danger he is the only party who has the *power* to make the necessary repairs or to provide the necessary protection.[3]

Kline has been cited with approval by courts applying Massachusetts law.[4] For example, its reasoning was echoed in the justification for imposing liability on a college for an attack on a resident of one of its dormitories:

> No student has the ability to design and implement a security system, hire and supervise security guards, provide security at the entrance of dormitories, install proper locks, and establish a system of announcement for authorized visitors. Resident students typically live in a particular room for a mere nine months and, as a consequence, lack the incentive and capacity to take corrective measures.[5]

This kind of reasoning should be familiar to students of law and

2. 439 F.2d 477 (D.C. Cir. 1970).

3. *Id.* at 480-81.

4. *See, e.g.*, Choy v. First Columbia Mgmt., Inc., 676 F. Supp. 28, 29 (D. Mass. 1987) (citing *Kline* for the proposition that "[t]he primary justification for imposing such a duty is the superior ability of the landlord to provide reasonable precautions against crime").

5. Mullins v. Pine Manor College, 389 Mass. 47, 51-52 (1983).

economic theory. Apartment buildings, office buildings, and college and university campuses pose a classic collective action problem in that an individual tenant, lessee, or student-resident endeavoring to provide common security would bear the full cost of that security, but would only have a share in the benefit. The landlord, on the other hand, is in the position to distribute the burden of security and hence eliminate any free riders.

The tenant *is* responsible for providing reasonable security for guests on the leased premises under the tenant's control. Therefore, just about every business must concern itself with negligent security law.

There are two scenarios, however, where courts have recognized that the lessor (the landlord) can be found liable (perhaps jointly with the lessee) for injuries suffered within the leased premises. The first scenario exists when the landlord had notice of a harmful condition on the leased premises. In *Young v. Garwacki*,[6] the plaintiff, a guest of the tenant, was injured falling off a balcony of leased premises after leaning on a railing that the plaintiff alleged was negligently maintained.[7] The Supreme Judicial Court (SJC) found that if the 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.[8] Such a scenario, however, is less likely to come up in the context of harmful acts by third parties.[9]

Landlords are more frequently found liable for harmful acts that have occurred on leased premises when the assailant gained access to the leased premises by passing through improperly secured common areas. Thus, the D.C. Circuit noted in *Kline*: "Even in those crimes of robbery or assault committed in individual apartments, the intruders of necessity had to gain entrance through the common entry and passageways."[10] Note that, as with all cases, the plaintiff must still establish all of the elements of the cause of action, including causation.[11]

6. 380 Mass. 162 (1980).

7. *See id.* at 162-63.

8. *See id.* at 170.

9. *See* Luisi v. Foodmaster Supermarkets, Inc., 50 Mass. App. Ct. 575, 579 (2000) (holding that lessor was not liable as a matter of law for harmful acts which occurred on the leased premises over which lessor had no control).

10. Kline v. 1500 Massachusetts Ave. Apartment Corp., 439 F.2d 477, 480 (D.C. Cir. 1970).

11. Thus, the assailant may have gained access to the leased premises by passing through common areas, but if the assailant was an invited guest of the lessee, then the plaintiff will have difficulty arguing that better security would have prevented the attack.

B. The Plaintiff Must Have Been on the Premises Lawfully

Historically, the Commonwealth imposed different duties upon a possessor of land depending upon whether the individual on the land was an invitee (the highest standard of care), a licensee (a middle standard of care), or a trespasser (the lowest standard of care). The SJC did away with the distinction between invitees and licensees in *Mounsey v. Ellard*,[12] reasoning that the dichotomy was confusing and often lead to inconsistent results.[13] The court wrote: "[W]e no longer follow the common law distinction between licensees and invitees and, instead, create a common duty of reasonable care which the occupier owes to all lawful visitors."[14] Notably, the court did *not* rule that all lawful visitors were identical under the law. Rather, distinctions between visitors would play out in the application of the general rule and the weighing and evaluation of elements such as the foreseeability that a particular visitor would be harmed and what precautions would be deemed reasonable given the status of a particular visitor.[15]

The SJC in *Mounsey* maintained the rule that possessors of land owe trespassers a much lower standard of care: "We feel that there is a significant difference in the legal status of one who trespasses on another's land as opposed to one who is on the land under some color of right—such as a licensee or invitee."[16] The court reaffirmed this holding in *Schofield v. Merrill*,[17] although it recognized some narrow exceptions, including circumstances where the trespasser is known to be in a position of peril and cases involving child trespassers.[18]

C. The Plaintiff Must Prove that the Defendant Breached Its Duty of Care to Provide Reasonable Security

1. The possessor of land must meet a duty of care established, at least in part, by its own practices and by those similarly situated

The possessor of land's duty of care is not found in any building code. Indeed, it can be quite effective for defense counsel in most negligent security cases to point out that the defendant has not broken any law or

12. 363 Mass. 693 (1973).
13. *See id.* at 705.
14. *Id.* at 707.
15. *See id.* at 708-09.
16. *Id.* at 708 n.7.
17. 386 Mass. 244 (1982).
18. *See id.* at 247.

regulation. While juries may give credence to this observation, it can create great confusion for the possessor of land considering how to act and how much and what kind of security to provide. There is no "right answer" for any possessor of land. The law imposes a duty to provide *reasonable* security. But what is reasonable security? This question can be particularly frustrating for the possessor of land because (1) "reasonable" in a legal context is a moving target depending on a wide range of factors; and (2) from the point of view of litigation, the issue of a possessor of land's duty of care almost always goes to the jury (unlike elements such as foreseeability and causation that are more ripe for pre- or post-trial dispositive motions). As the Michigan Supreme Court observed in one of that state's seminal negligent security cases: "Whether the care exercised was reasonable under the circumstances is for the jury to determine."[19]

So what is the rule? It was stated by the SJC in *Mounsey*: "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."[20]

At first, this formulation seems to have an almost mathematical sense to it. If the risk from not adopting a particular safety measure, multiplied by the magnitude of the likely harm, is greater than the cost of adopting the particular safety measure, it logically follows that the safety measure is part of the duty of care. One can even plug hypothetical numbers into the analysis. For example, a landlord considers hiring a night guard for $50,000 per year. Theoretically, this could significantly decrease the likelihood that a tenant will be raped. However, if the landlord forgoes the expense of hiring this security guard and the tenant is raped, the "seriousness of the injury" might be valued at $200,000. Thus, the cost/benefit analysis mandates the hiring of the guard since the cost is less than the foreseeable harm prevented or minimized. The analysis, of course, is not that easy; these numbers are not so easily assigned. Further complicating matters, courts have found it to be an unfair business practice and have imposed punitive damages where the actor decides to forego security precautions because they would have been more expensive than compensating injured plaintiffs.[21]

Courts, under the "totality of the circumstances" doctrine, typically provide litigants substantial room to argue to the jury the appropriate duty of care for a particular possessor of land. A couple of factors seem paramount. Two buzz words are "proximity" and "similarity." In

19. Samson v. Saginaw Prof'l Bldg., Inc., 224 N.W.2d 843, 849 (Mich. 1975).

20. *Mounsey*, 363 Mass. at 708 (emphasis added).

21. *See infra* Part II.C.2.

evaluating the appropriate standard of care, courts consider "proximity" by looking at other properties nearby. For example, a particular downtown office building will be evaluated in comparison to other downtown office buildings. Courts may also consider "similarity" by looking at similar types of property: one suburban residential college campus may be compared to another, even if quite far away. Courts often conflate "proximity" and "similarity" into "industry standard." In evaluating standard of care, courts also consider a property's own prior practices, and whether any special relationships exist between the possessor of the property and the person lawfully entering the property. For example, courts considered "industry practice" in *Fund v. Hotel Lenox of Boston, Inc.*,[22] but analyzed the safety procedures of the possessor of land in *Hotel Lenox of Boston*,[23] *Rawson v. Massachusetts Operating Co.*[24] and *Nallan v. Helmsley-Spear, Inc.*[25] Additionally, courts have considered whether the possessor of the land has a special relationship with the visitor, as in *Whittaker v. Saraceno*,[26] and how the possessor of land reacted in the aftermath of the alleged incident, as in *Atari v. United Parcel Service, Inc.*[27] Again, one factor may not be dispositive in any particular case.

2. Businesses' reactions to September 11, 2001 likely raised the duty of care drastically

September 11, 2001 has had a profound effect on the standard of care. In the wake of those horrifying acts of terrorism, businesses rushed to adopt security measures intended to ease the fears of their tenants, employees, and customers. In the days and weeks following September 11, this meant, at least in part, insuring (1) that increased security measures were visible to tenants, employees, and customers;[28] and (2) that building management

22. 418 Mass. 191, 194 (1994) (noting industry practice of patrolling guest floors in hotels).

23. *See id.* at 193 (indicating hotel's alarm system did not work).

24. 328 Mass. 558, 560 (1952) (explaining theatre manager's testimony as to theatre's usual practice and deviation from it on night in question was basis for jury finding breach of duty of care).

25. 407 N.E.2d 451, 458 n.9 (N.Y. 1980) (showing evidence that assailant gained entry to hotel lobby through unlocked front doors while lobby was unattended, even though policy was for attendant to always lock front door when he left lobby, was basis for jury to find breach of duty of care).

26. 418 Mass. 196, 197 (1994) (noting that higher duties may be imposed where there is a special relationship between the two parties, such as between a residential landlord and a tenant, a college and a dormitory resident, and a hotel and its guest).

27. 211 F. Supp. 2d 360 (D. Mass. 2002) (illustrating that defendant's post-incident investigation was material to whether it met its duty of care).

28. In Boston and elsewhere, visible security measures included uniformed security

was taking the issue as seriously, if not more seriously, than any other building in the area.

These concerns spur several observations. First, as we discussed earlier, since the standard of care is measured, at least in part, by "proximity" and "similarity," the standard of care for *all* building owners became increasingly strict as each building adopted new security measures after September 11. Consequently, buildings and tenants that did not implement such heightened security measures risked being viewed as operating below this post-September 11 standard of care.

Second, we observed that the types of security measures that building owners adopted typically had very little relationship to preventing the types of acts that occurred on September 11, even if the measures were clearly adopted in response to the events of that day. Rather, these measures were effective at preventing more common risks, such as an unauthorized intruder entering the property and committing an assault and battery or rape. Thus, we may come to see the following scenario: Post-September 11, a building owner elects not to hire a security guard. Later, a tenant is raped on the premises and brings suit alleging that the rape was a consequence of the building owner failing to meet its standard of care. The plaintiff compares the level of security in the building to other buildings in the area that are similarly situated (e.g., types of tenants, number of units). The plaintiff finds that the buildings in the comparison pool had hired security guards since September 11. The result is that before September 11, not having a security guard may have met the standard of care; after September 11, in our hypothetical, the decision not to hire a security guard may subject the building owner to liability, even though the hiring of the security guard would offer little protection against September 11-type acts of terrorism.

The third observation is that after the initial post-September 11 rush to reassure nervous tenants, employees, and customers about the level of safety provided in buildings, property owners realized the expense of providing security. The authors have observed a dramatic scaling back of security measures since September 11. The abandonment of security measures creates its own legal issues; a jury may conclude that the initially adopted security measures set the standard of care, and that by subsequently abandoning those security measures, the property owner or possessor falls below the standard of care set by the owner himself. *Kline* is illustrative of the exposure that can be created by implementing heightened security measures that are subsequently abandoned.[29] The landlord at the

guards and, in some buildings, bomb-sniffing dogs. The level of security seemed to vary in direct proportion to the height of the building.

29. Kline v. 1500 Massachusetts Ave. Apartment Corp., 439 F.2d 477 (D.C. Cir.

time of the attack in *Kline* no longer followed a series of security measures that had previously been in place.[30] The court found that by having adopted the security measures in the first place, the landlord had tacitly admitted that such measures were the standard of care.[31] By abandoning them, the landlord therefore failed to meet his own established standard of care.[32]

There is an interesting twist to the reasoning of the court in *Kline*. The court wrote: "We therefore hold in this case that the applicable standard of care in providing protection for the tenant is that standard which this landlord himself was employing in October 1959 when the appellant became a resident on the premises at 1500 Massachusetts Avenue."[33] This statement rationalizes the court's ruling based on the contract law principles of reliance and implied covenant. In other words, the tenant had relied on a certain level of security in entering into the lease, and the landlord impliedly covenanted that he would provide that level of security as a condition of the lease. Perhaps recognizing that such reasoning might act to narrow the effect of its holding—since under the contract theory, security measures both adopted and abandoned after the commencement of a particular lease would not be relevant—the court made clear that the tenant "was entitled to performance by the landlord measured by this standard of protection whether the landlord's obligation be viewed as grounded in contract or in tort." [34]

An attorney defending a client for abandoning security measures adopted after September 11, on the other hand, could cite the reasoning of a case like *J.C. Penney Co. v. Spivey, Inc.*[35] There, the defendant had hired one security guard and the plaintiff claimed that the defendant was negligent for not hiring more.[36] That the court rejected this argument is not necessarily surprising, but its reasoning is interesting: "Undertaking measures to protect patrons does not heighten the standard of care . . . ."[37]

1970).

30. *See id.* at 486.

31. *See id.* at 478-79.

32. *See id.* at 486-87.

33. *Id.* at 486.

34. *Id.; see also* Gillot v. Fischer, No. 00CV251, ¶ 23 (Mass. Housing Ct. March 27, 2002) (finding that a duty of care arose out of condominium documents).

35. 452 S.E.2d 191 (Ga. Ct. App. 1994).

36. *See id.* at 193.

37. *Id.*

D. The Plaintiff Must Prove that He or She Suffered Injuries as a Result of Acts By a Third Party that Were Foreseeable to the Defendant

This is essentially the proximate cause element of the cause of action, although it should be noted that foreseeability plays a dual role in negligent security cases to the extent that it helps define the possessor of land's duty of care.[38] The burden is on the plaintiff to prove by a preponderance of the evidence that the act by the assailant was foreseeable to the defendant. There are two aspects to foreseeability that we will address. First, what actually must be foreseen? Second, how does a plaintiff prove foreseeability? We will then look at how what is foreseeable may have changed since September 11, 2001.

1. What must be foreseen?

Defense attorneys often focus on the element of foreseeability. You can almost hear defense counsel arguing to the jury during closings: "Ladies and gentlemen, the plaintiff simply has not proven that the defendant foresaw that an assailant wearing red knickers and wielding an envelope opener as a knife would injure the plaintiff on the balcony of the building on Wednesday evening at 6:17 p.m." The law, however, does not require that the plaintiff prove that the defendant had extra-sensory perception or clairvoyant powers. As the Michigan Supreme Court explained, "[f]oreseeability of harm, . . . unless it is to depend on *supernatural revelation*, must depend on knowledge."[39] But just as the law does not define "foreseeability" so narrowly, likewise it rejects an overly liberal interpretation. In the cosmic sense, everything is "foreseeable." As the United States Court of Appeals for the District of Columbia Circuit stated in *Kline*, "[i]t would be folly to impose liability for mere possibilities."[40] Instead, courts have taken a middle view of "foreseeability." Based on the possessor of land's knowledge, courts consider "the "totality of the circumstances," including actual notice, past experience, and the likelihood that the conduct of third parties will *endanger the safety* of visitors on the property.[41]

38. *See, e.g.*, Seron v. Maltagliati, 8 Mass. L. Rptr. No. 22, 498 (Mass. Super. April 28, 1998). "[F]oreseeability plays a dual role, namely to define the limits of proximate cause, and to help define the limits of the duty of care owed by the landowner." *Id.* at 494.

39. Samson v. Saginaw Prof'l Bldg., Inc., 224 N.W.2d 843, 848 (Mich. 1975) (quoting 3 FOWLER V. HARPER, FLEMING JAMES, JR. & OSCAR S. GRAY, THE LAW OF TORTS § 16.5 (2d ed. 1986) (1965)) (emphasis added).

40. Kline v. 1500 Massachusetts Ave. Apartment Corp., 439 F.2d 477, 483 (D.C. Cir. 1970).

41. *See* Morgan v. Bucks Assocs., 428 F. Supp. 546, 549 (E.D. Pa. 1977).

2. How does a plaintiff prove foreseeability?

Foreseeability is typically proven by showing that the defendant landowner or possessor had actual or constructive prior notice of the type of harm in question. The trick for defense counsel in negligent security cases is to limit the breadth of evidence that plaintiff may present relating to foreseeability. Since the plaintiff has the burden of persuasion on the foreseeability element, if the plaintiff is unable to offer any evidence of notice to the landlord, then the defendant is in a good position to bring a dispositive motion. The plaintiff's counsel must try to expand the scope of what is relevant to the issue of foreseeability.

As with the standard of care, courts have evaluated evidence of notice on sliding scales that consider the proposed evidence's "proximity" and "similarity" to the acts by the third party at issue. There are generally three categories of evidence that courts are willing to evaluate: (1) evidence from the particular property in question; (2) evidence from the general vicinity or neighborhood; and (3) evidence from similar properties outside the particular neighborhood.[42] Thus, if the defendant is, for example, a college, a court is most likely to entertain evidence of prior acts and complaints originating from the defendant's campus. The court will then exercise its discretion and determine whether to admit evidence relating to notice from the area around the college or from other colleges located in similar areas of Massachusetts.

When the plaintiff offers evidence of some prior act or complaint, the court will also evaluate how similar that act or complaint was to the act that the plaintiff now claims the defendant should have foreseen. Evidence that a landlord had notice of a prior rape on the premises is likely to be admissible in a rape case, but what about evidence of property crimes in a rape case? What if there had never been a crime in a particular building, but other tenants had complained about the opportunity for crime presented by the building? There simply are no bright line rules and courts will evaluate the evidence case by case.

Foreseeability can be shown in a number of ways. Some evidence will be more direct, some more circumstantial. Perhaps the very best evidence is evidence that the possessor of the land actually foresaw the act that occurred. Thus, in *Mullins v. Pine Manor College*,[43] a witness for the defendant admitted on the stand that the college had actually "foreseen the risk that a student at Pine Manor could be attacked and raped on

42. *See* Choy v. First Columbia Mgmt., Inc., 676 F. Supp. 28, 31 (D. Mass. 1987) (examining crime statistics and the level of security in the building in question itself, in other buildings in the neighborhood, and in other similar types of buildings).

43. 389 Mass. 47 (1983).

campus."[44] The SJC therefore concluded that "[t]he risk of such a criminal act [rape] was not only foreseeable but was actually foreseen."[45] Similarly, in *Flood v. Southland Corp.*,[46] the SJC commented that while there had been no history of violent crime on the defendant's premises, the defendant had actual notice that the assailant was intoxicated and had a knife.[47] These were facts from which the jury could find proximate causation.

Perhaps next on the sliding scale is evidence of prior similar crimes on the particular premises. Thus, in *Nallan v. Helmsley-Spear, Inc.*,[48] the court admitted into evidence a police log for the building showing that "there had been 107 reported crimes in [the building] in the 21 months which preceded the shooting and that at least 10 of these unlawful acts were crimes against the person."[49] This case provides a practical tip for a plaintiff's lawyer: get the police log for the premises in question and perhaps the police log for buildings nearby or for similar types of buildings.

But there need not have been prior similar incidents for a jury to find liability.[50] For example, in *Samson v. Saginaw Professional Building., Inc.*,[51] there had been prior complaints about the risk of similar acts on the premises, although no such acts had been committed.[52] There, the plaintiff was an employee of a commercial tenant in a building that also housed a mental health clinic.[53] She brought suit against the landlord after one of the clinic's patients stabbed her.[54] There was no evidence that the patients of the clinic had ever committed any crimes against any of the other tenants, and hence no prior-act evidence. Yet the trial court admitted evidence that other tenants had complained in the past about the risk posed by the clinic's patients. The Michigan Supreme Court agreed that this was enough evidence of notice for the plaintiff's case to get to the jury.[55] The lesson for landlords is to take tenants' complaints seriously.

In *Morgan v. Bucks Associates*,[56] the plaintiff was assaulted in the

44. *Id.* at 54-55.

45. *Id.*

46. 416 Mass. 62 (1993).

47. *See id.* at 73.

48. 407 N.E.2d 451 (N.Y. 1980).

49. *Id.* at 458.

50. *See* Whittaker v. Saraceno, 418 Mass. 196, 199 (1994) ("[T]he foreseeability question is not conclusively answered in favor of a defendant landlord if there has been no prior similar criminal act.").

51. 224 N.W.2d 843 (Mich. 1975).

52. *See id.* at 849.

53. *See id.* at 843.

54. *See id.*

55. *See id.* at 848-49.

56. 428 F. Supp. 546 (E.D. Pa. 1977).

parking lot of the defendant's shopping center.[57] At trial, the parties stipulated that the defendant had knowledge of prior car thefts in the parking lot, although there was no evidence of prior crimes of violence in the parking lot.[58] The court admitted this evidence and denied the defendant's motion for judgment as a matter of law after the jury returned a verdict for the plaintiff. In its written decision, the court found that the jury could have concluded that the history of property crimes in the parking lot had provided the defendant notice of a danger to its visitors, against which the defendant then had a duty to provide reasonable security.[59] Similarly, in *Silva v. Showcase Cinemas Concessions of Dedham, Inc.*,[60] the First Circuit found that evidence of vandalism was admissible in a case involving a stabbing in a movie theatre parking lot.[61] In *MacQuarrie v. Howard Johnson Co.*,[62] the First Circuit held that a possessor of land could reasonably foresee that "a violent crime may at some time occur" because of a history of property crimes.[63]

Other cases have admitted evidence of notice stemming from off-premises-but-within-the-vicinity information. For example, in *Stewart v. Federated Department Stores, Inc.*,[64] the court admitted evidence as to the number of crimes within a two block radius of the garage where the plaintiff had been attacked.[65]

Frequently, one of the parties will seek to offer evidence[66] that the area in question is a "high crime area" (evidence typically offered by the plaintiff) or a "low crime area" (evidence typically offered by the defendant). It is not unusual for courts to admit this type of evidence to prove to foreseeability.[67] We think, however, that the better rule is not to admit such vague testimony. The problem with this testimony is that there is no baseline. A high or low crime area as compared to what? This testimony simply is not helpful to the jury.

At some point, courts draw the line. *Popp v. Cash Station, Inc.*[68] is an

57. *See id.* at 547.

58. *See id.* at 548.

59. *See id.* at 550-51.

60. 736 F.2d 810 (1st Cir. 1984).

61. *See id.* at 811 (noting there was also evidence of a prior incident with a knife in the theatre lobby).

62. 877 F.2d 126 (1st Cir. 1989).

63. *Id.* at 130.

64. 662 A.2d 753 (Conn. 1995).

65. *See id.* at 756.

66. This evidence is often offered through the testimony of a police officer.

67. *See, e.g.*, Fund v. Hotel Lenox of Boston, Inc., 635 N.E.2d 1189, 1190 (Mass. 1994) ("The hotel is in a medium to moderately high crime area.").

68. 613 N.E.2d 1150 (Ill. App. Ct. 1992).

interesting example. There, the plaintiff was attacked while withdrawing cash from an automated teller machine.[70] With only 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.[71] The court in *Popp* was likely concerned about the remoteness of the statistics to the crime in question where the nexus between them was too tenuous.

3. What is foreseeable has radically changed since September 11, 2001

The issue of proximate cause has been affected by the terrorist acts of September 11 in ways similar to the standard of care. As previously discussed, property owners, in reaction to terrorists commandeering airplanes, adopted a series of security measures that nonetheless had little relation to preventing future September 11-type attacks. What September 11 did do, however, was to make everyone pay greater attention to all types of risks.[72] In this way, even non-terrorist attacks may be considered more foreseeable than they were before September 11. With more and more property owners and possessors performing risk assessments of their properties, it is increasingly difficult for them to hide behind a lack-of-foreseeability defense.

These assessments, along with other similar analyses, have created a post-September 11 conundrum. If a property owner hides his or her head in the sand, fewer acts may be considered foreseeable; by not being proactive, the property owner risks not meeting the prescribed standard of care. On the flip side, by being proactive, the property owner may meet his or her standard of care, but expand the realm of foreseeable risks to his or her detriment.

The anthrax scare and the Washington, D.C. sniper shootings have also influenced what is foreseeable across the nation. Before the anthrax scare,

70. *See id.* at 1151.

71. *See id.* at 1153.

72. There is one type of risk whose heightened foreseeability has a closer nexus to the actual events of September 11: crimes directed at individuals who appeared to the assailants to be of Arab descent. Post-September 11, there was an increase in these hate motivated crimes, and the subsequent media attention made their foreseeability greater, arguably putting property owners on notice of the risk to guests who might be targets of such attacks. Thus, in *Atari v. United Parcel Service, Inc.*, 211 F. Supp. 2d 360 (D. Mass. 2002), the plaintiff, an individual of Palestinian descent injured in an attack on the defendant's property, brought a negligent security action claiming, in part, that the defendant had notice that the plaintiff was at risk of attack by third parties in the immediate aftermath of September 11. *See id.* at 361.

the focus on mailroom security was on the possible package-bomb (which arguably became foreseeable in the aftermath of the Unabomber). Since then, the risk that the mail could transmit deadly chemical or biological hazards has become more foreseeable. In reaction, we have seen businesses adopting measures such as requiring mail handlers to wear gloves (thereby likely changing the standard of care).

The reaction to the D.C. sniper shootings has also been interesting. We have learned from cases discussed in this article that businesses can be held liable for foreseeable injuries to patrons in parking lots. The circumstances of the shootings had the effect of making injuries from gunshot wounds in parking lots and gas stations in the D.C. area arguably foreseeable while the sniper(s) was (were) still at large. Some businesses reacted by taking measures such as hanging tarps to screen gas station pumps. Once this standard of care is embraced, the comparable businesses that do not follow it risk being found to be below the standard of care.

E. The Plaintiff Must Prove that He or She Would Not Have Been Injured *But-For* the Defendant's Breach of Its Duty of Care

Causation is one of the more difficult elements for plaintiffs to meet and may be one of the most fertile places for defense counsel to focus on during opening and closing statements. A defense counsel should not miss the opportunity to point out to the jury that the plaintiff simply cannot "prove" that the crime would not have occurred had the defendant adopted additional security measures. If the plaintiff's counsel argues that external doors should have been locked, for example, then the defense counsel should counter with the argument that the plaintiff cannot prove that the assailant would not have picked the lock or broken a window to gain entry.

Choy v. First Columbia Management, Inc. is illustrative of the challenge faced by plaintiffs.[73] There, the plaintiff was raped in her apartment by an unknown assailant. The court granted the defendant summary judgment, in part because the plaintiff could not establish causation in fact:

> Even assuming that the plaintiff's assertions are true [that the building's locks were typically broken or unlocked], . . . the plaintiff has not seriously controverted the fact that no one knows how the assailant entered the apartment complex on the night of the attack. Without evidence as to how the attacker entered the building, it would be pure speculation to state that greater care on the part of the defendants in providing security would have prevented the attack. . . .
>
> Without evidence as to how the assailant entered the building or at least tending to exclude the possibility that he entered lawfully, it would be

73. 676 F. Supp. 28 (D. Mass. 1987).

> purely conjectural to believe that a security guard on the premises would have prevented the entry of the assailant.[74]

What is a plaintiff's counsel to do? First, a plaintiff need not eliminate every possible scenario. In a civil case, a plaintiff must prove each element only by a preponderance of the evidence. Indeed, when faced with an argument similar to the one articulated above in *Choy*, the SJC came to a very different decision in *Mullins v. Pine Manor College*,[75] a case where the plaintiff was raped by an unknown assailant.[76] There the SJC explained: "A plaintiff need only show 'that there was greater likelihood or probability that the harm complained of was due to causes for which the defendant was responsible than from any other cause. . . .'"[77] The court concluded: "We think also that the jury were entitled to discount the possibility that the assailant was a person lawfully on the premises . . . . It is therefore mere conjecture to suggest that the assailant was lawfully on the premises, and [the plaintiff] is not required to eliminate every possibility."[78]

In fact, the SJC in *Sharpe v. Peter Pan Bus Lines, Inc.* may have further lightened the plaintiff's burden.[79] There, the decedent was stabbed and killed in a random attack in a bus terminal.[80] The plaintiff argued that the defendant should have had security personnel in the terminal. The defendant objected that the plaintiff could not prove that having security guards would have prevented such a random attack. The SJC wrote:

> It is likely that a uniformed security officer in the terminal could not have prevented [the assailant's] attack on [the plaintiff]. The fact that a physical attack could not have been prevented, once a person had decided to undertake it, however, does not fully answer the causation question.
>
> The presence of uniformed police or security personnel provides a deterrent effect.
>
> . . . .
>
> The question, of course, is not simply whether crime in general might have been deterred by a police presence, but whether the jury would

74. *Id.* at 30.
75. 389 Mass. 47 (1983).
76. *See id.* at 47.
77. *Id.* at 58 (citations omitted).
78. *Id.* at 58-59 (citation omitted).
79. 401 Mass. 788 (1988).
80. *See id.* at 788-89.

> have been warranted in finding that it was more probable than not that sudden, unprovoked attacks, such as [the assailant's] attack on [the plaintiff] *could* have been prevented.[81]

Two aspects of the SJC's observations are of interest. First is the recognition that it is not necessarily fatal to a plaintiff's case if that plaintiff cannot prove that better security would have prevented the attack.[82] Instead, the standard is whether it is more probable than not—greater than fifty percent—that the attack *could* have been prevented.[83] This is a very liberal standard.

The second point is the SJC's use of the word "could." Thus, at least under *Peter Pan Bus Lines, Inc.*, a plaintiff need only prove that unadopted security measures more probably than not *could* have prevented the attack.[84] The exact meaning of this conclusion is unclear.

The totality of the circumstances is also important and may help a plaintiff avoid a dispositive defense motion. For example, in *Rodriguez v. Cambridge Housing Authority*,[85] the plaintiff was being harassed and threatened by someone who had a key to her apartment.[86] She asked the landlord to change the locks, but the landlord failed to do so. Thereafter, the person making the threats broke into the plaintiff's apartment and physically assaulted her. The plaintiff sued the landlord for providing negligent security. After a plaintiff's jury verdict, the trial court granted the landlord's motion for a judgment notwithstanding the verdict on several grounds, including causation. The Massachusetts Appeals Court reversed the trial court's ruling on causation. Based on all the circumstances, the jury could have found that the landlord's failure to install the locks when asked was a "but-for" cause of the attack.[87]

Explaining to a jury a proposed security measure's potential deterrent effect is likely the province of an expert witness. The SJC observed in *Pine Manor* that "[a]n expert's opinion based on facts in evidence is sufficient proof of causation."[88] For example, in *Nallan v. Helmsley-Spear, Inc.*,[89] an assailant shot the plaintiff in the lobby of the defendant's hotel.[90] The lobby

81. *Id.* at 793 (emphasis added) (citation omitted).
82. *See id.*
83. *See id.*
84. *See id.*
85. 59 Mass. App. Ct. 127 (2003).
86. *See id.* at 127.
87. *See id.*
88. 389 Mass. 47, 58 (citation omitted).
89. 407 N.E.2d 451, 454 (N.Y. 1980).
90. *See id.* at 454.

was unattended by any hotel employee at the time of the attack.[91] A security expert testified on behalf of the plaintiff that even the presence of an unarmed attendant would have had a deterrent effect on criminal activity in the building.[92] The court found that this testimony was a sufficient basis for the jury to find that the plaintiff met its burden on the causation element.[93]

F. The Plaintiff Must Prove Injuries

Obviously, as in any negligence case, the plaintiff must prove the existence of an injury in order to maintain a cause of action. The plaintiff will try, likely through requested jury instructions, to recover for physical and mental pain and suffering in addition to any economic damages, such as medical bills or lost wages. All of this is based on general tort damages rules.

An interesting question in negligent security cases is whether a plaintiff can get multiple damages. Massachusetts courts have recognized that liability under Mass. Gen. Laws ch. 93A (Chapter 93A) may be imposed in the negligent security context.[94] In *Brown v. LeClair*, the assailant broke through the plaintiff's apartment door.[95] In upholding the imposition of treble damages under Chapter 93A, the appeals court focused on the long history of tenant complaints.[96] It is the rare case, however, in which the quantum of evidence against the possessor of land will reach the level where a court will impose multiple damages.

One situation in which courts have imposed multiple damages is when a possessor of land intentionally foregoes security procedures after determining that it would be less expensive to simply pay off the claims of those injured as a result of the absence of security procedures.[97]

III. ADDITIONAL CONSIDERATIONS

In the aftermath of September 11, 2001, many insurance providers

91. *See id.*

92. *See id.* at 459.

93. *See id.*

94. *See* Brown v. LeClair, 20 Mass. App. Ct. 976 (1985).

95. *See id.* at 979.

96. *See id.* at 978-80. It seemed that the court used the tenant's long history of complaints to reach the conclusion that the landlord was "willful" and "wanton" in response to the tenant's complaints. *See id.*

97. *See, e.g.*, Jardel v. Hughes, 523 A.2d 518, 531 (Del. 1987) ("An economic decision may be the basis for punitive damages . . . only if the economic cost is intentionally weighed against a perceived risk which includes the reasonable likelihood of the harm which occurred.").

expressed an intention to exclude coverage for claims resulting from acts of terrorism, or alternatively to afford such coverage only at inflated premiums. In response, Congress enacted the Terrorism Risk Insurance Act of 2002 (Act), which was signed into law by President Bush on November 26, 2002.[98] The Act establishes a program by which losses resulting from acts of international terrorism are shared between participating insurance companies and the federal government.[99]

In the event of an international terrorist attack, one certified by the Treasury Secretary and causing more than $5 million in damages, the federal government is responsible for paying ninety percent of a participating insurer's property-casualty losses above that insurer's scheduled program deductible.[99] Insurer's annual deductibles, constituting their retained liabilities, are calculated based on a sliding scale over the life of the program, using its covered losses in that year and its direct earned premium for lines of business covered by the program in the prior year.[100] During the first two years of the program, participating insurance companies are obligated to cover all claims caused by an act of terrorism to the same extent that the loss would be covered if caused by another means.[102]

The Act is limited to commercial lines of insurance, inclusive of business interruption, but excludes crop insurance, mortgage guarantee, monocline financial guaranty, medical malpractice, the national flood insurance program, and life and health insurance. Although the Act requires the United States Treasury Department to monitor the price and availability of terrorism risk insurance, it does not limit the premium that can be charged for terrorism insurance. It does, however, require clear disclosure of terrorism insurance premiums.[102]

IV. STRATEGIC CONSIDERATIONS FOR PLAINTIFF'S COUNSEL

One of the challenges for a plaintiff's counsel is overcoming the tendency for juries to be suspicious of plaintiffs who sue the "deep pocket"

98. *See* Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, 116 Stat. 2322 (2002).

99. *See id.* § 101(b).

99. *See id.* § 102(1).

100. *See generally* Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, 116 Stat. 2322 (2002).

102. *See id.*

102. *See id.*

rather than the party perceived as the actual wrongdoer. Indeed, we have read various model opening statements for defendants in negligent security cases and a common theme is the "wrong guy" defense, which says something along the lines of: "Ladies and gentlemen of the jury, the plaintiff suffered a terrible injury [this is followed by a soliloquy by defense counsel showing empathy for the plaintiff]. BUT, my client did not do it. . . ."

The unspoken legal argument being made by defense counsel in such an opening statement is that the harmful act committed by the assailant was a "superseding intervening cause" of the plaintiff's injuries, thereby eliminating the defendant's liability regardless of how egregiously the defendant violated his duty of care. The only problem with this argument is if the assailant's act was foreseeable to the defendant; in that situation, the act itself is *not* an intervening cause.[104] This result must be the case, since a contrary rule would effectively eliminate the duty of care. Indeed, liability is assumed and imposed because of the failure to secure against the (foreseeable) act by the third party. There would be no negligent security law otherwise.

What should a plaintiff do? It is a fundamental rule of trial practice that a lawyer's opening statements may not include misleading statements regarding the law. The "wrong guy" approach runs afoul of this rule because it takes away from the jury the responsibility of determining foreseeability. In our own practice representing plaintiffs, we have had success bringing a motion *in limine* in a jury trial to preclude defense attorneys from making the misleading "wrong guy" opening statement. A successful *in limine* motion forces the defense counsel to address foreseeability during his or her opening statement. The focus of the case thereby shifts back to the defendant and away from the "other guy."

Another challenge for plaintiff's counsel is how to "ask" the jury for damages. Generally, a plaintiff may not put a dollar value on these kinds of cases. Additionally, the plaintiff cannot ask the jurors to put themselves in the place of the plaintiff. The trick is to ask for "fair and full compensation," while having the jurors think in their minds, "Gee, I would not go through that for $5 million." A closer call is whether a plaintiff's

104. *See, e.g.*, Mullins v. Pine Manor College, 389 Mass. 47, 62 (1983) ("The act of a third party does not excuse the first wrongdoer if such act was, or should have been, foreseen."); Luz v. Stop & Shop, 348 Mass. 198, 205 (1964) (holding the jury could have found that the act of the third party was foreseeable and hence "did not supersede [the negligence] of the defendant as an effective factor in causing harm to the plaintiffs."); Nallan v. Helmsley-Spear, Inc., 407 N.E.2d 451, 459 (N.Y. 1980) ("Of course, the fact that the 'instrumentality' which produced the injury was the criminal conduct of a third person would not preclude a finding of 'proximate cause' if the intervening agency was itself a foreseeable hazard.").

counsel can pose damages as a market question. In other words, what would the market be for getting raped? Case law regarding damages, however, could fill a tome and is therefore reserved for another article.

Plaintiff's counsel should also carefully consider before trial whether to bring motions *in limine*, both to exclude evidence, and to *include* evidence important to the plaintiff's case.

V. STRATEGIC CONSIDERATIONS FOR DEFENSE COUNSEL

The primary strategic goal of defense counsel in negligent security cases is to avoid going before a jury. It is a difficult challenge. When the standard requires the jury to consider "all the circumstances" in assessing liability, it is hard to say that there are no disputes of material fact and that the matter should be disposed of as a matter of law. Nevertheless, dispositive motions do work in the right case. As noted in *Westerback v. LeClair*:

> Questions of reasonable foreseeability are ordinarily left to the jury, but the judge may properly decide them as a question of law where the harm suffered, although within the range of human experience, is sufficiently remote in everyday life as not to require special precautions for the protections of patrons.[105]

Dispositive defense motions were successful in cases like *Whittaker v. Saraceno*[106] and *Choy v. First Columbia Management, Inc.*[107] *Pascarelli v. LaGuardia Elmhurst Hotel Corp.*[108] and *Friedman v. Safe Security Services, Inc.*[109] are recent examples of successful dispositive defense motions focusing on foreseeability and causation that were decided in other jurisdictions.

During discovery, defense counsel should also seek evidence supporting the defendant's affirmative defenses. For example, the defense counsel may seek to establish that the plaintiff was comparatively negligent; this defense, however, is not available if the act in question was *intentional*.[110]

If a case does go before a jury, defense counsel should not be hesitant to bring motions *in limine* in an attempt to narrow the plaintiff's case. In

105. 50 Mass. App. Ct. 144, 146 (2000).

106. 418 Mass. 196 (1994) (plaintiff's evidence of foreseeability (property crimes in a parking area) was too tenuously related to the act in question (an attack inside the office building)).

107. 676 F. Supp. 28 (D. Mass. 1987) (holding that plaintiff could not as a matter of law meet its burden on the element of actual causation).

108. 742 N.Y.S.2d 98 (N.Y. App. Div. 2002) (affirming grant of defendant's motion to set aside jury verdict because of lack of evidence of foreseeability).

109. 765 N.E.2d 104 (Ind. Ct. App. 2002) (affirming directed verdict in favor of defendant due to lack of evidence of causation).

110. *See* Flood v. Southland Corp., 416 Mass. 62, 65 (1993).

particular, defense counsel should seek to limit the breadth of evidence admissible to establish foreseeability. For example, if there were no prior crimes on the property in question, but there is evidence of crimes on an adjacent property, defense counsel may want to move *in limine* to preclude the plaintiff from introducing the crimes on the adjacent property because they are not probative to whether the defendant could have foreseen the acts in question. Also, if the plaintiff is seeking to prove causation in fact through expert testimony, defense counsel should carefully consider whether there are any grounds for bringing a *Daubert/Kumho Tire/Lanigan/Theresa Canavan's Case* challenge.[111]

111. *See* Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999); Daubert v. Marshall Dow Pharm. Inc., 509 U.S. 579 (1993); Theresa Caravan's Case, 432 Mass. 304 (2000); Commonwealth v. Lanigan, 419 Mass. 15 (1994).