

GAZING INTO THE MURKY CRYSTAL BALL: THE RISE OF DESIGN PROFESSIONAL LIABILITY FOR THE CRIMINAL ACTS OF THIRD PARTIES

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I. INTRODUCTION

Design professionals¹ have increasingly become the target of

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1. “Design professional” refers to architects and engineers who design and supervise construction projects. See Richard M. Shapiro, *Design Professionals—*

lawsuits brought by victims of the criminal acts of third parties.² These actions have largely been brought under negligence theories, alleging that the commission of the criminal acts that caused the claimant's injury was facilitated by the professional's choice of design for a building, facility, or its surroundings. In the past, the American legal system has been unwilling to impose liability upon design professionals under these theories.³ With the looming threat of future acts of domestic terrorism, however, this unwillingness is eroding as the public becomes more incensed about the rising tide of criminal activity, and local law enforcement agencies are perceived as unable to protect the public against these apparent threats. Accordingly, as the courts' dockets reflect, more citizens now look to non-traditional parties⁴ such as architects and engineers to protect them from criminal activity.⁵ The current case law addressing design professional liability for criminal conduct has resulted in a legal terrain that is both unpredictable and perilous for the design professional. In this legal environment, trying to advise a design professional on how best to avoid potential liability for these types of claims has

Recognizing a Duty to Inform, 30 HASTINGS L.J. 729, 729–30 (1979). However, the theories discussed in this article are applicable to any entity or individuals performing similar functions, e.g., designers of lighting systems in apartment parking lots.

2. See, e.g., *In re Sept. 11th Litig.*, 280 F.Supp.2d 279 (S.D.N.Y. 2003); See generally Eugene J. Farrug, *The Necessity of Expert Testimony in Establishing the Standard of Care for Design Professionals*, 38 DEPAUL L. REV. 873, 873 n.1 (1989) (examining the historical rise of claims against architects and how this has resulted in increased insurance premiums and a precipitous decline in the number of insurance companies willing to offer design professional coverage); Constance Frisby Fain, *Architect and Engineer Liability*, 35 WASHBURN L.J. 32, 32 n.3 (1995) (discussing the historical increased frequency and costs of design professional malpractice claims); see also William David Flatt, Note, *The Expanding Liability of Design Professionals*, 20 MEM. ST. U. L. REV. 611 (1990) (discussing the expanding scope of liability faced by design professionals).

3. See Nadine M. Post, *Defensible Space: More Than Merely Cops and Robbers*, ENG'G NEWS REC., May 1, 1995, at 18. Historically, such suits were difficult to bring. Many jurisdictions have lengthy statutes of repose for design defects claims. See E. Wayne Taff, Comment, *A Defense Catalogue for the Design Professional*, 45 U. MO. KAN. CITY L. REV. 75, 92 n.130 (1976) However, as a result of (1) the increased sophistication of plaintiffs' lawyers regarding these types of claims, and (2) recent increases in design professional involvement in retrofit and renovation projects, more claims are now being brought. In addition, the element of causation with respect to a given crime—especially premeditated crimes such as terrorism—has been difficult to prove. However, as discussed *infra*, part III-C, the rise of comparative responsibility schemes in many jurisdictions has made it more difficult for defendants to prevail on this issue before the case goes to the jury.

4. Traditional premises liability defendants include business owners and those who actively control the security of the premises.

5. In fact as one commentator notes, given the current state of public awareness and its attitude toward these potential claims, “[i]f they don’t sue the architects, the lawyers themselves could be sued for malpractice.” Post, *supra* note 3, at 18.

been compared to gazing into a “murky crystal ball” to predict the future.⁶ Nevertheless, the failure of design professionals to understand the nature of these liability theories and play a proactive role in the development of this area of the law could lead to the continued expansion of tort liability and prove very costly to the industry.

This article examines the current case law governing design professional liability for the criminal acts of third parties. Part II examines the legal basis of these claims. Part III explains why these claims will continue to be a prominent fixture of the premises liability landscape for the foreseeable future. Part IV examines the costs and benefits associated with expanding liability to design professionals for these types of claims. Based on this analysis, Part V concludes with an alternative, more proactive approach to achieve the goals sought by the current liability scheme.

II. THE ANATOMY OF A CLAIM

“The law of negligence establishes the societal norms of behavior which exist to prevent injury and property damage to others. If a norm is violated causing injury to another, the losses are shifted from the injured party to [the tortfeasor].”⁷ Accordingly, for a plaintiff to recover against a design professional in a negligence action, the plaintiff must prove that there was a duty owed to prevent the harm alleged to have occurred, a breach of that duty, a causal relationship between the breach and the alleged damages, and measurable damages.⁸ “[The elements of] duty and breach serve as legal thresholds in determining negligence before proceeding with causation and damages.”⁹ Each one of these elements will be examined in turn.

A. *Does a Duty Exist?*

Societal norms may impose a duty to protect third parties. However, with respect to torts committed by criminal actors upon innocent parties, the courts acknowledge that individuals and

6. See William H. Hardie, Jr., *Foreseeability: A Murky Crystal Ball for Predicting Liability*, 23 CUMB. L. REV. 349 (1992).

7. Kenneth R. Michael, *Design Professional Liability: A Balanced Framework for Third-Party Actions by Tenants and Users*, CONST. LAW 8, 10 Aug. (1994).

8. See *Ward v. Hobart Mfg. Co.*, 450 F.2d 1176, 1181 (5th Cir. 1971).

9. Michael, *supra* note 7, at 10.

companies are not insurers to the public against general crime.¹⁰ Accordingly, under the law of most jurisdictions, a duty to protect others from the criminal acts of third parties will not exist in the absence of statutes or “a special relationship or circumstances” existing between the claimant and the potential defendant.¹¹ The relationship between design professionals and the public has yet to be defined by the courts as one of the “special relationships” giving rise to this duty.¹² Nevertheless, the courts have acknowledged that, under certain circumstances, the design professional may owe a duty to the public with respect to a design selection that facilitates criminal conduct.¹³

Case law regarding the existence and scope of this duty gives design professionals little guidance as to when they may be found to have a duty to prevent or protect against criminal conduct.¹⁴ According to most authorities, the existence of the duty of care for a design professional for the criminal act of third parties is dependent upon both (1) the foreseeability of a third party’s criminal activity and the claimant’s resulting injury, and (2) the reasonableness of placing the duty on the design professional to prevent this type of conduct.¹⁵

The element of foreseeability alone has proved problematic with respect to criminal activity. A review of current case law illustrates that its definition will not only vary from jurisdiction to jurisdiction, but among juries in the same jurisdiction as

10. See *Perry v. S.N.*, 973 S.W.2d 301, 306 (Tex. 1998) (“At common law there is generally no duty to protect another from the criminal acts of a third party or to come to the aid of another in distress.”).

11. See RESTATEMENT (SECOND) TORTS § 314A (1965) (setting forth special relationships giving rise to a duty to aid or protect, which include those between a landowner and invitee, landlord and tenant, and common carrier and passenger).

12. See, e.g., *J.M. v. Shell Oil Co.*, 922 S.W.2d 759, 765 (Mo. 1996) (“The relationship between the designer of a building and a business invitee is not one of those previously recognized as a ‘special relationship’ or ‘special circumstance.’ We need not and, therefore, do not recognize such relationship as a basis for liability in this case.”) (citation omitted).

13. There are relatively few reported cases on this issue. The likely explanation for this is that given the large potential liability stemming from these types of cases, the huge defense costs, the likelihood that there will be multiple defendants, and insurance company involvement in the handling of the claims most of these cases settle long before trial or are settled after trial and before the appeal. See Peter Toll Hoffman, *Valuation of Cases for Settlement: Theory and Practice*, 1991 J. DISP. RESOL. 1, 30 (1991).

14. See, e.g., *Crochet v. Hosp. Serv. Dist. No. 1 of Terrebonne Parish*, 476 So. 2d 516, 518 (La. Ct. App. 1985) (applying Louisiana’s duty-risk analysis approach to determine whether a duty existed between the designer of lighting system and kidnapping and rape victim); cf. *Am. Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 432 (Tex. 1997) (applying Texas’ risk-utility analysis to determine liability for a defective design).

15. See, e.g., *Crochet*, 476 So. 2d at 518.

well.¹⁶ Furthermore, because foreseeability is used in different ways by many courts, it is not clear whether courts have uniformly decided who should resolve the foreseeability issue—judges or juries.¹⁷ The ultimate determination of this issue may also turn on the judges' and juries' subjective beliefs.

Currently there are three major definitions of foreseeability commonly used in American jurisprudence.¹⁸ The most restrictive view of foreseeability requires that the design professional actually knew or should have known of the risk of criminal activity associated with a design selection. Under this formulation, for foreseeability to exist, the claimant must prove that the design professional was notified by previous clients that the design had caused or could cause the same criminal activity that allegedly harmed the claimant.¹⁹ The "prior similar incidents" formulation is a middle-ground definition that requires a claimant to produce evidence of prior similar criminal acts that were caused by a particular design to establish foreseeability.²⁰ Finally, the "totality of circumstances" formulation requires that the courts analyze foreseeability in light of all the facts and on a case-by-case basis.²¹

16. See Melinda L. Reynolds, Note, *Landowner Liability for Terrorist Acts*, 47 CASE W. RES. L. REV. 155, 171-73 (1996).

17. *Id.* at 176.

18. *Id.* at 171. Two minor definitions of foreseeability that are occasionally discussed in some jurisdictions are the "first line of defense" and "tempting target" theories. Under the former, even if foreseeability is rather low (*e.g.*, no prior incidents), when the design professional's nonfeasance amounts to what would generally be considered gross negligence (*e.g.*, no door locks), the criminal activity is foreseeable and a duty exists. Although only a few courts have adopted the "tempting target" theory, the thesis of this approach is often used as a factor in the foreseeability analysis under one of the major formulations discussed above. Under the thesis of this approach, some properties are by their nature particularly attractive for crime (*e.g.*, bars, concert halls, and casinos) and this leads to a greater foreseeability that criminal activity will occur. *Id.*

19. See, *e.g.*, *Kline v. 1500 Mass. Ave. Apartment Corp.*, 439 F.2d. 477, 479 n.3 (D.C. Cir. 1970) (explaining that foreseeability was established through conversations between tenant and landowner regarding safety of building and police reports documenting the frequency of crime on the premises); *Samson v. Saginaw Prof'l Bldg., Inc.*, 224 N.W.2d 843, 851 (Mich. 1975) (stating that foreseeability established by communication to landlord by tenant that criminal attacks were likely or possible).

20. See Reynolds, *supra* note 16, at 172. Although widely used, the prior similar incidents rule has several drawbacks. First, the design professional is effectively allowed one "free" instance of criminal activity as a result of a particular design choice before he can be held to have a duty. Second, this rule can lead to arbitrary results and distinctions. The issues of how close in time, near in location, or analogous in conduct the prior incidents must be, are all subjective determinations to be made by the judge or jury.

21. Most jurisdictions that have adopted this approach have also established factors which are to be considered in making this determination and which promote consistency in the case law on this issue. For example in *Timberwalk Apartments, Partners, Inc. v. Cain*, the Texas Supreme Court, recognizing that crime can be visited upon virtually

Because not every risk which may be foreseeable will necessarily create a duty to a victim of criminal conduct, the reasonableness of placing the duty on the design professional must also be examined. This inquiry has no uniform guidelines and generally involves the subjective weighing of the relationship between the parties, the nature of the risk, and the public interest in placing the duty on the design professional.²² A distillation of the case law yields a list of the following factors used by the courts in making this analysis: (1) the reasonable expectation of the claimant and the public to be protected by the design professional from the criminal activity; (2) the extent of burden on the design professional and the impact on the entire design profession by placing the duty upon the design professional; (3) the potential for unlimited or insurer-like liability to result from establishing a duty; (4) the design professional's moral blame for the claimant's injury; (5) the policy of preventing future harm; (6) the availability, cost, and prevalence of insurance for the risk involved; and (7) the consequences to the community by establishing or not establishing a duty.²³ This analysis is, at its core, a test of fairness. Essentially, through the use of these factors the courts are determining whether placing liability upon the design professional, under the circumstances of the case, is fair.

Design professionals may possess information critical to this analysis. This information may include: (1) the availability of an alternative design selection which would address the security concern at issue and not be unreasonably expensive; (2) the design professional's ability to increase crime preventive aspects

anyone at any time or place, held that the duty to protect people from the criminal conduct of third persons only exists when the risk of criminal conduct is so great that it is both unreasonable and foreseeable. 972 S.W.2d 749, 756 (Tex. 1998). The foreseeability of such a risk is not to be determined from hindsight, but rather should be measured by what the premises owner knew or should have known before the criminal act occurred. *Id.* at 757. Factors to be considered in this foreseeability analysis include (1) whether criminal conduct previously occurred on or near the property; (2) how recently the prior criminal conduct occurred; (3) how often the prior criminal conduct occurred; (4) how similar the prior criminal conduct was to the conduct that occurred on the property; and (5) what publicity was given to the prior criminal conduct that would indicate that the landowner knew or should have known about the potential for crime. *Id.* at 757-59. Similar factors would apply to determine foreseeability with respect to the conduct of design professionals.

22. See, e.g., *Crochet v. Hosp. Serv. Dist. No. 1 of Terrebonne Parish*, 476 So. 2d 516, 518 (La. Ct. App. 1985); see also 57 AM. JUR. 2D *Negligence* § 104 (2003) (stating that the existence of a duty is often based on the "weighing of the relationship of the parties, the nature of the risk, and the public interest in the proposed solution").

23. See *532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc.*, 750 N.E.2d 1097, 1101 (N.Y. 2001); *Biakanja v. Irving*, 320 P.2d 16, 19 (Cal. 1958); *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334, 342 (Cal. 1976).

of its design without seriously impairing its usefulness or significantly increasing its costs; (3) the design professional's awareness of the design security issues with its design selection because of public knowledge; and (4) the expectations of the public regarding crime prevention designs.²⁴ Given this status quo in the case law, the chances for developing clear and uniform rules regarding the existence of the duty to victims of criminal conduct without the input and assistance of design professionals are slim.

B. *Did the Design Professional Breach Its Duty?*

To proceed on their claim, the victims must next prove a failure by the design professional to use reasonable care to protect him or her from foreseeable criminal attacks.²⁵ A determination of whether the design professional breached this duty will likely turn on three issues: (1) whether the designer took reasonable steps to ascertain the extent of the potential harm from its design selection; (2) whether the designer informed the owner of the risks of selecting the particular design; and (3) whether the designer took reasonable measures to protect the claimant from harm in its design selection.²⁶

The standard of reasonable conduct for the design professional with respect to criminal acts on its premises is determined on a case-by-case basis by juries. However, the following factors, among others, may be important in this determination: (1) the designer professional's reasonable efforts to ascertain the risk of a design on crime prevention, so that it can be determined what design would be appropriate; (2) the design professional's contact with the police or consultants regarding specific security issues relating to a particular location or design;²⁷ (3) the design professional's internal procedures for

24. *Cf.* Am. Tobacco Co. v. Grinnell, 951 S.W.2d 420, 432 (Tex. 1997) (setting forth a risk-utility analysis to be applied to design defects under Texas law).

25. Once a duty has been established, it is very likely in most jurisdictions that the case will proceed to a jury trial for a finding of fact on the remaining elements rather than being dismissed through a summary judgment. *See generally* Judge David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 54 BAYLOR L. REV. 1, 66 (2002).

26. *Cf.* Walkoviak v. Hilton Hotels Corp., 580 S.W.2d 623, 625 (Tex. Civ. App. 1979) (analyzing the issue of breach with respect to innkeepers and proprietors of public businesses).

27. As one commentator notes:

It is not only in particular areas, but also in particular types of buildings, that crime is more likely. Convenience stores are often selected for robbery because they are located near major roads but tend to be too far away from the roads to be seen by [a] passerby. Burglaries

determining design security and safety; and (4) the design professional's response to negative information regarding design security.²⁸

C. Did the Design Professional's Conduct Cause the Claimant's Injury?

To successfully sue the design professional, the victim must also establish that the design professional's conduct was the "cause in fact" of an injury, and that the injury was a reasonably foreseeable result of such conduct.²⁹ To make this showing, a claimant is only required to offer sufficient proof that it was more probable the design professional's actions or omissions caused or contributed to the event than not.³⁰ The claimant is not required to show that the occurrence could not have possibly been caused by any other factor than the design professional's actions or omissions. The court will then look at facts offered by the claimant to determine whether the incident was a reasonably foreseeable result of the design professional's alleged failure to protect him or her.³¹ The outcome of many cases will turn on whether, in the minds of jurors, the evidence creates a belief that the particular crime in question was an immediate probability upon which the professional should have acted, rather than merely a remote possibility that the design professional could reasonably have ignored.

D. Damages

A claimant who successfully establishes liability must still establish actual loss or damage to recover a judgment against the design professional. Recoverable damages, assuming liability, may consist of loss of earnings and loss of future earning

are much less likely in buildings where residents remain home during the day . . . [and] . . . high-rises . . . have much more crime than other buildings.

Neal Kumar Katyal, *Architecture as Crime Control*, 111 YALE L.J. 1039, 1048 (2002).

28. Cf. RESTATEMENT (SECOND) OF TORTS § 344 (1965) (stating that, in the case of a landowner who holds his land open to the public for business purposes, liability for harm caused by third party conduct can be based solely on the landowner's failure to exercise reasonable care to discover that such acts are likely to occur or to give visitors an adequate warning).

29. See *Farley v. M M Cattle Co.*, 529 S.W.2d 751, 755 (Tex. 1975).

30. See *id.* at 755–56 (discussing these elements with respect to landowner liability).

31. See B.A. Glesner, *Landlords as Cops: Tort, Nuisance & Forfeiture Standards Imposing Liability on Landlords for Crime on the Premises*, 42 CASE W. RES. L. REV. 679, 702–03 (1992) (discussing the use of foreseeability with respect to the existence of duty and causation).

capacity, medical expenses in the past, medical expenses in the future (including but not limited to reasonable and necessary attendant care), mental and physical pain and suffering in the past and in the future, disfigurement, and physical impairment in the past and future.³²

The size of potential jury verdicts in premises liability suits involving criminal conduct can be staggering.³³ Trials of premises claims involving the criminal acts of third parties are often emotionally charged affairs for juries, with days of repeated testimony regarding the nature of the criminal activity and the introduction of gruesome photographs of the victim. Depending on the jurisdiction, several factors may operate to reduce the likelihood that a design professional would ultimately be held liable for the entire amount of these large verdicts. First, premises cases usually have multiple parties and the burden of damages will be spread among the tortfeasors through theories of contribution and comparative fault. In addition, in jurisdictions where joint and several liability requires a liability finding of 51% or greater upon a tortfeasor, given the typical number of potential tortfeasors, design professionals may be able to escape the burdens of a large judgment.³⁴ Other jurisdictions also limit the availability of punitive damages in these types of cases to a restricted set of circumstances that will rarely apply to design professionals.³⁵ Finally, indemnity provisions in the design contracts may be applicable to allow cross actions by design professionals against co-defendants.

32. See generally RESTATEMENT (SECOND) OF TORTS § 917 (1979); 25 C.J.S. *Damages* § 22 (2003).

33. See, e.g., *Berry Prop. Mgmt. v. Bliskey*, 850 S.W.2d 644 (Tex. App. 1993) (upholding a jury verdict of \$16 million for negligence on the part of a property management company in the handling of plaintiff's keys which resulted in plaintiff being sexually assaulted in her townhome). Historically, the majority of premises claims arising from the criminal acts of third parties have been filed in Texas, New York, California and Florida. See *supra* note 3, at 18.

34. See, e.g., TEX. CIV. PRAC. & REM. CODE ANN. § 33.001 (Vernon 1997). In addition to defending the claim, the design professional's attorney could consider bringing a third party claim against the manufacturer, distributor, or seller of any material or product that may have contributed to the claimant's injury. See Jeffrey L. Nischwitz, Note, *The Crumbling Tower of Architectural Immunity: Evolution and Expansion of the Liability to Third Parties*, 45 OHIO ST. L. J. 217, 255 (1984) (suggesting that an architect could claim that the owner's negligent maintenance of a building after its completion was the proximate cause of an injury and that his own negligence was only remotely related to such injury).

35. See, e.g., TEX. CIV. PRAC. & REM. CODE ANN. § 41.005(a), (b) (Vernon 1997) (setting forth limited exceptions to general rule prohibiting the award of exemplary damages against a defendant in actions arising from harm caused by the criminal act of a third party).

III. WHY THESE CLAIMS ARE HERE TO STAY

The sustained increase of third party premises claims for criminal conduct into the near future can be attributed to three major socio-economic/legal events, which occurred during the 1990's. These events, and their effect on the development of third party liability claims, are examined below.

A. *The General Increase in All Types of Third Party Claims Against Design Professionals*

Since the mid 1990's, there has been a proliferation of third party lawsuits in general against design professionals.³⁶ This increase is due in part to the expansion of tort liability among all professionals as a result of the growing perception that the industry's self-policing efforts were not effective.³⁷ This rise can also be traced to the increased participation of design professionals in renovation projects in the 1990's.³⁸

During this period, in an attempt to adapt to overbuilt real estate markets, property owners engaged in numerous retrofits and renovations of existing properties. These projects appeared to be golden employment for design professionals but proved to be traps for the unwary.³⁹ In the absence of contractual protections, the design professional's work was relied upon by not only the contractors that they supervised but also a growing number of other participants in these projects. Accordingly, when these design services caused personal injuries, the list of potential third party claimants grew exponentially and radiated outward from the core project participants to contractors, construction workers, insurers, subsequent owners, tenants and their employees, and finally members of the public. The resulting case law from these claims completed the demise of the privity requirement for bringing tort claims against design professionals and cleared the way from a public policy perspective for victims of crimes to also bring claims based on criminal conduct.⁴⁰

36. See Michael, *supra* note 7, at 8.

37. See Farrung, *supra* note 2, at 873.

38. See Michael, *supra* note 7, at 8.

39. *Id.* at 8.

40. *Id.* at 8; see also Nischwitz, *supra* note 34, at 219 (discussing the demise of the privity requirement and its beginnings in the landmark decision of *MacPherson v. Buick Motor Company*, 111 N.E. 1050 (N.Y. 1916)).

B. *Growing Public Awareness of the Role of Architecture in Public Safety*

Today, more than ever before, the public is more educated regarding the benefits and cost effectiveness of designs in protecting against criminal conduct. Crime prevention through environmental design (“CPTED”)⁴¹, once derisively thought of by design professionals as playing “cops and robbers,” has become a rapidly emerging field of crime prevention throughout the country.⁴² Municipalities that have successfully implemented CPTED mechanisms have grown exponentially in the past four years and public officials who have championed these mechanisms have been the subject of considerable positive press.⁴³ These cost effective and seemingly commonsense techniques have also been employed with extremely positive results abroad.⁴⁴ In addition, the recent high profile bombings and loss of life in the Murrah Federal Building and the World Trade Center has increased the profile and perceived importance of these techniques.⁴⁵ Although these mechanisms are not well understood by all designers and builders, the proliferation of their use has created the lasting perception in society that design professionals can play key and cost effective roles in protecting it

41. CPTED has been defined as follows:

In its purest sense, CPTED is the passive use of the physical environment to reduce the opportunity for and fear of predatory stranger-to-stranger crime—burglary, robbery, assault, larceny, murder, rape, even bombing. CPTED relies on three main strategies: natural surveillance; natural access control; and territoriality—establishing boundaries and transitional spaces. CPTED looks at sitting, landscaping, footprints, window schedules, facades, entrances, lobbies, layouts, lighting, materials, and traffic and circulation patterns. It treats microenvironments, such as restrooms, and macroenvironments, such as campuses and cities.

Post, *supra* note 3 at 18.

42. Post, *supra* note 3 at 18. An example of CPTED is the crime preventive design of placing bathroom entrance doors with right angles to entrances. This permits the warning sounds of crime to travel more freely and reduces the sense of isolation.

43. See Nadine M. Post, *Award of Excellence Winner: Sherry Plaster Carter*, ENG’G NEWS REC., Feb. 19, 1996, at 20. In a recent survey of over 300 cities by the U.S. Conference of Mayors, 90 cities indicate that they have implemented CPTED based programs and 60 more indicate that they are considering them. *Id.*

44. See Katyal, *supra* note 27, at 1047 (noting that “countries throughout the world, such as Australia, Canada, Great Britain, Japan, and the Netherlands have used architectural design to prevent crime”). A prime example of CPTED at work was the 2000 Sydney Olympics. For this event, the government deliberately “employed architecture to reduce crime by modifying landscapes, restricting access to sites, changing parking patterns, and creating visibility around stadiums.” *Id.*

45. See generally Nadine M. Post, *No Reasonable Precautions Could Have Prevented Collapses*, ENGINEERING NEWS REC., Apr. 8, 2002, at 11.

from harm. Also, parties are now more likely to hold design professionals liable for their failures to do so.⁴⁶

C. *The Rise of Comparative Responsibility*

Finally, the rapid rise of comparative responsibility statutes in American jurisprudence has fueled the expansion of tort liability in this area to design professionals. Under the theories of comparative and “proportionate” responsibility, the legal system endeavors to submit all parties who may be responsible, in any way, for a plaintiff’s injury to the fact finder to assess fault.⁴⁷ Here, plaintiffs are encouraged and in fact rewarded for joining all potential tortfeasors in an action where possible. This includes bringing claims against defendants under derivative liability theories.⁴⁸ Examples of derivative liability claims include cases where a defendant’s affirmative acts enable third persons to engage in conduct causing plaintiff’s injuries, or where a defendant’s negligence interferes with the plaintiff’s own safety measure and thereby creates an unreasonable risk of harm of criminal conduct. Under such systems, architects and other design professionals are natural defendants anytime there is an injury on property. Furthermore, under these theories, design professionals who are not sued directly by the plaintiff could be joined by co-defendants.⁴⁹

IV. WILL EXPANDED TORT LIABILITY RESULT IN GREATER PROTECTION?

Are there any important public policy goals to be achieved by holding design professionals liable for damages arising from third party criminal conduct? In other words, if the goal of liability is to achieve enhanced design protection and promote greater public safety against crimes, does this system foster those goals, or do

46. See Nischwitz, *supra* note 34, at 217–18. One sign of the popularity of design security is seen in the curious phenomenon of “security hardening becoming an industry ‘badge of honor,’ that organizations are linking their importance to the need for extensive security: the more extensive the security, the more important the work done inside.” Garrett M. Graff, *Park Benches Fight Terror: Sidewalk Bulwarks*, HARV. MAG., July-Aug., 2003, at 15.

47. See TEX. CIV. PRAC. & REM. CODE ANN. §§ 33.001–.017 (Vernon 1997); Gregory C. Sisk, *Interpretation of the Statutory Modification of Joint and Several Liability: Resisting the Deconstruction of Tort Reform*, 16 U. PUGET SOUND L. REV. 1, 89 (1992).

48. See William D. Underwood & Michael D. Morrison, *Apportioning Responsibility in Cases Involving Claims of Vicarious, Derivative, or Statutory Liability for Harm Directly Caused by the Conduct of Another*, 55 BAYLOR L. REV. 617, 622–23 (2003).

49. See, e.g., Proportionate Responsibility, Designation of Responsible Third Party, TEX. CIV. PRAC. & REM. CODE ANN. § 33.004(e) (Vernon 1997 & Supp. 2004).

the costs of such a system outweigh any potential benefits? There is no clear answer with respect to this issue. Commentators have persuasively argued both for and against expanded tort liability as an effective incentive for the industry wide adoption of design protections against criminal activity.

A. *The Benefits*

Proponents of expanded tort liability for design professionals have argued that finding design professionals liable for protecting the public against crime will result in considerable industry-wide efforts to make their designs crime-proof.⁵⁰ These commentators argue that such liability is needed because, historically, professionals and the design industry as a whole have been slow to embrace positive societal changes that are not directly linked to the industry's benefit. The rapid rise of professional liability claims across the board is compelling evidence of this phenomenon.

Commentators also note that the more subtle, but no less significant, effect such lawsuits may have on increasing architectural design protections concerns the role of insurance companies. Insurers of design professionals make substantial profits by exploiting downward cost curves in the design industry. These companies insure against a potential liability that has a probability of occurring and calculate the premium based on that probability. They then educate design professionals about ways to reduce that probability, which benefits design professionals in that they learn valuable information to incorporate into their design choices. This simultaneously benefits the insurance company by reducing expected payouts for designer liability claims. An example of this positive social effect can be seen in the fact that a large percentage of fire prevention measures undertaken by business owners today is the direct result of insurance companies that took aggressive steps to educate construction companies and owners about fire prevention.⁵¹ A similar result may be induced by holding design professionals liable for damages arising from the criminal acts of third parties. If so, tort liability will also prompt insurers as educators to help bring about better architectural design selections.

50. See Reynolds, *supra* note 16, at 193.

51. See Katyal, *supra* note 27, at 1114-17.

B. *The Costs*

While tort liability can spur the incorporation of effective security designs, it can easily consume excessive resources and become overly burdensome.⁵² One of the most important costs is the “chill on creativity” created by expanded liability. As commentators note, while innovation is the essential element of the design profession, with the specter of increased liability, design professionals will be reluctant to be creative in their efforts.⁵³

As commentators also note, as with most tort regimes, increased liability can force design professionals to adopt socially inefficient precautions because judges and juries will not always accurately calculate liability and cost.⁵⁴ The degree of liability imposed should take into account the fact that victims will often be able to prevent crimes on their own; too much liability borne by design professionals can result in undesirable social costs.

Burgeoning dockets and limited financial resources will handicap judges in their efforts to make these calculations thoroughly. Without adequate legislative guidance, judges and juries will have to decide complex questions about architectural design and the probability of crime, and other difficult questions of causation.⁵⁵ These determinations are very resource-intensive, requiring extensive expert testimony and briefing, and will have to be made in each and every case.⁵⁶ The costs of the process may pale in comparison with the expected recovery and induce many crime victims to avoid bringing suits altogether.⁵⁷ Furthermore, the lawsuits may focus on target-hardening designs and not on more subtle, and perhaps more cost efficient and desirable forms of architectural design precautions such as CPTED.⁵⁸

In addition there may be unintended negative consequences as a result of holding design professionals liable for criminal acts.⁵⁹ These consequences can generally be grouped into two

52. *See id.*

53. *See Nischwitz, supra* note 34, at 261–62.

54. Katyal, *supra* note 27, at 1114.

55. *Id.* at 1115.

56. *Id.*

57. *Id.*

58. *Id.* at 1115–16. “Target hardening” includes such steps as concrete barriers known as “Jersey barriers” or “setbacks,” bars, locks, security guards, and other physical obstacles to prevent criminal activity. *See also* Garrett M. Graff, *supra* note 46, at 14 (arguing that the social costs of such preventive steps “may actually foster more worries than they prevent, heightening fears that there is something to be afraid of”).

59. *See Reynolds, supra* note 16, at 192 (suggesting that imposing liability on landlords for terrorist acts could have unintended negative consequences).

basic arguments: (1) design professionals may not respond to liability with increased security and may even treat liability as a disincentive to engage in other crime prevention measures, and (2) design professionals may use liability as a justification to shift the risk of liability to other parties who may not be as efficient in crime prevention.⁶⁰

Short of declining to provide services in jurisdictions that have developed liability schemes, design professionals may respond by simply refusing to make design precautions regarding criminal activity and expressly disclaim in their contracts all responsibility for crime preventive designs.⁶¹ At present, to employ security measures and document criminal activity could constitute a design professional's admission of knowledge of the crime risks associated with its designs. In some jurisdictions, such precautions could be used by claimants to establish that the design professional voluntarily assumed the duty of providing a safer design.⁶² This action however would not eliminate the risk of liability to the design professional if the criminal activity is found to have been foreseeable.⁶³ Thus, a more likely scenario would be for design professionals to attempt to modify tort liability by shifting the risk back to the owners or others who may not be able to act as efficiently in crime prevention as the design professional.⁶⁴

60. See *id.* at 192–93.

61. See *id.* at 197 (noting that the imposition of liability for terrorist acts could lead landlords to simply refuse to provide security and disclaim all responsibility).

62. See *id.* at 166 (noting that the voluntary assumption of a duty to provide security is a common theory in the context of landlord liability). This scenario would proceed as follows: Assume there are two architects who both perceive that at some point their building designs may lead to a criminal act. One architect chooses to ignore various threats, while the other designs its building with these potential threats in mind. When tenants or their invitees ultimately suffer injuries, under the voluntary assumption of duties theory, the design professional who took steps to make his building crime proof and gathered information regarding various design alternatives is more likely to be found to have had a duty and will probably face a jury to defend the reasonableness of his conduct. Under this analysis, it is hard to see why any architect would initially take what is undoubtedly the safer course, because he would at best be in the same position as his counterpart who did nothing: facing a potentially hostile jury to defend his conduct. On the other hand, if the architect does take crime prevention into consideration he still has not eliminated the risk of potential liability. From current empirical data it is difficult to measure the true effect of this disincentive. However it seems reasonable to conclude that if not a disincentive, the incentive effects of tort liability in this context will be muted. *Id.* at 194–195.

63. See *id.* at 197 (noting that a landlord's attempt to disclaim liability by informing prospective tenants that security is their own responsibility does not eliminate the risk of liability for terrorist acts if such acts are found to be foreseeable).

64. See *id.* at 197 (explaining that attempting to modify tort liability by shifting risk back to the tenants would be more prudent than trying to disclaim liability by notice to

Finally, historically, tort law has been only moderately successful in crime prevention and it is questionable whether the benefits from the use of tort law outweigh the costs imposed.⁶⁵ For example, it is unclear whether imposing liability on design professionals will actually prevent crime or merely relocate it. There are also the social costs of the perceived unfairness in a system which finds that a person is entitled to more protection from a design professional than from police and business owners who may be better financial and technical resources for crime prevention.⁶⁶

Advocates of the liability scheme counter that local governments have a variety of tools to correct the alleged pitfalls in the system.⁶⁷ For example, if a jurisdiction wants to use tort liability to encourage design solutions to crime, it could create a specialized administrative court where such lawsuits could be brought. Such specialized courts might be better suited to making locally tailored design determinations and would avoid having each judge or jury reinvent the wheel to determine what types of precautions are necessary.

Likewise, to deal with perceived disincentives to develop design precautions, governments might develop “safe harbor” provisions, which insulate design professionals that comply with design security requirements from tort lawsuits. This might include the adoption of rules to bar admission of such design improvements into evidence at trials.⁶⁸

prospective tenants). Including indemnification or exculpatory clauses in design agreements is one common method of shifting this risk. While few courts have specifically addressed the use of exculpatory clauses with respect to criminal acts, generally, a commercial party may agree to exonerate another from liability for future acts of negligence for personal injury damages. *Id.* at 197–198 (noting that contractual clauses allocating the risk of future acts of negligence are generally effective between commercial tenants and landlords).

65. See Reynolds, *supra* note 16, at 193 (suggesting that imposing liability on landlords may simply relocate crime instead of prevent it); Katayal, *supra* note 27, at 1116–17 (arguing that the imposition of tort liability “provides a disincentive to employ security measures and document criminal activity, because such steps can constitute a landowner’s admission of knowledge of crime risk”).

66. See Reynolds, *supra* note 16, at 193 (arguing that imposing liability on landlords would cause law enforcement to become essentially private, which, in turn, could lead to increased chances of corruption, discriminatory enforcement, and violations of tenants rights).

67. See Katayal, *supra* note 27, at 1117 (suggesting that the government could impose on landlords a duty to disclose certain information to tenants).

68. *Cf. id.* at 1118 (arguing that the government could give landlords an incentive to provide information to tenants by adopting penalty default rules that could be removed upon a showing that the landlord made sufficient disclosures).

C. *An Alternative Approach*

There is a dearth of empirical data establishing which of the above competing views is more meritorious. Accordingly, perhaps a more favorable approach may be a hybrid of both positions. Design professionals in cooperation with local governments, who have greater access to financial and technical resources than the courts, can begin to develop building codes, which incorporate the most efficient, and least costly crime precautions such as lights, landscaping and other CPTED items. Once the administration for these codes is in place, the government and design professionals can consider and evaluate additional codes on an as needed basis. This would give the industry some certainty with respect to the standards they would be held to while advancing public protection. Tort liability stills plays an important role in this system. Failure to comply with codes could give rise to negligence per se liability should the particular code provision be something that the local governments intensely want to encourage.⁶⁹ Negligence per se would also provide guidance to parties and insurance companies well before litigation even became an issue.

In areas where local government and industry professionals cannot reach agreement but liability may still be a desirable tool to foster further protections, the courts should adopt a uniform set of policy factors to determine the existence of a duty to protect third parties from criminal acts consisting of the following: (1) the foreseeability of the criminal activity as a result of a particular design selection; (2) the reasonable expectation of the claimant and the public to be protected by the design professional from the criminal activity; (3) the extent of burden on the design professional and the impact on the entire design profession by placing the duty upon the design professional; (4) the potential for unlimited or insurer-like liability to result from establishing a duty; (5) the design professional's moral blame for the claimant's injury; (6) the policy of preventing future harm; (7) the availability, cost, and prevalence of insurance for the risk involved; and (8) the consequences to the community by establishing or not establishing a duty.⁷⁰

69. A similar approach, resulting from cooperative efforts between industry professionals and local governments, has been successfully applied with respect to bank liability for criminal acts at automated teller machines. See Jennifer Juhula DeYoung, Note, *ATM Crime: Expanding the Judicial Approach to a Bank's Liability for Third Party Crimes Against ATM Patrons*, 30 VAL. U.L. REV. 99, 112-15 (1995).

70. See Michael, *supra* note 7, at 17. (discussing the use of some of these elements

Courts should analyze the relationship and weight of these policy factors under the particular facts and circumstances of each case. Design professionals can increase the ease and predictability of these calculations by compiling and publishing statistics regarding particular design selections in easily accessible trade journals. The publication would also assist other design professionals in their choices of design. Cooperation between the industry and local governments would work towards the “twin goals of jurisprudential predictability and comprehensive policy considerations.”⁷¹

This proposed approach is meant to be flexible, while at the same time serve as a uniform outline with which courts could, as a matter of law, rule by summary judgment that a design professional does not have a duty of care to a third-party user or tenant. Written judicial opinions under this framework would create a case law record of more precise policy considerations which could be refined as needed. The result could be more predictable case law based on sound policy considerations and design professional input.

V. CONCLUSION

Design professional liability for the criminal acts of third parties is a rapidly developing area of premises liability law and will be a facet of the legal landscape for the foreseeable future. So far, developing case law has not resulted in clear guidelines about when duty will be imposed or which design security responses will be considered sufficient for design professionals to avoid liability. Nor is it clear whether the current developing liability scheme will ultimately lead to greater public protection or is even the most efficient mechanism to achieve this goal. These issues, which stymie attempts at increased crime prevention and public protection, will only be exacerbated by the inevitable application of this scheme to acts of domestic terrorism. If the greater goal is to advance crime prevention, it is up to the design professional industry, in cooperation with local governments, to voluntarily and proactively implement industry wide basic design preventions. Otherwise, a potentially inefficient and costly liability scheme will inevitably force prevention methods on the industry.

in the case law and advocating this aspect of the author's approach to promote consistency in this area of the law.); Nischwitz *supra* note 34 at 259–62 (discussing some of the societal costs to be considered by the courts when expanding design professional liability).

71. Michael, *supra* note 7, at 17.