



‘Reasonable and necessary measures’: In an active shooter world, these 4 things could spell liability

by Benjamin Powers

In 2012, when a gunman killed 12 at an Aurora, Colorado, movie theater, the community and the country were shocked. So too were the theater owners, who successfully defended themselves from a civil lawsuit that alleged they should have known better. Property owners today might find the courts to be less generous.

As a matter of civil law, business owners are not liable for acts of violence committed on their properties—unless a jury decides they should have seen it coming. Historically, courts have found mass shootings to be so shocking and unexpected that no rational person could hold the property owner accountable. That may soon change.

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“Society’s collective awareness of mass shootings and our willingness to accept – and even expect – increased hardening of buildings and venues against potential attacks will have an undoubted effect on the standard of care for businesses going forward,” says Mike Steinlage, a lawyer at the firm Larson and King, who has worked on risk and liability. “We may eventually see liability safe harbors established for venues and businesses that take reasonable precautions against potential attacks, similar to the SAFETY Act for anti-terrorism-related technologies and safety measures.”

According to the Gun Violence Archive, there were 417 mass shootings in the United States last year. That follows 337 in 2018 and 346 in 2017. Likewise, other acts of public violence like vehicle rammings are becoming more common. Not all of these tragic events make national headlines, but by now more than enough have occurred to give business owners pause.

So should the legal repercussions. Victims of the shooting at an El Paso Walmart have filed two separate lawsuits alleging the store “did not take reasonable and necessary measures to protect its customers.” Likewise, a lawsuit in front of the Colorado Supreme Court argues that the Rocky Mountain Planned Parenthood should have known it was a potential target and hired security that would have prevented a 2015 shooting that killed three people.

Trade associations are keeping an eye on the Colorado case, as it could lead to increased insurance and security costs for businesses. “Due to the sharp increase [in shootings] since 2016, variations of the active shooter coverage have been offered by brokers. It’s more commonplace now to protect the victims, community establishments, homes, and businesses,” said Vicky Riggs, a senior analyst at AM Best, which analyzes the insurance industry.

Regardless of the Colorado ruling, it behooves business owners to consider how at risk their property is for an act of mass violence and secure their properties accordingly.

Political atmosphere and prior bad acts

The Rocky Mountain Planned Parenthood clinic knew their property was a target—staff had gotten death threats and were given active shooter training. The clinic offered bulletproof vests to doctors. The shooting, plaintiffs argue, was foreseeable.

The Walmart shooting is a murkier case. A rise in politically- and racially-motivated shootings nationwide could not necessarily have predicted a shooting at any given store location, even if El Paso is a location that serves a substantial amount of Mexican and Mexican-American customers.

“Nothing in the world of safety and security or risk and liability is done in a vacuum,” said Rob Reiter, co-founder of the Store Front Safety Council and an expert in perimeter security and hostile vehicle attacks. “What works in an environment that is very stable, politically or in terms of homogeneity, can be a colossal failure in times of political or civil strife.”

And at the end of the day, experts must take into account not just what is possible, but what is likely, based on the values that make something a target. For example, there is a reason terrorists went after the Twin Towers on 9/11, such as their prominence in the Manhattan skyline and the location of Manhattan itself, rather than a nondescript skyscraper in Houston for example. Reiter says ‘possible’ and ‘probable’ are different criteria.

“This is why there are consultants and safety and security professionals who give the best possible advice on the whole picture, not just the obvious one,” said Reiter.

Gun carry laws and private property

In response to the El Paso shooting, Walmart asked shoppers to stop carrying guns into their stores. In at least one case, a shopper was removed for violating the policy. But in states that allow concealed and open carry of guns, does barring customers from bringing guns inside raise or lower liability?

Steinlage says that generally speaking, a business owner’s responsibility to keep customers safe is based on a variety of factors. Some juries might conclude that business owners who bar guns assume a legal duty to protect their customers. But Steinlage said it’s hardly an open and shut case.

According to Steinlage, the right to ban guns on premises is a business owner’s right, and it would be unfair and unreasonable to place additional liability on a store owner simply for exercising that right. Second, because liability in tort is grounded on foreseeability (the concept that a parties action or inaction could reasonably result in injury) an owner could argue that by banning guns they made it less likely that an active shooter situation would occur.

But factor in a video surveillance and weapons detection system, and the impact on liability is a closer call.

“A sign banning guns, combined with armed security, video surveillance and other hardening measures, could lead some courts in some jurisdictions to find that the owner provided express assurances of safety upon which an invitee could reasonably rely,” says Steinlage.

In short, if you’ve established a reasonable expectation of safety, you’d better make sure you can deliver. Blind spots, Steinledge said, “could lead a court to find that the store owner assumed a duty” to protect its customers that it didn’t fulfill.

That’s where professional assessments come in.

Security assessments

Reiter says that when it comes to a store, commercial property, sports venue, or a tourist area like Times Square, the need is to take the most appropriate actions to protect people. He warns against complacency and inactivity, saying that doing something is better than doing nothing.

The thought process around total security also has to be more expansive. Shelomo **Alfassa** is the Director of Communications at **VIRSIG**, a New York City-based security technology firm which focuses on people and infrastructure. Part of what **VIRSIG** does is provide security consultations to stadiums, schools, and others identifying weak points or gaps, and how to address them. He identified foot traffic, how open a space is, whether it has protections to stop vehicles from entering it, and how close to the street it is as some factors **VIRSIG** looks at when assessing a site.

Reiter recalls that after the 1993 truck bombing of the World Trade Center, public places such as stadiums worked to make their buildings car-bomb proof in a variety of ways. But they didn’t necessarily think of the 20,000 people who were waiting to get inside of the stadium, or what might happen when they were leaving. In this way, even well-intentioned plans can have unforeseen blind spots.

When considering vehicle attacks, as well as shootings, what pre-emptive measures a company or city has taken can make a huge difference when it comes to determining liability after the fact.

Victims of a 2018 attack in which a Home Depot rental truck plowed through the bike lane on Manhattan’s West Side highway filed a \$600 million lawsuit against New York City. They claimed the authorities knew the area was vulnerable to a vehicle-ramming but didn’t take action. The suit states they didn’t “take the necessary precautions based on appropriate engineering studies for this target location in the financial capital of the world.”

In the New York City case, the city had encountered security recommendations that pointed out ways to prevent such an attack. In getting those recommendations, but choosing not to pursue them for whatever reason, it left the city open to claims of liability.

Costs

Alfassa says across the board, whether it’s government agencies, nonprofits, or companies, they often balk at the cost of adding a protective measure like bollards to shore up their physical security.

“Protection against vehicles is foreseeable,” says Reiter. “And failure to protect the public is what creates tort liability. So whether you are a city-owned venue or you are the city, you need to figure out protection for people when it comes to any events or permanent conditions like you’re taking the traffic off the streets and becoming a pedestrian mall for a period of time.”

While many public spaces are turning to insurance to address these risks, investing in security consultations, and following the ensuing recommendations, can not only limit liability were something to occur, but also potentially deter or stop an incident from happening in the first place. Because when it comes to taking chances, this isn’t something to gamble on.

Alfassa alluded to one prominent stadium **VIRSIG** looked at, where he encountered pushback around a suggestion of installing bollards because of the extensive process of getting permits, ripping up the concrete to install them, and the cost, among other areas. But he says people have to start thinking about this on a continuum, because the consequences of not doing so can be deadly.

“I often have to say, ‘look at it from a liability perspective,’” says **Alfassa**. “For example, is it worth putting \$10 down now or putting down \$20 in the future, if God forbid, something happens?”

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