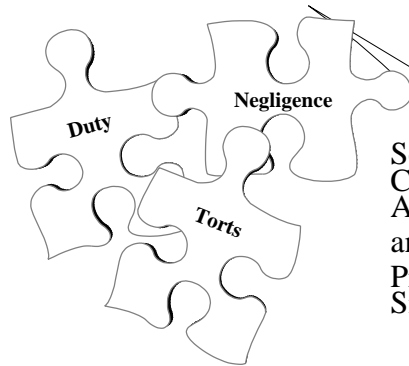


# Physical Security Practice and Premises Liability:

## Avoiding Liability in Premises Security



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## Overview

- Disclaimer
- New cases you should be concerned with
- Sample Security Liability Settlement Costs
- Regulation and laws impacting the Security Industry
- Legal Considerations of Security Systems and Private Security
- Important Case law on Avoiding Liability in Premises Security
- Sources of Additional Information



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## Disclaimer - What you will not learn in this presentation

- Legal advice – seek consult legal counsel prior to acting on any information in this presentation
- Primer on all criminal, civil, constitutional, contract, and regulatory laws
- Definitions of legal terms beyond the scope of this presentation
- Law enforcement-only related legal terms



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## Security Related Settlements

- Misrepresentation of systems standards, negligent design and installation, negligent training of employees who improperly monitored, breach of service contract, \$12.3M
- Failure to teach use of alarm, failure to install centrally monitored system, \$4.2M
- Security beat visitor, assault and battery, failure to perform pre-employment investigation, \$300K
- Assault by guard, \$1.5M
- Failure to have two full-time guards, \$7.3M, and Failure to have adequate patrols, \$577K
- False arrest/imprisonment, \$2.25M
- Inadequate training in security measures, \$1.25M
- Killing of customer by guard, \$1.4M



Source: Association of Trial Lawyers of America

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## Five Elements of Adequacy of a Negligence Related Security Claim

- The owner or occupier of the land owed a legal duty of care to the plaintiff;
- Assault crime was foreseeable on the premises;
- The owner occupier failed (negligence) to conform to a reasonable standard of care (protection);
- The negligence was the proximate cause of the assault upon the plaintiff;
- The plaintiff was damaged (injured) as a result of the breach of duty.



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## Sources of Case Law Impacting Security Systems and Management

- Criminal law
- Civil (Tort) law
- Constitutional law
- Contract law
- Regulatory law
- Case law differs from statute law. *Case law* is current and in constant refinement and interpretation by the courts. *Statute law* (determined by legislative bodies) may remain unchanged for many years.



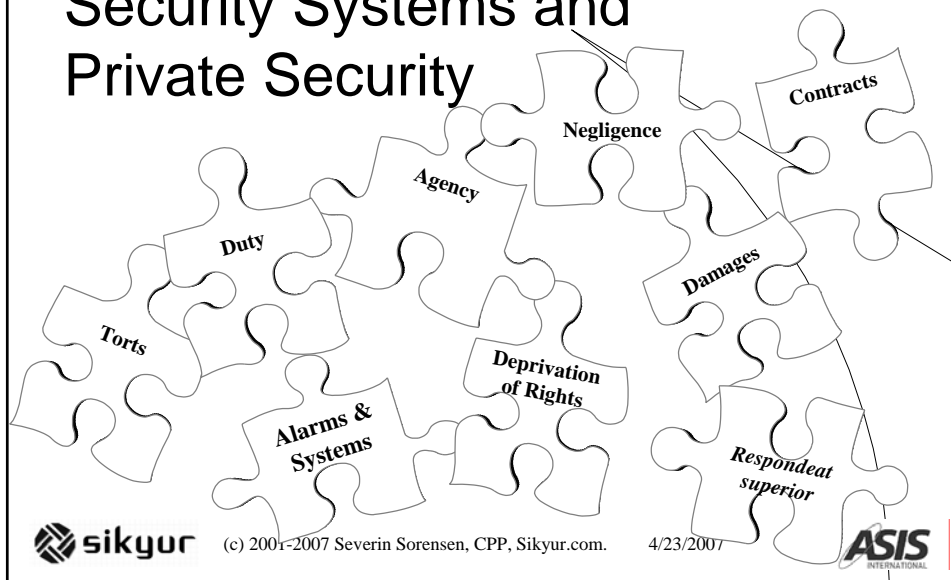
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# Legal Considerations of Security Systems and Private Security



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## Duty

- In negligence cases, duty plays a critical role in determining legal obligation. Duty is the expected conduct based on a legal obligation to which the law will give recognition and effect to conform to a particular standard of conduct. The duty-bound actor is required to conduct its activities in a manner that does not subject the other to liability, injury, or damage.



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## Important Terms of Art – Legal Vocabulary for Security

- Negligence
- Intentional Torts
- Agency
- Contracts
- Alarms and Security Systems
- Damages
- Authority
- Probable cause
- Arrest
- Search and Seizure
- Interrogation
- Use of force
- Deprivation of rights
- Entrapment



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## Negligence

- The omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a reasonable and prudent man would not do. Negligence is the failure to use such care as a reasonably prudent and careful person would use under similar circumstances.



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# Negligence

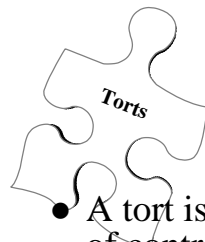
- Duty
  - Duty Owed
  - Duty to Perform Satisfactorily
- Negligent Hiring
- Negligent Training
- Negligent Entrustment
- Negligent Supervision
- Negligent Retention
- Negligent Investigation
- Negligent Detention
- Negligent Use of Weapons
- Failure or Omission
  - To call police
  - To Patrol
  - To comply with policy
  - To provide exculpatory statements



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# Intentional Torts

- A tort is a civil wrong or injury other than breach of contract. It is a violation of some duty owed to the individual who claims to have been injured. The wrong may be committed against a person or property. Principal elements of torts:
  - (1) the existence of a legal duty from the defendant to the plaintiff
  - (2) a breach of that duty
  - (3) damage or harm or injury as the proximate result of the breach



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## Intentional Torts (wrong doing)

- Assault & Battery
- False Arrest and False Imprisonment
- Malicious Prosecution
- Trespass
- Invasion of Privacy
- Reasonable Activity
- Intrusive Investigation
- Outrageous Conduct



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## Agency

- Agency is the delegation of lawful business activity of the employer to another. An example of agency is contract security. There are several types of agency relationships:
  - Principal – directs or permits another to act for his benefit
  - Master – a principal who employs another (servant), and who has the right to control the other's physical conduct
  - Proprietor – an owner or operator of a business with exclusive title or legal rights of the enterprise.
  - Independent contractor – contracts with another to do a job, but is not controlled by the other with respect to physical conduct in the performance of undertaking



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# Agency

- Relationship
- Control
- Joint Control
- *Respondeat Superior* / Vicarious Liability
- Scope of Employment
- Beyond the Scope of Employment
  - Rape/Murder
  - Assault/Rape
  - Arson
  - Burglary
  - Wrongful Death
- Independent Contractor
- Delegable or Non-Delegable Duty



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## Let the Master Answer

- Respondeat Superior -- “Let the master answer.” This doctrine or maxim means that a master is liable in certain cases for the wrongful acts of his servant, and a principal for those of his agent. The doctrine is inapplicable where injury occurs while employee is acting outside legitimate scope of authority.



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## Contracts

- Contracts are used frequently in security. A contract is a consensual agreement between two or more parties which creates an obligation to do or not to do a particular thing. A contract contains terms and conditions with declared and explicit language. Contracts are valid both verbal and written. It should be needless to say, but written contracts are more clearly defined and more easily enforced. However, verbal commitments not memorialized in contracts are often the source of conflict between contracting parties.



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## Contracts

- Intent of the Parties
- Clear and Express Language
- Oral Contract
- Implied or Not Implied Contract
- Duty
- Third Party Beneficiary
- Breach of Contract
- Limitation
- Disclaimer



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## Alarm and Systems

- Alarm installation and monitoring are integral to the security program. Alarm companies are expected to exercise reasonable care in supervising their employees in design, installation, and monitoring of accounts. There are numerous lawsuits concerning nonperformance and malfunctioning alarms and alarm systems.



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## Alarms and Security Contracts

- Limitation on Liability Clauses
- Gross Negligence
- Willful or Wanton Misconduct
- Inadequate Alarm Systems
- Intentional Misrepresentation
- Negligent Supervision
- Criminal Act of an Employee
- Unforeseeable Intervening Criminal Act
- Consumer Protection Act
- Deceptive and Unfair Trade Practices
- Warranty
- False Alarm Ordinance



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## Damages

- Damages are financial compensation which may be recovered in court by a person or entity that has suffered a loss, injury, or damage to their person, property, or rights through the unlawful act or omission or negligence of another. It is the award of money for the tortuous act or breach of contract of another.



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## Damages

- Compensatory or Actual Damages
- Exemplary or Punitive Damages
- Corporate Parent or Subsidiary Owner
- Comparative/Contributory Negligence
- Mitigation of Damages
- Ethics, Professionalism, Lack of Jurisdiction



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## Authority of Private Citizen

- Stands in Shoes
- State Commission / Licensure
- Limitation on State Authority
- Police Moonlighting – Primary Responsibility
- Catch 22



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## Probable Cause

- Standards of Probable Cause
- Reasonable Cause vs. Probable Cause
- Probable Cause as Affirmative Defense



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## Arrest by Private Citizen

- Background
- Rationale of Citizen Arrest
- Presence – Actual
- Presence – Constructive
- Legitimizing the Citizen Arrest
- Felony in Fact Committed
- Unreasonable Detention
- Outrageous Conduct



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## Search and Seizure by Private Citizen

- Fourth Amendment and Private Citizens
- Guidelines
- Joint Operation
- Stop & Frisk
- Emergency Doctrine
- Plain View
- Found Property
- Locker – Inventory
- Locker – Invasion of Privacy
- Search of Female by Male
- Non-coercive Search Tactics / Alternative Procedures
- Fourth Amendment – Non-application to Private Property
- Fourth Amendment – Application to Private Security



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## Interrogation by Private Citizen

- Mantle of State Authority
- Joint Operation
- Public Interest/Public Function/Public Accommodation Tests
- Outrageous Conduct
- Public Place
- Investigatory Interview – Union Representation
- Investigatory Interview – Pre-interview conference



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## Use of Force by Private Citizens

- Confrontation and Aggression
- Self-Defense
- Defense of Property
- To Recover Property
- Ejection from Premises
- Pushing
- Retreat
- Wholly without justification
- Inexcusable acts
- Standard of Proof – civil / criminal

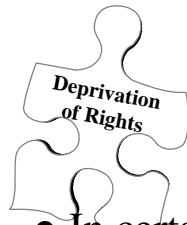


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## Deprivation of Rights

- In certain circumstances when rights such as constitutional rights are deprived others by private security, they may be viewed as operating under color of law and subject to subject to Title 42 United States Code (USC), Section 1983 (civil sanctions) and Title 18 USC Section 242 (criminal sanctions). However, beware of depriving rights, especially when there is an expectation of the right (e.g., privacy)



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## Special Case – Privacy and Video

The U.S. Supreme Court in *Katz vs. United States* 389 U.S. 347 (1967), defined modern "search and seizure" law under the Fourth Amendment. The Court declared that "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection, but what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. Generally, a person walking along a public sidewalk or standing in a public park cannot reasonably expect that his activity will be immune from the public eye or from observation by the police. As recognized by the Supreme Court in *United States vs. Knotts* 368 U.S. 276, 281-82 (1983):

A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another. When [an individual] traveled over the public streets he voluntarily conveyed to anyone who wanted to look the fact that he was traveling over particular roads in a particular direction, and the fact of his final destination when he exited from public roads onto private property. Source: Marcus Nieto, California Research Bureau, CRB-97-005 (1997).



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## Deprivation of Rights

- Color of Law – Statutory Provision
- Joint Action – Private Security / Police
- Significant Involvement / Public Function / Nexus Tests
- Mere Furnishing of Information from Police
- No Acting in Concert
- Section 242 – Criminal Sanctions



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## Entrapment

- Entrapment is the act of officers or agents of the government in inducing persons to commit crimes not contemplated by them for the purpose of instituting criminal prosecutions. Entrapment does not result from the inducement by a private citizen. However, when a private citizen becomes an extension of the law enforcement's official arm their actions may provide a defendant's affirmative defense of "entrapment."



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# Sources of Case Law

- Demonstration of [www.aele.org](http://www.aele.org)
- Other WWW sources (use Google.com)
- Newsletters on Case Law
- Legal seminars and briefs
- Other ASIS and trade association workshops
- Presentation Bibliography



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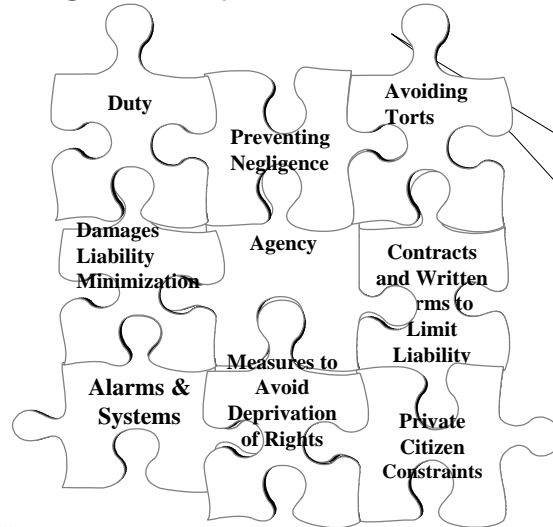
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## There are many pieces to consider in avoiding liability in premises security



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## To review – what is the duty of the firm in these instances?

- Deprivation of rights
  - Privacy, where there was an expectation of privacy
  - Detainer or citizens arrest
- Negligent hiring
  - Hiring someone who has history of misuse and access to technology that is abused
  - Negligence by not training or providing inappropriate access
  - Others



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