

Publications - Liability Exposure

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LIABILITY EXPOSURE OF OWNERS AND OPERATORS OF MALLS, RETAIL ESTABLISHMENTS AND COMMERCIAL ENTERPRISES

**PREPARED BY
LAW OFFICES OF
SAUNDERS & SCHMIELER
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**8737 Colesville Road, Suite L-201
Silver Spring, Maryland 20910
(301) 588-7717**

**Suite 700, North Building
601 Pennsylvania Avenue, N.W.
Washington, D.C. 20004**

**Suite 2700, Legg Mason Building
111 South Calvert Street
Baltimore, Maryland 21202**

**3132 N. 10th Street
Arlington, Virginia 22201**

**4900 Cutshaw Avenue
Richmond, Virginia 23230**

LIABILITY EXPOSURE OF OWNERS & OPERATORS OF MALLS, RETAIL ESTABLISHMENTS & COMMERCIAL ENTERPRISES I. OVERVIEW OF THE DEVELOPMENT OF THE APPLICABLE LAW

A. Negligence - Reasonable man standard. A theory of liability predicated upon fault.

The most fundamental concept of American Jurisprudence is the principle of liability founded on fault. It is a concept deeply imbedded in the heritage and precedent of the law and is the cornerstone of all liability predicated upon negligence.

In order to validly state a cause of action sounding in negligence, four elements must co-exist:

1. A duty owed to another;
2. A breach of that duty;
3. Damages or injury;
4. A causal connection between the breach and the injury and damages.[\[1\]](#)

Liability founded on negligence therefore depends primarily upon the existence of:

1. A legally recognized duty; and
2. A breach of that duty.

The basic concept of negligence is therefore liability premised upon a fault basis of liability, i.e., a duty and breach thereof. This basic **fault concept** is the gravamen of all tort liability based upon negligence.

Such a concept, i.e., **liability predicated upon fault**, is submitted to be a fundamentally fair concept. While the basic concept of liability predicated on fault is fundamentally fair, why then are the results of the application of the concept by the modern day jurisprudence system seen as largely unfair by the public? The answer to the question lies in the basis premise itself, **duty** and breach of duty in that the Courts have defined **tort duty** in a manner which is not **co-extensive** with a **moral duty**.

In the case of the Village of Cross-Keys v. U.S. Gypsum, 315 Md. 741, 751, 556 A.2d 1126 (1989), the Maryland Court of Appeals stated that:

A tort duty... is an expression of the sum total of those considerations of policy which lead the law to say that the Plaintiff is entitled to protection, and that a tort duty is not necessarily co-extensive with a moral duty.

The Court further stated:

Among the factors to be considered in determining whether tort duty should be recognized are:

- (1) **The foreseeability of harm to the Plaintiff;**
- (2) **The degree of certainty that Plaintiff suffered injury;**
- (3) **The closeness of the connection between the Defendant's conduct and the injury suffered;**
- (4) **The moral blame attached to the Defendant's conduct ;**
- (5) **The policy of preventing future harm;**
- (6) **The extent of the burden of the Defendant;**
- (7) **The consequences to the community of imposing a duty to exercise care with resulting liability for a breach;**
- (8) **The availability, cost and prevalence of insurance for the risk involved.**[\[2\]](#)

While the basic concept of negligence predicated on fault is a fundamentally fair concept, the incongruous and logically inconsistent application of the concept together with social engineering and legislation by the Court system, has resulted in the basic unfairness of the law of negligence as it exists and as it is applied today by the American judicial system. In the present day litigation of a premises liability case, as a general rule questions of whether or not an owner breached his duty of care to invitees and whether an invitee exercised reasonable care for his or her own safety are normally determined to be **jury questions** except in rare instances and undisputed cases where reasonable minds cannot differ as to the conclusion to be reached.

This tendency to present cases to a **jury for a liability determination** rather than a judicial determination has the effect of expanding liability and the associated risks of liability in an ever increasing fashion rather than confining liability to an established standard which the law defines as constituting a clearly defined duty and breach thereof. It injects uncertainty in the law in an area where a clearly defined standard of care would not only assist owners/occupiers in establishing reasonable maintenance and operational policies and procedures but also obviate needless litigation. It breeds uncertainty in an area of the law which cries out for certainty.

B. Premises Liability

The field of premises liability is an enormous one involving a myriad of cases. It is also a significant area of tort law. At one time, in the earlier part of the twentieth century, premises liability cases were ordinary “run of the mill” and largely “nuisance type” cases disposed of by small settlements. Those cases proceeding to trial resulted in mainly defense verdicts. They were aptly described as a “defense attorney’s dream.” Such is no longer the case. Premises liability cases today often involve sizeable verdicts and judgments and are a factor to be reckoned with in assessing liability risk exposure.

The liability of owners/occupiers of real property to an individual injured on their property is dependent upon the standard of care owed to the individual. That standard of care differs in that Maryland Courts have adhered to the position that the standard of care owed by an owner/occupier depends upon the status of the Plaintiff as a **trespasser, licensee or invitee.**

An **invitee** is one invited or permitted to enter or remain upon another’s property for purposes connected with or related to the owner’s business. The owner must use reasonable and ordinary care to keep his premises safe for the invitee and to protect the invitee and to protect the invitee from injury caused by an unreasonable risk which the invitee, by exercising care for his own safety, will not discover.

A **licensee** is one privileged by virtue of proper consent to enter for his own purpose or convenience onto another's property. A licensee takes the property as he finds it and like the trespasser is owed no duty by the owner of whatsoever except that he may not be willfully or wantonly injured or entrapped by the owner once his presence is known.

It is the duty to the business invitee owned by an owner-occupier of property which governs the liability of the owners and operators of malls, retail establishments and commercial properties.

It is an axiomatic legal principle as reflected in nearly every Maryland premises liability case that mere ownership or occupation such as a building does not render the owner/operator liable for injuries sustained by third parties as the owner/occupier is not an insurer of such persons. The duty of an owner/operator is to use reasonable and ordinary care to keep the premises safe. It is also a fundamental principle of law that the mere existence of a defective condition or danger in a store or public place of business, does not, as a matter of law render the proprietor liable for injury caused by the defective condition unless the proprietor knew or in the exercise of reasonable care ought to have known of the defect, i.e., the owner/occupant of the premises must have actual knowledge or constructive notice of the defect and have either failed to remedy the defect or defective condition or warn third parties of the existence of the dangerous condition in order to impose liability on the owner/occupier of business premises.

Generally, a presumption of negligence on the part of an owner or lessee does not arise merely by showing that an injury has been sustained by a person rightfully on the premises as the owner is not the insurer of safety of such persons.

The owner or occupant of premises is liable to a person injured on the premises when the perilous instrumentality or dangerous condition is known to the owner or occupant and not known to person injured

C. The Collateral Development of Liability Without Fault - Strict Liability in Tort

In the past forty (40) years, separate and apart from the developing law of negligence, the concept of liability without fault, i.e., strict liability in tort developed, principally in the area of products liability which imposed liability on product manufacturers even in those instances where there was no negligence under the public policy theory that public policy demanded that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the marketplace. The theory underpinning strict liability is that the product

manufacturer is more able to bear the risk of loss by protecting itself with insurance coverage than an injured party.

Strict liability imputes liability on the commercial supplier of “unreasonably dangerous” products without the need to show any negligence on the part of the defendant. The general rule is stated in Restatement of Torts 2d, section 402A.

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his physical property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) The seller is engaged in the business selling such a product, and

(b) It is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) The seller has exercised all possible care in the preparation and sale of his product, and

(b) The user or consumer has not bought the product from or entered into any contractual relation with the Seller.

Strict liability is also imposed for inherently dangerous activity as well as in certain legislative enactments inclusive of:

1. ADA (Americans With Disabilities Act);

2. OSHA (Occupational Safety and Hazard Act); and

3. CERCLA (Comprehensive Environment Response, Compensation and Liability Act of 1980).

As a consequence of the development of the concept of strict liability in tort, i.e. liability without fault, the public perception which exists in today's society is that if a person is injured then someone else is responsible for the injury. The end result of such a concept as well as the development of the law of premises liability so as to impose greater duties on the owners and occupiers of property is a tremendous liability exposure from the risk management standpoint on the part of the owners and operators of malls, retail establishments and commercial enterprises.

II. HISTORICAL BASIS - PREMISES LIABILITY/BUSINESS PREMISES

A. Tort Liability of Mail Owners and Operators, Retail Establishments and Commercial Enterprises

At the time that the traditional principles of tort liability applied to the liability vel non of business establishments, i.e. liability predicated upon fault, for instance in the area of premises liability, small, medium and large business and retail establishments operated on Main Street America where clear demarcations existed between public services provided by municipal governments and service provided to members of the public invited on to private business premises. The law reflected the respective legal responsibilities of the public bodies and private enterprise to third parties and was rather routinely and consistently applied. The law also clearly reflected the liability of the owner/operator of businesses to the business invitee.

As increased crime in the inter-cities occurred and a migration to the suburbs resulted as a consequence partly of the crime in the inter-cities as well as the goal of the "American dream" of owning a home in the "burbs", the modern phenomenon of the shopping mall emerged. With the emergence of the mall and large retail establishments and commercial enterprises, came the congestion, and the presence of enormous numbers of potential and actual shoppers on premises which are as large as small cities and which share many of their characteristics. The modern shopping mall has enormous facilities inclusive of large surrounding parking lots, utilities, inclusive of water supply and sewerage systems, environmental systems and controls, streets, a myriad of walkways, public access areas and transportation systems. Most large malls also furnish police protection . The modern shopping mall is in essence a **quasi city** as it has many of the attributes of a municipality. As patrons of malls, retail establishments and commercial enterprises begin to seek civil restitution for a myriad of injuries which occur on malls and commercial property, new vistas in the concept of tort liability have arisen. Commercial land owners, and in particular, owners and operators of malls and shopping centers, are confronted with unpredictable areas of law which effect every facet and manner in which they conduct business and operate the commercial property which they own.

III. EXEMPLARS OF LIABILITY PROBLEMS AND RISK EXPOSURE IN MODERN DAY AMERICA

Two recent cases exemplify the types of problems and risk exposure of owners and operators of malls, retail establishments and commercial enterprises.

Case #1: Case of the Injured Penis:

On July 15, 1994, at 4:45 a.m., a 911 call was made by a clerk at the Scottish Inn in Lakeland, Florida. The clerk reported that Robert Chevront, 33, was trapped in the

hotel's swimming pool. The responding police officer stated "as I approached the man, I could see his pants were down to his knees and his penis was stuck in the suction hole located in the north side of the swimming pool." According to the police report, the police officer shut off the pool's pump before the paramedics arrived but to no avail, Chevront's penis remained stuck. It appeared that it had become swollen by the battering it had received before the pump was turned off and could not be extricated from the pool's suction return line. The paramedics arrived but their efforts to free Chevront from the filtration pipe were futile. They applied lubricant around the pump fitting in the hopes that Chevront would become unstuck. It took nearly an hour of alternating delicate maneuvering and strenuous pulling efforts before Chevront popped out of the suction pipe. The paramedics immediately took him to Lakeland Regional Medical Center where he received treatment for bruised genitalia. **Question** - Was the Scottish Inn at fault? The answer of course is no. The law does not suffer fools and the law does not require an owner/operator of real property or a business enterprise to protect or warn invitees of all possible hazards. Was the event foreseeable? Not at all. The Scottish Inn's pool suction pipe was not designed for such activities as Chevront was apparently engaged in. Post a warning sign? Ridiculous. However, consider this. What if it happens again? Foreseeable? How about a third time?

Change the facts. How about a twelve year old girl who caught her hair in the whirl pool suction drain at the Fountainebleau Hilton in Miami Beach. Her hair became knotted so tightly in the drain cover that she could not free herself. By the time she was rescued she had been submerged too long and later died in a Miami area hospital. Was the Fountainebleau Hilton at fault in this instance? In this instance, a sign near the whirlpool prohibited use by anyone under the age of sixteen (16). The little girl's hair got caught in the drain cover. Was that scenario foreseeable? Should the hotel have detected the hazard and eliminated it? Should it have warned its guests about it?

Assuming arguendo in the Scottish Inn case, the six year old's hair got caught in the suction hole rather than a man's penis. Would that be foreseeable? Would the Scottish Inn then be liable? If so, if the Scottish Inn would be liable for a little girl's hair why not for a man's penis.

The answer to these questions are difficult and there are no easy answers. The bottom line is that the owner/operator should let common sense be their guide. A public safety policy should be reasonably adopted and reasonably implemented based upon a common sense and rational approach. If it is considered the right thing to do in the common sense approach then in all eventuality it is the right thing to do in the eyes of the law too.

Case #2: The 2.9 Million Dollar Coffee Case Involving McDonalds

An eighty-one year old woman scalded by McDonald's coffee was recently awarded 2.9 million dollars. A public opinion survey taken subsequently is squarely on the side of McDonalds. Polls have shown that a majority of Americans are outraged at the verdict. Consider the underlying facts. McDonalds' coffee, according to its Operations and Training Manual, must be brewed at 195 to 205 degrees and held to 180 degrees to 190 degrees for optimum taste. The basic facts were that Stella Liebeck, the Plaintiff, bought a forty-nine cent cup of coffee at the drive-in window at an Albuquerque, New Mexico, McDonalds and while removing the lid to add cream and sugar had spilled it causing third degree burns of the groin, inner thighs and buttocks. She alleged that the coffee was "defective because it was too hot." Mrs. Liebeck spent seven (7) days in the hospital and had considerable skin grafts. The jury were shown gruesome photographs of the injury and the skin graft. The facts revealed that McDonalds had seen such injuries many times before. Company documents showed that in the past decade McDonalds had received at least seven hundred reports of coffee burns ranging from mild to third degree and had settled claims arising from scalding injuries for more than Five hundred thousand dollars (\$500,000.00). The Plaintiff's lawyer immediately prior to trial offered to settle for Three hundred thousand dollars (\$300,000.00). A mediator judge recommended that McDonalds settle the case for two hundred twenty-five thousand dollars (\$225,000.00). McDonalds alleged that the Plaintiff was contributorily negligent by holding the cup between her legs and not removing her clothing immediately. It also argued that the Plaintiff's age may have caused her injuries to have been worse because older skin is thinner and more vulnerable to injury. The testimony of a McDonalds' executive indicated that McDonalds knew its coffee sometimes caused serious burns, it hadn't consulted burn experts about it; it had decided not to warn customers about the possibility of severe burns; and it did not intend to change any of its coffee policies or procedures. A human factors engineer who testified for McDonalds told the jury that the number of injuries were statistically insignificant when compared to the billion cups of coffee McDonalds sells annually. The jury verdict consisted of One hundred sixty thousand dollars (\$160,000.00) in compensatory damages and the balance in punitive damages.

These two cases represent the types of problems confronted every day with respect to liability claims arising out of commercial enterprises.

IV. GENERAL CONCEPT - NEGLIGENCE/PREMISES LIABILITY NATURE AND TYPES OF CLAIMS:

Background and Summary of the Law:

It has historically been an accepted principle of negligence law that the mere existence of a defective condition in a store or public place of business does not, as a matter of law, render the proprietor liable for an injury caused by the defective condition unless the proprietor knew, or in the exercise of reasonable care ought to have known, of the defect. Thus the owner or occupant of the premises must have actual or constructive notice of the defect in order to be charged with negligence.

The above-stated rule historically has been applied in cases considering the liability of the proprietor of a store or other place of business for injuries suffered by customers in falls caused by the existence of a transitory condition upon the premises. Thus, where the transitory condition is one which is traceable to the proprietor's own act, that is, a condition created by the proprietor or under this authority-or is a condition in connection with which the proprietor is shown to have taken action, the proprietor is deemed to have actual notice of the condition and no proof of notice is necessary.

However, where it appears that the transitory condition is traceable to persons for whom the proprietor is not ordinarily responsible, proof that the proprietor was negligent in relation to the transitory condition requires a showing that the proprietor had actual notice thereof, or that the condition existed for such a length of time that in the exercise of reasonable care the proprietor should have known of the condition, or in other words, a showing that the proprietor had constructive notice of the condition.

1. Injury Caused by Slip and Falls Due to Condition of Floor Surface

A. Floor Surface Cases:

- (1) Natural condition, terrazzo, marble;**
- (2) Floor Covering(s), rugs, carpets, doormats,;**
- (3) Floor treatments, wax, polish, etc;**
- (4) Mopping, cleaning, maintenance;**
- (5) Foreign Substance/Objects;**
- (6) Uneven Surfaces.**

2. Injury Caused by Trip and Falls Due to Site Conditions

A. Stairway Cases:

- (1) Tread and Design;**
- (2) Metal Strip;**
- (3) Code Violations**
- (4) Handrails;**
- (5) Step-down platforms; changes in floor level.**

B. Natural Conditions

C. Foreign Objects/debris/litter/foreign substance;

D. Other Adverse Site Conditions Considered Dangerous.

(1) projecting objects;

(2) obstacles.

E. Spilled Objects;

F. Entrance way mats.

3. Injury Caused by Slip and Falls on Snow and Ice

A. Exterior condition of walkways/parking lots;

B. Interior condition - tread in water, snow, mud, etc.

4. Parking Lot Cases

5. Public Access Areas

6. Lighting/illumination

7. Doorways

8. Exterior walkways, ramps, passageways

9. Actual Case Exemplars - Law Practical Results

A. Lake Forest Mall - Dwarf Case:

This case involves a personal injury premises liability claim arising out of an incident at a large regional shopping mall located in Montgomery County, where the Plaintiff, a twenty-one year old disabled person suffering from spondyloepiphyseal dysplasia congetia (SED), a form of dwarfism, was being pushed by her sister in a wheelchair, when the front wheel(s) hit a crack in the pavement which in turn tipped over the wheelchair pitching the Plaintiff forward, alleging causing her severe injury inclusive of a broken vertebra in the lower spine, necessitating surgical removal of

steel rods which had been permanently hooked to the vertebra in order to correct a pre-existing condition known as scoliosis. **Liability exposure analysis** indicated that a jury question would be presented on the issue of negligence predicated upon the existence of a crack in the pavement of the surface of the parking lot immediately adjacent to the handicapped parking space in the lot.

B. Lake Forest - Ice Skating Facility:

The case involved a personal injury premises liability arising out of an incident which occurred at an ice skating facility at large regional shopping mall located in Montgomery County, Maryland. The Plaintiff claimed that the ice was dangerous in that it had been improperly prepared for a Beta Lesson, which the Plaintiff was then engaged in at the time of the occurrence as a student. The defense evidence showed that state of the art equipment, inclusive of a Zamboni Ice Surfacing Machine had been used to prepare the ice and that the Plaintiff assumed the risk of injury. **Liability exposure analysis** resulted in a determination that the case did not present a jury issue on the issue of liability.

C. Mazza Gallery - Slip and Fall on Terrazzo Floor:

The case presented a personal injury premises liability claim arising out of an incident which took place at the Mazza Gallery located in Chevy Chase, Maryland, at which time the Plaintiff, an eighty-seven (87) year-old female shopper slipped and fell on a terrazzo floor, severely injuring herself. The Plaintiff claimed that the surface of the floor was dangerous and that the mall owner failed to warn of a dangerous condition. There was no evidence of a foreign substance having been spilled on the floor and the Defendant's evidence revealed that the coefficient of friction measurement met or exceeded all industry standards. In view of the fact that the defense evidence established that a dangerous condition was not present, the **liability exposure assessment** resulted in a determination that the case did not present a jury issue on the issue of negligence.

D. Tischer Auto Body - Criminal Acts of Third Persons:

The case presents a premises liability claim brought by the personal representatives of a deceased who was the criminal victim who received a gunshot wound to the head and subsequently died. The deceased was an employee of the building maintenance company, an independent contractor hired by the owner. A security firm had been hired by the owner to protect the owner's property and on the date of the occurrence the security guard reported to work one-half hour late during which time the assailant gained access to the interior of the autopark and killed the deceased. The Plaintiff alleged that the owner owed a duty of due care to provide a

secure and safe work environment for the employees of its independent contractor. It was alleged that at the time of the killing there was no security guard on duty and that situation created an abnormally dangerous condition.

The **liability exposure analysis** resulted in a determination that the case was not viewed as a case of ultimate liability. A Motion to Dismiss filed preliminarily as a response to the Complaint was granted by the Circuit Court for Montgomery County, Maryland.

E. Shoplifting - Malicious Prosecution Case:

The case of the K-Mart Gang: The case presented a case of premises liability brought by three (3) plaintiffs who were arrested at a K-Mart Store in Montgomery County. The security personnel observed through the one-way mirrors at K-Mart and through a false air vent located in the security room, five (5) people who were dubbed "K-Mart Gang" in the process of a scheme which consisted of two (2) persons accumulating a large quantity of merchandise as if shopping and then leaving a cart in a hidden area of the store. A third shopper then put the merchandise in a large empty baby stroller box and also exited the store. The remaining two (2) shoplifters were observed shopping with the large baby stroller box, purchasing a number of smaller items and paying for the several items of merchandise they bought in addition to the cost of the baby stroller and exit the store. The **liability exposure analysis** revealed it was a case of no liability notwithstanding the criminal prosecution of the "K-Mart Gang" was unsuccessful due to the unavailability of a material witness. The case proceeded to trial before Judge McAuliffe in the Circuit Court for Montgomery County and resulted in a defense verdict by the jury.

F. Sick Building Case:

The Capitol Plaza Office Building Case: The case presented a personal injury premises liability claim alleging a "sick building syndrome." Plaintiff alleged that she was exposed to certain environmental toxins in the air within the building which caused her to suffer from "dizziness, headaches, fatigue, brain damage and loss of short-term memory." Plaintiff sustained medical bills in excess of forty-thousand dollars (\$40,000.00) and loss of wages in excess of one year. Demand was One million dollars (\$1,000,000.00). Plaintiff alleged that the CPOC Building where she was employed had "sick building syndrome." The defense maintained that there was no existing scientific methodology and/or guidelines which can be applied to determine the specific cause of "sick building syndrome" and that the subjective manifestations associated with the Plaintiff's complaints cannot be scientifically established or associated to the Capital Plaza Office Complex and that the owner(s) of the building cannot be subjected to legal liability as no scientific nexus linking the

illness to the building exists and that the Plaintiff's action should be dismissed as no legal nexus can be established linking the CPOC Building to the Plaintiffs alleged illness. The defense maintained that buildings aren't sick - people are. **Liability exposure analysis** was that it was more likely than not that the Plaintiff would not be able to establish a prima facie case of liability at the time of the matter. Summary Judgment was granted on behalf of the defendant.

G. Hillandale Shopping Center - Nail in the Foot Case:

The case presented a premises liability claim arising out of the Plaintiff stepping on a large nail on the premises of Peoples Drug Store located in the Hillandale Shopping Center in Montgomery County, Maryland. At the time of the loss, Peoples leased the premises from the owner of the shopping center who managed it as well and who acted as general contractor for certain repairs that were necessitated from time to time. Evidence revealed that it was unknown as a factual matter whether the Plaintiff stepped on the nail in the store or first noticed that she had a nail in her shoe while she was in the Peoples Drug Store. **Liability exposure analysis** revealed that the case was not determined to be a case of ultimate liability with respect to the owner/general contractor. A Motion for Summary Judgment was granted on behalf of the Defendant terminating the litigation.

H. Kimberly Smith - The Tipping Dumpster Case:

The case of Kimberly Smith presented a premises liability claim, which proceeded to trial and resulted in the largest verdict in the history of Prince George's County, Maryland, \$12,690,002.80 of which \$10,965,085.00 constituted medical expenses reasonably probable to be incurred in the future. Kimberly Smith was a six year old girl who was injured when a refuse bin on which she had been swinging tipped over and crushed her, rendering her a paraplegic. The Plaintiffs' contentions were that the dumpster did not meet ANSI Code specifications, CPSA Regulations, and that the refuse bin had been improperly loaded. Under section 11-109 of the Courts and Judicial Proceedings Article of the Maryland Annotated Code, which was enacted in 1986 as part of the tort reform movement then prevalent in the State of Maryland, a defendant or the defendant's insurance carrier can petition the Court to order that all or part of the future economic damages portion of the award be paid in the form of annuities or other appropriate financial instruments, or that it be paid in periodic or other payments consistent with the needs of the Plaintiff, funded in full by the defendant or the defendant's insurer and equal when paid to the amount of the future economic damages award. The "annuitization" of this judgment could permit the defendant's insurance carrier in this case to realize a savings of in excess of five million dollars (\$5,000,000.00) and still provide for the payment of all medical expenses awarded by the jury, a figure over the Plaintiff's lifetime as calculated by the

Plaintiff's economic expert to be the staggering figure of \$101,723,702.00. This case is still pending on appeal. The firm of Saunders & Schmieler is appellate counsel retained on behalf of Chubb Group of Insurance Companies to represent its interests on appeal issues and in connection with the Petition to Annuitize.

V. LIABILITY FOR THE CRIMINAL ACTS OF THIRD PERSONS

The Tort Liability of Mail Owners, Retail Establishments and Commercial Enterprises for the Criminal Conduct of Third Parties

A woman carrying her packages walks across a mall parking lot to her vehicle. As she approaches her vehicle she is assaulted and robbed by an unidentified assailant. Such a scenario is all too familiar to the owners and operators of malls and retail establishments. The shopping mall and large shopping center is a microcosm of the community in which it is located and reflects many of the same crime problems. As modern commercial phenomenon known as the shopping mall has emerged, the same crimes which caused the initial migration from the city to the suburbs are the ones associated with patron attacks; assault; rape and murder. As the victims of these crimes begin to receive civil restitution a new vista in the concept of tort liability presents itself. Commercial land owners and owners of malls and shopping centers are confronted with unpredictable areas of potential liability. The general rule in the State of Maryland is that an owner or occupier of property is under no special duty to protect another from criminal acts by a third person in the absence of a statute or a special relationship. The underlying rationale, which also applies to the liability of landlords, is that the mere ownership of a building does not render the owner liable for injury sustained by third parties as the owner is not an insurer of such person. That language appears nearly universally as a preface to whatever duty the Court ultimately decides may be applicable in a given instance. The duty is articulated as a duty to use reasonable and ordinary care and keep the premises safe.

The first case to espouse such a duty in a landlord/tenant situation was the case of Scott vs. Watson, 278 Md 160, 359 A2d 548, which held that if a landlord knows or should know of criminal activity against persons or property in the common areas of his building, he has a duty to take reasonable measures in view of the existing circumstances and to eliminate the conditions contributing to the criminal activity. The duty arises primarily from criminal activities existing on the landlord's premises and not from knowledge of the general criminal activities in the neighborhood. The Court went on to state that even if no duty existed to employ the particular level of security measures which were provided by a landlord in a particular case, improper performance of voluntary acts of the landlord could, in particular circumstances, constitute breach of the landlord's duty to use reasonable care or to keep the premises safe and to protect the tenants from criminal activity in common areas.

In Tucker v. KFC National Management Co., 689 F.Supp. 560 (D. Md. 1988), Tucker was standing in a restaurant waiting for an order when he became engaged in a fight with Reeves, another patron. Reeves brandished a knife and stabbed Tucker. Tucker sued the restaurant alleging that it did not provide an adequately safe place for business invitees. Specifically, Tucker focused on the allegation that the restaurant failed to have a security guard on the premises, and that this failure, in light of prior fights and robberies, constituted negligence on the part of the restaurant owner. As part of his claim, Tucker presented expert testimony that a security guard would have mitigated the injury.

The Tucker court also considered the issue of proximate cause and concluded that the absence of private security was not the proximate cause of the Plaintiff's injury. The Tucker court observed:

[T]hat the absence of private security guard service was not the proximate cause of plaintiff's injuries ... The incident occurred spontaneously when the two customers were standing in linewaiting for service. Once the altercation started, it would be sheer speculation to determine how the security guard would have prevented the injury; considering the spontaneity and brevity of the incident, he most likely could not have prevented it. If he were wearing a gun, would he have used it or would the courts have expected him to have used it? In the face of an assault, he might have been justified in taking action, but his failure to do so could not be the cause of the incident.

F. Supp. at 563.

The Tucker court held that no special duty is imposed on storekeepers to protect their customers and rationalized that:

[w]here the Court to hold otherwise, every newsstand, drug store, fast food establishment, gas station and similar establishment would be required to provide security guard service for its business invitees. The articulation of a duty so broad and with such extensive consequences rests on the legislation and will not be imposed judicially. Would one guard be enough? What procedures would be necessary for the guard to prevent criminal activity? Could the requirement to have a security force or guard not lead to greater harm and exposure to business invitees by confrontation? These are not questions of reasonableness for the jury to decide, but are questions of duty.

F. Supp. at 564.

In Nigido v. First Nat'l Bank of Baltimore, 264 Md. 702, 288 A.2d 127 (1972), the Court of Appeals considered an action brought against a bank for injuries sustained in a bank robbery. In this case, the Plaintiff went to the branch of the Defendant to make a deposit, and while he was there, armed robbers entered the bank and shot him. The Plaintiff alleged that the bank was negligent because: The bank's "cameras and other protective devices were not functioning, "the bank's building was not "properly guarded," the bank "failed to take proper precautions to guard" its building, and because "in view of the history of bank robberies" at that location, the robbery was "foreseeable." Id.

In holding that the Plaintiff failed to state a cause of action, the Court first determined that the Plaintiff was "an invitee to whom was owed the same duty a shopkeeper owes his customer, i.e., to use reasonable care for his protection." Id. at 128. The Court stated the following:

We see in the declaration not an allegation that the bank's premises, per se, were unsafe for the purpose for which they were being used, but rather that the bank was negligent in failing to have its premises "properly guarded" against "foreseeable" robberies. The allegation that this robbery was "foreseeable" is supported only by the further allegation that there is a "history of bank robberies at the said location." But even if it could be said that the robbery was foreseeable, it does not follow that the shooting of a customer was foreseeable.

Id. Regarding the allegation that the bank's premises were not "properly guarded," the Court further held the following:

If the words "properly guarded" are intended to connote measures designed to bar the entry of robbers such measures could well turn out to be counter-productive, in that they might keep out most of the customers as well. It will be observed that appellants do not allege a total absence of guards or a complete lack of any precautions. It is the failure to "properly" guard, the failure to take "proper precautions" to guard upon which they rely. But, in appellants' declaration, "properly" is but an adverb and "proper" but an adjective and, as we have said many times, naked adjectival or adverbial words, phrases or expressions can never take the place of facts. This is not to say however, that alleging a total absence of guards would have saved the day. Indeed, it has occurred to us that not providing armed guards might very well reflect the exercise of sound judgment rather than negligence. If it is the rationale of the bank that armed guards might provoke gun-play and that it is better to lose cash than lives, then the total absence of guards would seem to be justified.

Id. at 128-29.

Maryland law provides that only where a special relationship exists will a private person owe a duty to another to protect from criminal assaults by third persons. In Rock vs. Danley, 93 Md App. 411, 633 A2d 485 (1993), a case involving a breach of promise by an owner and management agent of rental property to investigate a potential security breach which resulted in an initial intruder assaulting a tenant, the Maryland Court of Special Appeals articulated the "**assumed duty**" theory of liability in holding that "**a person who volunteers or agrees to do something to protect another even though there was no preexisting duty to protect, must exercise reasonable care in doing what was volunteered or agreed to be done.**"

The case was predicated upon the **good samaritan doctrine** which the Court indicated has been an integral part of the tort law of Maryland.

The case of Rock v. Danley, supra, is problematic in that in theory it imposes potential liability on the part of an owner/occupier of malls, retail establishments and commercial enterprises for improperly providing mall security even though they had no duty to do so in the first instance.

In Southland Corporation v. Griffith, 332 Md 704, 633 A2d 84, (1993), the Maryland Court of Appeals held that an owner of a retail establishment has a **legal duty to come to the assistance of an endangered business visitor** on the premise if there is no risk of harm to the proprietor or its employees. The Court adopted section 314A of the Restatement of Torts Second and embraced the proposition that an employee of a business has a legal duty to take affirmative action for the aid or protection of a business invitee who is in danger while on the businesses premises provided that the employee has knowledge of the injured invitee and the employee is not in the path of danger.[\[3\]](#)

Assumption of Duty

The duty to protect others is set forth in Restatement of Torts 2d, section 314 and states:

The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action.

Unless there is some factor[\[4\]](#) creating a duty, an actor has no responsibility to protect another.

"There is rarely an absolute duty to secure the other's protection."[\[5\]](#)

However, once a party voluntarily renders assistance or protection to another, they have assumed a duty. Once a duty arises or once a duty is assumed a standard of care is imposed. This standard is found in the Restatement of Torts 2d, section 323,

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

(a) his failure to exercise such care increases the risk of harm, or

(b) the harm is suffered because of the other's reliance upon the undertaking.

The theory of voluntary assumption of duty also applies to third parties. This position is stated in Restatement of Torts 2ds, section 324A, which states as follows:

One who undertakes, gratuitously or for consideration to render services to another which he should recognize as necessary for the protection of a third person or this things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

(a) his failure to exercise reasonable care increases the risk of such harm, or

(b) he has undertaken to perform a duty owed by the other to the third person, or

(c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Accordingly, in the State of Maryland the owner/occupier's duty to protect against third party criminal activity under the existent Maryland law is that such an owner/occupier has a duty to exercise reasonable care for the safety of tenant and/or business invitees. If an owner/occupier knows or by the exercise of ordinary care should know criminal activity against person or property has occurred on the owner/occupier's property, the owner/occupier has a duty to take reasonable measures to protect tenants against these criminal activities.

In determining whether the measures taken by the owner/occupier were sufficient, the owner/occupier's acts can be measured only by the criminal activities occurring on the owner/occupier's property and of which the owner/occupier knew or should have known and not by those criminal activities occurring generally in the surrounding neighborhood. An owner/occupier has no duty to protect invitees against criminal activity occurring on the public streets. Buck v. Acme Mkts., Inc., 53 Md App 151, 456 A2d 47 (1982).

The difficulty with the modern day rule as it applies to liability of an owner/occupier for the failure to protect against third party criminal activity is that liability vel non of the owner/occupier in accordance with established authority of premises liability law, depends upon foreseeability. **In today's climate everyone can foresee the commission of crime virtually anywhere and at anytime.** The law as it presently is enunciated breeds uncertainty as to when the duty to furnish police protection arises, as well as what measures adequately discharge any such duty. Furthermore, requiring a business property owner to supply enough guards to prevent crime puts the owner in the position of an insurer which is also contrary to the common law and the established law of premises liability in the State of Maryland.

The modern day law of premises liability, as it is being applied, puts the mall owner/operator on the horns of a dilemma. Liability for the criminal acts of third persons is predicated currently on the concept of foreseeability. This is so under the traditional concept of premises liability and sound legal precedent. Premises liability is thus established on the owner/operator of malls and commercial facilities, but it has absolutely nothing to do with a natural or artificial condition of the premises, but rather a public safety function, i.e. protecting business invitees from the criminal acts of third parties.

It is suggested that such a duty cannot be predicated logically on foreseeability, otherwise liability of the owner/operator is strict liability in tort as it is axiomatic that criminal activity is foreseeable at any time and at any place to any person.

Consider the practical consequences of establishing liability of mall owners and operators to protect invitees from the criminal acts of third parties. Such a liability is non-existent when it comes to public authority. Is the liability of mall owners/operators which is greater than public authorities a fair concept under the law? It is submitted that such a concept results in the breakdown of the traditional negligence concept of negligence predicated upon fault and is the advent of strict liability in tort on the part of mall owners for the criminal conduct of third parties.

At the present time there is no reported case in the State of Maryland that clearly answers the question of liability of the owners of malls, retail establishments and commercial enterprises to protect against third party criminal activity insofar as establishing a duty to protect its patrons. However, Maryland has adopted sections of the Restatement of Torts Second in enunciating premises liability duties, i.e. section 314A of the Restatement was specifically adopted in Southland Corporation v. Griffith, supra. However, another section, namely section 344 contravenes the long existing Maryland law and general rule that a business property owner has no duty to protect their patrons. section 344 states that an owner/occupier of property who holds it open for business purposes is liable for physical harm to patrons caused by **accidental, negligent or intentional harmful** acts of third persons by the failure of the owner/occupier to exercise reasonable care to discover that such acts are being done or are likely to be done or give a warning adequate to enable the visitor/business invitee to avoid harm or otherwise protect them against it .[6] In comment f to section 344, it is observed that since the possessor is not an insurer of the visitor's safety, ordinarily he is under no duty to exercise any care until he knows or has reason to know that the acts of the third persons are occurring, or are about to occur. However, the Comment points out, the possessor may know or have reason to know from past experience that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual. Comment goes on to state that if the place or character of the business, or past experience is such that the possessor should reasonable anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it and to provide a reasonably sufficient number of employees to afford a reasonable protection.

The bottom line to owners and occupiers of malls, retail establishments and commercial enterprises is to **expect the unexpected**. Under the current existing law, negligence can be established for failing to provide security to protect invitees from the criminal conduct of third parties and may also be established by the failure to prevent crime by means of a security force as a consequence of the improper provision of security or the failure of the security force to prevent crime.

Simply stated, the current Maryland law is one of "**you're damned if you don't and you're damned if you do.**" Such is the concept of liability for the criminal acts of third persons predicated upon a "negligence standard." In each and every case that a **jury issue** is presented, liability is a distinct possibility.

The bottom line and end result is that a clearly enunciated legal standard should be adopted in the State of Maryland and strictly enforced by the Courts in order that liability vel non can be established as a matter of law.

Since the original publication of this material, a more recent opinion authored by Judge Chasanow of the United States District Court of the District of Maryland on July 31, 1995, serves as a significant limitation on premises liability in the State of Maryland predicated upon the criminal acts of third persons. In the Kay Jewelers, et al. vs Bias case, the owner of the mall, (Equity Property Management Corp.) a business owner, (Kay Jewelers), and the mall security company, (IPC International Corporation) all were sued by the survivors of Jay Stanley Bias, Jr., [7] who was killed as a consequence of a criminal act of a third person while both the assailant and the victim were exiting the mall after an altercation had occurred.

The significance of the decision is that Judge Chasanow relied upon two (2) earlier Maryland cases, namely, Tucker v. KFC Nat'l. Management Co., 689 F. Supp. 560, 563 (D. Md. 1988) an opinion written by Judge Neimeyer and Nigido v. First Nat'l. Bank of Baltimore, 264 Md. 702, 704, 288 A.2d 127 (1972), in making the rulings denying the liability of all three (3) defendants. The Court stated that Maryland Law is clear that in most circumstances there is no special relationship between a store keeper and its invitee to protect them from the random criminal acts of third parties.

The case is deemed significant in the Judge Chasanow relied heavily upon the Doctrine of Proximate Causation in denying liability against all three (3) defendants. Of particular import is the Court's language which indicated that "generally a landowner will not be held liable to its invitees for the random criminal acts of a third party, even if the negligence provided the criminal with the opportunity to perform a crime, because the particular criminal act is not foreseeable." The Court cited Giant Food, Inc. v. Mitchell, 334 Md. 633, 640 A.2d 1134 (1994).

Finally, liability was determined in favor of the security company on the grounds that while there was evidence of a contractual responsibility (an existence of a duty) the evidence was insufficient to establish liability predicated upon the random criminal act of the criminal assailant and the failure of the Plaintiff to prove that the negligence, vel non of the security company was the proximate cause of the occurrence. The Court indicated that the evidence did not rise above "speculation and conjecture."

The Bias case is viewed as the most significant case decided on Maryland Law to be decided in the last decade on the issue of the liability exposure of the owners and operators of Malls, retail establishments and commercial enterprises. It represents a significant decision which imposes a definitive limitation on the expanding liability exposure which has directly resulted from the failure of the Judicial system to impose strict evidentiary and legal standards in this area of premises liability.

VI. MANAGEMENT VIS A VIS OWNER/OPERATOR LIABILITY AND LIABILITY FOR THE ACTS OF THIRD PARTY CONTRACTORS

In Maryland, the general rule is that an employer of an independent contractor is not liable for the negligence of the contractor or its employees. However, the general rule has been subsumed by a number of common law exceptions to the non-liability for the acts of independent contractors. The exceptions fall into three (3) broad categories:

- (1) Negligence of the employer in selecting, instructing or supervising the contractor;
- (2) Non-delegable duties of the employer arising out of some relationship towards the public or the particular Plaintiff; and
- (3) Work which is specifically peculiarly or inherently dangerous.

In this regard, Maryland has adopted the Restatement of Torts Second.

In the case of Rowley vs. The City of Baltimore, 305 Md 456, 505 A2d 494 (1986), the Court of Appeals held that while the City of Baltimore had a non-delegable duty to maintain the convention center in a reasonably safe condition, it was not liable for injuries suffered by a security guard where the independent contractor was obligated to perform all routine maintenance and repairs at the convention center and evidence permitted finding that the assailant gained entrance to the building through the door the independent contractor knew was defective. The Court held that the City, as a landowner, was not liable to a security guard for failure of the independent contractor to perform the work that it had contracted to do, i.e. maintenance and repair for the convention center. The Court held, however, that as to members of the general public and adjacent landowners, the duty remains a non-delegable duty providing for liability on behalf of the landowner, in this case the City of Baltimore. The Court further indicated that the usual concepts of duty owed by a landowner - employer to an independent contractor and his employees to maintain in a reasonably safe condition the land upon which they work or over which they may be invited to travel to reach their work, remains intact. The Court indicated that an employee of an independent contractor injured on the employers premises by reason of a latent defect (known to the employer, but not to the contractor or his employee) which existed when the work began, has recourse against the employer. Similarly, the Court added, an employee of an independent contractor invited to cross land of the employer to reach a work place thereon, may recover from the employer for injuries resulting from the defective condition of the premises within the employer's control and not within the duties of the contractor to repair.

VII. TENANT LIABILITY

Under the clearly defined Maryland law, when an owner of real property leases premises to another and the lessee has full and exclusive control of the premises, the owner, as a matter of law, cannot be held liable for any injuries sustained by a third party invitee on the leased premises. Under the Maryland law, when land and/or premises are leased to a tenant, the law of property regards the lease as equivalent to a sale of the premises for a term. Henley vs. Prince George's County, 305 Md 320, 503 A2d 1333 (1986). Under the Henley Case, the Court indicated that the lessee acquires an estate in the land and becomes for the time being both owner and occupier, subject to all of the responsibilities of one in possession to those who enter upon the land and those outside of its boundaries. Thus, in connection with tort liability of mall owners, retail establishments and commercial enterprises, under the traditional concept of tort liability the mall owner would not be responsible for any negligent act which took place totally on leased premises as opposed to the common areas. However, in view of the nature of the modern day mall, it is anticipated that a judicial exception will be carved out in view of the control over the premises exercised by mall owners with regard to security matters. It is noted, however, no such judicially recognized exception has been applied by the Maryland Courts.

VIII. INDEMNIFICATION AND HOLD HARMLESS PROVISIONS

The general rule in Maryland, with respect to indemnification is that in the absence of any agreement, the Court will apply an "active/passive" analysis. Under this analysis, a party is only entitled to indemnification from a co-tortfeasor where a parties wrongdoing is found to be passive, or secondary to those of the primary wrongdoer. Thus, the court will apply a balancing test to determine if one wrongdoer is more at fault than the other. If such is the case the primary wrongdoer may have to indemnify the secondary wrongdoer.

The Maryland Courts have held that parties may reach express agreements providing for indemnification, however, this general rule is subject to several important limitations.

The first limitation is the rather clear-cut rule that a contract of indemnification will not be construed to indemnify a party against its own negligence unless the intention to do so is expressed in those very words or other unequivocal terms.

IX. RECOMMENDATIONS OF STEPS TO REDUCE LIABILITY EXPOSURE

In view of the existent Maryland law and the vigorous duties which have been ascribed to the owners/occupiers of commercial property, the following recommendations are made in order to reduce liability exposure:

- (1) All owners and operators should establish and implement a **reasonable standard of care** with respect to the premises. The standard of care should encompass all areas of potential liability and be predicated on a common sense establishment of duty associated with the care and maintenance of the premises. In recognition of the duty to use reasonable and ordinary care of the premises, each business entity or facility should establish and develop a reasonable standard of care suited to the nature of the premises. Furthermore, it is recommended that the owners of malls, retail establishments and commercial enterprises, join together in order to establish a **uniform standard of care** for the maintenance of premises, i.e. the creation of an industry standard;
- (2) The owners and operators of malls, retail establishments and commercial enterprise, as an industry should set the standard of care applicable generally otherwise a court or jury will do so. Not only are Courts and juries ill-equipped to do so but the results are incongruous in that different yard sticks are used to measure liability on a case by case basis rather than a singular standard set by industry predicated upon a reasonable standard of care;
- (3) A management decision should be made to **establish and implement** the recommended standard of care;
- (4) The reasonable standard of care should be established by utilizing a negligence standard predicated upon the fault concept imbedded in the traditional law of premises liability related to the condition of the premises;
- (5) **A common sense approach** should be taken in connection with all risk management decisions. The number one rule should be let common sense be your guide;
- (6) Customer assistance efforts, as well as first aid matters should be bifurcated and kept separate and distinct from claims handling and reporting;
- (7) A proper reporting or claims handling procedure is to obtain the customer's complaints and version of the occurrence and to record and accurately report it as such;
- (8) Security should obtain all available information inclusive of a complete description of the customer and the customer's account of the incident, as well

as all existing site conditions in order to document the condition of the premises at the time of the alleged occurrence;

(9) Identify and locate all eyewitnesses to all or part of the occurrence and any part thereof. This information should include full names, addresses and all available information inclusive of witness statements if possible;

(10) A determination of the condition of the premises on the date, time and place of the occurrence, as well as the names and addresses of all witnesses thereto should be obtained and recorded as part of the reporting or claims handling process. The condition of the premises at the date, time and place of the occurrence should be fully documented;

(11) Preserve all available evidence at the scene of the occurrence and/or accident local: (a) photographs; (b) measurements; (c) preserve all physical evidence;

(12) All security reports and/or incident reports should be labeled as such and identified as accident investigation and legal investigation. All documents and the security report should be labeled "**Confidential - Prepared in Anticipation of Litigation**" and submitted to legal; Such material also can be labeled "**protected by attorneys work product;**"

(13) Establish a **litigation contact person** initially for communications with the insurance carrier and subsequently for litigation counsel. Such a person should be in charge of all of the security reports that were prepared in anticipation of litigation;

(14) Adopt a procedure for **mall emergency closures** and/or partial or segmental mall closures dealing with all matters of mall safety and security such as fire, criminal activity, catastrophe and the like. **Emergency procedures** should be reflected in all lease agreements and otherwise deal with segmental closing of the mall in order to assure safety and/or matters of public necessity are authorized;

(15) **Security Survey:** It is recommended that a security survey be undertaken with respect to all matters of mall safety and security. It is recommended that such a security survey be performed under the advice of counsel and that once a security and safety program has been implemented that a second security survey be performed as part of the regular maintenance and safety review policies for the facility. The security and safety survey should include all

matters of primary risk inclusive of all existing conditions, natural and artificial.

X. CONSIDERATION OF STATUTORY LIABILITY AND STANDARDS

In addition to common law standards which may impose liability, certain statutory provisions exist which serve to impose strict liability in one form or another on the owners and operators of malls, retail establishments and commercial enterprises.

A. Liability of Landlords and Tenants Under CERCLA

In recent years, the development of a body of federal statutory law dealing with environmental hazards and the imposition of liability for the existence of these hazards, has imposed upon landlords and tenants an additional group of liabilities that the parties cannot always avoid by contractual provisions or the exercise of due care. Under the **Federal Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA)** it gives the Environmental Protection Agency (EPA), the power to recover its costs in cleaning up a hazardous waste site from, among others, the "owners and operators" of the facility. This is also known as the **Superfund Law** and as amended by the **Superfund Amendment and Reauthorization Act of 1986 (SARA)**, both Federal and State Governments have authority to respond to releases and threatened releases of hazardous substances and thereby protect the public and environment.

The term "hazardous substances" is broadly defined under CERCLA and accompanying regulations and include toxic pollutants, hazardous air pollutants under the Federal Clean Air Act and any "eminently hazardous chemical substance or mixture". Courts interpreting CERCLA have concluded that the statute allows for the imposition of joint and several liability among all potentially responsible parties (PRP). The Court's construing CERCLA held that parties identified as responsible persons in CERCLA section 107(a), are **strictly liable** for the release of a hazardous substance. Recent judicial decisions have dealt with a range of factual situations evidencing broad application of the statute for imposing upon landlords and tenants as "tenants and operators." Liability under CERCLA is imposed upon both current owners and operators and past owners and operators of facilities on which a release of hazardous substance has taken place. Accordingly, an owner/operator of a commercial facility, must constantly police all tenants in order to prevent the tenant from causing any environmental impact on the property. Lease terms should require that pre-lease and post-lease environmental audits of the property be conducted and under the law an owner must exercise due care to prevent a tenant from contaminating the property.

The bottom line for owners/operators of commercial facilities is to make certain that the tenant is in full compliance with the law and that indemnification provisions protect the owner/operator from liability.

B. The Americans With Disability Act (ADA)

Title III of the ADA took effect on January 26, 1992, and prohibits discrimination against individuals with disabilities in the "full and equal enjoyment" of all public facilities and services. Places of public accommodation includes places of lodging, convention centers, cultural facilities, retail sales establishments, service establishments (such as laundromats, banks and doctors' and lawyers' offices) and any business in which the public is allowed access (presumably including insurance companies). It is discriminatory under the ADA to fail to remove structural, architectural and communication barriers in existing facilities where such removal is "readily achievable, easily accomplished, and carried out with little difficulty or expense. In determining whether removing a structural barrier is readily achievable, such considerations as the nature and cost of the modification and the size, financial resources, and type of business are pertinent. If the removal of a barrier is not readily achievable, the goods or services must be made available through alternative methods, where doing so is readily achievable.

New facilities must be readily accessible and usable by individuals with disabilities except where it is structurally impractical to do so. Regulations have been issued by the Architectural and Transportation Barriers Compliance Board which must be utilized prior to making any structural changes.

Title III of the ADA may be enforced by the Attorney General or by private lawsuit. The Attorney General must investigate complaints and undertake compliance reviews. Title III's remedies can include ordering the alteration of facilities to make them accessible, monetary damages to aggrieved persons and civil penalties of up to \$50,000.00 for a first violation and \$100,000.00 for subsequent violations. This section of the ADA states that "the monetary damages and other such relief as courts may grant" does not include punitive damages.

C. Occupational Safety and Health Act (OSHA)

In 1970, Congress enacted the Williams-Steiger Occupational Safety and Health Act of 1970. The stated policy of the Act is to assure, so far as possible, every man and woman in the nation safe and healthful working conditions and to preserve the nation's human resources. Thus, the purpose of OSHA is to eliminate dangerous conditions in the work place, and to prevent the first accident, and it has been said that avoidance of minor injuries, as well as major ones, was intended to be within the purview of the statute. The Act represents a decision to require safeguards for the

health of employees even if such measures substantially increase production costs. The Occupational Safety and Health Act has been called the most revolutionary piece of labor legislation since the National Labor Relations Act, and it has been hailed as a new "bill of rights" for employees, and as for the most part a sound and constructive law.

OSHA attempts to accomplish its broad objectives through many means, including the stimulation of employers and employees to institute new, and to perfect existing programs for providing safe and healthful working conditions, providing that employers and employees have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions; authorizing the Secretary of Labor to set mandatory occupational standards; providing continuing occupational health and safety research, including research into psychological factors involved; providing training programs; providing an effective enforcement program; and by encouraging the states to assume responsibility for occupational safety and health to the greatest extent possible. It is thus clear that OSHA provides a broad spectrum of powers for use by the Secretary of Labor in reducing exposure to hazardous conditions in the workplace, and that cooperation among all levels of government and the voluntary compliance of both employers and employees are essential ingredients for success. As with any highly complex legislation, untempered by the forge of judicial review, only time - and cases - will reveal judicial reaction and philosophy relating to the statute as particular factual settings arise. The reader is cautioned that the criminal and civil penalty provisions of the Act are severe; that the time periods for contesting or appealing the decisions of the effectuating agencies are very short; and that the rules and regulations promulgated under OSHA are being frequently expanded, deleted, or modified.

The Occupational Safety and Health Act of 1970 (OSHA) is extremely broad in its coverage. Because of the broad definition of "employer" under the Act, it has been estimated that the Act applies to more than five (5) million businesses and about sixty (60) million employees, or about three-fourths of the civilian labor force. The size of a business, for purposes of the Occupational Safety and Health Act, is irrelevant, and the type of activity of a business is similarly of no consequence in deciding whether an employer is covered by the Act.

It has been held, however, that since Congress' intent was to protect working men and women from hazards at their place of employment, a standard promulgated pursuant to the Act cannot be extended to provide protection for pedestrians or other non-employees. And OSHA does not apply where a worker is an independent contractor and not an employee of the owner.

An employer may carry out its statutory duties through private arrangements with third parties, but if it does so and those duties are neglected, it is up to the employer to show why he cannot enforce the arrangements he has made, if he cannot make this showing he must take the consequences and his further remedy lies against the private party with whom he has contracted and whose breach exposes the employer to liability.

Congress has defined "employer" for purposes of the Act to mean a person engaged in a business affecting commerce who has employees, other than the United States or any state or political subdivision of a state.

XI. CONCLUSION

One need only step into a courtroom anywhere in the State of Maryland or read the newspaper in order to recognize that American society is litigious in nature and the State of Maryland is no exception. The changing law of premises liability is a wake-up call to owners and occupiers of property and retail establishments. It is a business necessity to adopt a defense minded policy with respect to the ownership and operation of any commercial facility, small or large and to establish maintenance, safety and security policies predicated upon the reasonable procedures founded upon common sense. **Reasonably safe premises** are what the law requires, no more and no less and nearly every premises liability case decision commences with the statement that whatever the duty upon an owner/occupier, it is not an insurer. In Scott vs. Watson, 278 Md 60, 359 A2d 548 (1976), a leading Maryland case in premises liability, the Court stated:

"Mere ownership of a building does not render the owner liable for the injuries sustained by [tenants] since the [landlord] is not an insurer of such person. Rather where a [landlord] leases separate portions of a property to different tenants and reserves under his control halls, stairways, and other portions of property used in common by all tenants, he is only obliged to use reasonable diligence and ordinary care to keep the portion retained under his control in a reasonably safe condition."

However, as a consequence of the legal standards imposed on Owners/Operators of malls and commercial enterprises and the duties placed upon them and by the public perception, caused in part by the collateral development of strict liability and other legal principles imposing strict liability, it is submitted that the modern shopping mall/business facility, is, relatively speaking, a **quasi-insurer** of people and property. The duties imposed on owner/operators of malls and commercial enterprises are very arduous and the standard is very high.

The modern day shopping mall/businesses facility is, relatively speaking, a reasonably safe place to be. The problem of safety and the shopping mall is not the safety of the public but the **liability exposure** to the owners and operators of the facility. Most modern shopping malls are safe. That which makes them unsafe or hazardous are people. In the final analysis, the problem associated with the ownership and operation of a mall, retail establishments and commercial enterprises is protecting the mall owner/operator from people who are constantly attempting to impose liability on them when it in most instances ought not to exist.

Endnotes:

[1]Lamb v. Hopkins, 303 Md. 236, 492 A.2d 1297 (1985); Scott v. Watson, 278 Md. 160, 359 A.2d 548 (1976); Southland Corporation v. Griffith, 332 Md. 704, 633 A.2d 84 (1993).

[2]Southland Corporation v. Griffith, supra.

[3]The comments to section 314A of the Restatement clarify the rule: Comment (d) states that the duty to give aid to one who is ill or injured extends to cases where the illness or injury is due to natural causes, to pure accident, to the acts of third persons, or to the negligence of the Plaintiff himself.

[4]The use of the word “factor” refers to a special relationship, contract, custom, industry practice, regulation, etc.

[5]Restatement of Torts 2d, section 291, comment g.

[6]The Restatement of Torts 2d section 344 provides that a possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent or intentional harmful acts of third persons or animals and by the failure of the possession to exercise reasonable care to discover that such acts are being done or are likely to be done, or give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

[7]James (Jay) Stanley Bias, Jr., is the brother of Len Bias, who was the Maryland basketball player who died of a drug overdose in 1985.

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