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Forensic Security and the Law

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Introduction to forensic security

Historical overview of forensic sciences

In ancient Rome, a forum was a public place where important governmental debates were held. Sometimes it was a town square or even a marketplace. Gradually, the forum also became a sort of public 'courthouse,' where various trials of importance to the citizenry were held. Etymologically, the word forensic may be traced to the Latin *forensis*, for 'public,' and to *forensus*, meaning 'of the forum.' In some centers of higher learning, forensic studies came to mean the art or study of argumentative discourse, while in others the legal and judicial aspects of forensics were emphasized. In modern times, the term forensic has been applied to a body of knowledge useful to the courts in the resolution of conflicts within a legal context.

The word 'science' also comes to us from the Latin word *scire*, meaning 'to know.' Forensic science in its broadest definition, then, is the application of science to law. Essentially, a forensic scientist is one who relies on a systematically collected body of knowledge in order to provide relevant information to courts of law tasked with resolving legal issues. Although one might speak of science in service to the law, certain conflicts are inevitable in that the classic goal of science is the production of truth, while the goal of the law is to achieve justice.¹ Forensic scientists must recognize that they are but guests of the court, invited for the court's purposes. It is not unexpected that, from time to time, 'scientific truth' will be subordinated to 'legal truth.' Such is the reality of the adversary system, and one which every forensic scientist must be prepared to accept if he or she is to engage in the modern forum.²

Because of the wide breadth of knowledge potentially useful to the courts, numerous classification schemes have been proposed for the forensic sciences. Some authors have claimed that forensic science is simply a more generic term for criminalistics, the application of natural science to the detection of crime (Gilbert, 1986). Saferstein (2001) argues that, for all intents and purposes, the two terms are taken to be one and the same. Other scholars believe this approach is too narrow and exclusionary. For example, Moenssens, Starrs, Henderson and

Inbau (1995) consider scientific evidence in civil and criminal cases to be comprised of evidence based on the biological and life sciences, evidence based on the physical sciences, and behavioral science evidence. Thus, biological and life science evidence would consist of forensic pathology, serology and toxicology, drug analysis, DNA testing, and forensic odontology. Forensic anthropology and osteology (see Bass and Jefferson, 2003) would also be included within this rubric.

Forensic evidence based on the physical sciences would include questioned documents, ballistics, firearms identification and micrography, trace evidence, arson and explosives, spectographic voice recognition, and fingerprint identification.³ In such a scheme, behavioral science evidence would be derived primarily from psychiatry, psychology and, to a limited extent, the detection of deception through polygraphy, hypnosis, narcoanalysis, and voice stress analysis.

In this chapter, however, we shall follow the lead of James and Nordby (2003), who argue that forensic science is much more comprehensive than criminalistics and related laboratory subjects. In addition to the conventional areas of study mentioned above, the field of forensic science 'constantly expands to include many additional areas of expertise' (James and Nordby, 2003: xvi). Thus, these scholars also include analyses of bloodstain pattern interpretation, forensic engineering, forensic cyberotechnology, and criminal personality profiling in their recently edited textbook. Other subjects which may be routinely included one day are forensic economics, forensic photography, forensic radiology, and forensic accounting.

While the modern security manager would instantly understand the relevance of forensic accounting to his or her loss prevention responsibilities, certain social sciences are also becoming more forensically relevant to security concerns (Faigman, Kaye, Saks, Sanders, 2002b; Monahan and Walker, 1998). Certainly, there is a developing forensic sociology (Colquitt, 1988; Jenkins and Kroll-Smith, 1996; Moore and Friedman, 1993; Roesch, Golding, Hans and Reppucci, 1991) as well as a forensic criminology (Anderson and Winfree, 1987; Kennedy and Homant, 1996; Thornton and Voigt, 1988; Wolfgang, 1974). As will be seen below, there is also an emerging specialty known as forensic security with which today's loss prevention manager must become quite familiar if he or she is to successfully respond to the growing challenge of premises liability for negligent security litigation facing today's businesses, corporations, and commercial/residential landlords.

Because security litigation can be a rather complex matter, it is best understood from the perspective of the security expert witness so often called up by the courts or by attorneys for either plaintiffs or defendants.⁴ The consulting or testifying expert must understand completely the event in question as well as the parts played in it by all parties. The expert witness must also be aware of a property's history, all security-related policies and procedures, relevant industry standards, and the legal process as well. It is from this comprehensive perspective, then, that much of the ensuing material will be presented.

Forensic security and premises liability litigation

Among the myriad duties of the modern security manager is the responsibility to limit an organization's exposure to premises liability for negligent security. As a result of the evolution of case law in the US and Commonwealth countries over the past three decades, landowners and landlords of all stripes may be legally liable should a passenger, customer, client, tenant, guest, or other category of visitor to the premises be assaulted while on property under their control. For example, merchants may be sued by a customer attacked in a store's restroom or car park. A hotel guest sexually assaulted in her room by a nighttime intruder may have a cause of action against hotel management. Students at a university, visitors to a corporate headquarters, and passengers of common carriers are increasingly looking to the courts to order compensation from the owners and managers of the property whereupon their injuries were sustained (Michael and Ellis, 2003). The actual perpetrators of these acts are unlikely targets of such lawsuits since their identities often remain unknown or they themselves are simply uncollectible. This leaves, of course, the third-party corporate entity which is often looked upon as a 'deep pockets' defendant.

Not only might a commercial enterprise be sued for a criminal act occurring on its property, a lawsuit might arise out of the actions of its own employees. Should a salesperson assault a customer, or a contract security officer wrongfully detain a suspected shoplifter, liability may attach. In addition to crimes by employees, modern organizations must be concerned about crimes *against* employees. Traditionally, business entities had been relatively immune from lawsuits instituted against them by their own employees for injuries sustained while at work because in many jurisdictions workers' compensation was their exclusive remedy. Even this barrier, however, is beginning to erode as more and more courts are carving out exceptions to workers' compensation laws and allowing increasing numbers of employees or their heirs to successfully sue employers for crime-related injuries sustained while on the job (Sakis and Kennedy, 2002). As one member of the defense bar has observed, 'Today, premises security lawsuits are among the fastest growing segment of personal injury lawsuits' (Kaminsky, 2001). This same source goes on to suggest that claims alleging inadequate security soon will be second only to general negligence/slip-and-fall cases as the most common lawsuit brought against landowners and landlords. Based on a recent survey of businesses, the Institute of Management and Administration reported that one out of every five organizations faced a security-related lawsuit in 2003, and nearly one in two large companies (30,000 employees or more) suffered the same fate ('A New Look at How to Prevent Security-Related Lawsuits,' 2004). Accordingly, security and loss prevention professionals must be increasingly prepared to deal with forensic issues as they help guide their organizations into the 21st century. Indeed, the forensic security specialist should be prepared not only to assist his or her employer in avoiding litigation in the first place but also to help manage the defense of a lawsuit should one be filed notwithstanding preventive efforts.

The forensic security expert can seek to prevent litigation by developing a familiarity with a property's crime problems and implementing security measures appropriate to the threat, a form of 'negligence proofing,' if you will (deTreville, 2004; Bottom, 1985). In the event litigation proceeds nonetheless, the forensic expert can assist counsel in pointing out faulty opposing arguments, preparing witnesses, and marshaling affirmative defenses. The importance of these efforts cannot be denied, particularly given the millions of dollars in punitive and compensatory damages frequently awarded to plaintiffs by sympathetic juries (Anderson, 2002). For example, juries in the United States have recently awarded damages totaling over \$20 million dollars to a bank employee rendered paraplegic during an armed robbery, \$18 million to the guest of a motel who suffered a particularly violent group rape, and \$12 million to a mother who lost her son to murder at another motel. Other juries awarded over \$2 million to the child survivors of a woman killed by her former lover while both were working in an automobile plant, and \$1 million to the victim of a sexual assault in the parking lot of a major retailer. A bar was held liable for \$18 million in compensatory and punitive damages awarded to a family for the loss of a son killed while fleeing his drunken attackers. These reported cases are only the tip of the iceberg, however. Far more cases go unreported because they are resolved by settlement between the parties before trial, and these settlements can often involve amounts exceeding a million dollars.⁵ A perusal of such monthly publications as *Crime Liability Monthly* (The National Center for Victims of Crime) or *Private Security Case Law Reporter* (Strafford Publications) will reveal the pervasive nature of premises liability litigation in the US. These trends are becoming evident in other common-law countries as well.

History and nature of premises security litigation

The growth of security-related litigation in common-law countries around the world is closely related to the worldwide victims' rights movement, which was significantly influenced by the efforts of English magistrate Margery Fry to secure financial compensation for crime victims. Partially in response to her efforts, New Zealand set up a fund in 1963, followed by Great Britain in 1964, and by several Australian states and Canadian provinces during the next few years. In the US, California established the first government-funded victim compensation program in 1965 (Karmen, 2004; Tobolowsky, 2001; Wallace 1998).

While the concept of making a victim whole is not new (e.g. Code of Hammurabi), the renewed emphasis on victims' rights, including the right to sue criminal perpetrators and third parties whose negligence is causally related to the criminal attack, must be viewed in the context of a broader 'due process' revolution which began to sweep over much of Western society in the 1960s. The civil rights, anti-war, consumerist, and women's movements all emphasized the rights of individuals to seek redress from the broader social institutions which had been viewed as insensitive to their just needs (Pointing and Maguire, 1988). Also, as more and more innocent citizens suffered the ravages of crime, the stage was set for a sea change concerning the duty of property

owners and managers to provide proper security for all those people rightfully on the premises (see, generally, Kennedy, 1998).

In the US, two cases are widely regarded as the forerunners of third-party litigation against landlords, businesses, and corporate entities. In the 1970 case of *Kline v. 1500 Massachusetts Avenue Apartment Corporation*, a tenant sued her landlord for allowing the apartment building's security to deteriorate after she had moved in.⁶ Ms Kline was subsequently assaulted and robbed. Ultimately, the appeals court ruled the landlord had a duty to take steps to protect Ms. Kline since only the landlord had sufficient control of the premises to do so. The court ruled the landlord-tenant contract required the landlord to provide those protective measures which are within his reasonable capacity. It also noted that the relationship of the modern apartment house dweller to a landlord is akin to that of innkeeper and guest, and, therefore, a duty similar to that imposed on innkeepers would apply (Carrington and Rapp, 1991).

The Garzilli case, also known as the 'Connie Francis' case, has given great impetus to victims' rights litigation. In *Garzilli v. Howard Johnson's Motor Lodges, Inc.*, the internationally known recording artist was assaulted in 1974 while in her motel suite. The unit's sliding glass doors gave the appearance of being locked, but the faulty latches were easily defeated by an intruder.⁷ The property manager had known the locks were defective but had not yet provided for secondary-locking devices. The notoriety of the Connie Francis case came because of her star status and because the jury initially awarded her over two million dollars in compensatory damages (Carrington and Rapp, 1991).⁸ Thereafter, crime victims were more inclined to pursue redress through the civil courts and soon found their pleas resonating with plaintiffs' attorneys, juries, and the judiciary as well.

Although the specialist in forensic security is not expected to be a lawyer, he or she must possess a comprehensive understanding of the legal context in which he or she will be operating. Generally speaking, negligent security constitutes a tort at English common law. A tort is a civil wrong for which the plaintiff hopes to receive compensation. In order to prove his or her case, the plaintiff must establish by a preponderance of the evidence that the defendant (1) owed the plaintiff a *duty* to act in a certain way, that (2) the defendant *breached* his or her duty by failing to act as the duty required, and that this (3) *caused* some (4) *harm* to the plaintiff. This chapter will explore in some detail the concepts of foreseeability, breach of duty, and causation as they relate to premises liability for negligent security.⁹ As will be shown, underlying all arguments advanced by plaintiff and defense is the understanding that, generally speaking, the defendant had a duty to act as a reasonable person would act under similar circumstances (Best and Barnes, 2003).

For the purposes of this discussion, no duty exists without both a special relationship and crime foreseeability. As a general proposition, no duty is owed to another unless there is a special relationship between the two parties such as that of merchant-invitee, landlord-tenant, innkeeper-guest, public carrier-passenger or the like. The existence of a special relationship is generally a matter decided by the law of the particular jurisdiction as applied by the judge, and forensic security

experts have little or no input into this determination. On the other hand, assessing the foreseeability of a crime is a vital task to be performed by the forensic security specialist.

Without foreseeability, there is no duty to provide security, and conventional premises liability for negligent security cases will fail in the absence of foreseeability. To establish that a crime was foreseeable to a defendant, the plaintiff must show that the defendant knew or should have known that a crime was reasonably likely to occur (Kaminsky, 2001). Many lawyers believe foreseeability is the most important element of a negligent tort since it is seen to put a defendant on notice that an injury will occur; it is a form of notice to the defendant not generally available to the plaintiff. The question of foreseeability may be approached in a number of different ways, depending upon the jurisdiction in which the case is to be heard.

Foreseeability of criminal attack

Definitions and tests

There is no simple universal definition for the legal concept of foreseeability. Each jurisdiction which addresses the issue will generally do so through its own case law and will often provide more than one definitional approach to the concept. In its abridged fifth edition, Black's Law Dictionary defines foreseeability as 'the reasonable anticipation that harm or injury is a likely result of acts or omissions.' This definition can be misleading to some interpreters, however, because the word 'likely' could be taken to mean 'more likely than not.' In no jurisdiction does foreseeability require such a degree of probability, 51 percent or higher, since even in the worst part of the worst neighborhood, crime does not occur in 51 of 100 instances wherein it is possible to occur. Most jurisdictions instead use such language as 'reasonably likely to occur,' 'reasonable cause to anticipate,' or 'appreciable chance.' Other jurisdictions define foreseeability by citing the anticipated behavior of reasonable citizens. For example, in *Samson v. Saginaw*, 'foreseeability depends upon whether or not a reasonable man could anticipate that a given event might occur under certain conditions.'¹⁰ In the California case of *Onciano v. Golden Palace Restaurant*, an event is foreseeable 'if it is likely enough in the setting of modern life that a reasonably thoughtful person would take account of it in guiding practical conduct.'¹¹ As is the case with many legal definitions, however, the practical meaning of foreseeability remains elusive. In order to provide guidelines on how to apply foreseeability to the fact pattern of a case at bar, many jurisdictions provide for certain 'tests' of foreseeability. While a definition of foreseeability is useful in orienting the security manager to the concept, a test of foreseeability tells him or her which analytical steps a court is likely to follow in order to determine whether or not a certain crime was foreseeable, and thus whether a duty to protect can be said to have existed. For analytic purposes, foreseeability should be considered a continuous rather than a discrete variable. In other words, foreseeability should be assessed on a continuum from not foreseeable to highly foreseeable.

Currently, there are four tests of foreseeability which are routinely applied in common law jurisdictions. While some jurisdictions have used the same test of foreseeability for many years, others have adopted one or another of the tests as they have begun to examine more and more premises liability cases. The four most popular approaches are: the imminent or specific harm test, the prior similar acts test, the totality of the circumstances test, and the balancing test (Donohue, 2002).

Imminent harm test

Also known as the specific harm test, this approach to foreseeability is one of the older and more conservative tests and has lost favor in many jurisdictions because it constitutes such a formidable barrier for most plaintiffs to penetrate. Essentially, this test requires the plaintiff to show that a landlord was aware that a specific individual was acting in such a manner as to pose a clear threat to the safety of an identifiable target. Given the large size of much commercial property open for business to the public, it is unlikely that landlords or their agents will be physically present at many emergent situations, thus effectively absolving them of liability. As a matter of public policy, for example, the Michigan Supreme Court recently ruled that a merchant's duty is limited to responding reasonably to 'situations occurring on the premises that pose a risk of imminent and foreseeable harm to identifiable invitees.'¹² The court reasoned that to rule otherwise would have a pernicious and devastating effect on the many commercial businesses located in Michigan's urban and high-crime areas (e.g. Detroit). For the good of urban merchants, businesses, and metropolitan-area economies, then, at least one higher court has curtailed a great deal of third-party litigation concerning criminal attack. Most courts, however, are unwilling to hold that a criminal act is foreseeable only in such specific and limited situations. Accordingly, several jurisdictions have adopted one of the remaining three tests of foreseeability.

Prior similar acts test

It is almost axiomatic in forensic criminology and psychology that the best predictor of future behavior is past behavior. Empirical research involving the course of crime at 'hot spots' has shown, for example, that in one major city, each location had initially only an 8 percent chance of suffering a predatory offense. Once such an offense occurred, however, the chance of a second increased to 26 percent. After a third offense, the risk of a fourth within the year exceeded 50 percent (Sherman, Gartin, and Buerger, 1989). Should a burglary take place at a residential location, the likelihood it will be reburglarized may increase up to fourfold (Weisel, 2002). Similar patterns may be applied to individuals. Criminal recidivism rates often reach 60 to 70 percent (Austin and Irwin, 2001). The more crimes an individual has committed in the past, the more crimes he is likely to commit in the future. This is particularly true of early-onset delinquents and psychopaths (Lykken, 1995; Piquero and Mazerolle, 2001). Given the importance of past history in attempting to forecast future events, the forensic security expert should immediately acquaint himself with the history of a property either to be

protected or which has already become the subject of litigation. Jurisdictions will vary as to whether prior crime must be substantially similar to the litigated crime or whether, for example, as in Georgia, crimes against property may also make crimes against persons foreseeable (Gorby, 1998).

A related question refers to the appropriate time period for which prior similar acts should be evaluated. While plaintiff security experts would wish to extend the number of years back in time upon which to focus their attention, defense experts would probably prefer that a much shorter period of time be considered. Although the International Association of Professional Security Consultants suggests three to five years prior to the date of the incident as a relevant time frame, as does the General Security Risk Assessment published by the American Society for Industrial Security, many courts seem to consider a two- to three-year prior history not to be so remote in time as to be irrelevant. Time limitations on prior similar acts are most likely to be decided during *in limine* motions preceding trial.

An excellent framework for considering the most pertinent aspects of prior acts was provided in the Texas case of *Timberwalk Apartments, Partners, Inc. et al. v. Cain*.¹³ The court in that case decided that five factors must be considered together to determine whether criminal conduct was foreseeable: proximity, recency, frequency, similarity, and publicity. Thus, courts would consider whether any criminal conduct previously occurred on or near the property in question.¹⁴ However, many courts require that prior similar incidents be somewhat numerous. One or two prior incidents have been found insufficient to put certain properties on notice. Ten armed robberies in a three-year period were enough to put a fast-food restaurant on notice. The issue of numerosity seems to be determined more by the nature of each case rather than by any pat formula.¹⁵

Also important in determining foreseeability is how recently crime occurred, how often it occurred, how similar¹⁶ the conduct was to conduct on the property and, finally, what publicity was there to indicate the landlord knew or should have known about the crime on or near the property. Any forensic security expert charged with planning for security protection or tasked with helping to defend a landlord being sued should be familiar with these five factors.

The data which will provide the basis for this historical evaluation will come from an organization's own incident reports, proprietary guard service incident reports, and public police records. Because 'calls for police service' records can both overestimate and underestimate actual crime (Klinger and Bridges, 1997), the forensic security expert is expected to consult records of crime *known* to the police and the actual narrative reports composed by responding officers. A close reading of these narratives can provide the security specialist with a deeper, qualitative appreciation of the nature of crime at a property. For example, an initial report classified as domestic assault and battery may reveal, upon closer reading, that the battery arose out of a dispute over the proceeds of drug sales in an apartment complex. Such a revelation would, of course, present more profound implications for any security manager to consider.

In order to develop an appreciation of the broader neighborhood context, forensic specialists will sometimes compare the number of crimes committed in a

property's police district with crimes in other districts. Since disparities may be explained by differential population size rather than by actual risk, the analyst should develop comparative crime rates per 100,000, where possible. Some police agencies keep records of crimes within census tract boundaries (e.g. Milwaukee, Columbus), thus facilitating this task. Most police agencies, however, do not match population data with crime data except, of course, at the city level. Given the need for analytical information of this kind, the forensic security specialist may wish to develop skills and techniques approaching those possessed by public police crime analysts (Clarke and Eck, 2003; D'Addario, 1989; Gottlieb, Arenberg and Singh, 1994; Osborne and Warnicke, 2003; Peterson, 1998).

Totality of the circumstances test

There are many jurisdictions which do not require the existence of prior similar acts in order to conclude that a given crime was foreseeable. Known as 'totality of the circumstances' jurisdictions, foreseeability is determined therein by the existence of various social and environmental factors known to be associated with crime, which may or may not include prior crimes. For example, in one case a physician was shot in a poorly lit section of a hospital emergency room parking lot located in a 'high crime' area. The emergency room area was the site of many incidents of harassment yet was insufficiently secured. The court ruled that a landowner should not get 'one free assault' before he can be held liable for criminal acts which occur on his property.¹⁷ The court further commented that parking lots, by their very nature, create an especial temptation and opportunity for criminal misconduct.¹⁸ The Nevada Supreme Court, commenting further on parking lots, observed that the place and character of a hotel/casino's business, where 'cash and liquor are constantly flowing,' may provide a fertile environment for criminal conduct such as robbery and assault.¹⁹

Of primary importance to the forensic security analyst is the specific location of a property whereupon a criminal attack has taken place. The census tract in which this property is located can readily be determined so that the socioeconomic characteristics of the immediate population can be reviewed and compared with the rest of the city. For example, median family income, unemployment rate, proportion of population beneath the poverty level, population mobility, population density, percentage of female heads of household with children, and percentage of married-couple households have been correlated with criminal behavior in an urban setting (Figlio, Hakim and Rengert, 1986; Roncek, 1981; Stark, 1987). Canadian criminologists Paul and Patricia Brantingham (1981/1991, 1984) have documented the travel patterns and thought processes of criminals as they navigate the urban landscape. The implications of their environmental criminology are obvious for the security manager responsible for customer and employee safety. A proximity hypothesis suggests that people within a one to two mile radius of a potentially criminal population are at risk for criminal victimization (Meadows, 1998).²⁰

In addition to considering the proximity of criminal populations, the security manager must also note the differential land use of surrounding properties. For

example, certain high schools, housing projects, fast-food restaurants, and even shopping centers have been found by various researchers to be linked with crime in a neighborhood (Roncek, Bell and Francik 1981; Roncek and Lobosco, 1983; Roncek and Maier, 1991). Australian researcher Ross Homel and colleagues (1997) have documented the incidence of crime attendant to selected entertainment areas, much as Roncek and Maier (1991) have done for bars and taverns in the US.

Further related to land use, an interesting distinction can be made between properties described as crime 'attractors' and those described as crime 'generators' (Brantingham and Brantingham, 1995). The former tend to experience more crime than other locations simply because there are more potential victims from which criminals may choose although the level of risk per individual may not be heightened. Crime generators, on the other hand, foretell more crime because of the illicit nature of activities on the premises, such as illegal gambling, prostitution, and drug trafficking. Since the association between drug use, drug trafficking, and crime is so well established (Goldstein, 1985), security managers must take action to both prevent and aggressively respond to any such activities occurring on the properties for which they are responsible.

Certainly, all the variables which might be considered in a 'totality of the circumstances' test of foreseeability have not been discussed. Additional criminological concepts such as crime displacement, vehicle and pedestrian travel patterns, critical intensity, criminal mental mapping, and Crime Prevention Through Environmental Design issues may impact on crime foreseeability (Kennedy, 1993). The forensic analyst must learn to recognize potentially violent situations which might arise out of a myriad mix of variables. For example, might violence be foreseen by a Manager On Duty at a hotel where a teenager has rented a room on a Saturday night and where dozens of underage and unchaperoned juveniles, many unknown to each other, are making a great deal of noise and acting belligerently while appearing to be under the influence of alcohol? Some acts of violence would be reasonably foreseeable here. Is violence in the parking lot of a gay bar foreseeable in a lower-income urban area where there have been taunts and threats of a 'hate crime' nature, but no known attacks? It would seem so. If one were to add a history of prior attacks under similar circumstances at these properties, it would seem a foregone conclusion that these crimes were foreseeable. On the other hand, if a woman was suddenly struck and robbed during daylight hours at a small strip mall parking lot which had no criminal history, was located in an upper-middle class suburb, and where there were several bystander witnesses in the area, would a court consider this attack to have been foreseeable? It is doubtful that a court would find that such an act should have been foreseen. Ultimately, the forensic analyst must familiarize himself with relevant cultural and social factors of the vicinity in which a security incident occurred. Local judges and juries will evaluate any given case in the context of informal history and community attitudes as well as the formal legal record. The effective expert will be aware of these variables as well.

To summarize, a crime is foreseeable under the ‘totality of the circumstances’ test if a reasonable person would be able to identify the presence of one or more social facts commonly associated with crime. Courts would consider all of the circumstances surrounding an event, including the nature, condition, and location of the land, the nature of human behavior regularly occurring on the property, as well as prior similar incidents, if any. Because this approach may render the foreseeability question too broad and too easily answered in the affirmative, a number of courts are turning to a fourth test of foreseeability, the balancing test.

Balancing test

As we have seen so far, some courts believe the specific harm test is too limited. Others find that the prior similar incidents test can unfairly relieve landowners of liability, at least insofar as the first victim is concerned. The totality of circumstances test is seen by other courts as rendering foreseeability simply too easy to establish. The balancing test offers a fourth alternative as jurisdictions around the world seek the appropriate approach to the question of foreseeability.

Essentially, the balancing test seeks to balance the level of harm to be anticipated against the burden of the duty to be imposed. As the gravity of the possible harm increases, the likelihood of its occurrence needs to be correspondingly less in order to trigger the implementation of appropriate security measures. Correspondingly, a merchant should not be expected to take burdensome security precautions unless their need is convincingly established, often through the occurrence of prior similar acts.

Early versions of the balancing test could be quite complex, as in Judge Learned Hand’s algebraic formula for ascertaining negligent conduct: If the burden (i.e. cost) of providing the security is less than the probability of criminal attack multiplied by the seriousness of the potential injury, the landlord will be liable. If, on the other hand, the burden outweighs the probability times the harm, then there is no negligence (Tarantino and Dombroff, 1990).

A recent Tennessee Supreme Court case lists a number of factors to be reviewed under the balancing test as courts seek to balance the burden of the duty with the rights to be protected. These include the foreseeability and magnitude of the harm, the importance or social value of the defendant’s activity, the feasibility of alternative, safer conduct, and the relative costs and burdens associated with that conduct.²¹ Because the forensic security specialist is rarely a trained lawyer, he or she might find the balancing tests somewhat difficult to apply in any immediately practical fashion. For those responsible for designing security in a balancing-test jurisdiction, a ‘three-way’ test of security adequacy is recommended as a threshold assessment. The three prongs of this test are: (1) the level of crime foreseeability, (2) the likelihood a given combination of security measures will prevent future harm, and (3) the burden of taking such precautions (McGoey, 1990). These three issues constitute the core of current balancing tests and are quite manageable for the purposes of case analysis.²²

Breach of duty

Reasonableness and standards of care

Once a special relationship and foreseeability have come together to impose upon a landlord a duty to protect someone on his property, the question becomes whether the duty was breached or whether it was discharged reasonably. The concept of reasonableness is a mainstay of common law, no less so in premises liability for negligent security cases. At the heart of all such cases is whether a landlord or property manager took appropriate steps to prevent a foreseeable harm from occurring. Although no landlord is expected to be a guarantor of invitee, licensee or trespasser safety, reasonable steps must be taken to avoid injury.²³ Because a landlord is in control of a property and in a better position to know the condition of a property, the law may place upon him a duty to act reasonably on behalf of people who come upon the property.

The issue, of course, is what constitutes reasonable behavior? Reasonable behavior is nothing more than that which a landlord or security manager of ordinary prudence would do under similar circumstances (Bilek, Klotter and Federal, 1981). While some courts are content to let judge or jury decide what is reasonable based upon a combination of the evidence and their own background experiences, other courts welcome discussion of relevant benchmarks or other information which would help guide them in their assessment of what is reasonable.

To that end, litigants will often introduce evidence purporting to establish certain standards of care against which a defendant's conduct is to be compared. Theoretically, a jury's job would be much easier if it could simply assess a defendant's behavior and then compare it to a known, descriptive standard specifying what the behavior should have been. The problem, of course, is identifying just what the standard of care is for a given set of circumstances. Not only will knowledgeable people disagree as to the nature of the appropriate standard, debates over the meaning of related concepts such as 'guidelines' or 'best practices' are likely to ensue.²⁴ In order for the forensic security specialist to navigate in the legal arena, it is important for him or her to understand the sources of various standards of care pertaining to security.

Most industries sponsor or support professional or trade associations whose purpose is to advance members' interests. For example, the American Hotel and Lodging Association serves the hospitality industry. The International Council of Shopping Centers serves retailers and developers of varying sizes. The National Association of Convenience Stores serves small stores while the Food Marketing Institute serves larger ones. The National Apartment Association and the Institute of Real Estate Management represent the interests of property managers of varying sizes. The forensic specialist's first inquiry into appropriate standards (or guidelines) should be with the appropriate professional or trade organization.

Forensic security specialists would certainly approach their own professional associations to determine the nature of relevant security standards. The American Society for Industrial Security International (ASIS) has a worldwide membership

of approximately 33,000 professionals representing all industries and publishes a monthly magazine as well as technical monographs. Security equipment manufacturers and service providers are also represented by such trade groups as the British Security Industry Association and, in the US, by the Security Industry Association. There are also smaller, specialty associations which are concerned with security in specific institutional settings. The International Association for Healthcare Security and Safety and the International Association of Campus Law Enforcement Administrators are but two such examples.

There are other sources of standards as well. Cross-cutting associations which provide specialized products and services through their members in a wide range of settings may also offer standards or guidelines. For example, the National Association of Security Companies represents the interests of contract and proprietary security officer providers in all settings. The Illuminating Engineering Society of North America publishes very comprehensive lighting standards. The National Parking Association and the Institutional and Municipal Parking Congress are two trade organizations whose members are very knowledgeable of appropriate parking practices. Organizations such as the American Society for Testing and Materials (ASTM), the American National Standards Institute (ANSI), and Underwriter's Laboratories (UL) are active in setting standards for security equipment.

Of course, the various associations just mentioned are but a tiny sample of the numerous trade groups and learned societies to which a forensic specialist might turn for guidance.²⁵ In any event, it is important first to develop an understanding of the very nature of standards themselves so that the credibility to be reposed in said standards might be better assessed.

Types of standards

Having sampled possible sources of security standards, it is also important to note the different types of standards routinely presented to civil courts in common law countries. Although there is no universally applicable standards typology, forensic security specialists often identify five categories: national consensus standards, community standards, self-imposed standards, mandatory standards and learned treatises.

National consensus standards are generated by neutral, consensus-setting organizations such as ASTM, ANSI, and Underwriters' Laboratories of Canada or by specialized professional societies such as ASIS and the National Fire Protection Association (NFPA). These organizations follow a formal procedure wherein standards are formulated, published, revised by consensus and eventually finalized. The idea, of course, is that consensus standards represent the best thinking of relevant stakeholders who have had multiple opportunities to contribute to the formulation of these standards. Both ASIS International and NFPA are in the process of developing numerous consensus standards through this process, and the forensic security specialist is well advised to keep informed of their efforts in this regard.²⁶

Community standards refer to those practices commonly found in a given geographic area or those practices generally preferred by an entire specialized

industry (Bates, 1997). For example, courts are routinely asked to assess the reasonableness of a company's security practices by comparing these practices to those of other companies in the same geographical area. The idea, of course, is that a security practice would appear to be all the more reasonable to the extent that numerous companies follow that practice. Unfortunately, of course, this has not always been the case. Community standards, in a broader sense, also relate to the security measures taken by a given industry throughout an entire region or nation. For example, how do most hotels in Australia handle guestroom key control? To what extent do enclosed malls throughout the United States patrol exterior parking lots? Do most British hospital maternity wards follow similar practices to ensure infant safety and security? Are criminal background checks done for people who are hired for security positions in all Commonwealth countries?

Self-imposed standards are those which organizations have set for themselves by inclusion in their own policies and procedures manuals. The first interrogatory questions or demands for production of documents in security litigation generally involve a defendant corporation's internal policy and training manuals. The idea, of course, is that a company will implement only those security measures which it deems reasonable. Thus, should a company violate its own reasonable practices, it is acting negligently. However, this is not necessarily the only proper conclusion to be drawn from a seeming contradiction between policies and actions.

Mandatory standards are taken to mean those nonelective measures formally mandated by state or provincial statute, municipal ordinance, administrative code, and the like. In some jurisdictions, negligence *per se* may apply where legally required security measures have not been implemented. Examples of mandatory standards include lighting levels for municipal car parks, security officer staffing at shopping malls, the number of clerks on duty at convenience stores by time of day, ventilation window locks for rental property windows, alcohol server training in certain states, pub doorman licensing, pre-assignment security officer training, and the installation of secondary door and window-locking devices.

Finally, the recommendations of learned treatises and expert opinion are to be considered. It is not unusual for judges to cite academic literature in their opinions. The scholarly works of natural and social scientists as well as legal philosophers routinely impact judicial thinking (Erickson and Simon, 1998; Faigman, 2000; Homant and Kennedy, 1995). Where an established expert has provided substantial evidence in a security-related case, his or her thoughts on reasonable security measures can play a significant role in a judge's formulation of case law and, in effect, become somewhat of a standard, at least in that particular jurisdiction.²⁷ Because most cases do not reach trial stage, the importance of a written expert report cannot be overemphasized. In the United Kingdom, expert reports must comply with Civil Procedure Rules, Part 35, while in the US, Rule 26 of the Federal Rules of Civil Procedure controls the structure and goals of expert reports. Forensic experts must be skilled in the written explication of their opinions and

also must be prepared to defend these opinions in open court under often rigorous cross-examination. For these and other reasons, forensic knowledge alone is insufficient to qualify one as an effective forensic expert.²⁸

Presumptive standards of care

On the one hand, industry leaders and security professionals are expected to formalize a set of broadly applicable standards in order to optimize protective efforts on behalf of all citizens. On the other hand, enlightened observers realize that most properties are somewhat unique in their configurations and in the threats they face. A shopping mall with a specific tenant mix located in a certain kind of neighborhood may have different security requirements than another mall with a different tenant mix located in a much poorer or richer part of town. One size does *not* fit all and, to a certain extent, security efforts must be tailored to fit each particular property or land usage. It is largely because of these conflicting themes that security standards have not been universally adopted and their impact on premises liability only partly understood.²⁹ A possible solution to this problem may lie in the notion of 'presumptive standards,' a concept borrowed from the field of corrections and its use of presumptive sentencing.

In presumptive sentencing, a somewhat narrow range of months of incarceration is established for a given crime (a standard sentence). This presumptive sentence, however, may be increased by aggravating factors or decreased by mitigating factors. Such a sentencing format, it is believed, will reduce inappropriate sentencing disparity (Clear and Cole, 1997; Schmalleger and Smykla, 2005). A similar approach to security standards may increase the uniformity of protective services both within and between nations and still take into account the unique requirements of each individual property. Consider the common question of appropriate security officer-to-patron ratios. How many security officers per 100 concertgoers is appropriate?

Although most security experts are reluctant to identify any ratios at all, some have ventured conditional recommendations. For example, Poulin (1992) has suggested assigning one security officer for every 100 concert patrons. Under a presumptive standards approach, venue managers might then assign one officer per every 50 patrons of a heavy metal or gangster rap concert (aggravating factors) and one officer per every 150 patrons of a Johnny Mathis or Yanni concert (mitigating factors). The parking lot of a hospital in an urban area might require security fencing for access control while a rural hospital might require no such measure. In both scenarios, however, a presumptive security standard would have required security managers to consider the issue of parking lot access control.

It seems, then, that the finder of fact in a premises liability lawsuit will face two major tasks concerning breach of duty. The first will be to determine what behavior should reasonably have been expected on the part of the defendant. What was the appropriate standard of care given the defendant's circumstances? The second task, of course, is to determine whether the defendant failed to live up to these expectations. In numerous instances, both plaintiff and defendant

will concur on the appropriate standard of care to be applied. They may disagree on whether the standard of care was actually breached. As will be seen, however, a defendant will not become liable for negligence unless it can be shown by a preponderance of evidence that the failure to act reasonably was causally related to the injuries sustained. In other words, had the defendant properly discharged his duty, it is more likely than not the crime would not have occurred.

Causation

Proximate cause and cause in fact

Even if crime at a property was foreseeable and there was breach of a standard of care, plaintiffs in civil litigation must still prove by a preponderance of evidence that the breach caused harm to the plaintiffs. Causation in the legal sense is not so rigorously defined as in the social sciences³⁰ and can generally be broken down into two parts: proximate cause and cause-in-fact.

Proximate cause is often defined as 'that, which in a natural and continuous sequence, unbroken by any efficient intervening cause, produces injury, and without which the result would not have occurred' (Nolan and Connolly, 1983: 641). Legal practitioners often take this definition to once again encompass the notion of foreseeability. In other words, not only must a crime be foreseeable for duty to attach, it must also be foreseeable that a given breach would lead to injury.

Cause in fact refers to the actual cause of an injury. One test of actual cause is the 'but for' test. But for the failure to implement a reasonable security program, would the plaintiff have been injured? Another very common test is the 'substantial factor' test. Was the failure to implement a reasonable security program a substantial factor in the plaintiff's injury or loss? Causation issues are generally left to the decider of fact.

Forensic security practitioners must be aware of the concept of 'abstract negligence' if called upon to defend a corporate security program.³¹ Plaintiff security experts will often criticize multiple aspects of a defendant's security program even if these aspects of the program were totally unrelated to the criminal attack. For example, an expert might criticize a landlord's key control or access control program even though an attacker entered upon the property legally as an invited guest. A security officer's training history may be criticized even though his actions at the scene of an incident were completely appropriate. A defendant landlord's failure to repair a garage security gate cannot be the legal cause of an assault if there is no evidence a perpetrator actually entered through the open gate. Without proving the critical element of causation, of course, the plaintiff cannot make his or her case.³²

Evidence-based security measures

Evidence-Based Medicine and Evidence-Based Policing should serve as models for security specialists intent on developing and implementing effective security measures (Sherman, 1998; 2003). By adhering as closely as possible to scientific

methodologies in evaluating the efficacy of security programming, researchers and practitioners can more effectively inform juries about appropriate standards of care for the security industry. For example, lighting is not the automatic crime deterrent it is thought to be by so many laymen (Farrington and Welsh, 2002; Marchant, 2004) nor does CCTV function universally to deter crimes against the person (Gill and Loveday, 2003; Painter and Tilley, 1999; Welsh and Farrington, 2003; Welsh and Farrington, 2004). Just as random police patrol is losing ground to directed patrol, security managers may need to rethink standard security officer deployment practices based on the best empirical evidence available (e.g. Sherman, Gottfredson, MacKenzie, Eck, Reuter and Bushway, 1997).

The forensic implications of these critical evaluations are obvious: improved lighting may not have prevented an attack in a parking lot so there may be no obvious causal relationship between a defendant's lighting levels and the crime. If CCTV does not prevent violent crimes in convenience stores, how can failure to install CCTV at a given location be the cause of a clerk's attack? On the other hand, lighting and CCTV may manifest preventive benefits in certain circumstances involving certain perpetrators. Lighting, for example, seems to be the catalyst which provides for the synergy of several security measures working together to more effectively harden a target. Hence, the liability implications of conventional security measures still need to be sorted out on a case-by-case basis. Lighting, CCTV, and preventive patrol are mentioned only as examples of popular security practices which need to be evaluated for the purposes of each particular property. Other security measures should also be realistically assessed before implementation so that a false sense of security is not generated.

Individual deterrence

Rather than focusing exclusively on the efficacy of security hardware, many forensic behavioral scientists also consider the criminal's susceptibility to deterrence.³³ Can all criminals be deterred? Is the deterrence threshold higher for criminals with certain cognitive characteristics than for others? Once again, each criminal must be evaluated on an individual basis.

Homant (1999) believes offenders can be placed in one of four categories based on their desire to avoid capture interacting with their motivation to commit a particular crime. Thus, the opportunistic offender who is not highly motivated to commit a particular crime and is highly motivated to avoid capture may be readily deterred (e.g. a professional criminal with many available targets). On the other hand, it is extremely difficult to deter an individual who is highly motivated to commit a particular crime yet not very motivated to avoid capture (e.g. a suicide bomber). Another approach to the question of individual deterrence involves a relatively new investigative technique known as 'criminal profiling.' Former law enforcement profilers sometimes have been retained in civil litigation to assess the behavioral characteristics of unknown offenders and to opine on the likelihood that certain security measures would have deterred them. While such crime scene profiling may occasionally prove helpful in an investigative sense,

caution must be employed lest such profiling be applied with unfounded confidence to inappropriate cases (Kennedy and Homant, 1997).

More recently, Jacobs (2004) has offered eight variables which serve to make an offender more or less risk-sensitive. The implication is that less risk-sensitive offenders will be less deterrable and vice-versa. Thus, impulsive offenders are less deterrable (see, also, Webster and Jackson, 1997) as are those who believe their appearances, altered by disguises, render them anonymous. The presence of bystanders can deter some criminals, while crime sprees generally reflect risk insensitivity. Other considerations include presence of a prior record, intoxication, whether an offender is 'dared' to do a crime, and whether there are perceived injustices to be corrected (Kennedy, Homant and Homant, 2004).

There are additional considerations when assessing the deterrability of a given offender. Psychopaths, for example, do not experience fear as others do (Hare, 1993) and might be less deterrable. Offenders can be intensely motivated by paraphilias (Abel and Osborn, 1992) and some rapists (Salter, 2003) and pedophiles (van Dam, 2001) actually find the risk of getting caught to be a big part of the thrill of the crime (Katz, 1988). Some gang members may be relatively impervious to conventional perceptual security measures since their prestige is often derived from 'La Locura,' or acting out in an outrageous fashion regardless of the obvious consequences (Moore, 1991; Yablonsky, 1997). As a practical matter, criminologists have generally found the criminal who acts instrumentally to be more deterrable (or displaceable) than one whose crimes tend to be expressive in nature (cf. Nettler, 1989). Thus, a professional criminal who tends to choose a lucrative target carefully might be more sensitive to security measures than a morbidly jealous man who charges into his girlfriend's place of work and shoots her in front of many witnesses because he had recently heard rumors of her infidelity.

Lifestyle and causation

The forensic security specialist will find study of the criminological subdiscipline of victimology quite useful in understanding alternative theories of causation. A major concern of early victimologists was the role played by the victim himself in helping to cause his own victimization. It is known that young males are several times more likely to be homicide victims than are older females. This disparity is largely due to lifestyle differences (Fattah, 1991; Karmen, 2004). For example, young males are more likely to go out to public unsupervised places late at night and consume alcohol while in the proximity of other young males in groups who are strangers to them. Ego contests and disputes over females often lead to violence. Additionally, to the extent young males engage in criminal behavior with other young criminals, they themselves are more likely to be victimized as well. As Wolfgang (1957) explained many years ago, it is often a matter of chance alone that determines which individual becomes the perpetrator and which becomes the victim of violence.

The implications of these youthful lifestyle choices for landlords of mass private property (cf. Shearing and Stenning, 1983) are obvious. A young man

injured at a shopping center or apartment complex while engaging in drug selling or 'gangbanging' will sometimes elect to sue property management for failing to protect him from the degradations of his peers. For example, a recent Texas case involved a young man who was shot at 4:30 a.m. while in the parking lot of his apartment building. Earlier in the day, he had beaten another young man in the same parking lot, and that youngster had vowed to return and take his revenge. The 'victim' was shot while selling drugs during the early morning hours, although he told the court he was in the lot at that hour only because his uncle was coming to pick him up early for day labor. Another case in California was brought by a gang member who was attacked in the parking lot of a large shopping mall. This 'victim' was attacked in retaliation for his own attack on the perpetrator earlier in the week. Clearly, both attacks were more related to pre-existing animosities than to any given condition of the property. Thus, in these instances the landlords can argue that there was no causal relationship between a property's security measures and the violent outbursts. Furthermore, it is particularly difficult to foresee the appearance of two antagonists at the same time and place.

To the extent security personnel understand relevant victimological theories, they can better explain to a jury that the real 'cause' of an injury might be an individual's own behavior rather than a landlord's negligence. Judges and juries must decide to what extent a landlord should compensate an individual for the negative consequences of his own lifestyle choices.

Conclusions

Forensic studies run the gamut from applied physics, entomology, and engineering to psychology, psychiatry, and criminology. Forensic security involves efforts to prevent litigation and to defend against it should lawsuits ensue. As we have seen in this chapter, premises liability for negligent security has become a billion dollar problem worldwide which no forward thinking business organization can afford to ignore. Accordingly, modern security managers must become familiar with tort law and master operational meanings of foreseeability, standards of care, and legal causation. Although forensic security specialists are not expected to become lawyers, their understanding of criminal behavior, security systems, and legal principles should make them indispensable assets to corporate leadership in this litigious business environment.

There are several areas of security litigation not yet touched upon in these limited pages. Security litigation is usually more complex than simply determining the quality of lighting in a distant car park. Subrogation often pits one insurance company against another, as when an insurance company pays off on a large claim and then sues for recovery. Many English cases involve contract disputes over delivery of services or system failures, as well as large financial losses due to theft or damage.

While a corporate or business entity may be vicariously liable under *respondeat superior* for the negligent acts of its employees committed within the scope of

their employment, there is also the notion of direct liability to consider. Here the organization may be deemed culpable if it negligently hired, retained, entrusted, supervised, assigned, directed, or trained an employee (Maxwell, 1993). Legal commentators expect new tort actions to evolve. For example, various companies sometimes issue false letters of recommendation to rid themselves of troublesome employees. From time to time other companies may arbitrarily and capriciously fire employees who then extract workplace revenge on other workers. While negligent referral and negligent firing are not as yet fully established causes of action, several such lawsuits have already been filed.

Other topics of concern for the forensic security expert, particularly in the retail sector, involve false arrest, false imprisonment, defamation of character, and excessive force. Banks have been sued for faulty alarm systems, construction engineers have been sued for failing to secure construction sites, and hotels have been sued for allowing unsupervised access to swimming pools. Lawyers have even been sued for failing to properly prosecute negligent security claims. The point here, of course, is that modern commerce requires attention to security issues; and where there is a security issue, there is the possibility of security litigation.

Notes

- 1 Of course, it would be naive to presume that all forensic scientists place the concern for truth above partisan and ideological considerations. Examples of 'junk science' abound in public health (Milloy, 1995), psychiatric (Kirk and Kutchins, 1992), psychological (Hagen, 1997) and public policy literature (Gilbert, 1997; Hunt, 1999). Even worse, Turvey (2003) has documented an alarming number of cases in which forensic scientists in criminal cases have deliberately offered fraudulent evidence to the courts. Ever since the US Supreme Court case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 US 579 (1993), federal trial judges have served as 'gatekeepers' to try and ensure that the claimed basis for scientific and other expert testimony is valid. *Daubert* and other related cases, however, have raised as many questions as they have answered (Faigman, 2000).
- 2 This snapshot of the evolution of forensic science is derived from discussions found in Faigman, Kaye, Saks, and Sanders (2002a), Osterburg and Ward (1997), and Saferstein (2001).
- 3 To be sure, most of these forensic specialities would be of more direct concern to public law enforcement agencies and public prosecutors than to the private security community. It is important, however, that private sector security professionals understand the role of physical evidence in the investigative process so that private property crime scenes can be protected, and relevant leads can be provided to the public authorities.
- 4 Expert witnesses are utilized in Australia, New Zealand, Canada, the United States and the United Kingdom, albeit with some minor differences. Due to their expertise, they are allowed to render opinions to the jury rather than simply relay facts. Ward (1999, 2004) points out some interesting distinctions among the common law countries and discusses the evolution of both civil and criminal expert evidence as well.
- 5 Historically, corporate executives and business owners would occasionally dismiss the need to implement security measures in order to prevent incidents by quipping, 'That's what we have insurance for.' In many instances, however, organizations are self-insured up to, for example \$250,000. In other words, there is a large deductible which the company will have to pay itself. It is also important to consider the nonrecoverable

personnel costs involved in locating, duplicating, and producing documents, sitting for lengthy depositions, hosting site inspections and tolerating disruption of executive schedules. Bad publicity, loss of good will, divulgence of embarrassing information, negative career consequences, and personal stress are also part and parcel of the litigation process. Effective security proactively seeks to avoid litigation by preventing adverse incidents from occurring in the first place.

- 6 439 F.2d 477 (D.C. Cir. 1970).
- 7 419 F. Supp. 1210 (E.D.N.Y. 1976).
- 8 Until his untimely death in 1992, Frank Carrington was clearly the leading legal advocate for litigation on behalf of crime victims in the US (see also, Carrington, 1978, 1983 and 1988). Much of his work is carried on through the National Crime Victim Bar Association, an affiliate of the National Center for Victims of Crime in Washington, DC. Its quarterly magazine, *Victim Advocate*, carries scholarly articles written by legal professionals and forensic security experts addressing premises liability and other types of third-party litigation on behalf of victims of crime and terrorism. Readers interested in additional treatises addressing premises security should consult Bakken and Abele (1995), Homant and Kennedy (1995), Kuhlman (1989), Talley (1994), and Tarantino and Dombroff (1990). Consult Blake and Bradley (1999) and McGoey (1990) for legal and professional texts and Kennedy (1993) for an academic treatise authored by a forensic security specialist. Those interested in far greater legal detail should consult the legal series *Proof of Facts* and *Causes of Action*.
- 9 The concept of harm translates to financial damages to be awarded a plaintiff. Damage experts are generally physicians, psychotherapists, rehabilitation specialists, and forensic economists. Forensic security experts are rarely involved in damages issues so these matters will not be discussed herein.
- 10 *Samson v. Saginaw Professional Building, Inc.*, 393 Mich. 393 (1975).
- 11 269 California Reporter 96 (Cal. App. 2 Dist. 1990).
- 12 464 Mich. 322, 628 N.W.2d 33 (2001).
- 13 972 S.W.2d 749 (Tex. 1998).
- 14 As will be seen in subsequent discussions, the occurrence of crime in nearby areas is generally associated with the foreseeability of crime on a particular property. Environmental criminology and journey-to-crime research (Kennedy, 1990) also attest to the importance of location and neighboring land use for assessing a property's susceptibility to criminal attack.
- 15 *Boren v. Worthen National Bank of Arkansas*, 324 Ark. 416, 921 S.W.2d 934 (1996).
- 16 According to the Timberwalk court, *supra*, note 11, assaults and robberies in an apartment complex make the risk of other violent crimes like murder and rape foreseeable. However, a spate of domestic violence in the complex would not portend predatory sexual assaults or robberies. Crimes between acquaintances or lovers generally emanate from prior disagreements, are expressive rather than instrumental in nature, and are not related to the condition of the property.
- 17 *Mervyn Isaacs, et al. v. Huntington Memorial Hospital*, 685 P.2d 653 (Cal. 1985).
- 18 Subsequent research by British and American scholars has established that certain parking lots can, indeed, be problematic (Clark and Mayhew, 1998; Smith, 1996). Parking structures can be particularly threatening because their environment contains multiple impediments which block victims' sightlines. Garages also offer multiple locations for offender concealment and often limit avenues of escape (Nasar and Fisher, 1993).
- 19 *Doud v. Las Vegas Hilton Corp.*, 864 P.2d 796 (Nev. 1993).
- 20 The security director interested in advanced environmental criminology is referred to Goldsmith, McGuire, Mollenkopf, and Ross (2000) and Paulsen and Robinson (2004), particularly Chapter 5, 'Behavioral Geography and Criminal Behavior.' English scholar David Canter (2003) and Canadian criminologist Kim Rossmo (2000) are well known for their work in geographic profiling, a topic also of interest to security analysts. These

- and other specialties can make substantial contributions to an evolving field of study and practice known as forensic criminology.
- 21 *McClung v. Delta Square Limited Partnership*, 937 S.W. 2d 901 (Tenn, 1995).
 - 22 The four tests of foreseeability discussed herein do not exhaust all approaches to the question, although they do constitute the dominant approaches. Two additional approaches to foreseeability are worthy of mention, however. One jurisdiction specifically declines to articulate a test for foreseeability, deciding on a case-by-case basis whether a reasonably prudent person would have anticipated danger and provided against it. See *L.A.C. v. Ward Parkway Shopping Center Company, L.P.* 75 S.W. 3d 247 (Missouri, 2002). In *Mary Ann Workman v. United Methodist Committee on Relief*, 320 F. 3d 259 (D.C. Cir. 2003), there is a relational component to the question of foreseeability. If the relationship between the parties strongly suggests a duty of protection, specific evidence of foreseeability is less important. If the relationship is not clearly of a type that entails a higher duty of protection, then the evidentiary hurdle is higher.
 - 23 In many jurisdictions a greater or lesser duty owed to visitors to a property depending upon the nature of their invitation and the likely beneficiary of their visit. Invitees are owed the highest duty. The landowner/occupier should attempt to discover any unreasonably dangerous conditions on the premises and either make them safe or warn the invitee of the danger. The licensee takes the premises as he finds them, although a landlord may be liable to a licensee if the danger of the premises is concealed or cannot reasonably be anticipated and no warnings were given, or there were no attempts to make the conditions safe. Finally, a trespasser is owed no duty, although the landowner must refrain from willful or wanton misconduct toward him (Page, 1988; Tarantino and Dombroff, 1990).
 - 24 For example, security professionals often prefer to use the term 'guideline,' believing this term will convey to a jury the need for professional discretion in the development of security policies and procedures. Many forensic security experts fear the term 'standard' would be taken to mean that a given security practice or device must be applied uniformly across all properties regardless of the unique nature of a given property. This, of course, would not be appropriate practice.
 - 25 Effective litigation is generally characterized by a multidisciplinary approach. Security experts may also be called upon to work with lighting engineers, human factors experts, architects and behavior scientists, to name but a few examples. Artificial disciplinary boundaries should not impede a barrister's ability to present an intelligible yet succinct case to a jury.
 - 26 The American Society for Industrial Security International is currently creating formal 'guidelines' pertaining to business continuity, investigations, risk assessment, security officer selection and training, information protection, security countermeasures, museum security, threat advisory response, workplace violence, and the Chief Security Officer. See www.asionline.org/guidelines/guidelines.htm.
- The National Fire Protection Association is preparing an extensive 'Guide for Premises Security' (NFPA 730), which consists of 22 chapters. Topics include vulnerability assessment, security devices and systems, security personnel, educational and healthcare facilities, apartment buildings, lodging facilities, shopping centers, retail establishments, office buildings, parking facilities, restaurants, and special events. See www.nfpa.org/codes/index.asp.
- 27 Expert testimony in premises liability cases is subject to differing admissibility tests depending upon the jurisdiction. In the US, for example, several states apply what is known as the federal *Daubert* test, first articulated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993). In essence, *Daubert* requires judges to be the gatekeepers of expert testimony and to ensure that such testimony is relevant and reliable. The March 1999 issue of *Psychology, Public Policy, and Law* is devoted to an analysis of *Daubert's* impact on social science evidence. See also, Britt (2001) for a plaintiff attorney's perspective and Patterson (2003) for a defense attorney's

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- perspective. Overall judicial and attorney responses to *Daubert* are addressed by Krafka, Dunn, Johnson, Cecil and Miletich (2002) and Groscup (2004).
- 28 Lawyers and experts in all common law countries would benefit from articles by Black (2003) and Wivell (2003), both of whom write from the perspective of a litigator who wishes to introduce expert evidence to the court.
 - 29 At least one publication written from the forensic security practitioner's viewpoint does a good job of applying various industry standards to litigation and liability issues. Mattman, Kaufer and Chaney (1997) discuss foreseeability, forensic consulting, and security case law pertinent to eight settings.
 - 30 For example, Hagan (2003) points out that causality in science involves demonstrating a covariance between variables, establishing the time sequence of this relationship (for A to cause B, it must precede B) and ruling out rival explanations for the purported causal relationship between the variables.
 - 31 See *Nola M. v. University of Southern California*, 16 Cal. App. 4th 421 (1993) and *Leslie G. v. Perry and Associates*, 43 Cal. App. 4th 472 (1996).
 - 32 In addition to the question of 'abstract negligence,' corporate defendants must also beware of an expert who argues for or against a particular standard of care without being able to cite a foundation for his opinion other than his own personal predilections. Such 'personal standards' evidence does not automatically constitute generally accepted standards and should be closely scrutinized (Jackson, 2004).
 - 33 Criminologists are beginning to explore the intermediate notion of displacement rather than limiting themselves to deterrence alone (Repetto, 1976; Clark, 1997). In other words, might someone who is hard to deter be easier to displace? Are these distinctions without a difference? Most landlords would be satisfied with simply displacing the criminal, at least from a liability point of view. Society as a whole, however, would be better served by absolute deterrence.

Key readings

There are several excellent texts available to the attorney or security manager interested in further information concerning forensic security and the law. For a pioneering and very comprehensive treatment, see Carrington, F. and Rapp, J. (1991) *Victims' Rights: Law and Litigation*. New York: Matthew Bender. A plaintiff attorney's perspective is presented by Kuhlman, R. (1989) *Safe Places? Security Planning and Litigation*. Charlottesville, Virginia: The Michie Company. The defense perspective is offered by Kaminsky, A. (2001) *A Complete Guide to Premises Security Litigation*, 2nd ed., Chicago: American Bar Association. A recent text on the subject is Perline, I. and Goldschmidt, J. (2004) *The Psychology and Law of Workplace Violence*. Springfield: Charles C. Thomas.

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