When Security Is Promised –

Fake Cameras & Defective Panic Buttons Can Lead to Expensive Liability Suits

*by Elliott Goldstein, B.A., LL.B.**

Consider this not-too-hypothetical situation:

An attractive young woman decides to look for a downtown apartment. Concerned about her personal safety, she seeks a newer, "more secure" building. She reads in the newspaper about a new "high security" apartment building, complete with built-in alarm systems, surveillance video cameras, "call-for-help" buttons on each floor, and security guards on patrol 24 hours a day. She makes an appointment with the building's property manager and views the vacant suite and tours the newly constructed apartment building including its underground parking lot. She is told many times by the property manager that the building is "safe" and "secure." "The whole building is under surveillance by video cameras. There are even cameras in the underground parking lot," says the property manager, "and there are 'call-for-help' buttons strategically located throughout the building." Impressed with the security, the young woman signs a lease (which makes no reference to the building's security features) and moves in.

Late one night, two weeks later, she is brutally attacked and robbed in the underground parking lot of her new apartment building by two youths looking for money to purchase drugs. During the attack she manages to temporarily escape and runs toward a video surveillance camera. She repeatedly presses a "call-for-help button" mounted on the wall near the camera. Thereafter, her attackers recapture her and continue their assault. A short time later she is found badly injured and semi-conscious by other tenants of the building. Her injuries leave her partially paralyzed and in mental distress.

The police investigate and discover that the surveillance camera in the underground parking lot is a non-functional ("fake" or "dummy") camera that was installed to act as a deterrent to would-be auto thieves. The "call-for-help button" that she pressed in vain, was never properly connected and no alarm signal was ever sent to the security room of the building. Further investigation uncovered numerous other deficiencies and defects in the building's security system, including insufficient patrolling of the building and underground parking lot.

Her attackers, before entering the building, were recorded on videotape by an external security camera, but unfortunately, the recorded image was blurry, dark, and virtually useless because of poor camera focus and dim lighting.

The attackers were never caught and are believed to be responsible for other similar attacks in the area. Some of these attacks occurred before the present one. One such attack occurred in this same apartment building. During the police investigation which followed many recommendations were made to the property manager and landlord to improve security. None of these recommendations was acted upon by either the property manager or the landlord.

Based on the foregoing realistic situation, the author examines questions of liability, in contract and tort, of the owner/landlord, property manager, and security firm involved. (Liability under the *Occupier's Liability Act* R.S.O. 1990, c.0.2, and similar legislation in other provinces, is left to a future article.) The aforementioned facts could give rise to litigation based on the following grounds:

Breach of contract. The young female tenant could sue the apartment building's owner(s) and the property management company for misrepresentation. She could argue that she was induced to enter into the contract *(i.e.,* the "lease"*)* based on the false statements and deceptive advertising *(i.e.,"* misrepresentations"*)* made by the property manager, as agent for the landlord and the landlord itself. It is fraudulent misrepresentation if they *knowingly made the false statements* to the tenant regarding the security system and the safety of the building. It is negligent misrepresentation if they made the false statements carelessly. In either case they are liable. They can only escape liability if the misrepresentations were innocent.

Negligence. The tenant could sue the landlord for failing reasonably to secure the underground parking lot once having represented its safe condition, or, alternatively, for allowing the tenant to be lulled into a false sense of security. Proper security may have prevented the unfortunate assault as would a warning to the tenant. A knowing and conscientious female tenant could have requested escort service or

**Elliott Goldstein is a Toronto area lawyer who specializes in civil and commercial litigation and visual evidence research. He has written a number of articles for Canadian Security and other periodicals and is the author of "Visual Evidence: A Practitioner's Manual".*

exercised greater care or, (more than likely) taken up residence elsewhere.

In addition, the landlord may be liable for failure to heed the recommendations of the police to improve security after the previous attack.[1] American cases have held that landlords, commercial occupiers, and banks have a duty to protect their tenants, customers, and clients, respectively, from intentional and even criminal acts of third persons where such misconduct is foreseeable.[2] Foreseeability is also a determining factor in Canadian cases.[3]

In the example above, if the assault was reasonably foreseeable, it ought to have been guarded against. That is, the landlord owed a duty to the tenant and breached that duty. The landlord fell below the standard of care because the level of security that was provided was insufficient in the circumstances.

The landlord could have protected itself by including in its lease exculpatory clause(s) exempting it from liability. However, exculpatory clauses designed to exempt landlords (and others) from liability for damages will be strictly construed. So if, for example, the landlord inserts a clause in the lease which explicitly relieves it of contractual and delictual (tort) liability to the tenant, the courts will give effect to it unless the landlord is guilty of gross negligence.

Canadian courts have held that it is not sufficient if the lease clause simply exempts the landlord from liability for personal injury suffered by a tenant "in any way." This wording was found to be ineffective to protect a landlord against an award of damages in favor of a tenant who had been attacked and injured by a stranger in the garage of her apartment building.[4]

Failure to ensure that a "call-for-help" button (or panic button) of a security system is operating properly may result in a landlord being found grossly negligent. Unlike the security/surveillance cameras, the presence of such a button is not a deterrent to would-be criminals. The button is a safety feature, much like a fire alarm box.

The landlord cannot escape liability by arguing that "security, such as it was, had worked for years." That may have been due to chance. The tenant doe not have to prove that her attackers' presence was due to lack of security. Nor the tenant need to show how the attackers came to be in the underground parking lot.

For the situation described above to be completely accurate and life-like, the owner/landlord and property manager, respectively, would have to sue the installer of the video surveillance and alarm system for breach of contract, and in negligence for faulty installation and design, and for negligent advice (*i.e.*, recommending "dummy" cameras). In addition, the installer would most likely sue the manufacturer for defective parts if there was any evidence to support such a claim. (However, the manufacturer's warranty may limit its liability in this regard.)

The installer of the security system could protect itself by including in its sales contract with the landlord/owner, a clause which limits its liability. In addition, if the installer is under contract to maintain, service, or repair the system, a similar "limitation of liability" clause should be included in the service agreement.

An installer's liability for recommending and installing "fake" or "dummy" cameras has not been an issue in reported Canadian cases of which this author is aware. "Fake" or "dummy" cameras are valuable only as a visual deterrent or "decoy." Because they are non-operational, their deterrent effect depends upon their visibility *(i.e.,* the would-be offender must be aware that the camera is present*).* They act as a "decoy" when installed together with hidden "working" cameras. The logic behind their use is that an offender will damage or steal the "dummy" or "fake" decoy believing that, having rendered it inoperable, he or she is no longer under surveillance. Sometimes they also damage or steal the VCR or videotape!

This author is not opposed to the use of "fake" or "dummy" cameras provided that hidden "working" cameras are also installed nearby. "Fake" or "dummy" cameras alone should never be used to protect people, just property. In the hypothetical situation given above, the use of "fake" or "dummy" cameras was totally inappropriate because the safety of tenants and guests using the underground parking lot, not just their vehicles, was at risk.

To protect themselves, security firms contracting to install "dummy" or "fake" cameras should include in their sales contracts a clause which specifically exempts them from any liability for loss or damage or personal injury caused by the use of such cameras. If a security firm advises against the use of "fake" or "dummy" cameras in a particular situation and the purchaser/customer insists on their use, the security firm/installer has three choices.

The security firm/installer can: (1) refuse to do so and run the risk of losing the business to a competitor; (2) try to convince the purchaser/customer to also install hidden "working" cameras nearby; or (3) write a letter to the purchaser/customer stating that the security firm/installer has advised the purchaser/customer against installing "fake" or "dummy" cameras in this location, but notwithstanding such advice, the purchaser/customer has insisted on their installation and use. Furthermore, the security firm/installer should clearly state in writing that it accepts no liability for any loss, damage, or personal injury occasioned by the purchaser's failure to follow the security firm's advice. Such a letter can be used to negative any claim that the security firm/installer recommended the use of "fake" or "dummy" cameras or negligently advised the purchaser.

American courts have been quick to find fault with negligent apartment owners for inadequate security, and have been generous to crime victims. For example, in a 1989 Texas case, a rape victim received a $3.8 million verdict against apartment complex owner, manager, and general contractor for deceptive advertising and inadequate security.

It is just a matter of time before similar cases begin appearing in Canadian courts. While Canadian court verdicts will certainly not be as large as those of American courts, the liability risk remains. Owners, managers, landlords, security firms, *etc.* should carefully review their contracts to ensure they include limitation of liability clauses and/or exemption clauses that provide adequate protection. In addition, there is no substitute for a good insurance policy which provides coverage of a wide variety of risks to a sufficient monetary level.

Caveat. The information contained in this article should not be construed as legal advice or opinion. The author encourages interested readers to consult with their in-house counsel or seek outside legal advice and opinion.

References

1) See *Q v. Minto Management Ltd.* (1984), 31 C.C.L.T. 158 (Ont. H.C.) (tenant raped by landlord's employee; landlord not controlling use of master keys and failing to improve security after previous attack on another tenant).

2) See *ATLA Law Reporter*, June 1984, Vol. 27, No. 5, p.202-203, and *ATLA Law Reporter*, Oct. 1988, Vol. 31, No. 8, p.347-349. See also, Thomas, P.M. "Once is enough; a prior similar incident may establish Foreseeability" (April 29, 1996), v. 109, no. 83, *The Los Angeles Daily Journal* (newspaper), p. 7, column 1 AND Carrizosa, P., "Court widens store owners' liability risk; issue is definition of 'prior similar incidents of crime; premises suit allowed" (March 11, 1996, v. 109, no. 48, *The Los Angeles Daily Journal* (newspaper), p. 7, column 6.

3) See *Allison v. Rank City Wall Can. Ltd.*, (1984), 45 O.R. (2d) 141 (Ont. H.C) (tenant attacked and injured by stranger in the garage of her apartment building) and *Stringer v. Ashley* Toronto Court file No. 321906/88U [(January 27, 1994, Ontario Court (General Division)].

4) See *Allison v. Rank City Wall Can. Ltd.*, (1984), 45 O.R. (2d) 141 (Ont. H.C.)

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OUR COVER: Tim Fletcher, who is known to our readers for his video expertise, shows how attention to food and drink intake can help surveillance staff stay alert and comfortable on the job. (See page 19 for dietary details and advice).

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