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How Juries View Active Shooter Premises Liability

By **Bliss Piverger and Christina Marinakis** (March 12, 2018, 5:05 PM EDT)

Time and time again, the American public reels from the traumas of mass shootings. Virginia Tech, Aurora, Pulse Night Club, Sandy Hook, Las Vegas, Sutherland Springs Church and, just last month, Stoneman Douglas — all fatal shootings we've heard and read about, occurring in different places, at different times of day, and targeting different people. The frequency and unpredictability of these tragic events have many of us wondering, are we ever really safe?

As victims, families and bystanders continue to heal, the search for potentially culpable parties often extends beyond the shooter. More recently, victims have been seeking to hold others partially liable for these tragedies and have filed lawsuits against premises owners, security companies, event organizers, gun manufacturers, and even social media platforms. And for these defendants, the public's anger, fears and concerns could contribute to a very costly outcome. Therefore, let's examine how jurors' own feelings about safety can influence their views on such cases.

The Early Cases

On July 20, 2012, during a midnight screening of the movie, "The Dark Knight Rises," a gunman shot and killed 12 moviegoers, leaving 70 others injured, at a Cinemark movieplex in Aurora, Colorado. This was the first mass shooting at a theater in the history of American cinema. Yet, victims and their families sought compensation for wrongful death and injuries sustained due to the shooting. In the civil negligence trial, victims argued that Cinemark did not provide adequate security the evening the shooting occurred, and as a result helped enable the attack. Ultimately, a six-person jury delivered a unanimous verdict that Cinemark was not liable for the shooting; the verdict hinged on the fact that the event was simply unforeseeable because it had never happened before.

By contrast, however, a Virginia jury awarded \$8 million to two families of victims of the Virginia Tech shooting, holding the school liable for failing to warn students in a timely manner of the potential for an active shooter on campus; although the verdict was eventually reversed by the state's Supreme Court.

The Effect of Widespread Media Coverage

Today, potential jurors have had extensive media exposure to active shooting situations and have been living in a world where enhanced safety precautions have been put in place at many venues. Moreover, a longitudinal FBI **study of active shooter incidents** found an increasing frequency of incidents annually. Nevertheless, the odds of an active shooting incident at any particular location remain extremely low.

Yet, due to what psychologists call "availability heuristics," the widespread, graphic media attention given to these events causes jurors to judge that the likelihood is greater than it actually is, because jurors can readily recall multiple examples of these incidents. If the Aurora verdict hinged on the fact that the shooting was completely unpredictable, unforeseeable and unpreventable, the same cannot be said of an active shooter situation in a school, church, hotel, movie theater or mall today. In the minds of jurors, previous "unpredictable" events put other premises owners on notice of potential threats and should prompt owners to evaluate the lapses in their safety and security protocols.

Now, much of the populace expects premises owners to take additional steps to enhance security and keep patrons safe from random violence. So when a premises owner fails to take notice that active

shooter events can occur anywhere, and then such an event occurs on his or her premises, it is only natural for jurors to feel that the owner should have done more to protect patrons. With mass shootings so prevalent in the news, the argument that they are unforeseeable and unpreventable no longer prevails.

The Need to Feel Safe

Further compounding the problem of increased media attention is the need for jurors to feel safe. The more we hear about active shooter events, the more unsafe we feel, yet safety and security are basic human needs. (Indeed, they form the base of what psychologists refer to as "Maslow's Hierarchy of Needs.") Not only do we have an innate need to feel protected, but those needs drive our behaviors: We go places where we feel safe and avoid places that feel unsafe. Traditionally, movie theatres, well-populated lounges, schools, concerts and churches have been places where the public has felt safe from harm.

But in the age of seemingly random mass shootings, in order to feel safe in these places, we (including jurors) rely on assumptions that premises owners have security and safety precautions in place to protect patrons. In a way, it serves as a form of self-assurance: If the premises owner cannot protect us from third-party criminal acts, then we can *never* feel safe, but if the premises owner has sufficient safety and security measures in place to protect patrons, then we can feel secure wherever we go. In essence, the need to feel safe sets jurors' expectations for safety.

Further, as a result of the innate desire for safety, people are willing to sacrifice their freedoms to feel safe and secure. Video surveillance, metal detectors, bag checks and armed security are things we have become accustomed to in our daily lives. Our civil liberties have taken a back seat to safety and security. As public opinion continues to push for additional safety and security measures by premises owners, active shooter premises liability cases may start setting a new precedent — shifts in safety expectations will be the driving force. In the minds of jurors, when people are injured or killed in a place that *should* be safe, it must be because the premises owner failed to meet expectations for safety.

The Blame Game

When tragedy strikes, it is a natural human response to look for someone to blame. If no one is to blame, then we are all vulnerable to these attacks. Thus, holding a premises owner, or gun manufacturer, or social media platform accountable can become a defense mechanism for jurors. Jurors may think, "If companies all do their part to prevent mass shooting incidents, then we can all feel safe, but if they don't, then we are all vulnerable to attack." Again, the need to feel safe drives jurors' expectations.

As we look to premises owners to take control and provide adequate protections in the event that something were to occur, we also look to blame them when we feel they have failed to meet society's increasing expectations of safety. As these lawsuits proceed, some jurors will inevitably blame premises owners in an effort to ensure that businesses take the necessary steps to secure their premises and give us those feelings of security.

On the Horizon

Despite a lack of success in the Aurora and Virginia Tech cases, plaintiffs' firms continue to file lawsuits following these tragic events. Hundreds of victims of the Las Vegas shooting have filed lawsuits against the venue owner, event organizer, and bump-stock manufacturer. Should these lawsuits survive summary judgment, plaintiff attorneys will no doubt employ "**reptile" tactics** to capitalize on jurors' personal fears of becoming an attack victim and their needs to feel safe. They will argue that the increased frequency of these incidents means they are no longer unpredictable, leaving premises owners vulnerable to massive jury awards.

To prepare to defend these lawsuits, jury research — in the form of focus groups and mock trials — are imperative in formulating themes and narratives that will effectively combat the basic human instincts that favor the plaintiff's case. This research can also help develop juror profiles to aid defendants in identifying and removing jurors who are most inclined to agree with the plaintiffs'

position and award hefty damages.

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