

## I. SCOPE & OVERVIEW

This presentation addresses innkeeper liability and the specific subset of negligent security. This presentation includes an overview of the duties imposed on an innkeeper, recent jurisprudence, and considerations and checklists for preparing a strong defense.

## II. INNKEEPER LIABILITY

### b. Duty

- i. The reasonable standard: An innkeeper is bound to exercise reasonable care for the safety of guests and patrons.
- ii. Non-Delegable: The duty of an innkeeper to protect its guests is non delegable, such that liability cannot be avoided on the ground that their performance was entrusted to an independent contractor.<sup>1</sup>

Courts have likened duty of innkeeper to duty of a common carrier such that a guest is entitled to a high degree of care and protection.<sup>2</sup> As a general rule, innkeepers are held to a higher standard of care than other business merchants.

- iii. Industry custom is not conclusive as to what is reasonably prudent. Courts note the degree of care an innkeeper must exercise varies with the grade and quality of accommodations offered.
- iv. Typically not bound to anticipate and guard against the unusual or abnormal.
- v. Establish Applicable Law and Standards: The applicable law often narrows the dispute. It should be determined whether local ordinances prescribe mandatory security measures. Of note, ordinances generally afford a minimum standard of care and the facts of a particular case may support a finding of negligence, despite compliance therewith. Government agencies also promulgate standards such as state crime prevention committees.

### b. Liability Evaluation

- i. Foreseeability: While it is generally foreseeable a criminal may commit crimes, that level of foreseeability does not make a criminal's acts the legal responsibility of everyone who may have contributed in some way to the criminal opportunity. In a premises liability case involving the criminal act of a third party, the first question is whether the criminal act was foreseeable.

a. To establish foreseeability a plaintiff must establish: (1) actual or constructive knowledge of the assailant's violent nature; or (2)

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<sup>1</sup> U.S. *Sec. Services Corp. v. Ramada Inn, Inc.*, 665 So. 2d 268 (Fla. Dist. Ct. App. 3d Dist. 1995)(Although the hotel could contract with an independent contractor to provide the required security for business invitees, it was nonetheless vicariously responsible for any negligence of independent contractor in providing such services.)

<sup>2</sup> *McAvey v. Lee*, 260 F.3d 359, 57 Fed. R. Evid. Serv. 511 (5th Cir. 2001) (applying Louisiana law).

actual or constructive knowledge that an atmosphere of violence exists on the premises. Evidence of an existing atmosphere of violence may include the overall pattern of criminal activity prior to the event in question that occurred in the general vicinity of the premises, as well as the frequency of criminal activity on actual premises.

b. Patterns are an important consideration when assessing foreseeability. For example, the type of crime can be stranger-on-stranger, gang related, drug related, or domestic violence related. This is important as most security experts will acknowledge that domestic violence is rarely relevant to a foreseeability analysis of stranger-on-stranger crime.

ii. Causation: The second question is whether the plaintiff can show the damages were proximately caused by the innkeeper's negligence. The test is not whether certain security precautions would have prevented the crime.

a. While an innkeeper is not the insurer of safety for its guests, it is under the duty to exercise reasonable care to maintain in a reasonably safe condition those parts of the premises which a guest may be expected to use. In the final analysis, the issue is whether, under all the circumstances, the hotel provided its guests reasonable protection against injuries from criminal acts.<sup>3</sup>

b. It has been held that the test for legal cause in a negligent security case is not whether certain security precautions would have prevented the crime, but whether the measures would have helped to deter the criminal activity.

c. Adequate training is often a source of causation. Issues that arise with security guards often relate to their training or lack thereof. A guard can become a creature of habit. A guard may check certain entrances at the same time every night or may go on break at the same time every night. This can be a sword or a shield.

### **III. NEGLIGENCE SECURITY**

Negligence is primarily a civil law concept intended to address grievances between people and encourage socially responsible behavior. The purpose behind criminal law is to enforce the government's interest in deterring future crime by punishing perpetrators. When a loss is suffered from a security incident, criminal law offers no compensation to the victim if the offender cannot be identified or is judgment-proof. As a result, victims are likely to seek loss compensation by turning to the civil arena where there are plenty of deep pockets.

A growing number of jurisdictions are beginning to recognize a distinction between situations where the plaintiff is arguing that the defendant did not provide adequate security measures, and the

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<sup>3</sup> *Bass v. Gopal, Inc.*, 680 S.E.2d 917 (S.C. Ct. App. 2009).

situation where the plaintiff is arguing that security personnel already hired by the defendant acted in a negligent manner, causing injury to the plaintiff. The latter is referred to as “negligent security”.<sup>4</sup>

Negligent security actions represent a significant and promising development for plaintiffs in the law of third-party premises liability actions. Even some of the most conservative jurisdictions recognize when a defendant undertakes to provide security a duty to protect the plaintiff is assumed.<sup>5</sup> Courts across the nation have uniformly held that when a business owner or proprietor hires security personnel and the personnel is on duty at the time of the injury-producing event, the owner or proprietor assumes a duty of care to protect the plaintiff.<sup>6</sup>

- a. Alarming Statistics
- b. Limitations?: The scope of the negligent security argument is not without its limits. At least one court has upheld summary judgment in favor of a security company contracted to provide security services to an apartment complex. The plaintiff – a guest of a tenant in the apartment building—was stabbed while in the presence of a security guard. The court held the contractual duty between the owners of the apartment complex and the security did not run to the guest of a tenant injured on the premises.<sup>7</sup> Other courts have held to the contrary.<sup>8</sup>
- c. Pertinent Questions: It is critical to understand why the owner decided to hire security personnel in the first place. Was the decision based on past experience at another business? Was the decision based on past experiences at another business? Was the decision based on prior criminal behavior at the business premises? Was the decision based on the nature of the business? These are questions which the plaintiff will be asking and which will help the plaintiff establish what the owner had reason to foresee at the time of plaintiff’s injury.
- d. Pertinent Documents: contracts between owner and security company which may define what duties the security company is supposed to discharge.

#### IV. FOR THE DEFENSE

- a. Investigation Considerations

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<sup>4</sup> *Ann M. v. Pacific Plaza Shopping Center*, 6 Cal. 4th 666, 25 Cal. Rptr. 2d 137, 863 P.2d 207, 1994 O.S.H. Dec. (CCH) ¶30356 (1993).

<sup>5</sup> *Walls v. Oxford Management Co., Inc.*, 137 N.H. 653, 633 A.2d 103 (1993) (landlords who gratuitously or contractually provide security may be liable for third-party criminal activity); One of the earliest such cases appears to be *Harris v. Pizza Hut of Louisiana, Inc.*, 455 So. 2d 1364 (La. 1984), in which the Louisiana Supreme Court wrote: "A business which undertakes to hire a security guard to protect itself and its patrons is liable for physical harm which occurs because of negligence on the part of that guard."

<sup>6</sup> *Mata v. Mata*, 105 Cal. App. 4th 1121, 130 Cal. Rptr. 2d 141 (1st Dist. 2003), as modified, (Feb. 6, 2003) and review denied, (Apr. 23, 2003) (tavern); *Lopez v. Baca*, 98 Cal. App. 4th 1008, 120 Cal. Rptr. 2d 281 (2d Dist. 2002), as modified, (June 5, 2002) (tavern); *Trujillo v. G.A. Enterprises, Inc.*, 36 Cal. App. 4th 1105, 43 Cal. Rptr. 2d 36 (2d Dist. 1995) (fast food restaurant).

<sup>7</sup> *Cassell v. Collins*, 344 N.C. 160, 472 S.E.2d 770 (1996).

<sup>8</sup> *Avila v. Jado Properties Inc.*, 5 Cal. Rptr. 3d 141 (Cal. App. 2 Dist. 2003), review granted, 8 Cal. Rptr. 3d 540, 82 P.3d 746 (Cal. 2004).

i. Time sensitive information: A case is won or lost before suit is filed. The following is a list of time sensitive information which should be gathered and considerations related thereto:

a. Property Condition: The property's physical condition should be documented as soon as possible as it may change by the time of trial or an expert's site visit. Shrubbery and trees are seasonal and their ability to "hide" a perpetrator or block light may be starkly different in January compared to July. Improvements or repairs may be made to the property after the incident, particularly if the incident exposes a dangerous condition. Documentation of conditions, such as evidence relating to the entry method of the perpetrator is critical.

b. Written Statements: Signed written statements from key employees and witnesses should be obtained so their stories are documented should they later be fired or quit due to dissatisfaction. Disgruntled ex-employees are fruitful sources of information for plaintiff's attorneys.

c. Surveillance tapes; ATM tapes; 911 recordings

ii. Reports: Obtain actual reports and not just an index. An index always warrants a further look. On its face alone, an index can be deceiving. Take the following examples. A crime may simply be reported from a property location, but did not actually occur on the property. The index log may not even reflect the report of a "crime." In hotel cases, you may see frequent calls to the police reporting "prop found" or "property found." This simply means someone found property which did not belong to that person or the hotel. The index log may contain a record where no crime ever occurred. There are documented cases where an alleged rape victim recanted the entire claim when taken to the station for questioning. Yet, the initial call is still listed on the police index as "rape." One should always be on alert for the issue of a false allegation.

iii. Police: In most jurisdictions, local police make routine stops. As a result officers tend to be familiar with an inn's reputation. This is a valuable source of information.

b. Going to Court

i. Theories of Recovery: An injured guest may file suit against the innkeeper for damages suffered at the hands of a third person based on tort principles or the breach of contract. The breach of contract claim is used by plaintiffs in a situation where a statute of limitations problem has ruled out a tort action but permits an action sounding in contract to be filed.

ii. Defenses: There will be no liability where: (1) there was no duty of care owed to the victim under the facts of the case; (2) defendant exercised reasonable care in discharging the duty to the victim; (3) defendant's actions or lack of actions did not proximately cause the victim's injury.

ii. Motion Practice

a. Dispositive motions are rarely successful as whether adequate safety precautions were employed is “almost always a question of fact for the jury.”<sup>9</sup>

i. Summary Judgment Denied – Plaintiff guest voluntarily let alleged third-party assailants into his room, plaintiff recognized the assailants, and talked with them for approximately 10 minutes before the alleged attack. These facts did not negate plaintiff’s claim that the hotel had a duty to protect the guest and to provide adequate security measures, thus precluding summary judgment.<sup>10</sup>

b. Motions in Limine are a critical tool for the defense but there are no standard rulings amongst the courts. In general, evidence of a guest’s prior criminal record will be excluded in a negligence action against the innkeeper. Likewise, some courts place restrictions on evidence of prior criminal activity at the premises.<sup>11</sup>

i. In jurisdictions using a more liberal approach, a broader array of evidence will be admissible to show foreseeability, including evidence of crimes in the surrounding neighborhood, statistics on crime as they apply to innkeepers, prior similar incidents of crime occurring on the innkeeper’s premises, and an assailant’s reputation for violence. Some more liberal jurisdictions include: Louisiana, Connecticut, Colorado, the District of Columbia, Florida, Georgia, Idaho, Kansas, Maine.

iii. In more conservative jurisdictions the plaintiff will be required to show a sufficient number of similar incidents of crime occurring on the innkeeper’s premises in order to prevail. Conservative jurisdictions allow more evidence if the plaintiff can establish negligence on part of the security personnel. Some of these jurisdictions include California, Texas, New Hampshire, and Virginia.

c. Motion to Bifurcate is critical in cases involving devastating injuries and questionable liability. Often, bifurcation of liability and damages aspects of the trial are strictly within the court’s discretion. In other instances, bifurcation may be mandated by statute.

iii. The Defense Philosophy courts have expressed sympathy for the difficulty of protecting guests. Should a case proceed to trial, defense counsel should

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<sup>9</sup> *Jenkins v. Ehmer*, 272 A.D.2d 976, 707 N.Y.S.2d 738 (4th Dep’t 2000); *Hardy v. Pier 99 Motor Inn*, 664 So. 2d 1095 (Fla. Dist. Ct. App. 1st Dist. 1995).

<sup>10</sup> *Stafford v. Drury Inns, Inc.*, 165 S.W.3d 494 (Mo. Ct. App. E.D. 2005), reh’g and/or transfer denied, (Mar. 30, 2005).

<sup>11</sup> See, *Patterson-Khoury v. Wilson World Hotel-Cherry Road, Inc.*, 139 S.W.3d 281 (Tenn. Ct. App. 2003), appeal denied, (Jan. 26, 2004)(court granting motion in limine to limit evidence of prior criminal activity on the hotel premises to events within the last year prior to the crime).

emphasize the following factors to the jury which highlight the fact that adequate security is perhaps an unattainable goal: (1) rising crime rate in society generally; (2) unpredictability of criminal assaults on a particular guest at a particular date; (3) very nature of assaults which usually occur suddenly, without warning, and without giving an opportunity to defend; (4) severe limitations of the capability of anyone, including an innkeeper to prevent an assault on another person by a third party; (5) inherent vulnerability of travelers, whose mobility makes them difficult to protect; (6) evolution of laws which in earlier times granted innkeepers wide latitude to use discretion to reject or eject persons with impunity but now require admission of nearly anyone to the premises to prevent civil rights violations; (7) limitations in many states upon innkeeper's rights to arm himself to protect either himself or guests.

## V. RECENT JURISPRUDENCE

### i. Innkeeper Liable

- a. Considering Technology: Court affirmed a judgment in favor of a plaintiff who was the victim of a violent attack by an intruder, where the plaintiff alleged that innkeeper should have installed television monitoring equipment in the public areas of the establishment as a deterrent to criminal activity.<sup>12</sup> An innkeeper's failure to install cameras or other security equipment on the premises was one fact cited by a court in affirming a sizable award in favor of a guest who was the victim of a violent attack by two men who broke into his room and kidnapped him.<sup>13</sup>
- b. The Premises: Court holding the parking lot was part of the "hotel premises" since, by its own admission, the hotel leased the adjacent parking lot primarily to provide a convenience for its hotel guests who were allowed to park on the property at no extra charge, such that, by virtue of that lease, the adjacent parking lot became as much a part of the hotel's premises as the hotel rooms themselves. Given the repeated instances of assault that had taken place within the previous year in or around the parking lot, the jury was warranted in finding that the hotel's failure to provide any security whatsoever constituted a clear breach of the innkeeper's special duty to his guests, and that this breach substantially contributed to the attack.<sup>14</sup>
- c. Unruly Guests: Hotel patrons who were arrested, detained, and allegedly injured by sheriff's deputies who were removing them at hotel's request stated negligence claim

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<sup>12</sup> *Orlando Executive Park, Inc. v. Robbins*, 433 So. 2d 491 (Fla. 1983).

<sup>13</sup> *Margreiter v. New Hotel Monteleone, Inc.*, 640 F.2d 508 (5th Cir. 1981) ( applying Louisiana law).

<sup>14</sup> *Landry v. St. Charles Inn, Inc.*, 446 So. 2d 1246 (La. Ct. App. 4th Cir. 1984).

under Florida law against hotel for breach of duty of reasonable care to protect them, as guests at hotel-sponsored event, from undue risk of harm.<sup>15</sup>

- d. Risk Awareness: Owners and operators of resort bar breached duty to guest to protect him from imminent assaultive conduct by fellow bar patrons, even if guest was aware of risk; no witness saw any security in bar during the 90-minutes of yelling, threatening, cursing, and shoving among drunk patrons, and bar staff continued to serve drinks and did not call security until after fight started.<sup>16</sup>
- e. Duty to Warn: Evidence that the management of a motor inn knew that during the previous six months more than 30 criminal incidents, including burglaries and assaults, had occurred on the premises, yet failed to warn a female guest of this possible threat to her safety was alleged, among other things, by the guest in her suit against the motel arising from an attack committed upon her by a strange man while she walked to her room, the court holding that this and other evidence established the motel's liability.<sup>17</sup>
- f. Need to Survey?: Holding trial court had improperly granted hotel's motion for summary judgment in a suit brought by a guest to recover damages for injuries suffered in an attack by two unknown assailants in the hotel parking lot, where affidavits and depositions furnished in support of the motion revealed that a security guard employed by the hotel at the time of the attack made no conscious effort to find out anything about the crime situation in the area immediately surrounding the hotel, and that police had been called to the hotel twice in the 12 months preceding the attack on the subject guest because of robberies committed at establishments on streets bordering the parking lot where the guest was assaulted.<sup>18</sup>

ii. Innkeeper Not Liable

- a. Lack of Evidence: No evidence existed as to how the person or persons who killed patron entered the room, no evidence showed a forced entry to patron's room, door to patron's room, which had a steel frame, an electronic door lock that would automatically close, and a peep hole. The hotel met minimum standards for protecting access to the

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<sup>15</sup> *Zivojinovich v. Ritz Carlton Hotel Co., LLC*, 445 F. Supp. 2d 1337 (M.D. Fla. 2006).

<sup>16</sup> *Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762 (Tex. 2010).

<sup>17</sup> *Orlando Executive Park, Inc. v. Robbins*, 433 So. 2d 491 (Fla. 1983).

<sup>18</sup> *Walkoviak v. Hilton Hotels Corp.*, 580 S.W.2d 623 (Tex. Civ. App. Houston 14th Dist. 1979), writ refused n.r.e., (Sept. 12, 1979).

room, and there was evidence that patron could have been shot by someone he knew and had allowed into the room.<sup>19</sup>

- b. Need to Survey: Innkeeper and franchisor did not breach duty of care to guest who was shot after leaving room to confront assailant, even if no security survey and crime analysis had been conducted, innkeeper provided reasonable protection for its guests, including appropriate lighting and doors.<sup>20</sup>
- c. The Media: Risk of the particular criminal conduct against guest who was victim of armed robbery, kidnapping, and aggravated assault, which began in parking lot, was unforeseeable to owner and operator, and thus, owner had no duty to protect. No evidence that few property crimes occurring at motel or in surrounding area were occurring with frequency or were kind that would have facilitated violent personal crimes, and there was no evidence that criminal activity within one-mile radius of motel, as indicated by police reports, was widely publicized in media or otherwise known to owner.<sup>21</sup>
- d. Similarity: Summary judgment granted because there was no evidence as to whether the hotel knew or should have known that its guests were at risk of a violent criminal sexual attack. Court stressing that the evidence regarding the other crimes was irrelevant, because none of the incidents were substantially similar to the sexual assault that was the basis of the subject litigation. Court adding those incidents did not serve as notice for the crime committed against the plaintiff.<sup>22</sup>
- e. Location: Ambient neighborhood crime was seen by the court as insufficient to make a criminal assault within the motel foreseeable where there was no such history of criminal activity on the premises of the motel itself.<sup>23</sup>
- f. Sudden Nature: Despite breach of duty of fraternal organization to provide adequate security to member, breach not cause of damages when attack was by unknown, knife-wielding assailant. It was not foreseeable that someone with no established connection to fraternity would spontaneously approach and stab plaintiff stepping off final

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<sup>19</sup> *Brown v. Motel 6 Operating, L.P., Ltd.*, 989 So. 2d 658 (Fla. Dist. Ct. App. 4th Dist. 2008).

<sup>20</sup> *Bass v. Gopal, Inc.*, 680 S.E.2d 917 (S.C. Ct. App. 2009).

<sup>21</sup> *Jai Jalaram Lodging Group, L.L.C. v. Leribeus*, 225 S.W.3d 238 (Tex. App. El Paso 2006), review denied, (July 7, 2006).

<sup>22</sup> *Ritz Carlton Hotel Co. v. Revel*, 216 Ga. App. 300, 454 S.E.2d 183 (1995).

<sup>23</sup> *Regina v. Broadway-Bronx Motel Co.*, 23 A.D.3d 255, 804 N.Y.S.2d 305 (1st Dep't 2005).



stair from lodge to public sidewalk. This unexpected, intervening criminal act broke any causal nexus between any alleged lack of security and plaintiff's injuries.<sup>24</sup>

- g. Event Size: Court noting evidence supported finding that 1,200-room hotel failed to perform required duty, when on night of a large ball in progress, employed only 1 security officer, 1 room clerk and 1 bellboy. Hotel staff was extremely unresponsive to calls for help from victims.<sup>25</sup>

## VI. APPENDIX OF RELEVANT MATERIALS

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### CHECKLIST OF INFORMATION TO OBTAIN FROM PLAINTIFF

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#### Background Information

- Full legal name
- Current address, daytime phone number, evening phone number
- Social
- Age
- Education
- Employment history
- Marital status
- Dependents
- Health history, including any prior physical or emotional conditions

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<sup>24</sup> *Milton v. I.B.P.O.E. of World Forest City Lodge, No. 180*, 121 A.D.3d 1391, 995 N.Y.S.2d 360 (3d Dep't 2014).

<sup>25</sup> *Nordmann v. National Hotel Co.*, 425 F.2d 1103 (5th Cir. 1970) (applying Louisiana law).

- Insurance coverage

### **Restaurant/Tavern/Business**

- Description of the restaurant/tavern/business where assault occurred
- Does plaintiff know if proprietor is also landowner; if not, does plaintiff know who landowner is
- Description of all security measures at the time of the assault of which plaintiff was aware
- Any prior conversations between plaintiff and defendant about security at the business
- Representations by restaurant /tavern that business was safe
- Questions or complaints by guests

### **The Assault**

- Description of the circumstances in which the assault occurred
- Time
- Place
- Witnesses
- Intruder's means of access—signs of forced entry
- Any photos taken of entrance area
- Details of the assault—including how long did the assault last
- Physical injuries suffered by the plaintiff
- Emotional injuries suffered by the plaintiff
- Post-traumatic stress disorder
- Depression
- Agoraphobia
- Anxiety
- Sleep loss
- Weight gain/loss

- Night terrors
- Mood/personality swings
- Prior relationship between victim and attacker, if any
- Investigation of the circumstances of the assault
- By whom
- Results of the investigation

**Plaintiff's Health Care Provider(s)**

- Name, address, and telephone number of each doctor, hospital, or other health care provider who examined or treated plaintiff as a result of the assault
- Diagnosis
- Tests performed
- Treatments performed/recommended
- Prognosis

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**DEPOSITION AND INTERROGATORY INFORMATION TO OBTAIN FROM  
PLAINTIFF**

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**Background Information**

- Plaintiff's status with respect to:
  - Age
  - Education
  - Employment
  - Marital status
  - Dependents
  - Health—Prior physical, mental or emotional conditions

**Other Litigation**

- State whether the plaintiff has ever been involved in any other similar litigation. If so, state
  - Names of parties and attorneys
  - Nature of claims asserted
  - Factual circumstances

- — Outcome

### **The Tavern/Restaurant/Business Premises**

- Describe the tavern/restaurant/business where assault occurred
- Describe all of the security measures in place at the time of the assault of which the plaintiff was aware
- Describe safety measures taken by the defendant
- State which precautions or measures the plaintiff contends were inadequate
- Describe the circumstances in which the assault occurred
  - — Time it occurred
  - — Where it occurred on the premises
  - — Who was involved other than the plaintiff
  - — Witnesses
  - — Any photos taken at time of the assault
  - — How long did the assault last
- Describe in detail the physical, mental or emotional injuries sustained by the plaintiff as a result of the assault

### **Plaintiff's Health Care Providers**

- Provide name, address and telephone number of each health care provider who examined or treated the plaintiff as a result of the assault
- Describe any diagnoses made, treatments performed, treatments recommended, and prognosis
- Describe the basis for plaintiff's belief that the business should have foreseen the occurrence of the criminal assault on the plaintiff

### **Requests for Admission**

- Plaintiff was on the defendant's premises for a business purpose
- Plaintiff had previously been on the defendant's premises
- Plaintiff never complained about the security provided at the defendant's premises
- Defendant provided a safe environment to its patrons at the time of the assault
- Plaintiff engaged in behavior that contributed to the plaintiff's injuries (state facts)

- Plaintiff knew that the business premises were unsafe [or knew the assailant] and yet voluntarily entered the premises [or provoked the assailant]
- Defendant is not liable to the plaintiff
- The defendant's security measures were adequate under the circumstances

**Production of Documents**

- Plaintiff's medical records, reports, and correspondence from all health care providers, including psychiatrists or psychologists
- Reports prepared by any person/agency who investigated the assault
- Police reports, if they are in the plaintiff's possession