

# PUBLICATION

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## Crimes on Your Properties Have Multiple Victims: The Affected Patron, Your Future Patrons and Your Business

January 06, 2010

In December 2007, a gunman entered a shopping mall in Omaha, Nebraska and killed nine people. Frequently, there are news reports of armed robberies or shootings occurring at hotels, restaurants or other commercial properties. With each of these tragic occurrences, businesses are asking a very important question: can we be liable for the criminal acts of third parties that occur on our property? In most states, including Tennessee, the answer is yes. Owners and operators of commercial property have a duty to take reasonable measures to protect their customers from the foreseeable criminal acts of third parties.

Prior to 1996, Tennessee courts held that commercial property owners had a duty to protect their customers only if they knew or should have known that criminal acts were occurring, or about to occur, on their property. Under this standard, businesses were almost never liable because their duty to protect customers only arose if they had actual notice that a crime was about to be committed and then did nothing about it.

In 1996, in *McClung v. Delta Square Limited Partnership*, 937 S.W.2d 891 (Tenn. 1996), Tennessee joined a national trend and established a new standard by adopting a balancing test. Under the test, if it is foreseeable that a third party's criminal act could occur on the premises, the business has a duty to provide reasonable protective measures to reduce the risk. Likewise, low foreseeability of potential criminal acts results in a much lower burden upon the business. Thus, the first step in determining the business's duty is to analyze whether criminal acts on the premises are foreseeable.

To determine foreseeability, Tennessee courts most often review prior incidents of crime on the premises and adjacent properties. For example, in a case involving a knifepoint robbery in a shopping center parking lot, the court determined that the criminal act was not foreseeable because there were only two assaults in the parking lot in the previous two years and no robberies. To the contrary, in a case where 286 criminal acts were committed at a shopping mall in the previous 14 months, the court ruled that a third-party criminal act was foreseeable. To prove that crimes are foreseeable, most plaintiffs introduce copies of local police reports and statistical analysis showing crime locations.

Under the *McClung* standard, even if the court concludes that third-party criminal acts are foreseeable, businesses are not required to be the insurers of their customers' safety. The court will still evaluate the second part of the balancing test by considering what protective measures are reasonable. For instance, in a case involving a shooting in a hotel parking lot, the court did not hold the hotel liable because one security guard was on duty and there was no evidence that an additional guard would have prevented the shooting. Because these rules of analysis are so fact-specific, there is no predictable bright line test that will allow the business operator to win the case on summary judgment.

Under fact-based tests like *McClung*, businesses can best prevent liability by first evaluating what crimes are foreseeable and then taking action to deter those crimes. This could require an advanced video system and full-time security or the installation of additional lighting. If a business finds itself defending a crime-related claim in court, an important factor is the record of how the business seriously considered protecting its customers from foreseeable criminal activity and then took reasonable action. Since the business's actions are always viewed in hindsight, after an incident occurs, the practical burden on a defending business to prove its

actions were reasonable can be daunting. Operators must demonstrate situational awareness of risks posed by their surroundings and the crimes committed at nearby businesses with similar exposures. Ignoring the issue is not likely to be a successful defensive strategy.