

A Security Consultant May Be Needed to Establish Foreseeability in Premises Liability Cases

By Timothy D. Lange

With this edition of *The Advocate* concentrating on *premises liability*, this column concerns the expert who will help find justice for the crime victim who is assaulted at a commercial premises historically frequented by crime.

Let's assume that your client was traveling late at night. She decided she needed a highly caffeinated, tasty beverage and should get some gas. Spying an exit ramp with a filling station at its base, she takes the ramp. Bringing her car to a stop at a pump, she grabs her purse and gets out, stretching her legs from the long drive.

As she stretches, she notices there is not much activity at the station, except an attendant who appears to be watching TV in the small cashier's booth, next to the soft drink and candy machines. She decides to pay at the pump. When looking through her wallet for the company credit card, standing roughly 40 feet from the attendant (who is safely inside his bullet proof booth), she is struck in the head from behind. Her wallet is ripped from her hands and she falls to the ground bleeding profusely, permanently brain-injured, and unconscious.

Unbeknownst to your client, she was in the wrong place...

Rarely was there a good time to be at that filling station. As your open records request subsequently reveals, it was the site of a rash of recent hold-ups and muggings, and is situated in a neighborhood having the highest incidence of crime in the city. An attendant was murdered at the

station three years before your client was attacked. In response, in-store sales were discontinued, a convenience store was razed from the site, and the current cashier's booth was erected. Despite the violent past of this filling station, its shining "Open 24 Hours" sign served as a beacon drawing your unassuming client to her demise. She needs justice—to prove liability on the part of the filling station. To have a stronger chance of obtaining justice for her, you need a professional security consultant.

A professional security consultant is the person to whom you can turn in this instance. This is an "inadequate security" case. These cases have significant hurdles. After all, an intentional criminal act was perpetrated by a third party against your client—not by an agent or employee of the filling station. Counsel for the filling station will argue that the station is not an insurer of its customers. The defense will either argue against an empty chair, or point toward an unsavory, likely judgment-proof, violent criminal. Liability on the part of the business operator will require the foreseeability of your client's injuries.¹ Establishing foreseeability of the attack will take significant research and expertise on the part of your security expert.

How Foreseeability is Assessed

To begin an analysis of the foreseeability of crime at a certain premises, the professional security consultant should review the history of crimes occurring at and near the site of your client's assault. This expert's careful sampling will be critical to the value of his or her testimony at trial. Sampling from too large an area can dilute the reliability of an opinion, as can the consideration of crimes that are not similar in nature to the crime in issue. This is a statistical analysis, and you will need to be certain that there is no "devil" in

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the detail of it that will diminish its scientific value, and threaten its admissibility.

In considering foreseeability, some experts may rely solely on a statistical analysis, though other approaches will vary and take into consideration other factors. These other factors can include:

- The nature of the business conducted at the premises—the FOP lodge (Fraternal Order of Police) parking lot may not be a high-risk spot for a mugging. A secluded ATM machine or drug store is potentially prime territory for predatory assault.
- Physical characteristics of the property in question—are there natural or artificial obstructions to vision; is there an easy “getaway” access; is the lighting adequate?
- Security measures in place—in the scenario above, the attendant was protected, but patrons remained exposed!
- The incidence of like crimes versus other crime (i.e., vandalism as compared to violent crime).

What Qualifications Will These Experts Possess?

The qualifications of the witness, as always, will be of paramount importance. Given a likely challenge to any opinion involving statistical or other analysis under *Daubert* and its progeny, careful review of the expert’s product should be undertaken to minimize putting on proof that can be challenged as *junk science*.² This industry appears to be replete with highly, and perhaps also not so highly, credentialed persons advertising for engagement as your professional security expert. Persons offering their services as security consultants have varying backgrounds, from providing industrial security, military experience, law enforcement, hotel security, etc. Many universities offer degrees in

police administration and law enforcement. Security industry organizations also exist, such as ASIS International³ and the International Association of Professional Security Experts.⁴ A background and fluency in statistics will also serve your case well.

Beyond Foreseeability: What Else Can This Expert Do for the Case?

In addition to assisting in providing you with expert testimony helping you to establish a legal duty based upon the foreseeability of the victimization of your client, a security consultant can also assess whether there has been a breach of that duty. Again, a business will not have to *insure* the safety of its patrons.⁵ Businesses frequented by crime often take security measures that are inadequate—a video camera may be installed for instance, without effect, when the pattern of criminal conduct warranted armed security or a more aggressive security response, such as screening for weapons before entry into a nightclub, etc. The properly qualified expert may be able to present testimony as to what security measures would have been appropriate in the facts of your case, and whether any security measures put in place by the defendant were inadequate to satisfy the duty owed to the victim. In other contexts, these experts can testify as to the appropriate provision of locks and security devices, security policies and procedures, employment screening, loss prevention, employee training (for security guards, bouncers, etc.), and the excessive use of force by security personnel.

Choosing Your Expert

As always, in your selection of the appropriate expert for your case, be advised to seek references from fellow KATA members or other counsel having previously employed the person

under consideration. Request references and background information on any expert with whom you are interested in working. Confirm the expert’s schedule of fees and document pertinent terms concerning payment and billing before engagement—including any limitation of your personal liability for payment of the expert’s fees. Conduct as significant a background check as your resources permit. Determine if your expert’s testimony has ever been excluded for failing a *Daubert* challenge or otherwise. Lastly, consider requiring a confidentiality agreement from the expert. Remember, your experts can make or break your case. Choose wisely!

¹ See *Waldon v. Housing Authority of Paducah*, Ky., App. 854 S.W.2d 777, (1991), which held that “[e]ven intervening a criminal act does not relieve one of liability for negligent acts or omissions, if the criminal act is reasonably foreseeable consequence of the negligent act.”

² *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993); *Kumho Tire Company v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999).

³ ASIS International, with more than 32,000 members, is an international organization for professionals responsible for security, including managers and directors of security. See www.asisonline.org.

⁴ The International Association of Professional Security Consultants has a searchable database of its membership and offers a host of experts engaging in security litigation support and analysis. See www.iapsc.com.

⁵ Proprietors of places of public amusement, innkeepers, storekeepers, and others who invite public into their premises have duty to exercise ordinary care for safety of patrons, but are not insurers of their safety. *Sidebottom v. Aubrey*, Ky., 101 S.W.2d 212, (1937).

