VEHICLE THEFT OR BREAK-IN
PARKING LOT LIABILITY – (TEXAS)
ARE APARTMENT AND GYM OWNERS LIABLE?
COULD BE…

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BOTTOM LINE:

When a landowner or possessor of land [gym, apartment, and/or their landlord] has actual or constructive knowledge of any condition on the premises [parking lot under their control] that possess a [foreseeable and] an unreasonable risk of harm to invitees [inadequate security systems] they have a duty to take whatever action is reasonably prudent to reduce or eliminate that risk... Del Lago Partners, Inc. v. Smith, 307 S.W.3d 762 (Tex. 2010); UDR Texas Properties LP et al v. Petrie, 517 SW3 98 (Tex. 2017).

Such duty applies to prevention or reduction of risks associated with third party criminal activity (theft or break-in to parked vehicles and associated personal injury assault on a vehicle owner committed by the criminal) parked on parking lots under the control of the landowner or possessor, and failure to have in place reasonable security measures to prevent or reduce the risk of such incident, can result in the controlling landowner/possessor being held accountable and liable for damages (personal or property) incurred by the vehicle owner invitee (apartment tenant/gym member including possibly their invited guests).

KEY QUESTION: HAS THE GYM OR APARTMENT IMPLEMENTED SUFFICIENT REASONABLE PARKING LOT SECURITY MEASURES TO PREVENT OR REDUCE THE RISK OF AUTO THEFT/BREAK-IN CRIMINAL ACTIVITY KNOWN TO OCCUR IN THEIR PARKING LOTS?

HAVE THEY DONE ENOUGH???

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THE CIRCUMSTANCE

You (Vicki Victim) are a resident at an apartment complex or you (Victor Victim) a member of a gym club. You park your vehicle in parking lot spaces provided or made available by the apartment complex or gym. Your legally parked vehicle is either stolen or broken into, and possibly items stolen, and the vehicle damaged – broken locks, broken windows, dented car body. Who pays for all this (could be a few hundred bucks to many thousands)? Not to mention the cost of time and inconvenience dealing with the aftermath of the incident. Had you unexpectedly encountered the criminal in the act of theft or break-in, you could also be subject to assaultive personal injury as a consequence of the criminal acting defensively.

Quick Remedies…

1. In the case of theft of the vehicle, if you have an auto **comprehensive insurance coverage** policy, such insurance can help pay for (after deductibles) your stolen vehicle, if it is not recovered. Depending on your policy, you may also be covered for custom parts, paint, rims, and other aftermarket additions and possibly break-in damages.
2. Personal property (cell phones, laptops, tools, etc.) stolen out of your car won't be covered by auto insurance, but may be protected under a **home, renters, or condo insurance** policy. Take into account the deductible, as in many cases that is greater than the value of the stolen property.
3. Your **personal medical insurance** will more than likely cover (after deductible) personal injury medical costs.
4. If there is personal injury caused by criminal assault, you may have a claim to recover some of the costs, under the Texas Attorney General **Crime Victims' Compensation (CVC) Program**; Texas Code of Criminal Procedure, Title 1, Chapter 56A, Rights of Crime Victims.

Thieves are always in a hurry and do not like any hurdles that slows them up (a steering wheel club lock may be old school and a nuisance to put on and off, but it sure does have a theft deterrence affect. Added security alarms set off by theft attempts is another good deterrent).

Unfortunately, a locked car can invite thieves to break windows and locks or create body damage – and while parking lot security signs advise to lock your car and remove your valuables, this can cause a thief to act more aggressively breaking in by breaking more.

Upon discovery of the incident, you immediately report it to the apartment manager or gym manager (in writing and ideally also notify in writing their corporate legal department) and police (– in Houston, you can't conveniently file a report for car break-in on-line (can if vehicle is stolen), and have to travel to the police station – Travis Street – in person to file an incident report and obtain an incident number –an inconvenient system). Reporting the incident is important for insurance coverage purposes, crime investigation, parking lot owner liability claims and publication of crime statistics in public records.

The gym/apartment managers may be sympathetic about the incident, may assist you reporting such to the police, but the managers will usually advise the apartment complex or gym are not liable for such circumstances. And in some cases the manager will also advise you of posted signs that typically read:

and consequently, the sign is portrayed as being the end of the story – and no liability to the apartment or gym. The manager may even go further and say, we have lights and security cameras and will advise the police of any relevant video recorded information, so we are doing more than we need to do regarding security in the parking lot. Thank you for being a good tenant or gym member and have a nice day.

More than likely, you took proper precautions and did not leave anything of value in the vehicle (in most cases, you are liable for that loss as you have a duty to act reasonably to protect your personal property). And if you did leave valuables in the car, you locked them in the trunk. But even locked trunks can be unlocked by criminals, recalling the old adage that *locks are made to keep honest people honest* – if a thief wants in, they usually can find a way...if not too cumbersome to do so.

After letting off steam and sense you have no claim, you sheepishly bow your head and open up your pocketbook and pay for the loss and just count yourself as another crime victim statistic.

Reporting an incident to the police is a good thing, but don't hold your breath that the thief will be caught and restitution made to you (a fancy word that means your losses will be recovered) – if it does, you are one of the rare lucky ones.

In large metropolitan areas such as Houston, gyms and apartment parking lots are frequent and repeated hot spots for criminal activity associated with vehicle theft and break-ins – even during broad day light (easily verified by checking published police department crime statistics) – citing type of crime, frequency, times and locations. For Houston, crime statistics are reported at:

(**https://www.houstontx.gov/police/cs/Monthly_Crime_Data_by_Street_and_Police_Beat.htm)**.

Oftentimes a parking lot crime incident is not an isolated one or two criminal act event but 50 or more vehicles subjected to criminal activity in the same parking lot on a single night. Criminals suspect vehicles in parking lots, especially associated with gyms and apartment buildings, might contain wallets, purses, briefcases, expensive electronic gizmos, maybe even firearms (and if you're at the gym before or after work, carrying all this into the gym so not left in the car can be a big hassle). And be assured more than likely the apartment and gym staff and shopping center landlord management know or have reason to know of the high crime hot spot in their parking lots.

THIS KNOWLEDGE CIRCUMSTANCE SUGGESTS THERE IS MORE TO THE STORY ABOUT WHO IS LIABLE FOR CRIMINAL ACTIVITY IN PARKING LOTS - BESIDES THE VEHICLE OWNER!

Unfortunately, Victim's desire to find a remedy to cover their losses other than they pay for the mishap, and sue the apartment or gym (or their shopping center lessor) – the one in control of the parking lot - to compensate the Victim for some or all of their damage and loss, is meant with various barriers:

- Establishing gym or apartment liability – do they have a duty to provide reasonable security protection for premises under their 'control' (such as their parking lot) for their tenants/members invitees, and if they do, they could be held liable to compensate Victim for their loss or damage to vehicles/personal injury – but that breach of duty is not always easy to prove, but in many cases, can be accomplished;
- Most attorney's will review a parking lot auto break-in/theft case and often determine they have other priority (more valuable) cases or that Victim's case is not a quick win event, meaning they have determined that they will have to spend too much of their time developing the case (routine higher valued automobile negligence cases are more appealing). This note may assist an attorney to better understand parking lot law (an area not well published) and may well decide to take Victim's case.;
- Victim seeking help from a legal aid group or self-help representing themself (a *pro se* Plaintiff) in Justice Court ($20,000 jurisdiction) for smaller cases, are alternates, but Victim needs guidance how to do this. This note provides some of that self-help guidance.

This note, while not a comprehensive survey or all encompassing legal analysis, is believed to provide a reasonable foundation of the basic law of parking lot liability in Texas, presenting under what circumstances a gym, apartment complex and/or owners (shopping center lessor in 'control' of a parking lot premises, could be held liable for compensating Victim for some or all of their, the *invitee's,* vehicle parking lot criminal related damages and injuries, suffered by Vicki Victim as a tenant or Victor Victim gym member – or even their invited guests, who could also be classified as an *invitee*. While the paper has focused on gyms and apartments, the principles can apply to any other parking lot..

Parking lot liability claims could be brought under various legal causes of action that include:

- Negligence
- Premises Liability
- Landlord Tenant Warranty of Habitability Law (Texas Property Code)
- Breach of Service Contract / Texas Deceptive Trade Practices-Consumer Protection Act
- Breach of Bailment

Each discussed below, but first a summary of important **BACKGROUND** issues, which understanding is essential in order to bring a reasoned claim.

BACKGROUND: INVITEE - TENANT (VICKIE)/MEMBER (VICTOR) ARE SPECIAL PERSONS DESCRIBED AS AN '*INVITEE*' AND WILL HAVE CERTAIN LEGAL RIGHTS

Businesses, such as apartment complexes and gyms, have a profit motive to 'invite' tenants and gym members to either live in the apartment complex or use a gym (and part of that invitation includes the convenient use of apartment/gym provided parking areas – rare would the apartment/gym that did not have access to parking spaces).

Tenants or gym members are described in law as '***invitees***'. An invitee is a special person who is on the gym or apartment premises (includes parking lots) at the express or implied invitation of the possessor

and controller of the premises (the gym or apartment complex or the shopping center lessor who controls the parking lot) and who has entered thereon either as a member of the public for a purpose for which the premises are held open to the public or for a purpose connected with the business of the possessor that does or may result in their mutual economic benefit, – including *invitee* use of gym/apartment provided parking lots or spaces :

(1) the apartment/gym benefit is to make money – AND

(2) the tenant benefit is to have a place to live/the gym member benefit has a place to improve their health/ and tenant/member both benefit having places to park their vehicles.

Invitees will have special legal rights owed to them by the apartment complex/gym/parking lot controller, as described below. Even *invitee* visiting guests (such as a family member, a friend, a dating partner, etc.) could also be considered to be an *invitee,* (a third party beneficiary), who can have the same *invitee* legal rights as the tenant and gym member, if such guest invitee's vehicle is subjected to criminal activity in the relevant parking lot and the apartment/gym/lessor have an expectation such guests are permitted invitees (impliedly 'invited') on the property.

Two other lesser classes of persons that might be on the property *(not further discussed)*, that have different (less) legal rights compared to an *invitee* include:

- a *licensee* – such as a door-to-door salesperson who enters the apartment/gym property, who is not invited to be on the property but may be permitted to stay if the managers or even Vickie as a tenant, elect to allow them to stay, and
- a *trespasser*, someone who has no legal right to be on the property.

BACKGROUND: DUTY-

An owner, lessee or occupier of land (gyms and apartments and/or their lessor) have a (reasonable) duty (an obligation) to keep the premises under their control in a safe condition [in regard to their invitees]. Redinger v. Living, Inc., 689 S.W.2d 415, 417 (Tex. 1985).

The existence of a duty is a question of law determined by the court. Generally, a person does not have a duty to protect others from third-party criminal acts. However, "[o]ne who controls the premises does have a duty to use ordinary care to protect invitees from criminal acts of third parties if they know or have reason to know of an (1) unreasonable and (2) foreseeable risk of harm to the invitee." Both foreseeability and unreasonableness are distinct issues to assess.

- **Foreseeability** is established through evidence of `specific previous crimes on or near the premises. Trammell Crow Cent. Texas v. Gutierrez, 267 S.W.3d 9 (Tex. 2008) Did the landowner or occupier take reasonable steps to correct the defect (such as providing reasonable security, that might include a 24/7 on-site security guard) and/or warn against vehicle criminal risk and having a duty to protect the invitee, did their failure to remedy (the proximate cause) any lack of security measures, cause damages? Foreseeability encompasses:
    - Evidence of prior crimes – foreseeability - is a fact question, generally determined by crime statistics, notices and reports on file with the apartment and gym manager from tenants/members or others, of criminal events in parking lots as well as discussions

between other area businesses. Trammell Crow Cent. Texas v. Gutierrez, 267 S.W.3d 9 (Tex. 2008)

- To determine whether the risk of criminal conduct is foreseeable, a court weighs the evidence of prior crimes using five factors: proximity, publicity, recency, frequency, and similarity. The evidence is not considered "in hindsight but rather in light of what the premises owner knew or should have known before the criminal act occurred. "A criminal act is more likely foreseeable if numerous prior crimes are concentrated within a short time span than if few prior crimes are diffused across a long time span." In addition to the recency and frequency of past crimes, a court must consider the similarity of the past crimes to the criminal conduct in question. Foreseeability does not require "the exact sequence of events that produced the harm [to] be foreseeable," — rather, previous crimes need only be "sufficiently similar to the crime in question as to place the landowner on notice of the specific danger." "The foreseeability requirement protects the owners and controllers of land from liability for crimes that are so random, extraordinary, or otherwise disconnected from them that they could not reasonably be expected to foresee or prevent the crimes..." Trammell Crow Cent. Texas v. Gutierrez, 267 S.W.3d 9 (Tex. 2008). Summary of the five factors…
  - Proximity - a landowner to foresee criminal conduct on property, there must be evidence that other crimes have occurred on the property or in its immediate vicinity." ;
  - Recency and frequency: "Foreseeability also depends on how recently and how often criminal conduct has [occurred on the premises];
  - Similarity: "The previous crimes must be sufficiently similar to the crime in question as to place the landowner on notice of the specific danger."
  - Publicity: "The publicity surrounding the previous crimes helps determine whether a landowner knew or should have known of a foreseeable danger."
- These factors—proximity, recency, frequency, similarity, and publicity—must be considered together in determining whether criminal conduct was foreseeable." UDR Texas Properties LP et al v. Petrie, 517 SW3 98 (Tex. 2017).

- **Unreasonableness** "turns on the risk and likelihood of injury [harm or damage] to the plaintiff…as well as the magnitude and consequences of placing a duty on the defendant. Del Lago Partners Inc v Smith 307 SW3d 762 (Tex 2010). If a premises owner (one in 'control') could easily prevent [or at least reduce the likelihood of occurrence] a certain type of harm [to an invitee], it may be unreasonable for the premises owner not to exercise ordinary care to address the risk. Del Lago Partners Inc v Smith 307 SW3d 762 (Tex 2010); UDR Texas Properties LP et al v. Petrie, 517 SW3 98 (Tex. 2017). Unreasonableness encompasses:
  - Property owner's duty to invitees extends only to reduce or eliminate an unreasonable risk of harm created by a premises condition once foreseeability of that risk has been determined. A risk is unreasonable when the risk of a foreseeable crime outweighs the burden placed on property owners—and society at large—to prevent the risk. The unreasonableness inquiry, on the other hand, explores the policy implications of imposing a legal duty to protect against foreseeable criminal conduct. This includes whether a duty would "require 'conspicuous security' at every point of potential contact between a

patron and a criminal" or require adoption of "extraordinary measures to prevent a similar occurrence in the future." Accordingly, "if a premises owner could easily prevent a certain type of harm, it may be unreasonable for the premises owner not to exercise ordinary care to address the risk." UDR Texas Properties LP et al v. Petrie, 517 SW3 98 (Tex. 2017).

- The question is the extent premises owners are required—even those who have experienced crime in the past—to provide the same level of security that airports enlist to prevent terrorism. Life in a free society carries a degree of risk. That risk can be virtually eliminated by a pervasive military presence, but the burdens—both in terms of the economic cost to premises owners and in the oppressive climate a police state spawns—would be prohibitive [and unreasonable in its own right]. UDR Texas Properties LP et al v. Petrie, 517 SW3 98 (Tex. 2017).

BACKGROUND: ARE PARKING LOT POSTED SIGNS READING " NOT RESPONSIBE FOR THEFT OR DAMAGE TO VEHICLE" ENFORCEABLE? …MAYBE NOT-

Parties may mutually agree to limit the liability of one for future negligence unless the agreement violates the constitution or statutes or public policy. In determining whether a contractual agreement limiting liability is against public policy courts look to the relationship between the parties. If because of this relationship there exists a disparity of bargaining power, the agreement may well not be enforced [as a matter of public policy].

A disparity of bargaining power exists when one party [tenant or gym member using a parking lot spaces] has no real choice in accepting an agreement limiting the liability of the other party [such as the apartment or gym unilaterally posting a non-negotiated no liability for auto theft or damage sign, in their parking lots – but even then, the signage liability limitation may be subject to the apartment or gym providing reasonable security measures in regard to auto theft or damage if the know or have reason to know of foreseeable and unreasonable criminal activities on the lot].

A parking lot owner/one in control of those premises, is a bailee,[1] may be

(1) for hire – a commercial parking lot charging a parking fee or

(2) implied bailee as part of the apartment/gym rents/fees and inclusion of access to parking spaces,

and such **bailee owes a duty of ordinary care (not be negligent) to protect the bailor's [tenant or gym member] parked automobile from theft or break-in**.

Texas cases dealing with the limitation of liability by parking lots bailee, have presented attempts to impose the limitation by posting no liability sign notices on the parking lot premises or by print on the

[1] A bailment involves trust and one party (bailee) having temporary possession of another's (bailor) personal property, such as bailee temporarily 'possessing' bailor's vehicle parked in bailee's parking lot, and bailor having the right to remove their personal property by abiding by any express or implied bailment contract (if a commercial parking lot, bailor paying a parking fee to bailee; if an apartment building/shopping center, right to park associated with living in an apartment or shopping at shopping center businesses). Bailor has the obligation to return personal property in the same condition it was delivered.

claim check. Courts have ruled that limitations of liability must be called to the attention of the bailor (be conspicuous) before they become part of the bailment contract. Even then, such liability limitation generally applies only if the bailor – the tenant or gym member - have realistic parking options (if they don't like the sign, park elsewhere). Oftentimes the tenant/member do not have a reasonable parking option, as they are realistically confined to park in the location of the apartment or gym – and not down the street in an unlit alley, or 'trespass' park in another distant shopping center parking area.

[Liability limitation signage] provisions are strictly construed against the bailee [apartment or gym]. Allright, Inc., v. Eledge, Jr., 515 S.W.2d 266 (Tex. 1974).

Even with a limited liability sign, the gym or apartment may still have certain duties to provide reasonable security protection in parking lots if the bailor knows or has reason to know of circumstances requiring such security, such as being aware of foreseeable vehicle criminal activity on the lot, and failure to provide reasonable security measure, could result in the gym's or apartment complex liability associated with damage to a vehicle theft or break-in event.

BACKGROUND: ATTORNEY'S FEES-

In Texas, attorney fees are recognized under two circumstances:

1. By contract, where the fee arrangement is contained in a written mutually agreed contract,
    a. Attorney's fees can either be incurred by either contracting with their client and charging their client either (1) an hourly rate plus expenses or (2) a contingency fee, whereby the attorney takes its fee out of a successful judgment award, and if not successful, the attorney does not receive a fee, or
2. By Statute or law which contains a provision that attorney fees will be included in awarded damages.
    a. Statutes that provide for award of attorney's fees include:
        i. Texas Deceptive Trade Practices-Consumer Protection Act
        ii. Property Code, Landlord Tenant Law (Sec. 92.0563), judicial remedies associated with a landlord failing to timely repair or remedy a condition of habitability that affects the safety of a tenant. (Does not include attorney fees associated with a personal injury cause of action or a claim based on a criminal act).
            1. A claim based on the apartment failing to protect the health and safety of a tenant because it failed to provide sufficient parking lot security to prevent or reduce the risk of a crime against parked vehicles is arguably a claim not based on a criminal act, but failure to have in place adequate security measures to prevent crimes for the safety and health of the tenant.

Claims based on negligence or premises liability, do not have a statutory right to recover attorney fees – hence attorneys look to their client to pay their fee.

If an attorney's client is not financially sound, an attorney may be more inclined to take a case if the underlying claim is based on a statute that provides for award of attorney fees from a solvent defendant and the attorney can gauge the financial soundness of the potential defendant and merits of a case.

If statutory attorney fees can be included in the court award, it is included in the amount in controversy regarding jurisdictional limits of courts.

Pro Se Plaintiff Being A Licensed Attorney. When the plaintiff (Victim) is also a licensed attorney and represents themselves in the claim (a 'pro se' plaintiff), can they also claim, if so entitled, to award of attorney fees? State of Texas and Federal Courts have varied feelings about such an award.

- The Texas Supreme Court decision in Rohrmoos Venture v. UTSW DVA Healthcare, LLP, 578 S.W.3d 469 (Tex. 2019), provides an excellent discussion of the elements required to prove up and recover attorney's fees in Texas.
- The Texas Appellate court decisions in Beckstrom D.O. v. Gilmore, 886 S.W.2d 845 (Eastland Tex. App. 1994) and Pullman v. Brill, Brooks, Powell & Yount, 766 S.W.2d 527, 530 (Tex.App.--Houston [14th Dist.] 1988, no writ)..." , allowed recovery of attorney fees to a pro se plaintiff if the plaintiff is a licensed attorney and likened the decision to the same circumstance where an in-house attorney representing his corporate employer, is entitled to recovery of attorney fees (Tesoro Petroleum Corporation v. Coastal Refining & Marketing, Inc., 754 S.W.2d 764, 766 (Tex.App.--Houston [1st Dist.] 1988, writ den'd)..., since that attorney was distracted from spending his time on other corporate business. The same principle would apply to any pro se licensed attorney.
- The U.S. Supreme Court decision in Kay v. Ehrler et al, 499 U.S 432 (US Sup Ct 1991), in regard to the award of attorney's fees allowed under the Civil Rights Attorney's Fees Awards Act and ruled such pro se attorney fee award was not allowed under the act because the fee was not 'incurred' by independent counsel as interpreted under the Act and the pro se attorney could not provide independent counseling between himself as a representing attorney and in his capacity of being a plaintiff. Federal Courts seem to be tending toward less support of awarding pro se attorney fees, at least to the extent where such award is based on some underlying law that permits such award if 'incurred', i.e. fee paid to independent not-party attorney.

BACKGROUND: STATUTE OF LIMITATION-

A statute of limitation is a type of law that prevents someone from starting a lawsuit after a certain period of time has passed. The law provides that claims and bringing of a lawsuit must be brought in a timely fashion (there is a deadline to bring such actions), or else they are barred (prevented) from being pursued – and relevant statutes are referred to as Statute of Limitations. *Cadle Co. v. Wilson*, 136 S.W.3d 345, 350 (Tex. App.- Austin 2004, no pet

Such statutes are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.

Texas CIVIL PRACTICE AND REMEDIES CODE, TITLE 2. TRIAL, JUDGMENT, AND APPEAL, SUBTITLE B. TRIAL MATTERS CHAPTER 16. LIMITATIONS, specifies the time limits in which a claim must be brought in Texas. The statute provides specific time frames in which a suit must be brought and varies with the type claim. Two important time frames regarding parking lot vehicle criminal act claims include the 2 year period for personal injury and a general 4 year period for most actions not associated with a specific limitation.

CAUSES OF ACTION CLAIMS

NEGLIGENCE

The below negligence discussion is based on an internet note published at https://www.texaslegalbrains.com/texas-causes-of-action/negligence; Funderburk, Funderburk, Courtois, LLP, Houston, Texas (2014)

Negligence encompasses a failure to do that which a person of ordinary prudence would have done under the same or similar circumstances, or doing that which a person of ordinary prudence would not have done under the same or similar circumstances. *See 20801, Inc. v. Parker,* 249 S.W.3d 392, 398 (Tex. 2008); *Thompson v. Gibson*, 298 S.W.2d 97, 105 (Tex. 1957); State Bar of Texas, Texas Pattern Jury Charges PJC 2.1 (2012).

A plaintiff must prove the defendant did something an ordinarily prudent person exercising ordinary care would not have done under the same circumstances, or that the defendant failed to do that which an ordinarily prudent person in the exercise of ordinary care would have done. *Sisters of Charity of the Incarnate Word v. Gobert*, 992 S.W.2d 25, 28 (Tex. App.--Houston [1st Dist.] 1997, no pet.)

"Ordinary care" means that degree of care that would be used by a person of ordinary prudence under the same or similar circumstances. See State Bar of Texas, Texas Pattern Jury Charges PJC 2.1 (2012).

ELEMENTS.

Elements of a Negligence cause of action are: (1) A duty owed by defendant to plaintiff; (2) Breach of that duty; (3) Proximate cause of the plaintiff's damages by defendant's breach; and (4) Damages. *Rodriguez-Escobar v. Goss,* 392 S.W.3d 109, 113 (Tex. 2013).

1. **Duty.** Duty is defined as the obligation to conform to a particular standard of conduct toward another, and is the threshold inquiry in a negligence cause of action. *C.J. Doe v. Boys Clubs of Greater Dallas, Inc.*, 868 S.W.2d 942, 948 (Tex. App.--Amarillo 1994), aff'd, 907 S.W.2d 472 (Tex. 1995). Duty is a question of law for the court to decide from facts surrounding the occurrence in question. *Greater Houston Transp. Co.v Phillips*, 801 S.W.2d 523, 525 (Tex. 1990). In determining whether a duty exists, a court is to consider several interrelated factors such as: 1) the risk involved; 2) the foreseeability of the risk; 3) likelihood of injury; and 4) factors 1-3 weighed against the social utility of the actor's conduct and the magnitude of the burden on the defendant.
2. **Breach.** Breach of duty looks at whether the party violated or breached, the applicable standard of care. *Parkway Co. v. Woodruff*, 857 S.W.2d 903, 919 (Tex. App.--Houston [1st Dist.] 1993, no writ), *aff'd as modified*, 901 S.W.2d 434 (Tex. 1995).
3. **Proximate Cause.** Proximate Cause is made up of two elements: cause in fact, and foreseeability. *Travis v. City of Mesquite*, 830 S.W.2d 94, 98 (Tex. 1992). Proximate cause cannot be established by mere conjecture, guess, or speculation. *McClure v. Allied Stores of Tex., Inc.*, 608 S.W.2d 901, 903 (Tex. 1980).
    a. The test for cause in fact is: whether the negligent "act or omission was a substantial factor in bringing about the injury," without which the harm would not have occurred. *Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762, 774 (Tex. 2010). Cause in fact is not shown if the Defendant's negligence did no more than furnish a condition which made the injury possible.
    b. Foreseeability requires that a person of ordinary intelligence should have anticipated the danger created by a negligent act or omission. A danger of injury is foreseeable if its "general character might reasonably have been anticipated."

PREMISES LIABILITY:

There are two types of harm a tenant or gym member could incur associated with vehicles stolen or damaged in a parking lot.

1. One deals with the potential harm or **injury to a person** (a vehicle owner who encounters a thief trying to break into or steal their vehicle, could be injured by the aggressive defensive behaviour of the discovered thief) – thus the personal safety of the vehicle owner is at risk associated with a parked vehicle in the parking lot, and a common sense need that the gym or apartment have in place reasonable parking lot security systems to eliminate or much reduce the risk of such event happening; and/or
2. Harm or **damage to the vehicle**, property damage, caused by the thief's break-in activities (broken locks, windows, car body damage) or theft loss of the vehicle.

Does both (1) personal injury (harm damages) to a person and (2) damage (harm) to property (the vehicle), constitute harm (damages) to the vehicle owner, and either considered legally recognized damage claims when assessing negligence or premises liability claims against the entity controlling a parking lot?

The Texas Civil Practice and Remedies Code (Title 2, Subtitle C, Chapter 41 – Damages) provides:

- This chapter applies to any action in which a claimant seeks damages relating to a cause of action (Sec. 41.002);
    - As defined in the Code (Sec. 41.001) damages encompasses: Economic, Exemplary, Compensatory, Future, Noneconomic damages and future loss of earnings.
        - Damages encompass both harm or injury to a person as well as harm or damage to a person's property.
    - A cause of action includes negligence and premises liability (a special claim of negligence) claims.
    - In contrast, actions and damages under the Deceptive Trade Practice Act or Property Code (Implied Warranty of Habitability) are governed by those statutes.
        - Relevant exceptions (Sec. 41.002) is that the Civil and Practice Remedies Code does not apply to actions brought under the Deceptive Trade Practices-Consumer Protection Act or Chapter 21 of the Insurance Code.
    - HARM RESULTING FROM CRIMINAL ACT. (a) In an action arising from harm resulting from an assault, theft, or other criminal act, a court may not award exemplary damages against a defendant because of the criminal act of another. (Sec. 41.005)
        - Inferentially, the Civil Practice and Remedies Code regarding damages, recognizes in regard to a criminal act, harm to encompass more than just personal injury to a person but also includes harm (or damage) to a person's property. Harm to one's property can be just as damaging as personal injury harm.

INJURY (harm):

A person personally injured on another's property may have either a common law negligence claim or a premises-liability claim against the property owner.

- When the personal injury (harm) is the result of a contemporaneous, negligent activity-on-the-property (**CONDUCT on the premises**), ordinary negligence principles apply [example, a premises owner working on the property fails to exercise reasonable and prudent care when operating a tractor negligently injures a worker on the property with the tractor].
- When the personal injury (harm) is the result of the property's condition (**CONDITION of the premises**) rather than an activity, premises liability principles apply, [example, a subcontractor walking on a parking lot property, breaks through a cover over a concealed hole and was injured in a fall, and the premises owner had actual knowledge of the covers weakiness to support a person and unreasonably failed to notify workers of the risk; ***slip and fall negligence supermarket causes of action or common premises liability claims***].

PROPERTY DAMAGE (harm):

A person's property damaged on another's property may also have either a negligence claim or a premises-liability claim against the property owner.

- When the property damage (harm) is the result of a contemporaneous (**CONDUCT** on the premises), negligent activity-on-the-property, ordinary negligence principles apply [example, a premises owner working on the property fails to exercise reasonable and prudent care when operating a tractor negligently damaging a vehicle of another located on the property with the tractor]..
- When the property damage is the result of the property's condition (**CONDITION** on the premises) rather than an activity, premises liability principles apply [example, a subcontractor driving in a tractor on a parking lot property, breaks through a cover over a concealed hole and the vehicle he was driving is damaged in a fall, and the premises owner had actual knowledge of the covers weakness to support a vehicle and unreasonably failed to notify workers of the risk].

LANDLORD-TENANT LAW (Implied Warranty of Habitability)

Texas Property Code, Title 8, Landlord and Tenant Chapter 92, Residential Tenancies, is generally called the Landlord Tenant Law and governs tenant and landlord rights in apartment complexes. It governs not only the living space the tenant lives in but also other common areas such as the parking lot areas used by the tenants (and their guests).

Subchapter B of the Code (Repair or Closing of Leasehold) is also referred to as *conditions of habitability (or implied warranty of habitability)*. A landlord has a **duty** to repair or remedy apartment conditions (even on the parking lot under its control) if, after notice from a tenant, the condition cited in tenant's notice, materially affects ***the physical health or safety of an ordinary tenant***. One cited exception in the Code is that the landlord does not have to provide security guards. If the tenant claimed remedy is to cause the apartment landlord to make relevant repair or remedy actions (adding more security in the parking lot) for the purpose of the safety and physical health of tenants, and disconnected from a criminal activity (car break in) then court costs and attorney fees could arguably be awarded.

Implied Warranty of Habitability in Texas
Unlike other states, tenants in Texas must notify their landlord about the problem that's making their rental uninhabitable before the warranty goes into effect.

- Generally, the implied warranty of habitability, governed by Texas Property Code statute, requires a landlord to maintain their rental property in a manner that makes it livable. While there is a warranty of habitability in Texas, it's pretty open-ended—and requires action on the tenant's part before it applies.
- **Texas's warranty of habitability is relatively broad**
    - Although the warranty of habitability is defined by Texas state law, it still leaves a lot of room open for interpretation. Instead of including a list of specific requirements for habitable rental units—such as a functional plumbing system or a working lock on the front door—Texas law simply states that landlords have to fix anything that "***materially affects the physical health or safety of an ordinary tenant***."
- **Texas's warranty of habitability is contingent on three things**
    - A tenant must inform their landlord of the problem (a condition precedent) before the warranty goes into effect. For a tenant to successfully use the warranty of habitability as a defense in court, three conditions must be met:
        - The tenant must notify the landlord of the problem (may have to be in writing if a written lease or otherwise provided in the lease terms)
        - The tenant can't be behind on rent at the time notice is given
        - The problem must either materially affect the physical health or safety of an ordinary tenant
- **There are some scenarios in which the warranty doesn't apply**
    - A landlord isn't required to repair an issue caused by a tenant or their guests, family members, or pets. Also, if the repairs were caused by a casualty loss—something like a hailstorm, a flood, or a fire—a landlord doesn't have to make a repair until they receive the insurance money.
- **Landlords have seven days to make repairs**
    - Although the warranty is relatively open-ended about which issues constitute a breach, Texas law is very specific about what is considered a "reasonable" amount of time to make repairs. Landlords have seven days to repair the problem—or explain why they can't—before a tenant can exercise one of three remedies available to them. This period may be shorter, however, if the habitability problem is very severe.
- **Tenants have several options to deal with a breach of the warranty**
    - If a tenant has informed their landlord of the breach, waited the seven days, and the problem persists, they can respond in one of several ways.
        - A tenant could self-help and "repair and deduct"—that is, make the necessary repairs themselves and take the cost out of their next monthly rent payment, or
        - A tenant could terminate their lease (without penalty) and claim constructive eviction if their landlord ends up suing them for unpaid rent.
- **A tenant could also take their landlord to court and pursue one of five judicial remedies**:
    - A court order directing the landlord to take reasonable steps to repair/remedy the condition (*add more security*)
    - A court order that reduces the tenant's rent according to the decreased rental value resulting from the condition
    - A judgment for one month's rent plus $500
    - A judgment for the amount of the tenant's actual damages
    - Court costs and attorneys' fees excluding those relating to recoveries for personal injury

- If the tenant wins the case, the court cannot award them more than $10,000 (including repair costs, but excluding interest and court costs). It is unspecified if the limit includes attorney fees.

- Award of attorney fees under the Code does not apply in regard to claims associated with property damage, personal injury or criminal act. However, if it can be shown that a claim is based on an *implied warranty of habitability* and the landlord apartment complex is not providing sufficient parking lot security for the ***safety and health of the tenant***, a safety based claim (adding more lights, or cameras, or fences, etc) may entitle the tenant to attorney's fees to enforce the claim since such action is not connected with property damage, personal injury or criminal act, but on the claim of keeping the tenant safe.

BREACH OF CONTRACT

Although an apartment tenant or gym member may have a claim of breach of contract regarding the parking lot against the apartment or gym, this will depend on what terms and conditions are contained in the apartment lease or gym contract concerning the parking lot. While there may be rules for use of the parking lot, that in and of itself may not invoke a contract obligation such as providing security measures associated with a safe and secure parking lot from criminal activity associated with vehicle theft or break-ins. Each lease and contract will need to be reviewed to determine if there are sufficient terms and conditions that impose contractual obligations on the apartment or gym to provide safe parking lot premises. Is there a contract between the parties affecting the parking lot; is there a duty under the contract for the gym/apartment to provide a safe and secure parking lot, did the gym/apartment breach that duty, breach of that duty resulted in damages to the Victim.

DECEPTIVE TRADE PRACTICE

An apartment lease or gym contract are service contracts and the apartment tenant/gym member are consumers under the Deceptive Trade Practices Act (both conditions to be proved).

A person whose car is damaged/stolen by theft activity in an apartment or gym parking lot, may have a claim under the Texas Deceptive Trade Practices-Consumer Protection Act, provided it can be shown there the lease or gym is a service contract, the tenant/member are consumers and there is evidence concerning the use of provided parking lot areas that is included in the gym contract or lease and any commentary about safety, security or other consumer oriented remarks on which the tenant or member relies. Assess whether there could be any false, misleading, or deceptive acts or practices in the conduct of the trade or commerce associated with any parking lot related undertakings or assertions .

Deceptive Trade Practice claims are technical and challenging claims to make and best left to an attorney to advance.

BREACH OF BAILMENT

There could be a claim against the entity in control of the parking lot for breach of bailment[2]. Claims for breaches of bailment agreements generally can be brought as contract (breach of contract) or tort

[2] Bailment is delivery of the parked vehicle, by one person or another, in trust to another, for the execution of a special object upon or in relation to such goods, the parked vehicle (utilizing a parking space in a parking lot), beneficial either to the bailor (a place to park) or bailee (receipt of a parking fee or the vehicle owner benefitting the bailor by either being a rental paying tenant of an apartment complex who provides for parking spaces or gym

(negligence) claims depending on the particular facts of the case and the type of action the plaintiff chooses to assert. *Presley v. Cooper*, 284 S.W.2d 138, 140-41 (Tex. 1955); *Elder, Dempster & Co. v. St. Louis Sw. Ry. Co.*, 154 S.W. 975, 987-88 (Tex. 1913).

In a bailment for the mutual benefit of the parties, and in the absence of a special contract, the bailee is held to an ordinary or reasonable degree of care (as in negligence claims). Trammell v. Whitlock, 242 S.W.2d 157 (Tex. 1951).

If property is damaged (stolen or damaged due to break-in) while entrusted to a bailee, there is a rebuttable presumption that the bailee was negligent. Buchanan v. Byrd, 519 S.W.2d 841, 843 (Tex. 1975). To rebut this presumption, the bailee must produce some evidence showing either (1) how the loss or damage occurred and that it was due to some cause other than the bailee's own negligence, or (2) however the loss or damage occurred, it was not due to the bailee's negligence. Id. at 844; Williams, 1997 WL 644081, at 2. Whether the presumption has been rebutted is a legal question. Williams, 1997 WL 644081, at *3. Once some evidence is presented to rebut the presumption, the presumption disappears and is of no concern to the factfinder. Trammell, 242 S.W.2d at 159. The case resumes its normal posture of the burden being on the plaintiff to prove the defendant's negligence. Id. Stratton v. Robins (Tex. App. 2020). A bailor might argue a third party criminal act caused the damages for which the bailor is not liable. This liability limitation will depend on what the bailor knew or had reason to know about foreseeable and unreasonable criminal conduct on its parking lot and what reasonable security measures it took to manage such risk. Did the bailor do enough to manage that risk? A fact question. If no, then arguably the bailor acted unreasonably under the circumstances and breached its duty of reasonableness and therefore negligent.

ATTORNEY REPRESENTATION OR SELF-HELP (DIY):

WHAT CAN THE VICTIM OF A STOLEN VEHICLE/BREAK-IN/PERSONAL INJRUY ASSOCIATED WITH A PARKING LOT, DO?

- **FIRST THING! REPORT IN WRITING (IDEALLY WITH PICTURES) DETAILS (DATE, TIME, LOCATION, WEATHER, DESCRIPTION OF WHAT HAPPENED) OF THE THEFT/BREAK-IN/PERSONAL INJUY INCIDENT TO THE GYM OR APARTMENT MANAGER AND LOCAL POLICE (OBTAIN AN INCIDENT NUMBER FROM THE POLICE). BETTER YET, ALSO SEND COPIES OF THE NOTICE BY CERTIFIED RETURN RECEIPT MAIL TO CORPORATE MANAGEMENT (GYM, APARTMENT, SHOPPING CENTER OWNER) LEGAL DEPARTMENTS AND ANY OTHER KNOWN CONTACTS. THIS HELPS ESTABLISH THE GYM/APARTMENT/ENTITY IN CONTROL OF THE PARKING LOT, KNOWS OR HAVE REASON TO KNOW OF CRIMINAL EVENTS ON THEIR PARKING LOT. INCLUDE IN YOUR NOTICE ANY REFERENCE TO LOCAL POLICE STATISTICS…FOR HOUSTON INCLUDE THE INTERNET CITE REFERENCE BELOW WITH A REMARK FOR THE GYM/APARTMENT/LESSOR TO REVIEW THE CRIMINAL STATISTICS FOR THE PARKING LOT AND GENERAL AREA.**

member paying membership fees and the gym providing parking spaces), and upon written contract (the gym membership or lease), express or implied, to perform the trust (allow the tenant/member to park and then remove their vehicle from the parking lot at their discretion) and carry out such object (permitted parking), and thereupon either to redeliver the vehicle to the bailor or otherwise dispose of the same in conformity with the purpose of the trust.

- **You will need to assess how much are your damages (damage to car – broken locks, windows, body damage or vehicle is stolen or personal injury) and is it worth it to pursue a claim (if not pursued, apartment/gym/lessor may will have won again dodging having to install first time or additional reasonable updated parking lot security measures) and equally what concerns you have about safety in the parking lot (if you stumble upon a thief breaking into your car, you could get hurt), hence the theft act is not the only incident of concern but personal safety. Assess what security is already in place and what else you or security experts may think may be more reasonable to implement to either prevent or reduce the risk of future vehicle theft/break-in activity in the parking lot.**
- **If you are the victim of a criminal act (break-in or stolen parked vehicle) on gym or apartment parking lot areas, find out as much as you can how often such criminal event has happened on the parking lot. Ask the apartment/gym manager how often they receive reports of such events. In Houston consult local crime statistics publications such as Houston police: (https://www.houstontx.gov/police/cs/Monthly_Crime_Data_by_Street_and_Police_Beat.htm) for a quick assessment of criminal activity on or near the lot. Talk to other tenants or members or area businesses, news media reports.**
- **Do a little homework who is in 'control' of the parking lot (the 'owner' of that premises). It probably is the apartment but for a gym it might be the gym or the shopping center landlord the gym leases from, or perhaps both have some control (landlord makes repairs, gym operates and controls security cameras in the parking lot).**
- **Give this note and your preliminary criminal activity survey, copy of your notice and parking lot control research information, to your attorney (if you have one), just in case they are not that familiar with parking lot law, as they will readily recognize the legal issues and the status of Texas Court rulings and relevant statutes and the merit of gym/apartment/lessor parking lot liability issues. Perhaps this supporting information will provide enough comfort for your attorney to pursue a claim on your behalf. You will then need to decide how attorney's fees will be handled.**
    - **If your attorney and you agree to advance a case…go for it.**
    - **Another option is to spend a little money and have an attorney submit a demand letter to the apartment or gym requesting compensation for your loss. The demand letter outlining some of the liability claims discussed in this note. Sometimes this method results in ready settlement, provided there is a basis that you have a claim and evidence that the apartment/gym knew or had reason to know of criminal activity on the parking lot, there is foreseeability (the five conditions) and the gym/apartment are being unreasonable in their security management and have a duty to provide certain minimum security measures on the parking lot for its invitees. (Have they or their landlord conducted a security assessment of the parking lot and implemented reasonable security measures? Enough cameras? Enough lighting? Security fencing? Guards? Etc.).**
- **If an attorney will not take your case and you are still compelled to pursue a claim, you can consult legal aid groups or represent yourself (a pro se or DIY claimant), in Justice Court (if claim is under $20,000), which means you act as your own lawyer. While the rules in Justice Courts are relaxed, you still need to present a descent case. Here are some tips for self-help or representing attorney.**

- **Prior to filing a suit, Victim should submit a written demand letter to the gym/apartment requesting compensation for Victim's loss (some or all) as a gesture of goodwill and an attempt at avoiding more costly and time consuming court remedy and to give the gym/apartment an opportunity to do what is right. If they have no interest in settling the matter out of court, then you decide the next step and desire to file a lawsuit.**
- **<u>Statue of Limitations</u>: Confirm the applicable statute of limitations have not expired (2 year personal injury, 4 for others).**
- **<u>Where to file a lawsuit</u>: normally Justice Court located in the county/precinct in which the apartment or gym (parking lot) are physically located will be the place (venue) where a lawsuit is filed. As an example, for a zip code of 77007 (The Standard In The Heights apartment example) the Justice Court to file a suit is Judge Eric William Carter, Harris County Justice of the Peace, Precinct 1, Place 1, 7300 N Shepherd Dr, Houston, TX 77091 (always contact the court before filing a suit to determine their local rules, confirm they are the correct court to file the suit and consult with the clerk of the court about the process for filing a suit – they like to help). (Find the appropriate courthouse in Houston, Harris County at http://www.jp.hctx.net/info/map.htm)**
- **<u>What court has jurisdiction to hear a case</u>: If the case claim is less than $20,000, a Justice Court (used to be called Small Claims Court) has jurisdiction - legal right to hear the case (such courts can have jurisdiction to hear a parking lot case). (County Courts often have concurrent jurisdiction, but to keep things simple, stay with the Justice Court) if claim is <$20,000.**
- **<u>Who do you sue</u>? The defendant must be correctly identified and served with legal papers (service of process), sue the proper entity.**
    - **<u>Apartment</u>: The owner of the apartment (assumed to be the same entity that controls and owns the associated parking garage) is the proper party to be sued (and not the leasing agent or property manager). To determine the legal owner of the apartment either (1) send a letter to the leasing agent or property manager and request that they advise you the name and address of the name of the legal owner of the apartment for the purposes of receiving legal summons (the correct name and their registered agent) or (2) another option is to research the County business assumed name ("dba") records. (In Harris County, assumed name records may be searched at https://www.cclerk.hctx.net/applications/websearch/AN.aspxand) and from that determine who the legal entity that owns the apartment, then research State of Texas Secretary of State records to determine who is the registered agent of the legal owner, which is the person who receives service of process associated with a law suit. The Secretary of State website for business entities is: (https://www.sos.state.tx.us/corp/sosda/index.shtml).**
        - **An Example: The Standard in the Heights Apartment in Houston, Texas located at 609 Waverly St, Houston, TX 77007, does not have an assumed name but is registered as the legal entity The Standard In The Heights, LP (the name of the legal entity that could be sued and its address and ownership structure) with the Texas Secretary of State – (a**

limited partnership, file number 802797208, and registered agent for receipt of service of process of a lawsuit is: Clay Likover, 2501 N. Harwood Street, Suite 2400 Dallas, TX 75201 USA)

- **If the Apartment is an out of state entity and does not have a registered agent for service of process, serving them is more complicated (the Texas Long Arm Statute may have to be used – serving the Texas Secretary of State who then mails copy of the summons to the defendant, or perhaps suing the local apartment manager). An attorney may be required to give guidance in this case.**
- **<u>Gym</u>: Suing a gym in regard to parking lot claims is a little more complicated than an apartment since there is the gym building itself (often times leased from a landlord who is the owner of a shopping center property) which is under the control of the gym management and the adjacent parking lot, which may or may not be under the control of the gym. If in doubt, sue both the gym and the owner of the property leased to the gym since it may be unclear who has control of the parking lot (either or joint control).**
    - **An example: 24 Hour Fitness in the Heights, located at 1513 W 18th St, Houston, TX 77008, Jester Village.**
        - **Per Secretary of State records (file number 11196706) , the legal entity is 24 Hour Fitness USA, LLC, 1265 Laurel Tree Lane, Suite 200 Carlsbad, CA 92011 and its registered agent to receive service of process in a lawsuit is Corporation Service Company dba CSC - Lawyers Incorporating Service Company, 211 E. 7th Street, Suite 620 Austin, TX 78701-3218 USA.**
        - **The legal entity for Jester Village (the lessor/owner of the shopping center) is per Secretary of State records, file number 804386085, Brixmor Arboretum Village, LLC, 450 Lexington Ave, 13th Floor, New York, N.Y., 10017, registered agent for service of process is Corporations Service Company dba CSC - Lawyers Incorporating Service Company, 211 E. 7th Street, Suite 620, Austin, Tx 78701-32188.**

- **<u>Cause of Action</u>: Victim will need to decide on one or more causes of action of their suit. Victim can include in the same suit one or more separate claims and as the suit progresses, elect which one Victim eventually wishes to receive an award (if you are successful with your claim). Each claim will have different elements to prove to the court, which will require Victim to obtain/present relevant evidence for each claim. Six possible causes of action could be based on:**
    - **Negligence;**
    - **Premises Liability (special negligence claim);**
    - **Violation of Landlord/Tenant Law;**
    - **Breach of Contract, and/or**
    - **Deceptive Trade Practice Act claim**
    - **Breach of Bailment (similar to breach of contract or negligence)**
- **A summary of the elements to prove for each follows:**

- **Negligence:**
  - **Duty: The defendant owed you a duty of care at the time of the theft or break-in damage to your vehicle. (20801, Inc. v. Parker, *249 S.W.3d 392, 398 (Tex. 2008);* Thompson v. Gibson*, 298 S.W.2d 97, 105 (Tex. 1957);* Rodriguez-Escobar v. Goss, *392 S.W.3d 109, 113 (Tex. 2013).***
    - **Defendant did something an ordinarily prudent (reasonable) person exercising ordinary care would not have done under the same circumstances, or, that the defendant failed to do that which an ordinarily prudent person in the exercise of ordinary care would have done. *Sisters of Charity of the Incarnate Word v. Gobert*, 992 S.W.2d 25, 28 (Tex. App.--Houston [1st Dist.] 1997, no pet.) "Ordinary care" means that degree of care that would be used by a person of ordinary prudence under the same or similar circumstances.**
    - **Landowner (entity in control of the parking lot) has actual or constructive knowledge of any condition on the premises (repeated and frequent vehicle theft or break-ins) that poses an unreasonable risk of harm to invitees (stolen vehicle or break-in damage and associated personal injury), landowner has a duty to take whatever action is reasonably prudent' to reduce or eliminate that risk.**
    - **Was there sufficient security measures in place that would either prevent or much reduce the likelihood of auto theft or break-in in the parking lot?**
  - **Dereliction: The defendant breached their duty of care through a negligent act or failure to act.**
    - **There was insufficient security measures in place.**
  - **Causation: The defendant's breach of duty directly caused (the proximate cause) your vehicle theft or break-in damage or personal injury**
    - **Failure to have in place relevant security measures was a cause of the vehicle theft or break-in.**
  - **Damages: You suffered damages (value of stolen vehicle, cost of repair, personal injury) as a result of the incident that you can claim in your lawsuit.**
- **Premises Liability**
  - **Duty: An owner, lessee or occupier of land (gyms and apartments) and in control of the parking lot, have a (reasonable) duty (an obligation) to keep the premises under their control in a safe condition [in regard to their invitees]. Redinger v. Living, Inc., 689 S.W.2d 415, 417 (Tex. 1985). and a duty to use ordinary care to protect invitees from criminal acts of third parties if they know or have reason to know of an (1) unreasonable and (2) foreseeable risk of harm to the invitee.**
  - **<u>Foreseeability</u> is based on providing evidence of criminal activity on the parking lot - is a fact question, generally determined by crime statistics, notices and reports on file with the apartment and gym manager from**

tenants/members or others, of criminal events in parking lots as well as discussions between other area businesses.

- **To determine whether the risk of criminal conduct is foreseeable, a court weighs the evidence of prior crimes using five factors: proximity, publicity, recency, frequency, and similarity.**
  - **Proximity - a landowner to foresee criminal conduct on property, there must be evidence that other crimes have occurred on the property or in its immediate vicinity." ;**
  - **Recency and frequency: "Foreseeability also depends on how recently and how often criminal conduct has [occurred on the premises];**
  - **Similarity: "The previous crimes must be sufficiently similar to the crime in question as to place the landowner on notice of the specific danger."**
  - **Publicity: "The publicity surrounding the previous crimes helps determine whether a landowner knew or should have known of a foreseeable danger."**
- **<u>Unreasonableness</u> "turns on the risk and likelihood of injury to the plaintiff ... as well as the magnitude and consequences of placing a duty on the defendant."**
  - **A risk is unreasonable when the risk of a foreseeable crime outweighs the burden placed on property owners—and society at large—to prevent the risk.**
  - **The unreasonableness inquiry, explores the policy implications of imposing a legal duty to protect against foreseeable criminal conduct. This includes whether a duty would "require 'conspicuous security' at every point of potential contact between a patron and a criminal" or require adoption of "extraordinary measures to prevent a similar occurrence in the future."**
  - **Accordingly, "if a premises owner could easily prevent a certain type of harm, it may be unreasonable for the premises owner not to exercise ordinary care to address the risk.**
  - **Show that is was unreasonable for the parking lot owner to have in place relevant crime prevention security measures and it was unreasonable not to do so.**

- **Dereliction: The defendant breached their duty of care by being unreasonable in not providing relevant security measures in the parking lot or failure to act.**
  - **There was insufficient security measures in place.**

- **Causation: The defendant's breach of duty directly caused (the proximate cause) your vehicle theft or breakin damage or personal injury**
    - **Failure to have in place relevant security measures was a cause of the vehicle theft or break-in and Victim incurring damages**
- **Damages: You suffered damages (value of stolen vehicle, cost of repair) as a result of the incident that you can claim in your lawsuit.**

- **Landlord-Tenant Law, Breach of Implied Warranty of Habitability (applies to apartments and not gyms)**
    - **Preconditions prior to filing a lawsuit**
        - **Give written notice to the apartment of your concern about the lack of security in the parking lot regarding prevention or risk reduction of criminal activity in the lot concerning theft or break-in, and provide guidance what the apartment should do (request they obtain a security risk report from an expert to advise on proper security measures and implement the findings, and/or suggest specific security implementation measures to make things more safe, others)**
        - **In the notice cite you are concerned about your safety in that if you encountered a thief in the act of trying to steal or break-in your car or others in the parking lot, the thief may will react violently and cause personal injury to yourself (possibly even death).**
        - **The apartment has an obligation to timely correct the problem that affects Victims safety or health, give you a reason why there is a delay or give you an answer they plan to do nothing and why.**
        - **Assess the quality of that response and determine if you still wish to file a law suit, or you could**
            - **"repair and deduct"—that is, make the necessary repairs and take the cost out of your next monthly rent payment.**
            - **Or, terminate the lease and claim constructive eviction (breach of implied warranty of habitability and your safety is at risk) if the landlord ends up suing you for unpaid rent.**
    - **Victim can file a suit and…**
        - **Petition for a court order directing the landlord to take reasonable steps to repair the condition;**
        - **Petition for a court order that reduces the tenant's rent according to the decreased rental value resulting from the condition;**
        - **Seek a judgment for one month's rent plus $500; and/or**
        - **Seek a judgment for the amount of the tenant's actual damages (value of stolen vehicle or repair costs of damages associated with a breakin)**

        - **Court costs and attorneys' fees excluding those relating to recoveries for personal injury**
            - **If the tenant wins the case, the Justice court cannot award them more than $10,000 (including repair costs, but excluding interest and court costs).**
- **BEACH OF CONTRACT**
    - **To establish a contract (gym contract or apartment lease) between the parties: an offer and acceptance for consideration and the gym/apartment breached its obligations of the contract and such breach caused you damages and you list the damages.**
    - **This is a challenge to advance since the underlying gym contract or apartment lease must make reference to the parking lot and what terms and conditions are associated with such lot between the parties.**
- **DECEPTIVE TRADE PRACTICE ACT**
    - **While there might be cause to file an action under the DTPA, this is much more complicated and challenging to advance it is a valid claim option. No specific guidance is given for this option and the reader is referred to online guidance reading regarding the elements required to be proved and the basis how to do that.**
- **BREACH OF BAILMENT**
    - **Claims for breaches of bailment agreements generally can be brought as contract or tort (negligence) claims depending on the particular facts of the case and the type of action the plaintiff chooses to assert.**
    - **In a bailment for the mutual benefit of the parties, and in the absence of a special contract, the bailee is held to an ordinary or reasonable degree of care (as in negligence claims), thus elements to prove are the same as above for breach of contract or negligence.**

APPENDIX

SUPPLEMENTAL DISCUSSION ON GYM AND APARTMENT LIABILITY REGARDING THEFT OR BREAK-IN DAMAGE TO TENANT/MEMBER VEHICLES PARKED IN GYM/APARTMENT PROVIDED PARKING AREAS

LESSOR/LESSEE LIABILITIES

Generally, a lessor [for example owner of a building site leased to a business such as a gym] has no duty to tenants or their invitees for dangerous conditions on the leased premises [inside the gym, but the gym who has control of the property will have such duty]. This rule stems from the notion that a lessor (landlord) relinquishes possession of the premises to the lessee (gym). However, Texas courts recognize several exceptions to this general rule. Endsley, 926 S.W.2d at 285; Palermo, 84 S.W.3d at 748. For example, a lessor who conceals defects on the leased premises of which the lessor is aware may be liable. Additionally, a lessor may be liable for injuries caused by a defect on a portion of the premises that remain under the lessor's control. [When assessing who controls a parking lot associated with leased premises is a fact question, since either the business tenant or the landlord may share control obligations. For example, regarding parking lot security cameras: who controls those cameras – the landlord or the business tenant? Often tenant gyms control such cameras and can be argued that they and the landlord (who probably has an obligation of keeping the lot repaired) share parking lot premises control duties and hence both potentially liable for parking lot negligent related events.] In circumstances where a lessor owes to its tenant the duty owed to an invitee, this duty of the lessor extends to the tenant's invited guests. Blancett v. Lagniappe Ventures, Inc., 177 S.W.3d 584, (Tex.App.-Houston [1st Dist.] 2005, no writ). Regarding a gym, if it knows or has reason to know of high crime activity on the parking lot associated with leased premises and used by gym members, it can be argued that the gym-tenant has a duty to its invitees to fully inform its landlord of the criminal activity and require (demand) them to implement reasonable security measures to prevent or reduce the risk likelihood of a crime being committed on the lot. That contact may include a request to conduct a security risk assessment by a security firm, installation of better lighting, installation of more effective cameras, installation of security fencing, in the extreme case on site-security guards, installation of secure lockers for gym members to store valuables relocated from their parked vehicles, posting of relevant and conspicuous security warning signs reminding parking lot users of risks and precautions to take, create a car break-in security fund that can be used to partially off set damage costs due to parked vehicle breakin damage, and others.

A claim for negligence [could be brought against gyms and apartment] in failing to provide adequate and reasonable security to protect against auto theft or break-ins in parking lots when there is a duty to do so and there is foreseeability and reasonableness standards of conduct that are applicable. The threshold inquiry in a negligence case is whether the defendant owes a legal duty to the plaintiff. The plaintiff must establish both the existence and the violation of a duty owed to the plaintiff by the defendant to establish liability in tort. The existence of duty is a question of law for the court to decide from the facts surrounding the occurrence in question. Generally, a person has no legal duty to protect another from the criminal acts of a third person. Greater Houston Transp. Co., 801 S.W.2d at 525; see also RESTATEMENT (SECOND) OF TORTS § 315 (1965) (noting that no general duty exists to control the conduct of others). There are, however, exceptions to this general rule. In the landlord-tenant relationship, for example, a landlord who retains control over the security and safety of the premises owes a duty to a tenant's employee to use ordinary care to protect the employee against an unreasonable and foreseeable risk of harm from the

criminal acts of third parties. Exxon Corp. v. Tidwell, 867 S.W.2d 19, 23 (Tex.1993); cf. Nixon v. Mr. Property Management Co., 690 S.W.2d 546, 549 (Tex.1985) (holding that apartment management had a duty to protect against foreseeable criminal activity); Haight v. Savoy Apartments, 814 S.W.2d 849, 853-54 (Tex.App.--Houston [1st Dist.] 1991, writ denied) (holding that apartment management had a duty to protect a tenant's guest). The right to control the premises is thus one of the factors that determines whether a legal duty should be imposed on the owner or possessor of the premises. "The court's inquiry must focus on who had specific control over the safety and security of the premises, rather than on the more general right of control over operations." Centeq Realty, Inc. v. Siegler 899 S.W.2d 195 (Tex. 1995).

If "he [landowner, lessor, occupier] should reasonably anticipate . . . criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it." The Third Restatement of Torts clarifies further: "In certain situations criminal misconduct is sufficiently foreseeable as to require a full negligence analysis of the actor's conduct. Moreover, the actor may have sufficient knowledge of the immediate circumstances . . . to foresee that party's misconduct." As we have recognized, when a property owner "by reason of location, mode of doing business, or observation or past experience, should reasonably anticipate criminal conduct on the part of third persons, . . . Del Lago Partners, Inc. v. Smith, 307 S.W.3d 762 (Tex. 2010) the owner has a duty to take precautions against it." This duty is recognized because "the party with the power of control or expulsion is in the best position to protect against the harm. Del Lago Partners Inc. et al v. Smith, 307 S.W.3d 762 (Tex. 2010).

Tort liability depends on both the existence of and the violation of a duty. Whether a duty exists is a question of law for the court to decide under the facts surrounding the occurrence in question. As a general rule, a landowner or one who is otherwise in control of the premises must use reasonable care to make the premises safe for the use of business invitees. This duty includes warning invitees of known hidden dangers that present an unreasonable risk of harm. Ordinarily, this duty does not include the obligation to prevent criminal acts of third parties who are not subject to the premises occupier's control. This rule, however, is not absolute. One who controls the premises does have a duty to use ordinary care to protect invitees from criminal acts of third parties if he knows or has reason to know of an unreasonable and foreseeable risk of harm to the invitee. This duty, is commensurate with the right of control over the property. Under certain circumstances, however, even one not in control of the property at the time of the injury may owe a duty to make the premises safe. One who agrees to make safe a known dangerous condition of real property owes a duty of due care. And a person who creates a dangerous condition owes the same duty. 40 Tex. Sup. Ct. J. 577 Lefmark Management Company v. Old, 946 S.W.2d 52 (Tex. 1997).

When we consider whether a particular criminal act was so foreseeable and unreasonable as to impose a duty upon a landowner, we first examine the particular criminal conduct that occurred in light of "specific previous crimes on or near the premises." If, after applying the Timberwalk factors of similarity, recency, frequency, and publicity, see Timberwalk, 972 S.W.2d at 756-57, we determine that the general danger of the criminal act was foreseeable, we then apply the second prong of the foreseeability analysis and determine whether it was foreseeable that the injured party, or one similarly situated, would be the victim of the criminal act. In essence, we consider whether the plaintiff was within the range of the defendant's apprehension such that her injury was foreseeable.

A complaint that a landowner failed to provide adequate security against criminal conduct is ordinarily a premises liability claim. Defendants' failure to provide adequate security measures created an unreasonable risk of harm that defendants knew or should have known about and yet failed to correct. This is a premises liability claim on which the district court correctly charged the jury. The court properly refused [the] request to charge the jury as in a negligent activity case. As a rule, "a person has no legal duty to protect another from the criminal acts of a third person". An exception is that "[o]ne who controls ... premises does have a duty to use ordinary care to protect invitees from criminal acts of third parties if he knows or has reason to know of an unreasonable and foreseeable risk of harm to the invitee." The exception applies, of course, to a landlord who "retains control over the security and safety of the premises". "Foreseeability requires only that the general danger, not the exact sequence of events that produced the harm, be foreseeable." When the "general danger" is the risk of injury from criminal activity, the evidence must reveal "specific previous crimes on or near the premises" in order to establish foreseeability. The foreseeability of an unreasonable risk of criminal conduct is a prerequisite to imposing a duty of care on a person who owns or controls premises to protect others on the property from the risk. Once this prerequisite is met, the parameters of the duty must still be determined. "Foreseeability is the beginning, not the end, of the analysis in determining the extent of the duty to protect against criminal acts of third parties." "[C]rime may be visited upon virtually anyone at any time or place", but criminal conduct of a specific nature at a particular location is never foreseeable merely because crime is increasingly random and violent and may possibly occur almost anywhere, especially in a large city. If a landowner had a duty to protect people on his property from criminal conduct whenever crime might occur, the duty would be universal. This is not the law. A duty exists only when the risk of criminal conduct is so great that it is both unreasonable and foreseeable. Whether such risk was foreseeable must not be determined in hindsight but rather in light of what the premises owner knew or should have known before the criminal act occurred. In determining whether the occurrence of certain criminal conduct on a landowner's property should have been foreseen, courts should consider whether any criminal conduct previously occurred on or near the property, how recently it occurred, how often it occurred, how similar the conduct was to the conduct on the property, and what publicity was given the occurrences to indicate that the landowner knew or should have known about them. We elaborate on each of these factors. 1 For a landowner to foresee criminal conduct on property, there must be evidence that other crimes have occurred on the property or in its immediate vicinity. Criminal activity occurring farther from the landowner's property bears less relevance because crime rates may be expected to vary significantly within a large geographic area. This is not to say that evidence of remote criminal activity can never indicate that crime is approaching a landowner's property. But such evidence must be especially strong, and must show that the risk of criminal conduct on the landowner's property is not merely increasing but has reached a level as to make crime likely. Most courts have looked to narrow geographic areas in analyzing the foreseeability of criminal conduct. A few courts have examined criminal activity occurring in broader geographic areas. Statistics regarding large or undefined geographic areas do not by themselves make crime foreseeable at a specific location. Even if a city's overall crime rate has risen, specific areas within the city may remain crime free. Likewise, merely because several crimes have occurred at a particular ATM located in a high-crime area does Timberwalk Apartments, Partners, Inc. v. Cain, 972 S.W.2d 749 (Tex. 1998) not render it more likely that future crimes will occur at every ATM the bank owns. For a risk to be foreseeable, there must also be evidence of criminal activity within the specific area at issue, either on the landowner's property or closely nearby. Foreseeability also depends on how recently and how often criminal conduct has occurred in the past. The occurrence of a significant number

of crimes within a short time period strengthens the claim that the particular crime at issue was foreseeable. On the other hand, the complete absence of previous crimes, or the occurrence of a few crimes over an extended time period, negates the foreseeability element. The previous crimes must be sufficiently similar to the crime in question as to place the landowner on notice of the specific danger. Thus, we have held that the stabbing of a guest at an apartment complex was not foreseeable from four prior incidents of vandalism and the theft of a refrigerator from a vacant apartment. The prior crimes need not be identical. A string of assaults and robberies in an apartment complex make the risk of other violent crimes, like murder and rape, foreseeable. On the other hand, a spate of domestic violence in the complex does not portend third party sexual assaults or robberies. Assessing this factor is difficult because "[c]riminal activity is not easily compartmentalized." Property crimes may expose a dangerous condition that could facilitate personal crimes, as when apartments are targeted repeatedly by thieves. "If a burglar may enter [an apartment], so may a rapist." An apartment intruder initially intent upon stealing may decide to assault a tenant discovered inside, even if the tenant avoids confrontation. In contrast, vandalism to automobiles in an apartment complex's parking lot can be a serious concern, but it does not suggest the likelihood of sexual assault. The publicity surrounding the previous crimes helps determine whether a landowner knew or should have known of a foreseeable danger. A landlord often has actual knowledge of previous crimes occurring on the premises through tenants' reports. Actual notice of past incidents strengthens the claim that future crime was foreseeable. However, unreported criminal activity on the premises is no evidence of foreseeability. Previous similar incidents cannot make future crime foreseeable if nobody knows or should have known that those incidents occurred. Property owners bear no duty to regularly inspect criminal records to determine the risk of crime in the area. On the other hand, when the occurrence of criminal activity is widely publicized, a landlord can be expected to have knowledge of such crimes. These factors--proximity, recency, frequency, similarity, and publicity--must be considered together in determining whether criminal conduct was foreseeable. Thus, the frequency of previous crimes necessary to show foreseeability lessens as the similarity of the previous crimes to the incident at issue increases. The frequent occurrence of property crimes in the vicinity is not as indicative of foreseeability as the less frequent occurrence of personal crimes on the landowner's property itself. The court must weigh the evidence using all the factors. 41 Tex. Sup. Ct. J. 1138 Timberwalk Apartments et al v. Cain 972 S.W.2d 749 (Tex. 1998).

TEXAS CLAIMS AGAINST PROPERTY OWNERS FOR INADEQUATE SECURITY

In Texas, a hybrid of the standard premises liability claim is a claim against a property owner for inadequate security. Can a property owner be held liable for an attack on a person or damage to personal property occurring on the premises? Do property managers or owners have a duty to protect others from attacks or damage to personal property? In *Timberwalk Apartments, Partners, Inc. v. Cain*, 972 S.W.2d 749 (Tex. 1998), the Texas Supreme Court established the standard for a recovery against a property owner for inadequate security. As a rule, "a person has no legal duty to protect another from the criminal acts of a third person." An exception is that "one who controls . . . premises does have a duty to use ordinary care to protect invitees from criminal acts of third parties if he knows or has reason to know of an unreasonable and foreseeable risk of harm to the invitee."*Id*. at 756. The exception applies, of course, to a landlord who "retains control over the security and safety of the premises." The foreseeability of an unreasonable risk of criminal conduct is a prerequisite to imposing a duty of care on a person who owns or controls premises to protect others on the property from the risk. A duty exists only when the risk of criminal conduct is so great that it is both unreasonable and foreseeable. Whether such risk was foreseeable must not be determined in hindsight but rather in light of what the premises owner knew or

should have known before the criminal act occurred. For a landowner to foresee criminal conduct on property, there must be evidence that other crimes have occurred on the property or in its immediate vicinity. *Id*. at 757. Foreseeability also depends on how recently and how often criminal conduct has occurred in the past. Proper factors to be considered in determining foreseeability in the context of premises liability for the criminal acts of third parties are: (1) the proximity of other crimes; (2) the recency and frequency of the other crimes; (3) the similarity of the other crimes; and (4) the publicity of the other crimes. *Id*.

Liability may also be created by conduct of patrons which immediately precedes an attack. In *Del Lago Ptnrs. v. Smith*, 307 S.W.3d 762 (Tex. 2010), seven members of a fraternity and ten men from a wedding party were involved in cursing, name calling, yelling and shoving for a period of 90 minutes before a fight broke out which resulted in serious injuries. The Texas Supreme Court noted that criminal misconduct is sometimes foreseeable because of immediately preceding conduct. Since the landowner is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occuring, or are about to occur. If he should reasonably anticipate criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it. The actor may have sufficient knowledge of the immediate circumstances to foresee that party's misconduct. When a property owner by reason of location, mode of doing business, or observation or past experience, should reasonably anticipate criminal conduct on the part of third persons, the owner has a duty to take precautions against it. This duty is recognized because the party with the power of control or expulsion is in the best position to protect against the harm. The Court upheld a $1,480,000 verdict against Del Lago Resort. The duty arose because the likelihood and magnitude of the risk to patrons reached the level of an unreasonable risk of harm, the risk was apparent to the property owner, and the risk arose in circumstances where the property owner had readily available opportunities to reduce it.

The potential defendants for a claim of inadequate security include property management companies, convenience stores, apartment complexes, bar owners, hotels, restaurants, or any retail establishment. These claims require immediate action to obtain police reports of prior criminal activity, statements from witnesses, video footage from the time period in question before it is destroyed, and notices previously sent to those in charge of the property. With *Del Lago Ptnrs. v. Smith*, 307 S.W.3d 762 (Tex. 2010), the Texas Supreme Court has expanded liability to owners with no prior knowledge of criminal activity other than the events immediately preceding the event in question.

"When a landowner 'has actual or constructive knowledge of any condition on the premises that poses an unreasonable risk of harm to invitees, he has a duty to take whatever action is reasonably prudent' to reduce or eliminate that risk..." Del Lago Partners, Inc. v. Smith, 307 S.W.3d 762 (Tex. 2010)