

BY ANDREA M. ALONSO AND KEVIN G. FALEY

Security Guard Liability

Security guard liability is surprisingly circumscribed in New York State. For store security guards, potential liability arises for assault and battery, which may occur during the course of attempting to stop or arrest a suspected shoplifter, and for subsequent false-imprisonment claims by the detainee. Liability, in exceptional circumstances, may also arise from the failure of a security guard to protect patrons.

Tortious Acts

In assault and battery claims, the jury must determine if the use of force used to stop and detain an individual was reasonable. For instance, in *Watkins v. Sears Roebuck & Co.*,¹ the plaintiff left a store with a stolen "boom box." His leg was broken when he was tackled from behind, without warning, by a security guard. The court found that the nondeadly force used by the guard in apprehending the fleeing shoplifter was reasonable as a matter of law. This is the highwater mark for justifiable use of force in arresting a shoplifter.

The word "arrest" is derived from the French word "arreter," which means to stop or to detain. In the past, merchants were reluctant to apprehend shoplifters because they were vulnerable to false arrest suits when the criminal case against a shoplifter was dismissed. To combat this, General Business Law §218 was enacted, which provides that "reasonable grounds" for detention of a shoplifter is a statutory defense to an action for false arrest.² These grounds include "knowledge that a person has concealed possession of unpurchased merchandise." In *Jacques v. Sears Roebuck & Co.*,³ the plaintiff left the store, was arrested and found to have unpaid items in his pocket. Plaintiff admitted his guilt and criminal charges were dropped. Plaintiff's suit for false imprisonment was dismissed since "reasonable grounds" to arrest were established.

Another ground for potential liability exposure to a security guard lies under Federal Law 42 USCA §1983, which provides a cause of action exists based upon a deprivation of a person's civil rights. If the security guard was acting "under color" of law, that is, using his badge of authority or the authority of the state to deprive an individual of his federally protected rights, then liability attaches.

In *Guiducci v. Kohl's Department Stores*,⁴ two 14-year-



Andrea M. Alonso



Kevin G. Faley

The court said the security guards at the stadium did not owe a duty to the plaintiff. They were intended only to benefit the contracting party (New York Yankees) and not third-party fans.

old girls were strip-searched by a security guard after a shoplifting arrest. The §1983 suit was dismissed since the guard did not arrest or detain "under color" of state law. There was no action by a "state" official as the defendant was a private entity. In order to satisfy the state action requirement, a plaintiff must show that the unconstitutional act of a private entity defendant is attributable to the state.⁵

In *Rojas v. Alexander's Dept. Store Inc.*,⁶ a store guard handcuffed and arrested the plaintiff for shoplifting. He was subsequently acquitted of all charges. The arresting security guard was also a "special patrolman" appointed by the New York City police commissioner pursuant to New York City Administrative Code §434a-7.⁷ She signed the summons as SPO (Special Police Officer) and specified her shield number. In finding for the plaintiff, the court reasoned that the store's decision to employ a "special patrolman" involved a utilization for Alexander's benefit of state law enforcement authority sufficient to satisfy §1983's "under color" of state law requirement.

Tortious Acts of Others

As illustrated above, security guard liability can arise from the tortious actions of the guard. It can also arise, in rare cases, from the failure of the security guard to prevent the tortious actions of others.

The threshold requirement in negligence cases requires that the tortfeasor owes a duty to the injured party. When a claim brought by an injured plaintiff is based upon a contractual theory, the courts have held that injured plaintiffs are not a third-party beneficiary to the contract between

the premises owner and the security company and thus deny third-party liability for the inactions of the guard.

Many New Yorkers can relate to the facts in *Hering v. New York Yankees*.⁸ During a game at Yankee Stadium, the plaintiff was accosted by an intoxicated spectator. The spectator was rowdy, had consumed large amounts of alcohol and eventually punched plaintiff in the face. Plaintiff was then thrown 12 rows of seats and severely injured. During the 10-minute fight security guards hired by the Yankees did not intervene.

The court found that the security guards at the stadium did not owe a duty to the plaintiff. The guards' presence was intended only to benefit the contracting party (The New York Yankees) and not any third-party spectator. This same reasoning has been applied in the case of supermarket robberies,⁹ bank robberies,¹⁰ apartment house murders¹¹ and shopping mall fights.¹² Most cases involving security guards' negligence are dismissed for

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lack of duty towards the complaining third party.

Similarly, in *Matti v. Temco Serv. Indus., Inc.*,¹³ the plaintiff sued a security guard when she slipped and fell on a rug runner as she exited her employer's office. The theory was that the security guard owed a contractual duty to report any dangerous conditions on the premises. While the guard was indeed trained by the security provider to report dangerous conditions, this in and of itself did not create a duty to inspect the area.

An exception to the general rule that a security guard owes no implied duty to third parties exists in the situation where a security guard intervenes in an attempt to render aid. Upon intervening, the security guard assumes a duty towards that third party and will become potentially liable from any breach thereafter. In *Flynn v. Niagara University*,¹⁴ the plaintiff was injured during the "annual" snowball fight which customarily occurred during the first snowfall each year. Since testimony established that security guards took affirmative actions to halt the snowball fight, which eventually led to the plaintiff's injury, it was found that the guards assumed a legal duty to act.

Vicarious Liability

The judicial standard is different when the tortfeasor is the security guard company. Vicarious liability will attach when the plaintiff can show that the employee was acting within the scope of his employment and the "tortious conduct is generally foreseeable and [a] natural incident of the employment."¹⁵

Under this scrutiny, assaults and rapes by security guards have been held as acts that were complete departures from the normal duties of a security guard and thus not a basis for a vicarious liability case against their employer.¹⁶ Acts that are committed for personal motive are likewise held unrelated to the employer's business interest.

To circumvent this, plaintiffs also assert a negligent hiring claim. In an action for negligent hiring, retention or supervision, a plaintiff must prove that the employer knew or should have known of the employee's propensity for the conduct that caused the injury and that, therefore, the offensive conduct was foreseeable.¹⁷

In *Honohan v. Martin's Food of South Burlington, Inc.*,¹⁸ a security guard sexually molested the plaintiff after detaining her for shoplifting. The employer was exonerated since it had conducted a thorough background check and checked prior references. Further, the guard received favorable reviews and was never the subject of any complaints.

Alarms

A related theory of liability involves the failure to timely respond to alarm systems. Liability here is very difficult to establish. Typically, the security alarm companies' contract limits damages to cases of gross negligence. A 15-minute delay in responding to an alarm signal is mere negligence, not the gross negligence necessary to sustain a cause of action.¹⁹ Where a security guard released keys and provided secret security passwords the guard was found to be grossly negligent and his employer responsible for the ensuing burglary.²⁰ Similarly, when a security company instructs a guard to "forget the assignment" and fails to notify the police upon receiving four alarm signals in three hours these "outrageous acts of folly" were found to constitute gross negligence.²¹

Conclusion

The courts have been somewhat reluctant to impose liability upon security guards and their employers. While a security guard will be liable if he uses excessive force, he is statutorily protected if there exists reasonable grounds to detain a suspect and the force used is commensurate with the circumstances. Additionally, a security guard is usually not liable for failing to intervene.

Security guard companies can insulate themselves from liability by carefully drafting contracts, following strict hiring practices, providing adequate employee training and availing themselves of statutory defenses.

1. 289 A.D.2d 73 (1st Dept. 2001).
2. General Business Law §218. Defense of Lawful Detention.

In any action for false arrest, false imprisonment, unlawful detention, defamation of character, assault, trespass, or invasion of civil rights, brought by any person by reason of having been detained on or in the immediate vicinity of the premises of (a) a retail mercantile establishment for the purpose of investigation or questioning as to criminal possession of an anti-security item as defined in Section 170.47 of the Penal Law or as to the ownership of any merchandise, or (b) a motion pic-

ture theater for the purposes of investigation or questioning as to the unauthorized operation of a recording device in a motion picture theater, it shall be a defense to such action that the person was detained in a reasonable manner and for not more than a reasonable time to permit such investigation or questioning by a peace officer acting pursuant to his special duties, police officer or by the owner of the retail mercantile establishment or motion picture theater, his authorized employee or agent, and that such officer, owner, employee or agent had reasonable grounds to believe that the person so detained was guilty of criminal possession of an anti-security item as defined in Section 170.47 of the Penal Law or was committing or attempting to commit larceny on such premises of such merchandise or was engaged in the unauthorized operation of a recording device in a motion picture theater. As used in this section, "reasonable grounds" shall include, but not be limited to knowledge that a person (i) has concealed possession of unpurchased merchandise of a retail mercantile establishment, or (ii) has possession of an item designed for the purpose of overcoming detection of security markings attachments placed on merchandise offered for sale at such an establishment, or (iii) has possession of a recording device in a theater in which a motion picture is being exhibited and a "reasonable time" shall mean the time necessary to permit the person detained to make a statement or to refuse to make a statement, and the time necessary to examine employees and records of the mercantile establishment relative to the ownership of the merchandise, or possession of such an item or device. Such detention at such vicinity shall not authorize the taking of such person's fingerprints at such vicinity unless the taking of fingerprints is otherwise authorized by Section 160.10 of the Criminal Procedure Law and are taken by the arresting or other appropriate police officer or agency described therein in accordance with Section 140.20 or 140.27 of such law. Whenever fingerprints are taken, the requirements of article one hundred sixty of the Criminal Procedure Law shall apply as if fully set forth herein.

3. 30 N.Y.2d 466 (1972).
4. 320 F.Supp. 2d 35 (E.D.N.Y. 2004).
5. *Tancredi v. Metropolitan Life Ins. Co.*, 316 F.3d 308 (2d Cir. 2003).
6. 654 F.Supp. 856 (E.D.N.Y. 1986).
7. Under the Administrative Code such a special patrolman "shall...possess all the powers and discharge all the duties of the [police] force applicable to regular patrolmen."
8. 166 A.D.2d 253 (1st Dept. 1990).
9. *Johnson v. Robert Bruce McLane Assoc.*, 201 A.D.2d 436 (1st Dept. 1994).
10. *Haston v. East Gate Security Consultants, Inc.*, 259 A.D.2d 665 (2d Dept. 1990).
11. *Gonzalez v. Nat'l Corp. for Housing Partnership*, 255 A.D.2d 151 (1st Dept. 1998).
12. *Buckley v. I.B.I. Security Serv., Inc.*, 157 A.D.2d 645 (2d Dept. 1990).
13. 253 A.D.2d 415 (2d Dept. 1998).
14. 198 A.D.2d 262 (3rd Dept. 1993).
15. *Judith M. v. Sisters of Charity Hospital*, 93 N.Y.2d 932 (1999).
16. *Heindel v. Bowery Savings Bank*, 138 A.D.2d 787 (3rd Dept. 1988).
17. *Estevez-Yalcin v. The Children's Village*, 331 F.Supp.2d 170 (S.D.N.Y. 2004).
18. 255 A.D.2d 627 (3rd Dept. 1998).
19. *Hartford Insur. Co. v. Holmes Protection Group*, 250 A.D.2d 526 (1st Dept. 1998).
20. *Green v. Holmes Protection of N.Y.*, 216 A.D.2d 112 (1st Dept. 1995).
21. *Hanover Ins. Co. v. D&W Alarm Co.*, 164 A.D.2d 112 (1st Dept. 1990).