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Research in Brief

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Issues and Findings

Discussed in this Research in Brief: The historical evolution of the legal basis for premises liability cases and their connection to Crime Prevention Through Environmental Design (CPTED).

Key issues: Victims of crime are seeking compensation from the owners and managers of properties on which crime takes place with increasing frequency. In these court cases, commonly known as premises liability cases, juries are being told that the crime was the result of a perpetrator's ability to take advantage of a lack of security in a certain building or property.

- With the development of CPTED, architects, developers, and property owners have an important tool for proactive crime prevention.

- Factors such as not having a security plan, not being aware of what is happening on the property, and not having properly trained guards may all contribute to the occurrence of crime.

Key findings: The authors' research on CPTED and premises liability produced the following findings:

- In order to find for the plaintiff in premises liability cases, the jury must implicitly agree that the setting in which the crime took place

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The Expanding Role of Crime Prevention Through Environmental Design in Premises Liability

by Corey L. Gordon and William Brill

Victims of crime are seeking compensation from owners and managers of the properties on which crime takes place with increasing frequency. These cases, commonly known as premises liability cases, are based on allegations made by the victim that the property owner failed to provide adequate security and thereby contributed to the occurrence of the crime. Claims of inadequate security include systemic, organizational, human, and environmental design flaws. It is further alleged in these cases that the crime that occurred was foreseeable and that the defendant had a legal duty to provide adequate security.

Although these cases often involve specific charges, such as poor lighting, weak locks, no access control, not enough or poorly trained guards, or poor management policies, many test the principles of Crime Prevention Through Environmental Design (CPTED). This Research in Brief discusses the connection between premises liability and CPTED by first explaining the historical evolution of the legal basis for premises liability and then offering illustrations of how CPTED has become a factor in court cases.

Early history: English common law

Unlike criminal or contract law, American civil tort law is based primarily on precedence established by court decisions, a process known as the "common law." American civil law has its roots in English common law.

Historically, English common law held fast to the rule that one person was under no duty to take any steps to protect another person from the wrongful acts of a third party. Thus, landowners had no legal duty to prevent criminal assaults on visitors to their property, and no legal liability could befall them.

Early case law developed the notion that a person engaged in a trade or calling who undertook to perform certain activities with respect to another's person or personal possessions had to meet the standards of that particular profession or calling; if they failed to live up to those standards and the person was injured or his goods damaged thereby, the tradesman could be sued for deceit in wrongfully representing himself as skilled in the trade.

Issues and Findings

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was critical and that had the property been designed or laid out differently and adequately guarded, the criminal would likely have been deterred or prevented from attacking.

- Courts use the "totality of the circumstances test" to determine whether security measures were inadequate and below generally accepted standards for a particular industry.

- The lack of prior similar crimes does not mean that a property owner should not take reasonable precautions to prevent crimes that most would agree should be reasonably foreseeable.

Therefore, property owners can expect to be subject to increasing litigation if they fail to take reasonable steps to make their property secure.

Target audience: Criminal justice professionals, property owners and managers, landlords, and tenants.

From this notion developed the concept of "special relationships," i.e., those relationships that created an expectation on the part of one person that another was undertaking to provide some degree of protection against the criminal acts of others. Two of the earliest special relationships were that of an innkeeper and a guest and a common carrier and its passengers.

In spite of these narrow exceptions, English common law clung tenaciously to the notion that the landowner was sacrosanct, and the general rule of nonliability, despite the special relationships exception, held sway for many decades.

Development of the American approach

Early American case law developed an ancillary exception to the special relationships doctrine, that of assumed duty. Basically, an assumed duty arises when one who would otherwise not owe any legal duty to take acts to protect others from crime nevertheless voluntarily assumes to do so. That assumption can arise by expressed means, such as the assurance of an individual that he will provide for the safety of another, or can arise by conduct, such as the presence of security guards engaged to provide protection to customers.[1]

Similarly, American common law developed the notion that when one takes a person into custody or otherwise places a person in a situation in which that person could not provide for his own protection, then the one taking custody owes a duty to protect the other from harm, including the criminal acts of others. A typical example would be a hospital in which the patient is incapacitated. In this case, the hospital would have a legal duty to reasonably protect the patient from the criminal acts of others.

Despite these expanded exceptions, the general rule was still predominant in the United States that most property owners had no duty to protect against criminal acts. In this environment of nonliability, most property owners, architects, planners, and others responsible for the development of building projects were virtually never the subject of lawsuits in early American case law.

Expanding the special relationships concept

In the middle part of the 20th century, courts began expanding the concept of special relationships to include virtually any business premises that invited others onto their property for business purposes. With the advent of business inviter-invitee special relationships, many more property owners became subject to liability for inadequate security. Restaurants, retail facilities, office buildings, service stations, and other businesses became possible responsible parties for harm caused by criminal acts.

Starting in 1970, American courts began to analogize the landlord-tenant relationship to that of the innkeeper-guest, one of the earliest special relationships. This was particularly so when problems arose in common areas over which a tenant had no control or in circumstances in which the rental agreement prohibited the tenant from taking security precautions such as installing deadbolt locks or other security devices. In the past 25 years, most American jurisdictions have, through case law, recognized the landlord-tenant relationship as a special relationships exception to the general rule of nonliability.

Foreseeability and the prior similar incidents rule

At the same time that the special relationships concept was being expanded to include landlords and tenants, courts

were also creating significant defenses for the growing number of potential defendants. The most significant limitation on liability imposed by American case law was the concept of foreseeability, i.e., no property owner could be held liable for failing to take reasonable steps to prevent a crime unless that crime was foreseeable.

To eliminate the ambiguity of foreseeability and incorporate a standard that judges could automatically apply, early cases developed the notion that a crime was not foreseeable unless it had occurred at the particular premises before. This became known as the "prior similar incidents rule." If a plaintiff could not demonstrate that there had been a prior similar incident to the crime in question, the court would then rule, as a matter of law, that the crime was not foreseeable, and the case would be dismissed.

The use of the prior similar incidents rule, in an effort to achieve a standard, in reality simply created more diverse interpretations and decisions. The predictability and objectivity that had been expected to evolve from early cases proved to be elusive, and case law developed an almost incomprehensible patchwork of decisions. In addition, courts became highly critical of the concept at its core: As the Idaho Supreme Court noted, the prior similar incidents rule had the effect of being a "one free rape rule."[2]

Totality of circumstances

In the 1980's, courts began critically examining the prior similar incidents rule and, over the next decade, the majority of American jurisdictions abandoned it in favor of a "totality of the circumstances" test. In other words, although prior similar incidents would be one factor that a court would consider in determining whether a crime was foreseeable, the court would look to other factors as well, such as the nature of the business, its surrounding locale, the lack of customary security precautions as an invitation to crime, and the experience of the particular landowner at other locations.

Property owners have been critical of the totality of the circumstances test because of their belief that it is an impossible standard, i.e., that any time a crime occurs, one can argue that the security was necessarily inadequate. What is often overlooked in the analysis, however, is that this test is not whether security was inadequate in any abstract sense, but whether the inadequacies were unreasonable and below generally accepted standards for a particular industry. Furthermore, the deficiency must have been a substantial contributing factor to the incident.

The lack of prior similar crimes does not render it impossible to take reasonable precautions to prevent crimes that most would agree were reasonably foreseeable. Crime prevention experts, for example, routinely develop proactive security plans for premises on which crime has not yet occurred, relying on all the circumstances to predict reasonably foreseeable crime and develop reasonable precautions against it. Therefore, if property owners take no such precautions, their good fortune in not having any prior crimes is not to their benefit when the first unfortunate victim brings a claim.

CPTED: a new liability area?

With the development of CPTED, architects, developers, and property owners have an important tool for proactive crime prevention. The developing body of CPTED concepts has done much to establish the reasonableness of certain crime prevention approaches and, thus, the unreasonableness of property owners who fail to take widely accepted steps. With the increase in the number of premises liability cases (see "Premises Liability Cases Are on the Rise"), CPTED has underscored the

Premises Liability Cases Are on the Rise

The increase in the number of premises liability cases has two primary causes:

- Crime victims, in part due to the liberating nature of the victims rights movement, are now more likely to seek restitution for what has happened to them.
- Courts in most jurisdictions have become increasingly willing to let juries hear theories about the relationship between how properties are managed and designed and criminal behavior.

Juries are now being told by expert witnesses that crime is the result of a decisionmaking process that includes an assessment of the property by the perpetrator. Some properties—by virtue of their location, design and layout, and the way they are managed—are more appealing to criminals than others that are better designed and managed.

In these instances, in order to find for the plaintiff, the jury must implicitly agree that the setting in which the crime took place was critical and that had the property been designed or laid out differently, the criminal would likely have been deterred or prevented from attacking.

effectiveness of adequate security design: Good security planning is highly effective in deterring crime, and poor security planning not only fails to prevent it, but actually acts as a crime magnet, thereby increasing the risk crime will occur on a given premises.

In this sense, CPTED has been useful in assisting plaintiffs in demonstrating the causation element, i.e., that not only was the defendant's conduct unreasonable but that had the defendant acted reasonably, it would have been a substantial factor in deterring the crime.

Premises liability cases

To illustrate the current legal climate as it relates to premises liability and CPTED, a discussion of three types of liability cases follows: convenience stores, shopping centers and malls, and apartment buildings.

Convenience stores. Convenience store crimes generally involve robberies of stores and customers and may include abductions and murder. Most cases involve allegations that the store's operation was flawed in several respects. The following case illustrates how deficiencies in staffing, training, and store layout combined in a premises liability suit.

The store, part of a small chain, was located in a quasi-residential area next to a park near a two-lane highway. The cashier station was located in the rear of the store, adjacent to a doorway that led to a rear storage room where there was a desk and a safe. Posters and advertisements covered the front windows, and the only outside lighting came from a street light across the road.

One night, two men recently released from a State prison held up the store. After forcing the cashier into the rear storage room and making her open the safe, they shot her. As the men were preparing to leave, two people entered the store; a female employee coming to work at the shift change and a young man coming in to make a purchase while his date and another couple waited in the car outside.

Seeing the two people enter, the gunman concealed his weapon behind his back and announced that the store was closed.

"It can't be," the employee replied. "I work here!" With that, the man revealed his gun, forced the woman and the young man to the rear of the store, and shot them dead.

Although the families of the two murdered employees could not sue the employer due to Workers Compensation, the father of the slain young man sued the store, charging that the store failed to provide adequate security due to the following factors:

- The cashier should not have been alone in such an isolated store.
- The counter was located in the rear of the store, which made it difficult for anyone outside to see what was happening within.
- The posters on the windows further isolated the cashier.
- There was no drop safe, which would have removed the incentive for the robbery.
- The second cashier's failure to recognize the threat when she was told by the gunman that the store was closed indicated a failure on the part of the store owners to provide proper security training.

Several of these factors involved environmental design: the lighting, the posters, and the location of the cash register. In an interview, which was used as a basis for expert testimony, one of the perpetrators reported that he canvassed the area looking for the "right store" and that he had rejected several because they were brightly lit, the cashier's station was toward the front of the store, and there were no posters to interfere with the view from the parking lot.

This case did not go to trial; it was settled for a substantial sum after expert testimony was submitted in deposition. Its usefulness as an example lies in the fact that the criminals acknowledged the importance of environmental design in deciding to strike at this particular store.

Shopping centers and malls. In premises liability cases involving shopping centers and malls, environmental design is relevant in several ways. First, there is the design of the malls themselves and the image they project of being modern fortresses—organized, controlled, and protected from wind and rain. To a shopper, this can mean a promise of safety, a place where one can relax and not be on guard.

Criminals recognize the opportunity malls present in terms of available cash and merchandise, both from the customers and the retailers. CPTED is critical to how retailers protect their merchandise and protect their customers from becoming victims of crime.

For example, a large regional shopping mall, with over 1.2 million square feet, had grown over the years from its original small, rectangular structure. Various asymmetrical sections had been built out into the parking lot; as a result, security guards could only see a small portion of the lot at any given time because sight lines were obstructed by the various expansions. In addition, as is customary in large shopping centers, most of the walls were solid, preventing shoppers and store employees from being able to view the parking lot. This is known as the "fortress effect," which limits the ability of people inside the mall to perform natural surveillance.

In addition to these physical characteristics, the lighting system at the mall had not been upgraded in some sections of the parking lot since the mall was first built in the late 1960's. As a result, the light poles in some areas were shorter than in other areas, and the fixtures in place employed an older, now-discontinued type of low-pressure sodium lighting. In addition to being essentially monochromatic, low-pressure sodium lights degrade very quickly, losing as much as 75 percent of their lighting ability in the first 25 percent of their life cycle.

One winter evening, two young women were abducted at gunpoint from one of the sections of the parking lot that had not had its lighting upgraded. At the time of the incident, several of the lights in the area were burned out and the remaining lights had been in place for a long time, resulting in substantially degraded lighting output. As a result, many sections of the parking lot had lighting below the recommended minimums of the Illuminating Engineering Society of North America, including some areas where the lighting was below the minimum amount needed for human beings to discern movement or objects. All of these environmental design factors were alleged by the plaintiffs to have contributed to the perpetrator's selection of that particular location to commit his crime. (See "Dim Lights and Liability" for another example of lighting and legal issues.)

Another premises liability case involved a woman who was attacked while opening the trunk of her car in a mall garage by three girls with baseball bats. Case investigation revealed that the assailants had been parked nearby for over one-half hour. Their car had been parked with the front pointing outward for improved observation of shoppers returning to their cars. It was also discovered that earlier in the day, the assailants had been chased from another mall by a guard who questioned them about their suspicious behavior.

The mall's security program had several deficiencies that contributed to the event and caused this case to be settled before trial. The mall's recordkeeping was inadequate, and it was established that mall management was unaware of the level of criminal activity on its premises. It was also established that management could not verify guard compliance to assigned patrols.

In general, mall cases in which juries find for the victim usually involve a combination of deficiencies that include inadequacies in the security guard service and mall policies as well as in design and environmental issues.

Apartment buildings. A common premises liability case in an apartment complex involves the rape of a woman by an intruder. Although the complaint may allege deficiencies in the guard service or management policy, environmental factors are usually at the center of these cases.

Typical allegations in these cases involve charges that the lighting was poor, the perimeter of the property was unsecured, access was uncontrolled, and the locking systems were inadequate. Sometimes a specific deficiency will dominate the case. A sliding glass door, for example, that the intruder was able to lift off the track, pry open, or bend easily so it could be opened; an apartment door that did not have a deadbolt lock on it; or a laundry room, located in an isolated part of the building that a victim was either trapped in or dragged into, are common deficiencies that are central to many cases.

Dim Lights and Liability

A woman employed in a shopping mall departed after store closing. When she arrived at work, the parking lot was crowded; as a result she parked along the perimeter of the lot. When she left work, the parking lot was mostly empty, and as she reached her isolated car, she was dragged into it and raped.

An analysis of this case demonstrated that the lighting was dimmer where her car was parked than in more central parts of the lot and that the route her assailant used to escape led to an unlit field. It was also determined that the security guards made no special provisions to protect employees they knew would be leaving late and crossing relatively vacant parking surfaces.

These cases also involve testimony concerning the evaluation of the environment by the perpetrator, a necessary element to any case because of the need for the jury to rule on the legal issue of proximate cause, i.e., to what extent the security deficiencies contributed to the criminal's decision to attack. In order for a jury to find for a crime victim, it must conclude that the property owner failed to provide reasonable adequate security and that this failure contributed to the victim's injury.

The plaintiff will present basic CPTED concepts to make his or her case, arguing that the setting played a major role in the crime. Through sketches, designs, and photographs, the jury will be invited to see the property as the criminal viewed it. For example, did the property look well maintained? Did it look defended, or was access easy? Could the perpetrator enter unchallenged? Was space defined on the property? Did it present psychological barriers that had to be crossed or was the space ill-defined, anonymous? How difficult was it to approach private space such as windows, patios, and back doors unobserved?

In this kind of presentation, jurors are briefed on some of the principles of environmental design. They are told that design influences behavior; they are provided examples of how design shapes everyday behavior—from the design of their homes to the design of churches, shopping centers, even courtrooms. Finally, jurors are asked the ultimate question: To what extent did the environment contribute to the crime, and what could the landlord or building owner have done from a design standpoint that would have been both reasonable and effective in deterring or preventing the crime?

The future

Property owners can expect to be the subject of increasing litigation if they fail to take reasonable steps to prevent crime from occurring on their premises. (See "Premises Liability and CPTED.")

It is critical to understand that there is a decisionmaking process that a criminal undertakes in evaluating the degree to which a property is vulnerable from a design perspective. Whether these inadequacies are unreasonable and below generally accepted standards for a particular industry will determine the extent of premises liability for those responsible.

With the available tools developed through the study of CPTED, property owners who avail themselves of proactive design will both reduce the likelihood that crime will occur on their premises and, in the event that it does, will provide a strong defense of reasonable conduct. Conversely, property owners who ignore these design principles and fail to take reasonable steps to prevent crime can expect their property to be the site of crime and their negligence to prompt adverse jury verdicts in resultant litigation.

Notes

[1] In this regard, assumed duties are similar to duties that arise by contract; i.e., even when no legal duty is owed, one can contract with another to provide certain services that then creates a duty to perform these services with reasonable care. For example, an apartment may by contract agree to provide 24-hour security. If it fails to do so and a crime is committed, its breach of its contractual obligation can serve as the basis for a claim even if the jurisdiction did not obligate apartments to provide security. However, the mere breach of the contract does not necessarily lead to liability because there still must be proof that the breach was a legal cause of the incident. Questions of causation are generally analyzed under tort principles. Thus, there is little practical distinction between a breach of contract claim and violation of an assumed duty claim in this area.

[2] *Sharp* v. *W.H. Moore, Inc.*, 188 Idaho 297, 796 P.2d 506 (1990).

Premises Liability and CPTED

Premises liability cases offer insights into the application of CPTED:

- It is apparent that judges and juries can appreciate the logic of CPTED and decide in specific cases that the way properties are designed can influence criminal behavior.
- Design is usually not a singular cause. Invariably, several factors contributed to the crime: not having a security plan, not being aware of what is happening on the property, not having enough guards, or not having guards that are properly recruited and trained. In other words, the crime was driven by a variety of factors, design being one of them.

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Selected NIJ Publications About Crime Prevention Through Environmental Design

Listed below are some recent NIJ publications related to issues of crime prevention through environmental design. These publications are free, except as indicated, and can be obtained from the National Criminal Justice Reference Service: telephone 800–851–3420, or e-mail askncjrs@ncjrs.aspensys.com, or write to NCJRS, Box 6000, Rockville, MD 20849–6000.

These documents can also be downloaded through the NCJRS Bulletin Board System or at the NCJRS Anonymous FTP site in ASCII or graphic formats. They can be viewed online at the Justice Information Center World Wide Web site. Call NCJRS for more information.

Please note that when free publications are out of stock, they are available as photocopies or through interlibrary loan.

Smith, Mary S., *Crime Prevention Through Environmental Design in Parking Facilities*, Research in Action, 1995, NCJ 157310.

Taylor, Ralph B., and Adele V. Harrell, *Physical Environment and Crime*, Research Report, 1995, NCJ 157311.

Other NIJ Publications on Crime Prevention

Evaluation of Violence Prevention Programs in Middle Schools, Update, 1995, FS0000094.

Fein, Robert A., Ph.D., Bryan Vossekuil, and Gwen A. Holden, *Threat Assessment: An Approach to Prevent Targeted Violence*, Research in Action, 1995, NCJ 155000.

Harrell, Adele, Ph.D., *Intervening with High-Risk Youth: Preliminary Findings from the Children-at-Risk Program*, VHS videotape, 1995, NCJ 153270, U.S. $19 ($24 in Canada and other foreign countries).

Kellerman, Arthur L., M.D., M.P.H., *Understanding and Preventing Violence: A Public Health Perspective*, VHS videotape, 1994, NCJ 152238, U.S. $19 ($24 in Canada and other foreign countries).

Partnerships Against Violence (PAVNET), a coalition of six Federal agencies, a two-volume directory of approximately 600 anti-violence promising programs, 200 information and technical assistance sources, and about 125 funding sources. Items and costs, including postage and handling, are:

> WordPerfect or ASCII diskettes with the data updated as of February 29, 1996, and "Read Me" files with instructions on searching for data. The cost for either the WordPerfect diskette (NCJ 160046) or the ASCII diskette (NCJ 160045) is U.S. $16, Canada and other countries $21.
>
> Partnerships Against Violence, *Online User's Guide*, NIJ's User's Guide to anti-violence programs on the Internet, 1994, NCJ 15207.

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