CORPORATE LIABILITY FOR CRIMINAL ACTS OF THIRD PARTIES

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The cases and materials presented here are in summary and outline form. To be certain of their applicability and use for specific claims, we recommend the entire opinions and statutes be read and counsel consulted.
CORPORATE LIABILITY FOR CRIMINAL ACTS OF THIRD PARTIES

While businesses generally do not owe a duty to protect against the criminal acts of third parties, there are instances in which a business can be held liable for such acts. Although seemingly unfair, businesses may be liable for injuries that would not have occurred but for a third party's criminal act. These events can be quite costly for businesses. Below are six such cases that have been tried or settled in Cook County in the last four years. The size of the verdicts/settlements in these cases emphasize how important it is to know what acts can create liability on the part of a business.

- **2013 Cook County Settlement- $1.35 million**
  - In this case, a 43 year-old man died when he was trapped and trampled during a crowd stampede at a Chicago club. On request of the disc jockey, club security had sprayed pepper spray after a fight broke out between customers. The crowd then panicked, resulting in the man being trapped and trampled.

- **2012 Cook County Settlement- $2.55 million**
  - The plaintiff was a 30 year-old man attending a party at a Chicago club. Two men began fighting at the club and club security decided not to remove them after they said they would leave. They then began play fighting with the plaintiff, who followed them down exterior stairs and jumped in the Chicago River, as one of the fighters had done. Plaintiff landed head-first in water that was two feet deep and was seriously injured. He sued the nightclub, among others, claiming that the club had inadequately trained security and allowed access to the Chicago River. $2 million of the $2.55 million settlement was with the nightclub.

- **2010 Cook County Settlement- $1.65 million**
  - In this case, a 20 year-old registered guest at a Cicero hotel was struck by a vehicle while fighting gang members who had attacked his brother in the parking lot. He suffered severe injuries. The hotel was sued for negligent security and paid $1.65 million in settlement.

- **2009 Cook County Settlement- $900,000**
  - In 2004, two co-workers were involved in an altercation that ended with one shooting and killing the other. The decedent's family sued the employer. The appellate court had determined that the exclusive remedy provision did not apply because the argument had arisen out of a personal quarrel. The case settled for $900,000.

- **2009 Cook County Verdict- $249,538**
  - Plaintiffs were exiting the defendant's bar in Robbins, IL and were struck by gunfire in the parking lot. The shooter had been drinking at the bar an hour earlier and had been removed from the bar. The defendant was sued for negligent supervision of the premises (as well as dram shop liability).
2009 Cook County Verdict- $125,677

- Plaintiff, a 23 year-old male, was attacked after he was ejected from the defendants’ nightclub and suffered fractures and nerve damage. He was attacked by customers who had also been ejected from the nightclub.

With these cases in mind, the below analysis provides a general overview of law regarding liability for the criminal acts of a third party, an analysis of certain cases, and a discussion of the exclusive remedy provision, which can act as a defense for employers in certain situations.

I. GENERAL OVERVIEW OF LAW REGARDING LIABILITY FOR THIRD-PARTY CRIMINAL ACTS

A. General Rule – No Duty Owed

Under Illinois law, it is well-settled that there is generally no duty to protect others from the criminal acts of third parties. Rowe v. State Bank of Lombard, 125 Ill. 2d 203, 531 N.E.2d 1358 (1988); Jackson v. Shell Oil Co., 272 Ill. App. 3d 542, 650 N.E.2d 652 (1st Dist. 1995). However, landowners, corporations and other businesses are not completely off the hook for such incidents. Rather, there are several common law exceptions to this rule which create possible liability.

B. Exceptions to General Rule that No Duty is Owed

There are several exceptions to the general rule that there is no duty to protect others from the criminal acts of third parties. These exceptions include the special relationship exception, the voluntary undertaking exception, and the landlord failure to maintain common areas exception. Each is discussed below.

1. Special Relationship Exception

Four special relationships are recognized at common law. These special relationships may create a duty on behalf of the landowner/business to protect others against the criminal acts of third parties. These four special relationships are:

(1) Innkeeper-guest;

(2) Carrier-passenger;

(3) Business inviter-invitee (business must be held open to the public for this to apply); and

(4) Voluntary custodian-protectee.
Importantly, under Illinois law, the landlord-tenant relationship is not considered a “special relationship.” Therefore, a broad duty is not imposed upon a landlord to protect tenants from foreseeable criminal acts committed by third parties. Attempts to change this have been rejected on many occasions by the Illinois appellate courts and by the Illinois Supreme Court. See *Rowe v. State Bank of Lombard*, 125 Ill. 2d 203, 216, 531 N.E.2d 1358 (1988). However, as with other corporate defendants, there are circumstances in which landlords can be held liable for such acts.

A special relationship does not alone establish a duty to protect against the criminal acts of third parties. Rather, a plaintiff must also establish that the intervening criminal act was reasonably foreseeable. *Sameer v. Butt*, 343 Ill. App. 3d 78, 86, 796 N.E.2d 1063 (1st Dist. 2003). Foreseeability generally means that which was apparent to the business at the time of the criminal acts. Some courts in Illinois have held that a defendant must have knowledge of the danger that is unique or superior to the knowledge of the plaintiff.

2. **Voluntary Undertaking Exception**

A duty to protect from the criminal acts of third parties also can arise when a defendant has taken actions that signal a voluntarily undertaking of the duty to protect others from the criminal acts of third parties. *Castro v. Brown’s Chicken and Pasta, Inc.*, 314 Ill. App. 3d 542, 547, 732 N.E.2d 37 (1st Dist. 2000). The duty of care owed by a business who voluntarily undertakes such a duty is limited to the extent of the undertaking. It is important to note that the voluntary undertaking is not a guarantee of safety, but rather establishes that the business must act reasonably.

Most Illinois case law regarding the voluntary undertaking exception cites to Section 324A of the *Restatement (Second) of Torts*, which sets out the voluntary undertaking doctrine. This section provides:

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 his 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.

*Restatement (Second) of Torts* § 324A (1965).
Numerous cases have addressed the specific topic of whether a franchisor voluntarily undertook the duty to protect against the criminal acts of third parties. A few of those cases are discussed below. Factors which are important to the courts in performing this analysis include, but are not limited to, the following:

- Whether security officers from the franchisor monitored the site at issue and enforced security procedures;
- Whether the franchisor had taken it upon itself to follow up regarding safety procedures at the franchise site;
- Whether the franchisor had published standards for franchisees in areas regarding safety, such as lighting and exit procedures;
- Whether there was evidence that the franchisor mandated certain security procedures;
- Whether the franchisee was required to follow the franchisor’s recommendations regarding security; and
- Whether the franchisor set up a security hotline or committee to review security measures.

3. **Landlord’s Failure to Maintain Common Areas of the Premises Exception/Code Violations**

While landlord-tenant is not a special relationship creating a duty to protect, landlords can still be charged with such a duty if they fail to maintain common areas and keep them safe. A landowner generally has a duty to keep the common areas of premises in a reasonably safe condition. A duty to protect from the criminal acts of third parties may be imposed when the landowner fails to use ordinary care in keeping the common areas of the premises safe from criminal harm. See *Duncavage v. Allen*, 147 Ill. App. 3d 88, 497 N.E.2d 433 (1st Dist. 1986). The extent of the duty owed is one of foreseeability. As with the special relationship cases, a plaintiff must establish that the criminal act was reasonably foreseeable at the time the landowner’s negligence was committed.

Additionally, a building or housing code violation may be actionable for a landlord if the harm committed was the type of harm that the code provision was designed to prevent and if the plaintiff was in the class of persons that the provision was designed to protect. *Id.*

**C. Foreseeability of Criminal Act**

As was mentioned earlier, the mere fact that there is a special relationship or voluntary undertaking is not enough to impose a duty to protect against the criminal acts of the third party. In order for such a duty to be imposed, the criminal attack or act must be reasonably foreseeable to the business. A criminal attack is considered reasonably foreseeable if the
circumstances are such as to put a reasonably prudent person on notice of the probability of the attack or when a serious physical altercation has already begun. Haupt v. Sharkey, 358 Ill. App. 3d 212, 832 N.E.2d 198 (2d Dist. 2005); Shortall v. Hawkeye’s Bar and Grill, 283 Ill. App. 3d 439, 670 N.E.2d 768 (1st Dist. 1996). Thus, there must be sufficient facts to put the business on notice that an intervening criminal act is likely to occur. Reasonable foreseeability can also be established by alleging that the business had notice of a dangerous condition or that violations directly related to the injury existed. Reasonable foreseeability is judged by what was apparent at the time of the criminal acts and not by what may appear through hindsight. Garrett v. Grant School District No. 124, 139 Ill. App. 3d 569, 487 N.E.2d 699 (2d Dist. 1985).

1. **Notice**

Specifically for criminal acts, a business’ knowledge of prior criminal activity may be considered actual or constructive notice. Actual notice most strongly supports imposing a duty and liability. Actual notice is knowledge of a prior criminal act of the same nature in the same place. Stribling v. Chicago Housing Authority, 34 Ill. App. 3d 551, 340 N.E.2d 47 (1st Dist. 1975). Constructive notice can arise when the business knew of a prior similar criminal activity and the plaintiff’s injury resulted from the same risk that induced the previous crime. See Rowe v. State Bank of Lombard, 125 Ill. 2d 203, 531 N.E.2d 1358 (1988). Citations for code violations can also constitute constructive notice of conditions which need to be corrected.

2. **Evidence Used to Establish Foreseeability**

Plaintiffs may produce various types of evidence to establish that the criminal activity was reasonably foreseeable. Plaintiffs will inevitably try to develop evidence to establish that the business should have foreseen the criminal activity.

Plaintiffs may produce statistics that crime is particularly high in the area of the attack, but this evidence alone is not generally enough to trigger liability. See Petrauskas v. Wexenthaller Realty Management, Inc., 186 Ill. App. 3d 820, 542 N.E.2d 902 (1st Dist. 1989). However, similar acts in the same location may establish foreseeability. See Duncavage v. Allen, 147 Ill. App. 3d 88, 497 N.E.2d 433 (1st Dist. 1986) (prior burglar had used the same window and same ladder to gain entrance to the same apartment on prior occasion).

Previous lawsuits against the business can be considered evidence of its knowledge of prior criminal activity, as well as building code violations entered against the defendant. Additionally, security measures taken by the business prior to the criminal act may establish that the defendant foresaw criminal activity and had tried to guard against it. See Cross v. Wells Fargo Alarm Services, 82 Ill. 2d 313, 412 N.E.2d 472 (defendant had hired security for certain hours of the day and not for other hours, arguably making the premises more dangerous during the hours the plaintiff was present).
D. Defenses/Arguments Against Duty

The main defenses to liability for the criminal acts of third parties are that there was no special relationship, no voluntary undertaking, no foreseeability, no proximate cause, and no duty resulting from public policy concerns. Additionally, for employers charged with the duty to protect their employees against criminal attacks of third parties, the exclusive remedy provision of the Workers’ Compensation Act may be a defense.

Proximate cause is available as a defense to a business charged with a duty to protect against the criminal acts of a third party. Generally, the proximate cause defense is similar to foreseeability, arguing that the possibility of the act was so unforeseeable that the defendant’s actions cannot be considered the proximate cause of the injuries. Additionally, there may also be an argument that the alleged negligence of the business would have done nothing to actually prevent the criminal act. See Castro v. Brown’s Chicken & Pasta, Inc., 314 Ill. App. 3d 542, 732 N.E.2d 37 (1st Dist. 2000) (evidence showed attacker had bought a meal and posed as a customer before the attack, meaning that restaurant’s failure to follow security procedures regarding an unlocked rear door was not the proximate cause of plaintiff’s injuries).

As with all arguments regarding whether there is a legal duty, three factors other than foreseeability must be taken into account. These three factors are:

1. The likelihood of injury;
2. The magnitude of the burden of guarding against it; and
3. The consequences of placing that burden on the business.

If a business has a strong defense regarding any of these policy concerns, it should be asserted.

Finally, for an employer sued by its employee, the exclusive remedy clause of the Workers’ Compensation Act may bar the civil suit if the injuries are compensable under the act. To be compensable, the injury must be accidental, must have occurred in the scope of the employment, and must have arisen from the employment. This defense is discussed in detail below.

II. APPLICABLE ILLINOIS CASE LAW

There are numerous Illinois appellate cases on this issue. Below, we have provided an analysis of several cases that expand on and illustrate the principles discussed above. These cases are merely a sampling of the Illinois case law on this topic. Much of the focus in cases regarding a duty to protect from the criminal acts of third parties is fact intensive and an analysis of one’s case should always be done on a case-by-case basis.
A. Franchisor’s Voluntary Undertaking – Martin v. McDonald’s Corp.

*Martin v. McDonald’s Corp.,* 213 Ill. App. 3d 487, 572 N.E.2d 1073 (1st Dist. 1991) – In *Martin*, one employee was murdered and two were injured by an intruder at an Oak Forest McDonald’s. On the night of the incident, the six-employee crew was cleaning up and closing the restaurant when the intruder appeared, ordered the crew into the store refrigerator, and demanded that one open the store safe. The family of the decedent and several employees sued McDonald’s Corporation, the licensor of the restaurant, claiming that it breached its duty to protect the employees. At trial, the jury found for the plaintiffs, awarding $1.03 million to the family of the deceased employee and $125,000 each to the emotionally-scarred employees. McDonald’s then appealed, arguing, among other arguments, that it had no duty to protect the employees.

On appeal, the First District began its analysis of the duty issue by explaining that plaintiffs had based its claim of duty on the fact that McDonald’s voluntarily undertook to protect the employees. It explained that liability can arise from the negligent performance of a voluntary undertaking. In this case, the court held that McDonald’s Corporation had undertook a duty to protect and had been negligent in its performance of this duty.

The court explained that two McDonald’s Corporation executives acted as security supervisors for the Oak Lawn restaurant, even though McDonald’s Corporation was only the licensor of the restaurant. The two McDonald’s Corporation executives had visited with the manager of the Oak Lawn restaurant about a month before this incident and had instructed the manager on proper closing procedures, including that no employee was to use the back door of the store after dark. The two executives also performed a security check and ordered new security windows and an alarm system for the back door. Following this visit, the two executives did not follow up with the manager to determine if the proper procedures were being followed. Restaurant employees testified at trial that they had not seen warnings on the back door and had not been instructed to not use the back door after dark.

The First District held that McDonald’s Corporation, through the two executives, had voluntarily assumed the duty to protect employees at the Oak Lawn store. Moreover, it held that this included the duty to follow up to see that the procedures implemented were being followed. Testimony at trial established that there had been no follow up and also that employees at the store were not following the procedures established. Given this failure to follow up, the court held that there was ample evidence to support the jury’s finding that McDonald’s Corporation had breached its assumed duty to the employees of the Oak Lawn store. The verdict was affirmed.


*Lawson v. Schmitt Boulder Hill, Inc.,* 398 Ill. App. 3d 127, 924 N.E.2d 503 (2d Dist. 2010) – Plaintiff in *Lawson* was a part-time employee at a McDonald’s who was injured early one morning when she was abducted, robbed and assaulted in the restaurant’s parking lot while walking into the...
restaurant. She sued both the franchisor, McDonald’s Corporation, and the franchisee, her employer. The trial court granted motions to dismiss filed by both defendants. On appeal, the Second District affirmed the dismissal of the claim against the franchisee employer, but reversed the dismissal of the franchisor.

The Second District determined that the franchisor, McDonald’s, had not shown in its Motion to Dismiss that it did not owe a duty to the plaintiff. Specifically, it had not made the showing necessary to prove it had not undertaken a duty to protect the plaintiff. The court explained that McDonald’s had published standards for franchises in the areas of parking lot lighting and security of employees and had monitored and enforced these procedures by sending security personnel to conform compliance at the various franchises. McDonald’s had supplied an affidavit stating that it did not have the authority to control the operations of the restaurant and did not supply any products or file a tax return for the restaurant. However, the Second District found that the security procedures were enough to show that McDonald’s mandated security procedures, which is a key factor in determining if a defendant voluntarily undertook a duty to protect people from criminal acts of third parties. Therefore, it reversed the dismissal granted by the trial court.

The Second District then affirmed the dismissal granted to the employer, the franchisee, determining that the Workers’ Compensation Act provided the plaintiff with her sole remedy against her employer. In doing so, the court determined without discussion that the injury was accidental and in the course of the employment. It determined that the injury also arose out of the employment because her employment exposed her to the hazard (dangerous parking lot) “a degree beyond that to which the general public would be subjected.”

C. Franchisor’s Voluntary Undertaking/Rejection of Several Other Duties Alleged by Plaintiff – Chelkova v. Southland Corp.

Chelkova v. Southland Corp., 331 Ill. App. 3d 716, 711 N.E.2d 1100 (1st Dist. 2002) – The plaintiff, an employee at a convenience store, was sexually assaulted while working alone during a late-night shift. She sued the franchisor, alleging that it breached a duty to protect her from harm. The defendant franchisor filed a motion for summary judgment, which was granted by the trial court. On appeal, the First District affirmed summary judgment in favor of the franchisor on the basis that it owed no duty to the plaintiff.

The Chelkova court explained that the record established that the defendant offered the services of field consultants to address security matters, prepared a robbery prevention kit, provided training to franchisees concerning rape and robbery prevention, and paid for a security system provided by an outside vendor. However, the evidence presented also established that the franchisees, such as the plaintiff’s employer, were not required to follow the franchisor’s recommendations and that the security system paid for by the franchisor was optional. The court distinguished other Illinois case law finding a voluntary undertaking because the defendant in the other cases took affirmative action to ensure compliance with its security standards. Conversely, the franchisor in Chelkova permitted the franchisee to run the business as
it saw fit. On these facts, the court held that there was no voluntary undertaking, and thus, no duty was owed by the franchisor.

Further, the First District rejected plaintiff’s attempts to impose duties on the franchisor that do not exist under Illinois law. First, it found that there is no duty under Illinois law to install security systems or equipment. Second, it determined that Illinois law does not impose a duty on convenience stores to staff its store with more than one employee at night. Finally, the court rejected plaintiff’s claim that the franchisor improperly and inadequately advised its franchisees of crime prevention measures and improperly trained employees on the same subjects, finding that there is no requirement under Illinois law (or the franchise agreement) to do so.

D. Franchisor’s Voluntary Undertaking/Proximate Cause – Castro v. Brown’s Chicken & Pasta, Inc.

*Castro v. Brown’s Chicken & Pasta, Inc.*, 314 Ill. App. 3d 542, 732 N.E.2d 37 (1st Dist. 2000) – This case involved a mass murder that occurred at a Palatine Brown’s Chicken restaurant owned and operated by one of the defendant’s franchisees. Administrators of the estates of two of the victims sued the franchisor, claiming that the franchisor undertook the duty to protect the franchisee’s employees. There were also specific allegations regarding a rear door that was unlocked. The trial court granted the franchisor’s motion for summary judgment on the basis that it owed no such duty. On appeal, summary judgment was affirmed.

The appellate court noted that deposition testimony of the franchisor’s employees established that security measures at the restaurant were left to the discretion of the individual franchisees. Further, it established that the franchisor did not mandate that any security procedures be followed, did not supply franchisees with any written materials concerning security issues, and did not employ security personnel for its franchisees. Moreover, it emphasized that the franchisor’s routine quality inspections were limited to matters of food safety and accident prevention and did not relate to crime prevention.

The court distinguished cases finding a voluntary undertaking, like *Martin*, noting that unlike the defendants in those cases, Brown’s Chicken did not implement mandatory security measures to be followed by the franchisee, did not follow up to make sure that security recommendations were followed, did not provide security for the Palatine restaurant or engage in routine security checks, and did not set up a security hotline or a committee to review security measures. On these facts, it was held that there was no voluntary undertaking.

Further, the court explained that even if the plaintiffs established a voluntary undertaking to provide adequate security measures to prevent entrance to the restaurant after it was closed, plaintiffs could not establish that the undertaking was the proximate cause of the murders. It explained that investigative police reports established it was highly likely that the killer had gained entry to the restaurant through the front door prior to closing, purchased a meal as a ruse, and remained until after the store was closed. The court explained that there was nothing in the record to indicate the intruder gained entry through the unlocked rear door. Therefore,
even if Brown’s Chicken had assumed a duty to make sure that the doors to the restaurant remained locked after closing, the court held that plaintiffs could not establish with reasonable certainty that a breach of the duty was the proximate cause of the murders.

E. Landlord’s Liability/Voluntary Undertaking/Foreseeability – Sanchez v. Wilmette Real Estate and Management Co.

Sanchez v. Wilmette Real Estate and Management Co., 404 Ill. App. 3d 54, 934 N.E.2d 1029 (1st Dist. 2010) – In this case, a tenant of an apartment complex filed suit against the owners of the apartment building and property manager after he was attacked by an unknown individual who exited a vacant apartment. Testimony in the case had indicated that the both the front and back doors to the vacant apartment were opened and unlocked. The defendants filed a motion for summary judgment. The trial court granted the motion, finding that there existed no duty and no special relationship with the plaintiff.

On appeal, the court acknowledged the general rule that a landowner has no duty to protect others from criminal activities by third persons. It also discussed the special relationship exceptions, but emphasized that before a duty will be imposed, the plaintiff must also demonstrate that the criminal attack was reasonably foreseeable. The court further explained that landlord-tenant is not recognized as a special relationship establishing a duty to protect, but pointed out that a landlord may be responsible for the criminal acts of others if the landlord has voluntarily undertaken to provide security measures, if it performs the undertaking negligently, and the negligence is the proximate cause of the injury to the plaintiff.

The court then examined the facts of the case and found that, although the apartment manager was responsible for hiring staff, maintaining the building, renting vacant apartments, and making repairs, there was no evidence that the defendants had a contract to provide building security or agreed to be responsible for protecting the plaintiff from the criminal acts of third parties. Moreover, the defendants had not voluntarily undertaken to provide security measures to protect the plaintiff from criminal acts of third persons. The court further determined that even if there was a voluntary undertaking, the defendants nevertheless exercised reasonable care because the building hallway was well-lit and plaintiff testified that he had to use his key to gain entry into the building on the night in question.

The Fourth District further held that the criminal attack was not reasonably foreseeable because the vacant apartments were routinely locked, no similar criminal attacks had occurred, and a third party had not been found in one of the apartments on a prior occasion. Similarly, the court held that the promise to maintain door locks in working condition does not rise to a voluntary undertaking to protect tenants from criminal activity. Accordingly, the First District affirmed the summary judgment entered by the trial court.

_Duncavage v. Allen_, 147 Ill. App. 3d 88, 497 N.E.2d 433 (1st Dist. 1986) – In _Duncavage_, plaintiff’s decedent was a tenant in an apartment complex in Chicago. The tenant was killed by a man who entered her apartment through a window. Plaintiff sued the owner of the apartment building. The intruder had entered the decedent’s apartment through a window that allegedly could not be locked. The intruder had used a ladder that the apartment complex stored in the yard adjacent to the complex. Plaintiff alleged that the same ladder had been used prior to the date of this attack to burglarize the same apartment. Plaintiff also alleged that the conditions of the complex amounted to numerous violations of the Chicago housing and building codes. He further claimed that the defendant failed to warn decedent of the prior incident and danger and had failed to take reasonable and necessary steps to protect the decedent. The trial court dismissed the counts of plaintiff’s complaint that alleged the defendant owed decedent a duty to protect against the criminal acts of a third party. On appeal, the First District reversed for various reasons.

The First District acknowledged the general rule that a landlord is not generally responsible for safeguarding his tenants from the criminal acts of others. However, it stated that the allegations in plaintiff’s complaint established a duty of care, first explaining that a landlord must keep common areas in a reasonably safe condition and that defendant had allowed exterior lights to burn out, weeds to grow to the point where intruders could conceal themselves, and allowed the ladder used in a prior burglary to remain on the property in an accessible location.

The court then rejected the defendant’s argument that its actions were not the proximate cause of the decedent’s death. The court explained that the same facts mentioned above, plus the fact that the intruder admitted that he chose the building due to its dilapidated condition, made the assault/murder not so unforeseeable as to allow proximate cause to be decided as a matter of law. The court used the intruder’s statement to further support its finding of duty on a different basis, explaining that the defendant’s actions materially increased the risk of criminal activity.

Finally, the First District found that defendant’s duty arose from specific building-code ordinances that were not complied with. It noted that the Chicago building and housing codes were public safety measures covering premises leased to tenants, such as the decedent. It found that the decedent was intended to come within the codes’ protection and found that a fair reading of the codes did not foreclose harm from criminal acts. Therefore, for these reasons, the court reversed the dismissal of these counts, finding that the allegations of plaintiff’s complaint established a duty.


_Morgan v. Dalton Management Co._, 117 Ill. App. 3d 815, 454 N.E.2d 57 (1st Dist. 1983) – The plaintiff was a tenant of an apartment complex who was attacked by a fellow tenant that had previously threatened the plaintiff. Plaintiff sued the attacker and his landlord. Among other
arguments, plaintiff claimed that the landlord voluntarily undertook a duty to protect him from the criminal acts of third parties based upon the following clause of his lease:

8. TENANT’S USE OF APARTMENT. The Apartment shall be occupied solely for residential purposes by Tenant, those other persons specifically listed in the Application for this Lease, and any children which may be born to or legally adopted by Tenant. Unless otherwise agreed in writing, guests of Tenant may occupy the Apartment in reasonable numbers for no more than three weeks each during each year of the Term hereof. Neither Tenant nor any of these persons shall perform nor permit any practice that may damage the reputation of or otherwise be injurious to the Building or neighborhood or be disturbing to other tenants, be illegal, or increase the rate of insurance on the Building.

Morgan, 117 Ill. App. 3d at 816.

The First District rejected plaintiff’s argument, explaining that it did not see where the landlord had undertaken any duty to protect against the criminal acts of third parties. In doing so, the court distinguished cases in which the landlord had sealed off vacant areas of a building negligently or had hired a security company to work only part of the day, increasing danger during the hours when security was not present. The First District explained that it did not find the actions of this landlord or the lease clause above analogous to the situations in those cases. Thus, it found no voluntary undertaking had occurred.

H. Special Relationship/Voluntary Undertaking – Doe v. Big Brothers Big Sisters of America

Doe v. Big Brothers Big Sisters of America, 359 Ill. App. 3d 684, 834 N.E.2d 913 (1st Dist. 2005) – In this case, plaintiff’s son was sexually abused by a mentor for Big Brothers Big Sisters of Metropolitan Chicago. Plaintiff, the victim’s mother, sued Big Brothers Big Sisters of America, claiming that it owed a duty to protect against the sexual abuse because it controlled the Chicago branch, had taken custody of her son and had voluntarily undertook to protect children from sexual abuse. At the trial court level, Big Brothers Big Sisters of America’s motion for summary judgment was granted. On appeal, that decision was affirmed.

The First District rejected the plaintiff’s contention that the national branch owed a duty to her son because it retained control over the Chicago branch. The court examined the facts and found that the national branch did not retain control over the Chicago branch by contract, supervision, or operation. It explained that there was no evidence that the national branch retained any supervision over the Chicago branch.

The court next rejected plaintiff’s argument that the national branch had taken custody of plaintiff’s son, which would have established a duty to protect due to a special relationship. It denied that the national branch had actual or constructive possession of the son, given that it was halfway across the country. The national branch had also not assumed any of the usual responsibilities associated with
the status of a custodian, including the ability to guard or protect the son, authority over him, and ability to dictate any of his activities. Given this, the court held that there was no special relationship imposing a duty on the defendant.

Finally, the First District rejected that the national branch had voluntarily undertaken a duty to protect the victim from sexual abuse. Plaintiff had argued that the national branch did so by engaging in a range of activities designed to prevent sexual abuse. The court reviewed numerous Illinois cases on the topic and found the facts to be similar to those cases finding that there was no voluntary undertaking. The following facts were important to the court:

- The national branch had not implemented a sexual abuse prevention program that was mandatory on the Chicago branch;
- The national branch did not create a “bible” of required procedures;
- The national branch did not specify policies which the Chicago branch was required to adopt;
- There was no formal committee on child protection or an individual responsible for ensuring implementation and compliance;
- The national branch did not monitor the Chicago branch to determine if it was complying with national policies;
- The Chicago branch was responsible for day-to-day operations; and
- The Chicago branch was in charge of adopting child protection or sexual abuse prevention policies that it deemed necessary.

On these facts, the First District held that there was no voluntary undertaking creating a duty to the victim to prevent sexual abuse.

I. **Club Owner Liability/Foreseeability/Voluntary Undertaking/Public Policy – Sameer v. Butt**

*Sameer v. Butt*, 343 Ill. App. 3d 78, 796 N.E.2d 1063 (1st Dist. 2003) – This case involved a stabbing at a concert/dance held at the Aragon Ballroom. The concert had been held in celebration of Pakistan's fifth year of independence. On that night, plaintiff went to the concert with friends. At some point during the concert, a fight started between several attendees. The fight spilled outside and one person was stabbed. Soon after, plaintiff, who had not been involved in the fight, began to leave the concert. As he did, he saw security guards asking people to leave. Suddenly, he was stabbed from behind, turned and saw the man who had stabbed the first injured party. He began to run and eventually got away. As a result of his injuries, plaintiff sued numerous defendants, including the Aragon Ballroom and the security service present that night. The trial court granted summary
judgment to the Aragon Ballroom and the security service on the basis that the assault was not reasonably foreseeable and that no duty was owed by either defendant.

On appeal, the First District first analyzed whether the stabbing was reasonably foreseeable, explaining that there must be reasonable foreseeability for a duty to be owed, even when there is a special relationship, as in this case. The court analyzed the facts and found that there was no reasonable foreseeability. Facts that were significant to the court were:

- Aragon had produced evidence that no similar incidents had occurred for the last five years;
- Both the plaintiff and the earlier injured party were stabbed within a very short period of time;
- The only evidence that could have supported a finding that the defendants had notice of either stabbing was the statement of the first injured party that there were two or three security guards in the lobby;
- No evidence was otherwise presented that either Aragon or the security company was aware of the incident unfolding on the sidewalk;
- The crowd was calm and well-behaved before the fight;
- There were no disturbances until just before plaintiff began to leave the ballroom;
- Plaintiff had not heard any fighting or yelling inside the ballroom;
- Plaintiff was stabbed from behind without any warning and for no obvious reason; and
- The defendants had not purposely moved the fight outside or escalated it by sending more patrons out to the fight.

The court next addressed whether the Aragon Ballroom undertook a duty to protect plaintiff from harm by hiring security. The court explained that the extent of a landlord’s liability stemming from a voluntary undertaking is limited by the scope of the undertaking. Within that scope, the landlord has a duty of reasonable care. When a landlord hires security, he can be liable for negligent hiring if the facts warrant such a finding. The court held that there was no evidence supporting proximate cause under a voluntary undertaking theory. It pointed out that there were no allegations that the security was negligent in performing its duties at the time plaintiff was stabbed. Further, there was no evidence of negligent hiring or that the security officials were involved in the fight. The court also rejected plaintiff’s argument that a pat-down search should have been done upon entry to the concert. It explained that whether this would have mattered was conjecture and speculation and that liability cannot be premised merely upon speculation.
Finally, the court rejected plaintiff’s argument that a duty to protect should have been imposed as a matter of public policy. The court explained it would be too burdensome to impose a duty to protect concert goers from all criminal attacks, pointing out that there were about 1000 concert attendees. The court felt this was too onerous of an economic burden for the defendants.

III. EMPLOYER LIABILITY FOR EMPLOYEE WORKPLACE INJURIES RESULTING FROM CRIMINAL ACTS OF THIRD PARTIES – EXCLUSIVE REMEDY PROVISION OF THE WORKERS’ COMPENSATION ACT

Many cases involve a situation where a third party (or fellow employee) attacks an employee at the workplace or just before or after work. In these situations, the exclusive remedy provision of the Illinois Workers’ Compensation Act (820 ILCS 305) may offer employers a defense against suits brought by an employee for injuries resulting from a workplace incident that the employee claims should have been prevented. The Illinois Workers’ Compensation Act provides compensation for accidental injuries sustained by any employee arising out of and in the course of the employment. Under the act, a work injury is compensable if the injury: (1) is accidental; (2) arises out of the employment; and (3) occurs in the course of the employment.

If the injuries are deemed compensable, the compensation provided by the act is to be the employee’s sole remedy against the employer. 820 ILCS 305/5(a). This is called the exclusive remedy provision of the act. Pursuant to the exclusive remedy provision, employees are prohibited from bringing a common law cause of action against an employer unless the employee can show that the injury: (1) was not accidental; (2) did not arise from his employment; (3) was not received in the course of his employment; or (4) was not compensable under the act. Meerbrey v. Marshall Field & Co., Inc., 139 Ill. 2d 455, 564 N.E.2d 1222 (1990).

Therefore, the four questions that need to be answered to determine whether a negligence claim against the injured party’s employer is barred are:

(1) Was the injury accidental?

(2) Did the injury occur in the course of the employment?

(3) Did the injury arise out of the employment?

(4) Is there some other reason why the injury is not compensable under the act?

Each of these questions are addressed briefly below.
A. Were the Injuries Accidental?

Work injuries must be considered accidental to be compensable under the Workers' Compensation Act. The term “accidental” is not defined in the act, but has been defined by Illinois courts to mean anything that happens without design or an event which is unforeseen by the person to whom it happened. *Meerbrey*, 139 Ill. 2d at 463. In the employment context, injuries inflicted intentionally upon an employee by a co-employee are considered accidental when such injuries are unexpected and unforeseeable from the injured employee's point of view. *Id.* Moreover, injuries inflicted intentionally by co-employees are also considered accidental from the employer's point of view as long as the employer did not direct or expressly authorize the co-employee to commit the assault. *Id.*

In *Rodriguez v. Frankie's Beef/Pasta and Catering*, 2012 IL App (1st) 113155, 976 N.E.2d 507, one employee shot another employee after an altercation over who had received the fry cook position at the restaurant where they worked. The First District held that workers' compensation was the exclusive remedy, finding the injury was compensable under the act. Specifically, the court held that the injury was accidental because there was no evidence suggesting that the victim expected the shooting to occur or that the owner had directly or expressly authorized the attacker to shoot. The First District found it significant that the employee who was shot showed up to work on the day of the shooting, clearly indicating that he did not expect the shooting to occur.

In *Richardson v. County of Cook*, 250 Ill. App. 3d 544, 621 N.E.2d 114 (1st Dist. 1993), the plaintiff was shoved into a room by a co-employee. The co-employee then hit her in the chest, blocked the exit, and verbally threatened her. Later, the plaintiff was arrested due to a complaint filed by the co-employee and underwent an examination when she developed chest pains. The court held that the injuries were accidental for the purposes of workers' compensation. It explained that while the actions of the co-employee in attacking the injured employee and the co-employees in arresting her were intentional, there were no facts to indicate that the employer had directed the actions. Further, it stated that the plaintiff's allegation that the employees had acted within the scope of their employment was not enough to establish that the employer had directed or authorized the employees’ actions. Therefore, the injuries were accidental and the exclusive remedy provision barred plaintiff's common law tort action.

B. Did the Injuries Occur in the Course of the Employment?

Work injuries must occur in the course of the employment to be compensable under the Workers' Compensation Act. Under Illinois case law, an injury is received in the course of employment where it occurs within a period of employment, at a place where the worker may reasonably be in the performance of his duties, and while he is fulfilling those duties or engaged in something incidental thereto. *Scheffler Greenhouses, Inc. v. Industrial Comm’n*, 66 Ill. 2d 361, 367, 362 N.E.2d 325 (1977). The Illinois Supreme Court has also stated that a compensable injury occurs in the course of employment when it is sustained while a claimant is at work or while he

Under Illinois law, the “course of employment” is not limited to the exact moment when the employee begins or concludes his work duties but also includes a reasonable time before starting and after completing actual employment. Injuries that occur in an employee parking lot are usually considered to be in the course of the employment even if they occur a reasonable time before or after work. See *Brooks v. Carter*, 102 Ill. App. 3d 635, 430 N.E.2d 566 (1st Dist. 1981); *Sangster v. Keller*, 226 Ill. App. 3d 535, 589 N.E.2d 940 (2d Dist. 1992). Injuries that occur during lunch period are generally considered in the course of the employment if they occur on the employer’s premises.

Additionally, the employer’s “premises” may be expanded to include areas outside of the employer’s actual property where the employees have some right of passage (such as in a large office building) or some right of ingress or egress, or if the injury occurs in an area where the employer instructed the employee to be at.

Finally, employees who are required to travel away from the employer’s premises to perform their job, injuries are considered in the course of the employment if the employee’s activity at the time was reasonable and was the type normally to have been anticipated or foreseen by the employer. See *Bagcraft Corp. v. Industrial Comm’n*, 302 Ill. App. 3d 334, 705 N.E.2d 919 (3d Dist. 1998).

**C. Did the Injuries Arise Out of the Employment?**

Work injuries must arise out of the employment to be compensable under the Workers’ Compensation Act. Under Illinois law, an injury is said to arise out of the employment where, upon consideration of all the circumstances, there is apparent to the rational mind a causal connection between the conditions under which the work is required to be performed and the resulting injury. *Castaneda v. Industrial Comm’n*, 97 Ill. 2d 338, 342, 454 N.E.2d 632 (1983). The mere fact that the injury occurred at the place of employment is itself not determinative. *Id.* at 341. Although injuries resulting from a quarrel concerning the employer’s work may be compensable, courts have consistently held that where the fight is purely personal in nature, the resulting injuries cannot be considered to have arisen out of the employment. *Huddleston v. Industrial Comm’n*, 27 Ill. 2d 446, 448, 189 N.E.2d 353 (1963). Additionally, it has been said that it must be apparent that the employment increased the risk of injury, and that the employee would not have been subject to the same attack if he had encountered the offender for the first time upon the street. *Rodriguez*, 2012 IL App (1st) 113155 ¶ 21. Given that this is a fact-specific inquiry, it is helpful to review several cases discussing whether an injury has arisen out of the employment.

In *Rodriguez v. Frankie’s Beef/Pasta and Catering*, 2012 IL App (1st) 113155, 976 N.E.2d 507, the plaintiff’s decedent was shot and killed at work by a co-worker the decedent had allegedly teased about being demoted from the role of fry cook. The First District held that the shooting arose out of the employment because the dispute was over an employment issue, i.e., who had...
been made fry cook. The court reviewed the facts of the case and explained that all of the witnesses had stated that the dispute/altercation centered on the new fry cook taking over for the shooter and taunts that the new fry cook was the better cook. Therefore, the court held that it was unlikely that the decedent would have been involved in the altercation with the shooter if he had not been employed at their place of employment and that there was a connection to work. Further, the court rejected the plaintiff’s argument that the fact that the shooter’s brother had told the police that no one at the shooter’s place of employment liked him made the dispute purely personal. The court emphasized that a purely personal dispute is one where the verbal exchange is "completely unrelated to the employer's work." Because all evidence indicated that the altercation started because of a dispute over who was made fry cook, the court held that it arose out of the employment.

In *Martinez v. Gutmann Leather, LLC*, 372 Ill. App. 3d 99, 865 N.E.2d 325 (1st Dist. 2007), a setting machine operator was shot to death by a co-employee shortly after completing his work shift. On appeal, the sole issue was whether the exclusive remedy provision barred the wrongful death action, with the First District holding that it did not because the dispute was personal. The victim’s wife had signed an affidavit attesting that the relationship between her husband and the co-employee attacker had been deteriorating for a long time prior to the shooting and had grown into one of extremely bitter enmity. She claimed that the attacker had come to their home several times looking for her husband and had threatened harm when he was not there. Her affidavit also stated that the quarrel between the two had nothing to do with the victim’s employment at Gutmann Leather. According to her, the quarrels and threats related solely to the fact that the attacker did not like the victim for personal reasons unrelated to work.

The victim’s estate claimed that the dispute between the two employees arose from a personal dispute and that the tort action was therefore not barred. The defendant employer claimed that there was a causal link between the death and employment because in order for him to fulfill his duties, the victim was required to work with the attacker. The First District rejected this argument. In deciding that the dispute was personal and the claim therefore not barred, the court pointed to the Plaintiff's affidavit and evidence that she lived with the victim prior to his death and had personal knowledge of the quarrel between the two employees. The victim's wife had attested that the relationship had been deteriorating for some time and had nothing to do with the employment. She also attested that the attacker had threatened her husband on many occasions. The court determined that at the motion to dismiss stage, it could not be said as a matter of law that the dispute arose out of and in the course of the employment. It explained that even if a fight occurs on an employer’s premises, resulting injuries are not compensable if the underlying dispute is not connected with the work.

In *Castaneda v. Industrial Comm’n*, 97 Ill. 2d 338, 454 N.E.2d 632 (1983), the claimant was injured after she was involved in a physical altercation with two co-workers who were sisters. The claimant had been talking to another coworker and working when one of the sisters told her to "shut up." The claimant refused and one of the sisters slapped her in the face. The claimant then threw a package of tablecloths at the woman, and the two began fighting. At that point, the other sister joined the fight and the claimant received an injury to her finger. The claimant sought workers’ compensation benefits for the injury. The Industrial Commission found that the
injuries did not arise from the employment and were therefore not compensable. The Illinois Supreme Court affirmed, finding that the injuries resulted from a purely personal dispute brought on by a verbal exchange that was unrelated to the employer’s work.

In *Illinois Institute of Technology Research Institute v. Industrial Comm’n*, 314 Ill. App. 3d 149, 731 N.E.2d 795 (1st Dist. 2000), the claimant’s decedent, a security guard, had been killed by a stray bullet shot from a building across the street from the building in which he was working. The lobby where he worked was fronted by floor-to-ceiling windows. The area across from the building where he worked was known as a dangerous area. On appeal, the First District held that the decedent’s death arose from his employment and was compensable. The court explained that the decedent’s risk of being hit by a stray bullet was greater than that of the general public. Important facts to the court in making its determination were that the crime rate and gang activity in the area of the decedent’s workplace were high and that the decedent guarded an area that was fronted by floor-to-ceiling windows.

**D.  Is there Any Other Reason that the Injuries Should not be Compensable Under the Workers’ Compensation Act?**

Finally, there are some occasions in which injuries that may satisfy the three prongs of the compensability test but are not compensable under the Workers’ Compensation Act. Two examples of this are when the injured party was the aggressor in the situation that injured him and when the injured party is an independent contractor, rather than an employee.

**1.  Aggressor Defense**

The principle known as the “aggressor defense” provides that even if a fight is work related, an injury to the aggressor is not compensable. *Bassgar, Inc. v. Illinois Workers’ Comp. Comm’n*, 394 Ill. App. 3d 1079, 917 N.E.2d 579 (3d Dist. 2009). The rationale for the “aggressor defense” is that the claimant’s “own rashness” negates the causal connection between the employment and the injury so that the work is neither the proximate nor a contributing cause of the injury. *Id.*

In *Bassgar*, the court found that the petitioner’s arm injury was compensable under the Act even though the petitioner initiated a verbal dispute with his supervisor. The evidence showed that the petitioner walked away from his supervisor following a verbal dispute between the two. While walking away, the supervisor responded by grabbing the petitioner and throwing him against a table, injuring the petitioner’s arm. Based on these facts, the petitioner was found not to be the aggressor for purposes of the Workers Compensation Act and therefore was not barred from recovery.

**2.  Independent Contractor/Employee Distinction**

If the facts surrounding the injured worker’s employment reveal that the worker was actually an independent contractor rather than employee at the time of the injury, the injury may not be compensable. Courts have identified several factors that help determine whether a person is an employee or independent contractor. Some of these factors include:
• Whether the company has the right to control the injured person’s work;

• Whether the company actually controls the manner in which the injured person works;

• Whether the company dictates the worker’s schedule;

• Whether the company withholds taxes from the worker’s pay;

• Whether the worker is paid hourly;

• Whether the worker may be discharged at will;

• Whether the company or worker supplies the tools and materials used; and

• Whether the company’s general business encompasses the worker’s work or whether the work is an entirely separate business.

The label given the parties in a written contract is a factor, but is not dispositive of employment status. Earley v. Industrial Comm’n, 197 Ill. App. 3d 309, 553 N.E.2d 1112 (4th Dist. 1990). Ultimately, the determination of whether a person is an employee or an independent contractor is based on the totality of the circumstances. Roberson v. Industrial Comm’n, 225 Ill. 2d 159, 866 N.E.2d 191 (2007).

The fact that the commission and courts consider all these factors creates the question of which is most important and determinative. Many courts have considered control to be the single most important factor, but courts also indicate that no single factor is determinative and the significance of the factors often depends on the work that is involved. Some courts have noted that one factor gaining significance is the relationship of the claimant’s work to the employer’s business. In several cases involving truck drivers, courts have quoted and focused on a line from the Larson treatise, which states there is “a growing tendency to classify owner-drivers of trucks as employees when they perform continuous service which is an integral part of the employer’s business.” Roberson v. Industrial Comm’n, 225 Ill. 2d at 187. Regardless, the independent contractor/employee classification has produced much litigation and is a fact-intensive inquiry that must be considered based on the circumstances of each case.
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