

Laying Down the Law: A Review of Trends in Liability Lawsuits

By Teresa Anderson

A new premises security liability study to be released this month examines the cost of lawsuits, who is winning, and what sort of crimes are garnering the highest awards.

Karen Houge and her daughter were shopping at Edgewater Mall in Biloxi, Mississippi, on December 2, 1992. The parking lot of the mall, owned by American National Insurance Company, was crowded with holiday shoppers. At around noon that day, Houge went alone to her van to drop off some packages. While she was putting items in her car, Houge was assaulted by a man who began choking her. He then threw her to the ground. Houge fought back, but the man overpowered her and forced her into the van, where he continued to beat her.

A patron walking by the van noticed the altercation. The passerby went into the mall and reported the altercation to one of the two security officers stationed there. That officer used his two-way radio to notify Richard Wren, an officer who was patrolling the parking lot in a motorized security cart, that there appeared to be a "domestic disturbance" occurring near a tan van. Wren attempted to respond, but the parking lot was packed with holiday shoppers, hindering Wren's progress, and it took him more than five minutes to arrive on the scene. Wren could not see into the van clearly but could make out a man kneeling on the floor. Wren approached the van and demanded to know what was going on. The assailant held a knife out the van door and told Wren to go away. Wren called another security guard for assistance and then left the scene.

After Wren left, the assailant forced Houge into the driver's seat of the van, threatened her with the knife, and ordered her to drive away. Houge resisted and was able to jump from the moving vehicle, sustaining serious head, face, and neck injuries. The assailant climbed into the driver's seat and drove away. He was never identified or apprehended.

Houge sued the mall owner for negligent security. The company argued that the fault lay with the contract security officers who responded inappropriately. The jury found in favor of Houge and awarded her \$40,000 in damages. The mall owner appealed. The Mississippi Court of Appeals agreed with the lower court, determining that the mall owner could not delegate its liability to a contract security company.

The case (*Houge v. American National Insurance Co.*, Mississippi Court of Appeals, 2000) illustrates a number of important trends identified in a new study of premises security liability cases to be released this month by Liability Consultants Inc., of Sudbury, Massachusetts. According to the study, which examines premises security liability cases published from 1992 to 2001, assault and battery cases have increased over the past eight years, with parking lots being the most likely venue for crimes leading to premises security liability lawsuits. The study also finds that the amount of the awards is trending downward but the number of cases brought against companies has remained about the same.

In the study, Liability Consultants considered a number of factors, including which party is winning cases, how much cases are yielding in damages, where premises security liability crimes are occurring, what types of businesses are being sued for premises security liability, and the costs of

premises security liability suits in different industries.

Also considered are the types of crimes that lead to premises security liability lawsuits and how the gender of the plaintiff can affect the amounts of verdicts and settlements. The findings of the current study, which were based on an analysis of more than 1,000 cases, are also compared to a previous study, *Major Developments in Premises Security Liability I*. The previous study, which covers cases from 1983-92, was completed by the same company in 1993. That study looked at a much smaller number of cases (under 300), however.

Types of crimes.

The study breaks out premises security liability cases into the types of crimes committed. Of the cases studied, assault and battery made up 42 percent; rape/sexual assault, 26 percent; wrongful death, 15 percent; robbery, 9 percent; and false imprisonment, 4 percent. The remaining 4 percent of cases included categories such as burglary, arson, and motor vehicle theft. For each crime, the study notes which industries are most likely to be sued. Examples of assault and battery, robbery, and sexual assault are discussed here.

Assault and battery. The study looked at 716 assault and battery cases and found that they involved a wide range of businesses, with no one group dominating the field. Companies involved in this type of litigation even included movie houses, tenant co-ops, trailer parks, and churches.

The largest category (85 cases) involved cases of assault and battery that occurred in bars. Apartment buildings and condos made up the next largest group, with 76 of the claims, and restaurants defended against 70 claims. Retail stores were sued in 52 cases, and security companies were sued in 46.

For example, in *Gage v. One Congress Street Corp.* (Suffolk Superior Court, Massachusetts, 1997), a doorman at a Boston nightclub was asked to remove a visibly intoxicated patron. He did so, but the patron reappeared later. The doorman again removed the customer, but this time the patron pulled out a knife and stabbed the doorman.

The doorman sued the nightclub for inadequate security and for having inadequate policies for dealing with drunken patrons. The plaintiff was awarded \$1.2 million.

This case, however, contrasts with another decision, *Cox v. The Keg Restaurant* (Washington Appeals Court, 1997), where one bar patron, Patrik Cox, was attacked by another, who was intoxicated. James Kollasch, the manager of the bar, was told before the attack that the drunken customer, Philip Whalen, was out of control and potentially dangerous. The manager escorted Whalen from the bar, but Whalen immediately returned. Eventually, Whalen attacked Cox, who was severely hurt and suffered brain damage from the attack.

Cox sued the bar, claiming that it was negligent in failing to protect him from Whalen. However, the trial court found that Whalen, not the bar, was responsible for Cox's injuries and that the bar could not have prevented the attack. The decision was upheld on appeal by two higher courts.

In another case, misrepresentation of security became the major issue in an assault case. In *Valentine v. Nayarit Restaurant and Night Club* (California Supreme Court, 2000), the plaintiff was having an argument in the parking lot when a third party pulled out a gun and shot her. The plaintiff's spinal injuries rendered her a paraplegic. It turned out that the Nayarit nightclub

advertised that it offered secure, safe parking for patrons in the rear of its building; but the parking lot contained no security features. The case settled out of court during the trial phase for \$7 million.

Robbery. In robbery cases, as in the assault and battery lawsuits, the range of businesses involved was diverse, with no one group making up a majority. Of the 196 cases reviewed, the top five categories of litigants were hotels and retail stores (at 21 cases each), shopping malls (20 cases), apartment buildings/condos (19 cases), and restaurants (19 cases).

One example of this type of case is *Simms v. Prime Hospitality Corp.* (Florida District Court of Appeals, 1997). Gaylene Simms was staying at Wellesley Inn, owned by Prime Hospitality Corp., when she returned to her room at 9:30 p.m. As she exited the elevator, she saw a man standing in the corridor next to her room. The man, who was clean and neatly dressed, pointed a gun at her, forced her into her room, and robbed and raped her.

Simms sued Prime Hospitality for inadequate security. At the trial, the plaintiff presented evidence that there had been 56 crimes on the premises during the past three years, including robberies. The hotel argued that Simms was partly responsible for the incident because she should not have gotten off the elevator when she saw the man in the corridor. Instead, argued the defense, Simms should have returned to the lobby and reported the person.

The jury did not agree and awarded Simms \$400,000 in damages. A court of appeals later upheld the decision, determining that the reality of hotel accommodations makes it impractical to establish a rule that a guest must take precautions against anyone he or she might encounter in the hallway.

In another case, involving a retail establishment (*Roe v. Interstate Properties*, District Court of the Eastern District of Virginia, 1994), the plaintiff worked as a sales clerk in a kiosk shop in a mall. One night, about 30 minutes after the mall had closed, Roe was preparing the night deposit. A former mall employee robbed Roe at gunpoint, ordered her out of the mall, and then drove her to a remote location where he assaulted her. The assailant attempted to shoot Roe, but she struggled and later escaped when a passing car distracted the attacker.

Roe sued the owners and operators of the mall for inadequate security. In depositions given before the trial, plaintiff's witnesses offered evidence that a night security officer was supposed to be on duty at the mall but was not present on the night of the attack. In the previous four years, 170 crimes had been committed against individuals at the mall. The mall's security director noted that he had requested four guards to patrol the area but had only been given funds to hire one. The mall settled out of court for \$360,000 just before the trial began.

Rape. The rape and sexual assault lawsuits also involved a range of businesses, with none constituting a majority of the 334 cases studied. Apartment buildings and condos were the type of establishment most often sued (they were the litigants in 65 of the cases). Healthcare facilities were the defendants in 28 cases, while hotels and management companies defended against 26 cases each. Security companies and shopping malls were defendants in 23 cases each.

Apartment buildings also topped the list of venues for such crimes in the 1993 study, but attacks in healthcare settings have increased. Many of the new cases are occurring in nursing homes and assisted living facilities.

For example, in one case (*Niece v. Elmview Group Home*, Washington Supreme Court, 1997), a patient with cerebral palsy was sexually assaulted on numerous occasions by a male staff member. The plaintiff's family sued the healthcare facility. They argued that a policy prohibiting male employees from being alone with female patients was disregarded and that the facility should be held liable for negligent supervision.

The court ruled in favor of the group home, finding that the healthcare facility was not liable for the employee's conduct. The court of appeals reversed the finding, saying that the defendant had a duty to protect patients and that the act was foreseeable. The supreme court upheld the reversal.

In another case involving a healthcare facility (*McCann v. Grant*, Franklin County Court of Common Pleas, Ohio, 1999), a nurse was arriving for work at a hospital when she was abducted and sexually assaulted. The nurse sued the hospital for inadequate security, claiming that the facility had no perimeter security, no lot attendant, and no security guards, and that there was inadequate monitoring of CCTV cameras. The jury awarded the plaintiff \$400,000

Who's winning.

Out of the 1,086 cases studied, defendants prevailed 52 percent of the time. Plaintiffs won 21 percent of the time, and 19 percent of the cases were remanded--meaning that a case was sent back to the trial court for some further action (those cases had not resulted in a verdict for either party at the time the study was concluded.) Eight percent of the cases were settled, with the results made public.

These numbers have shifted since the previous study; at that time, plaintiffs prevailed more often. The change can be attributed to a number of factors, according to the study. One factor credited with the change is better training for property owners, defense attorneys, and insurance claims adjusters. This training has allowed defendants to pick their battles and to better defend their security programs as reasonable.

According to the study, the majority of plaintiffs in premises security liability suits, 71 percent, were people invited onto the property, for example, customers and tenants. Seventeen percent were employees. Seven percent were unknown--meaning that a confidential settlement was reached or the plaintiff's identity and relationship were not revealed in the suit. Only one percent of plaintiffs were trespassers.

Of the awards or settlements, 40 percent were amounts less than \$250,000; 16 percent were between \$250,000 to \$500,000; 13 percent were in the \$500,001 to \$1 million range; and another 13 percent fell in the \$1 to \$2 million category. Ten percent of plaintiffs received \$2 to \$5 million, and 8 percent obtained more than \$5 million. (A settlement is agreed to by the parties before the trial or before the resolution of the trial, while an award is determined by the jury or judge after the defendant has been found guilty.)

The study found that more cases are yielding smaller awards, perhaps because more of the cases in the newer study concern charges of assault and battery, which generally result in lesser awards than cases involving rape or wrongful death.

The amounts varied during each year of the study, with some years yielding higher settlement amounts and lower awards for plaintiffs. For example, of the 17 cases examined from 1996, the

average award was \$2.3 million, while the average settlement was \$1.9 million. Of the 31 cases in 2000, the average award after a guilty verdict was \$500,000, while the average settlement was \$2.3 million. (The award amounts were adjusted when reduced on appeal.) The significance of these changes is hard to decipher because of the discrepancy in the number of cases reported each year. For example, while 59 cases were studied in 1994, only 14 were studied in 1999.

Location.

Of the cases studied, the largest category (289) involved crimes that occurred in parking facilities. That represents a change from the 1993 study, in which apartments were the most likely place for crime that resulted in premises security liability suits. (And of the crimes in parking lots, robberies, rapes, sexual assaults, and wrongful deaths were the most common types.) Other common locations for crime include retail stores, exterior common areas, apartments, bars, and schools.

Types of businesses.

The study found that the types of businesses sued were diverse, with no one type making up a large percentage of the total cases studied. (Some cases involved more than one defendant--such as a security company and an apartment building--so the numbers noted with regard to the types of businesses sued refers to the parties involved in litigation rather than to the number of cases.) Apartment buildings and condos were most often sued (126 defendants), followed by retail stores (99 defendants), and bars (97 defendants). In 90 of the cases, a security company was sued, and in 88 cases, a restaurant was the object of litigation. Hotels follow, with 70 defendants; and shopping centers, with 63.

Though the top contender, apartments, remains the same as in the first study, the other categories illustrate some changes. For example, in the first study, hotels followed apartments as the type of business most often sued. However, in the current study, hotels dropped below retail stores, bars, and security companies.

Costs.

The study also examined the cost of premises security liability cases to different industries from 1992 to 2001. For example, apartment buildings paid on average \$1.5 million in damages from awards after guilty verdicts and \$1.7 million in reported settlements. Premises security liability cases cost hotels an average of \$1 million in awards and \$632,000 in settlements. Retail establishments paid on average \$1.7 million in verdict awards and \$1.2 million in settlements. Restaurants paid an average of \$600,000 in awards and \$2.8 million in settlements.

As would be expected, wrongful death cases yielded the largest awards, with an average of \$2.8 million awarded both in verdicts and in settlements. Robberies were next, with an average award of \$1.9 million and an average settlement of \$1.6 million. Rape cases were awarded on average \$1.5 million and garnered \$1.2 million in settlements. In assault and battery cases, plaintiffs received an average award of \$1.2 million and average settlements of \$1.1 million.

It should be noted, however, that these numbers do not tell the whole story. To determine costs, the cases were only counted once, even if some crossover in categories occurred. For example, a robbery may have resulted in wrongful death or may have included a rape, but the case would have been placed in only one of those categories.

Legal theory.

According to the study, premises security liability cases predicated on inadequate security are

more likely to result in higher awards and settlements than those based on the criminal act of an employee. Inadequate security awards averaged \$1 million, and settlements averaged \$1.5 million.

Cases centering on crime by an employee--based on negligent hiring, retention, or supervision--yielded awards of around \$775,000 and average settlements of \$1.4 million. (This distinction was also true in the first study, where inadequate security cases averaged \$9 million in awards and crimes by employees garnered an average of \$3 million.)

Inadequate security. An example of an inadequate security case is that of *M.C. v. Yeargin* (Missouri Court of Appeals, 1999). In that case, a woman staying at a hotel attempted to leave her room but was forced back in by an assailant. The two struggled and the woman screamed, causing a guest in a nearby room to call the hotel security department.

Two security officers arrived at the door of the room and heard the attacker threaten to kill the woman. The security officers decided not to intervene but called police and went down to the lobby to wait for assistance. Meanwhile, the assailant--who was HIV positive--raped and sodomized the woman.

The attacker then walked out of the room and exited the hotel before police arrived. The woman sued the hotel for inadequate security. The jury awarded her \$11 million. The award was reduced to \$3 million on appeal and was ultimately settled for a confidential, but considerably lower, amount while awaiting an appeal to the state supreme court.

In another case, *Bond v. BH Acquisition Corp.* (Hinds County Circuit Court, Mississippi, 1997), a waitress was attacked and murdered in the parking lot of the motel where she worked. Her family sued the motel owner and the management company, claiming that security was inadequate. Specifically, the plaintiffs pointed out that only one security officer was retained to patrol several properties covering 240 acres and that the sole light for the parking lot had not been operating for months before the murder. The case settled for \$1.6 million.

Negligent hiring and retention. In contrast to the inadequate security cases, crimes committed by employees are usually tried under the theories of negligent hiring and negligent retention. While these legal charges are being brought more often than in previous years, they are more difficult to prove.

In some cases, however an employer's failure to do a background check has been judged as sufficient legal grounds on which to base a claim of negligent hiring. In one such case (*Smith v. Sparks Regional Medication Center*, Arkansas Court of Appeals, 1998), a hospital patient was sexually assaulted by an employee assigned to bathe her. Charges were brought against the employee, who was convicted of assault.

The woman also sued the hospital, claiming that if it had conducted a thorough background check, it would have learned that the employee had been discharged from one previous job for harassing a patient and disciplined at another for engaging in sexual contact with two female patients. The hospital, through its negligent supervision, was responsible for the criminal acts of its employees, the court determined, and it ruled for the plaintiff. The appellate court upheld the jury verdict.

Gender.

Another finding of the study was the shift in the amount of money awarded plaintiffs of each gender. In the current study, male plaintiffs received significantly more in damages--in awards and settlements--than their female counterparts. In contrast, the 1993 study found female victims receiving larger awards. This trend is especially pronounced in cases of rape and sexual assault, wrongful death, and robbery.

Based on 56 cases involving rape and sexual assault, women received around \$1.4 million in damages, while men were awarded \$4.4 million. In wrongful death cases, female plaintiffs were awarded \$2.3 million on average. The average award for male plaintiffs was \$3.7 million. In robbery cases, women received \$1.9 million in compensation, while men received \$2.4 million.

In the 1993 study, male victims received an average of \$2.2 million in jury awards and \$600,000 in settlements. By contrast, female plaintiffs were awarded an average of \$4.1 million in awards and \$600,000 in settlements. (The 1993 study did not break down awards by types of crime.)

Though the disparity in the current study is across the board, the sexual assault category was colored by one particularly egregious case. In *Peterson v. Gibraltar Savings and Loan Club West* (Louisiana Fifth Circuit Court of Appeal, 1998), Fred Peterson was abducted at gunpoint from a parking garage by two men. The men drove Peterson to an abandoned house, sexually assaulted him, and infected him with the AIDS virus.

Peterson sued the owner of the parking garage and the security firm that provided guards for the facility. Evidence presented at trial (such as a lack of entries into the log) revealed that the guard who was supposed to be patrolling while the abduction was taking place was not doing his job correctly that night. Also, the evidence showed that the garage owner had removed the security guard hut at the entrance to the garage despite an increase in crime at the premises over previous years.

The jury found in favor of the defense. However, the appeals court took the extraordinary action of overturning the jury verdict and found in favor of the plaintiff, awarding Peterson \$4.4 million.

A similar set of circumstances resulted in a much lower award in another case (*Doe v. Kmart Corp*, Circuit Court of Charleston County, South Carolina, 1997). In that case, a woman was shopping at Kmart when she was robbed, kidnapped at knifepoint, and driven to a nearby town where she was sexually assaulted for 22 hours.

Doe sued Kmart for inadequate security, claiming that the store had been aware of crime in the area--including an assault and attempted kidnapping in the same parking lot--but had failed to take action. Doe also alleged that the store had failed to hire security officers even though a corporate memo encouraged stores in high-crime areas to do so. The jury found in favor of the plaintiff and awarded her \$600,000.

Property owners can learn a great deal by studying premises security liability cases: who is most likely to sue, what types of crimes lead to lawsuits, and the legal theories that prevail in such cases. Most important, by looking at these cases, companies can clearly see the high cost of premises security liability--and the true value of putting in adequate security measures before it's too late.

of Liability Consultants Inc., in Sudbury, Massachusetts contributed to this article. The study will be available for sale from the company later this month.

Methodology

The study comprises 1,086 reported cases from 1992 to 2001. The cases were taken from the following sources: *ATLA Law Reporter*, *Security Law Newsletter*, *Premises Security Liability Report*, *Professional Apartment Management*, *Private Security Case Law Reporter*, *Lawyers Weekly USA*, *Mealey's Litigation Reports*, *The Spain Report*, and *Personal Injury Verdict Reviews*. Only reported cases were considered. (However, it is important to remember that many cases go unreported due to confidentiality agreements.) Cases were then analyzed and categorized by legal experts at Liability Consultants Inc.
