

**NATIONAL ASSOCIATION OF MINORITY AND WOMEN OWNED LAW FIRMS**

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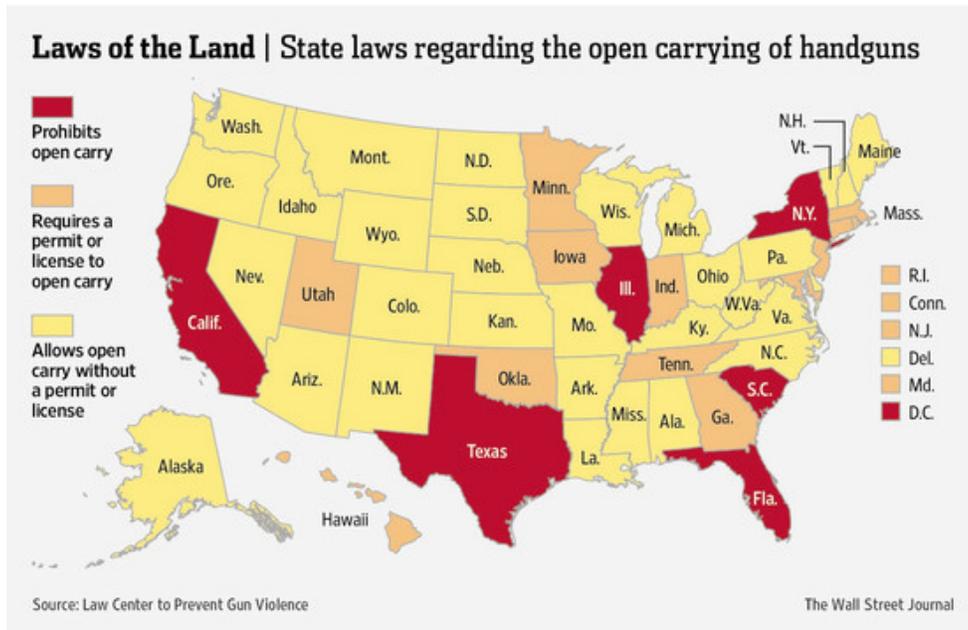
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**Hollywood, California**

**Gun Laws and Premises Liability**

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Due to changes in conceal carry laws, your customer may be packing heat. How can retail, restaurant and hospitality operators respond within the bounds of the law and without making Harry Callahan angry?



**A. Do Open Carry Laws Make Premises Safer or Owners More Liable?<sup>1</sup>**

This is the \$50,000 question. What are the rights of landlords, tenants and operators in the retail, restaurant and hospitality industries to ban or limit or even ignore open carry laws in order to reduce the risk of premises liability? The recent growing trend across the United States of increased protections and laws for gun owners has spawned a new language: the phrase

<sup>1</sup> The author extends her appreciation to Monica Owens, Esq. for the theme and permission to rely on her related paper on Georgia law, An Evaluation: Georgia’s Safe Carry Protection Act & Premises Liability Against Commercial Property Owners; and to Jennifer Hamrick (GSU 3L 2016) for her additional research and assistance in writing this paper.

"open carry" generally refers to the practice of "openly carrying a firearm in public", as distinguished from concealed carry, where firearms cannot be seen by the casual observer.<sup>2</sup>

As an exception, some gun carry laws allow certain property owners to decide whether to authorize persons to possess guns on their premises. This includes private property owners or persons in legal control of private property through a lease, rental agreement, licensing agreement, contract, or any other agreement to control access to such private property.<sup>3</sup> This same right applies to those in possession of private property that also are employers. Even in some "open carry" states, businesses are allowed to ban guns in their stores.<sup>4</sup> A few national retailers have engaged in public discourse with gun owners and activists.<sup>5</sup> Others have adopted a policy of following state and local laws and their own safety measures in their stores.<sup>6</sup>

The intersection between open carry laws and premises liability laws has not been fully evaluated. The debate boils down to whether the presence of guns provides greater protection to law-abiding customers, or whether those same guns increase the chances of a violent event by criminals or even angry or unstable customers. Are property owners liable for gun related violence if customers are not permitted to carry for their own protection? If an owner allows guns on its premises, should it be liable if someone is injured? Prior to making the decision, property owners should evaluate their business models, customer base, and exposure to premises liability claims associated with allowing guns on their premises.

## **B. 50 State Survey of Open Carry Laws**

Open carry laws vary widely not only across state lines, but also across county and municipality boundaries. Not every jurisdiction that has adopted these laws permits private owners to ban guns in their stores whether open or concealed. To date, only six states and the District of Columbia ban entirely the practice of open carry. However, Texas recently passed a law that as of January 1, 2016, open carry of hand guns will be allowed with a valid concealed carry permit. In 2014, Georgia joined in by passing the "Safe Carry Protection Act", which expands the locations where individuals may be authorized to carry guns to include stores, restaurants, shopping centers and other privately owned retail establishments.<sup>7</sup> Likewise, the federal government has joined in by debating various forms of legislation including the Open Carry Firearms Freedom Act, passed by the Senate in 2014. Twelve states permit open carry of

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<sup>2</sup> The Associated Press (February 28, 2010). "[Gun supporters cheer Starbucks policy](#)".

<sup>3</sup> E.g., O.C.G.A. § 16-11-126 (d) and O.C.G.A. § 16-11-127 (c).

<sup>4</sup> The Associated Press (February 28, 2010), "[Gun supporters cheer Starbucks policy](#)"; USA Today (July 13, 2015), "[Whataburger takes stand against Texas open carry law](#)."

<sup>5</sup> The Wall Street Journal (August 22, 2014), "[Map: Where is 'Open Carry' Legal?](#)"

<sup>6</sup> The Associated Press (February 28, 2010), "[Gun supporters cheer Starbucks policy](#)".

<sup>7</sup> See O.C.G.A. §§ 16-11-126 (g); 16-11-127 (c); 16-11-127.1 (7) and (8); 16-11-130.2 (a) and (b); and 16-11-135 (b).

handguns without a permit or license. Thirteen states require varying degrees of permits.<sup>8</sup> The table below charts the status of open carry laws around the United States:<sup>9</sup>

<b>Status of open carry, by state or other jurisdiction</b>					
<b>Jurisdiction</b>	<b>Permissive</b>	<b>Licensed</b>	<b>Anomalous</b>	<b>Non-Permissive</b>	<b>Notes</b>
Alabama	✓				Allows open carry without a permit or license
Alaska	✓				Allows open carry without a permit or license
Arizona	✓				Allows open carry without a permit or license
Arkansas	✓				Allows open carry without a permit or license
California			✓		Generally prohibited except in rural counties with local ordinances allowing open carry.
Colorado	✓				Open carry without a license permitted statewide, except in the City and County of Denver (where open carry is prohibited by local ordinances that pre-date Colorado's statewide pre-emption law).
Connecticut		✓			Open carry with a valid pistol permit is legal statewide. Courts have generally ruled that issuing authorities must grant pistol permits to qualified individuals who have passed a criminal and mental health background check and completed the required firearms safety training.
Delaware	✓				No permit or special license required.
District of Columbia				✓	Civilian open carry is not allowed in the District of Columbia.
Florida				✓	The constitutionality of the general ban on open carry is currently being challenged in court.
Georgia		✓			Licenses granted on a Shall-Issue basis.

<sup>8</sup> The Washington Post (December 16, 2012). "[The 6 craziest state gun laws](#)".

<sup>9</sup> See [https://en.wikipedia.org/wiki/Open\\_carry\\_in\\_the\\_United\\_States](https://en.wikipedia.org/wiki/Open_carry_in_the_United_States) and citations contained therein. See also The Wall Street Journal (August 22, 2014), "Map: Where is 'Open Carry' Legal?", <http://blogs.wsj.com/numbers/map-where-is-open-carry-legal-1715/>.

<b>Status of open carry, by state or other jurisdiction</b>					
<b>Jurisdiction</b>	<b>Permissive</b>	<b>Licensed</b>	<b>Anomalous</b>	<b>Non-Permissive</b>	<b>Notes</b>
Hawaii		✓		In practice	Licenses rarely issued to ordinary citizens. Licenses valid in the issuing county only.
Idaho	✓				
Illinois				✓	
Indiana		✓			Licenses granted on a shall issue basis. Preemption law enacted in 2011. Indiana recognizes firearms carry licenses issued by all other states.
Iowa		✓			
Kansas	✓				
Kentucky	✓				
Louisiana	✓				Open carry is legal in Louisiana. Per Attorney General Opinion No. 78-0795: "the carrying of an exposed handgun is not illegal, except as provided in LSA R.S. 14:95.1. . . . state has preempted the legislative control and has implicitly authorized the carrying of unconcealed weapons. Therefore, an ordinance enacted by a Parish and/or Municipality regulating the carrying of exposed handguns would be without effect as being in conflict with State Law."
Maine	✓				
Maryland		✓		In practice	Licenses are rarely issued to ordinary citizens. However, no permit is required to openly carry a rifle or shotgun.
Massachusetts		✓		In practice	Pistol permits are issued by local authorities on a "may-issue basis." Ability to obtain a pistol permit varies between localities. In practice, open carry is highly discouraged by authorities, and one may be charged with Disorderly Conduct or Breach of Peace if open carry causes public alarm.

Status of open carry, by state or other jurisdiction					
Jurisdiction	Permissive	Licensed	Anomalous	Non-Permissive	Notes
Michigan	✓				No License needed for open carry (not in a Vehicle). A valid Concealed Pistol License (CPL) is required to carry in a vehicle and are granted on a "shall-issue" basis.
Minnesota		✓			Licenses are granted on a "shall-issue" basis.
Mississippi	✓				
Missouri		✓			Concealed carry license required.
Montana	✓				
Nebraska			✓		
Nevada	✓				
New Hampshire			✓		
New Jersey		✓		In practice	Licenses rarely granted to ordinary citizens. Open carry of long guns prohibited.
New Mexico	✓				State law does not preempt tribal laws on Native American reservations, except when traversing a reservation on a state-owned highway. Some tribes do not permit open carry, while some others may require a tribal permit for open carry.
New York				✓	Some rural counties issue permits for open carry (valid in the issuing county only). Open carry of long guns prohibited in most places, except while hunting in designated game reserves during open seasons.
North Carolina	✓				
North Dakota		✓			
Ohio	✓				Ohio is an open carry state. Open carry is not permitted in vehicles without a Concealed Handgun License.

Status of open carry, by state or other jurisdiction					
Jurisdiction	Permissive	Licensed	Anomalous	Non-Permissive	Notes
Oklahoma		✓			Residents of permitless carry states may openly carry without a license with a valid ID from their home state.
Oregon			✓		Some more populous locations (Portland, Salem, etc.) have ordinances restricting open carry. Persons with concealed carry licenses are exempt from local open carry restrictions.
Pennsylvania			✓		License to carry needed to open carry in a motor vehicle or in a city of the first class (pop over 1,000,000—currently only Philadelphia falls into this category).
Rhode Island		✓			Open carry of handguns permitted with permit issued by the Attorney General's Office. No permit required to carry long guns.
South Carolina				✓	
South Dakota	✓				
Tennessee		✓			
Texas		**Jan 1, 2016*		✓	As of 29 May 2015, Texas lawmakers have approved licensed open carry of handguns, and on the 13 <sup>th</sup> of June, 2015 Governor Abbott signed Bill 910 Into law.
Utah		✓			A license is required to openly carry a loaded firearm (e.g., a live round of ammunition in the firing chamber of the weapon). No license necessary when the weapon is unloaded and exposed.
Vermont	✓				
Virginia	✓				
Washington	✓				Open Carry is legal without a license, but to carry a handgun loaded in a vehicle one needs a concealed pistol license (CPL). Carry of loaded rifles and shotguns in vehicles is also restricted, per RCW 77.15.460

Status of open carry, by state or other jurisdiction					
Jurisdiction	Permissive	Licensed	Anomalous	Non-Permissive	Notes
West Virginia	✓				
Wisconsin	✓				Section 32 of 2011 Wisconsin Act 35 (codified as Wis. Stat. 167.31(2)(b), removed the vehicle carry restriction for handguns. However, what constitutes open carry is defined by case law. If one does not possess a Wisconsin concealed weapons license (or a qualifying out of state license), ensuring that the weapon is visible from the outside is essential.
Wyoming	✓				

### C. Open Carry Laws and The Premises Liability Standard

#### **Restricted Open Carry - Georgia**

Georgia permits the open carrying of handguns with a weapons carry license.<sup>10</sup> Under the Safe Carry Protection Act, there are very few locations where open carry is prohibited, such as courthouses, jails or prisons, places of worship, government buildings with restricted access, nuclear power facilities and mental health facilities.<sup>11</sup> Carrying weapons in violation of the statute does not create or give rise to a civil action for damages.<sup>12</sup> However, the Act does not definitively preclude civil liability against a private property owner if an invitee is injured from the use of a gun on the premises.

The Act does provide greater protection from liability to certain employers and property owners who provide access to their parking lots for employees and invited guests who are injured:

No employer, property owner, or property owner's agent shall be held liable in any criminal or civil action for damages resulting from or arising out of an occurrence involving the transportation, storage, possession, or use of a firearm, including, but not limited to, the theft of a firearm from an employee's automobile, pursuant to this Code section unless such employer commits a criminal act involving the use of a firearm or unless the employer knew that the

<sup>10</sup> O.C.G.A. § 16-11-125 (5); 16-11-126 (c), (h)(1).

<sup>11</sup> O.C.G.A. § 16-11-127 (b) & (e).

<sup>12</sup> O.C.G.A. §16-11-127 (b) & (c).

person using such firearm would commit such criminal act on the employer's premises. Nothing contained in this Code section shall create a new duty on the part of the employer, property owner, or property owner's agent. An employee at will shall have no greater interest in employment created by this Code section and shall remain an employee at will.<sup>13</sup>

The Act also allows certain property owners to decide whether to allow possession on their premises. For example, private property owners or persons in legal control of private property through a lease, rental agreement, licensing agreement, contract, or any other agreement to control access to such private property shall have the right to exclude or eject a person who is in possession of a gun from their private property.<sup>14</sup>

In general, Georgia premises liability laws impose upon an owner or occupier of land the duty to exercise ordinary care to keep its premises safe.<sup>15</sup> However, a property owner is not an insurer of an invitee's safety, and an owner's duty to exercise ordinary care to protect invitees against third-party criminal attacks extends only to reasonably foreseeable criminal acts.<sup>16</sup> "If the owner has reason to anticipate a criminal act, he or she then has a duty to exercise ordinary care to guard against injury from dangerous characters."<sup>17</sup>

To be deemed as reasonably foreseeable, the event must be "substantially similar in type to the previous criminal activities occurring on or near the premises," thus giving rise to ordinary precautions to protect and prevent the risk posed by the activity.<sup>18</sup> The determination requires an inquiry comparing the likeness, proximity and other relationship between prior criminal activities and the crime in question as to: location, nature and extent of the criminal activities.<sup>19</sup> The prior incidents must be sufficient to attract the owner's attention to the dangerous condition, but need not be identical to the crime in question.<sup>20</sup> It is not a question whether a gun was used in prior incidents, but whether the prior crimes should have put an ordinarily prudent person on notice that the invitees were facing increased risks.<sup>21</sup>

### **Unrestricted Open Carry - Wisconsin**

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<sup>13</sup> O.C.G.A. § 16-11-135 (e).

<sup>14</sup> O.C.G.A. § 16-11-126 (d) and § 16-11-127 (c).

<sup>15</sup> O.C.G.A. § 51-3-1.

<sup>16</sup> See Vega v. La Movida, Inc., 294 Ga. App. 311, 312 (1) (a) (670 S.E.2d 116) (2008).

<sup>17</sup> Woods v. Kim, 207 Ga. App. 910 (1993), quoting Lau's Corp. v. Haskins, 261 Ga. 491, 492 (1991).

<sup>18</sup> Vega, supra, 294 Ga. App. at 312 (1) (a).

<sup>19</sup> See id. at 313 (1) (a).

<sup>20</sup> Id.

<sup>21</sup> See Matt v. Days Inns of America, Inc., 212 Ga. App. 792, 794 (1994).

Wisconsin is considered one of the most unrestricted open carry states. Under Wisconsin law, open carry follows the concealed carry provisions, allowing gun owners to possess weapons in all the same locations.<sup>22</sup> Prohibited locations are limited to schools, police stations, prisons, jails or correctional facilities, mental health facilities, courthouses (unless the carrier is the judge or one whom the judge has specifically authorized) and airport checkpoints.<sup>23</sup> However, even the locations where carrying is prohibited have exceptions, i.e. an unloaded firearm secured in a vehicle is permitted on school property.<sup>24</sup> The carrying of a weapon whether concealed or open is expressly excluded from the definition of disorderly conduct.<sup>25</sup> Unloaded firearms and/or handguns may be carried in a motor vehicle.<sup>26</sup> Local jurisdictions are not permitted to enact ordinances that contradict or limit the state's open carry laws.

Notwithstanding the expanded carrying laws, Wisconsin permits owners and occupants of property to prohibit individuals from carrying a firearm in or on the property.<sup>27</sup> A person may be subject to a Class B forfeiture if he or she carries a firearm on the property after being notified not to remain on the property.<sup>28</sup>

Wisconsin law also protects from liability those owners that do not prohibit customers from carrying weapons on their premises:

a person who does not prohibit an individual from carrying a concealed weapon on property that the person owns or occupies is immune from any liability arising from his or her decision. An employer who does not prohibit one or more employees from carrying a concealed weapon is immune from any liability arising from that decision.<sup>29</sup>

Although not deemed an insurer of the customer's safety, an owner in Wisconsin has a duty to exercise ordinary care to protect members of the public while they are on the premises from injuries caused by the accidental, negligent, or intentional acts of third persons.<sup>30</sup> A owner will be subject to liability if the owner by the exercise of reasonable care could have discovered

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<sup>22</sup> Wis. Stat. § 947.01.

<sup>23</sup> Wis. Stat. § 175.60(16); § 948.605(2).

<sup>24</sup> Wis. Stat. § 948.605(2).

<sup>25</sup> Wis. Stat. § 947.01; Open Carry of Firearms and Wisconsin's Disorderly Conduct Statute, Wis. Stat. § 947.01: Advisory Memorandum.

<sup>26</sup> Wis. Stat. § 167.31.

<sup>27</sup> Wis. Stat. §§ 943.13(1m)(b); 175.60(1)(ag).

<sup>28</sup> Id.

<sup>29</sup> Wis. Stat. §175.60(21)(b),(c)

<sup>30</sup> Delvaux v. Vanden Langenberg, 130 Wis. 2d 464, 484 (1986) (citations omitted).

that such acts are being done or are about to be done, and could have protected the members of the public by controlling the conduct of the third persons, or by giving a warning adequate to enable them to avoid harm.<sup>31</sup>

Once a legal duty has been imposed, the "standard of care" to be exercised is defined as follows:

"the degree of care, which the great mass of mankind ordinarily exercises under the same or similar circumstances. A person fails to exercise ordinary care when, without intending to do any wrong, he does an act or omits a precaution under circumstances in which a person of ordinary intelligence and prudence ought reasonably to foresee that such act or omission will subject him or his property, or the person or property of another to an unreasonable risk of injury or damage."<sup>32</sup>

Wisconsin courts have held that even where the chain of causation is complete and direct, recovery may sometimes be denied on the following public policy reasons:

(1) The injury is too remote from the negligence; or (2) the injury is too wholly out of proportion to the culpability of the negligent tort-feasor; or (3) in retrospect it appears too highly extraordinary that the negligence should have brought about the harm; or (4) because allowance of recovery would place too unreasonable a burden on the negligent tort-feasor; or (5) because allowance of recovery would be too likely to open the way for fraudulent claims; or (6) allowance of recovery would enter a field that has no sensible or just stopping point."<sup>33</sup>

### **Prohibited Open Carry - California**

Except in rural, unincorporated areas of the state, California prohibits open carrying of weapons.<sup>34</sup> Open carry permits are issued only in counties with a population of less than 200,000 persons. Drivers and/or owners of motor vehicles are strictly prohibited from allowing a person to open carry an unloaded handgun into the motor vehicle.<sup>35</sup> Violation of these code provisions can result in felony conviction and/or felony enhancement.<sup>36</sup>

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<sup>31</sup> Peters v. Holiday Inn, Inc., 89 Wis. 2d 115 (1979).

<sup>32</sup> Id.

<sup>33</sup> Coffey v. Milwaukee, 74 Wis. 2d 526, 541 (1976).

<sup>34</sup> Cal. Pen. Code § § 25850, 26350

<sup>35</sup> Cal. Pen. Code § 17512.

<sup>36</sup> Cal. Pen. Code § § 25400, 25850, 26350.

Under California code, everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself.<sup>37</sup>

California courts recognize the “no-duty-to-protect” rule, which protects owners from a general duty to act and protect others from the harmful conduct of third parties.<sup>38</sup> This rule is limited by the special relationship exception in which a duty to maintain the safety of premises arises from the “special relationship” an owner shares with its invitees, customers, and tenants”.<sup>39</sup> For example, an owner who serves intoxicating drinks to customers on the premises is required to exercise reasonable care to protect those customers from injury caused by others on the premises.<sup>40</sup> Likewise, if a restaurant owner

The Supreme Court of California applies a balancing approach in determining the scope of this duty.<sup>41</sup> An owner’s duty is determined “in part [by] balancing the foreseeability of the harm against the burden of the duty to be imposed”.<sup>42</sup> Foreseeability is usually shown by a history of prior criminal incidents, but not necessarily prior nearly identical criminal incidents.<sup>43</sup>

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<sup>37</sup> Cal. Civ. Code § 1714 (a)

<sup>38</sup> Delgado v. Trax Bar & Grill, 36 Cal 4th 224, 225 (1993).

<sup>39</sup> Id. at 229, 234 - 241.

<sup>40</sup> Id. at 241.

<sup>41</sup> See Ann M. v. Pacific Plaza Shopping Ctr., 6 Cal. 4th 666 (1993).

<sup>42</sup> Isaacs v. Huntington Memorial Hospital, 38 Cal. 3d 112, 125 (1985).

<sup>43</sup> Delgado, 36 Cal. 4th at 236-240 (1993).

## **D. Questions for Owners to Consider in the Context of the Open Carry Laws**

1. If an owner allows guns on the premises, and has knowledge that customers have guns in their possession, is the owner on notice of a foreseeable risk of harm?

In almost all jurisdictions, in order for a business to be liable for the harm caused by a third party carrying a gun, a plaintiff must prove foreseeability. This inquiry looks at an owner's knowledge of circumstances that might give rise to the crime that resulted in injury.

### **Restricted Open Carry**

An owner's awareness of guns on the premises does not appear to substantially change the legal analysis and standard for determining the issue of foreseeability. For example, addressing this issue in Fowler v. Robertson, the Georgia Court of Appeals applied the same standard, ruling that "[i]n the absence of evidence that similar criminal activities had occurred at the premises during the recent past, the owner will not be deemed as having anticipatory knowledge sufficient to raise a question of liability for an unexpected incident."<sup>44</sup> Citing Hewett v. First Nat. Bank of Atlanta, the court reasoned "[t]he fact that guns were in the store is no different than having armed guards in a bank."<sup>45</sup> In a similar case where a bank messenger was assaulted and killed in the bank, the fact that guards were present did not change the fact that the bank could not foresee nor reasonably expect that a robbery would take place upon its premises."<sup>46</sup> See, e.g. Roberts v. Wal-Mart Stores, Inc., (owner was not liable for shooting of a child in its store; although there was evidence that BB guns had been removed from their packages, there was no evidence that anyone had ever loaded a gun with BBs and shot someone).<sup>47</sup>

However, in DiCosola v. Kay, the Boy Scouts of America were held liable when a camper was injured by a loaded handgun that was kept in the living quarters of a camp counselor.<sup>48</sup> The New Jersey Supreme Court noted that because the Boy Scouts knew that the counselor kept the guns on the premises, and the mere presence of the guns was dangerous, it was foreseeable that a gun injury would take place.<sup>49</sup>

### **Unrestricted Open Carry**

In Wisconsin, to establish a duty, the harm in question must be reasonably foreseen as probable by a person of ordinary prudence under the circumstances if conduct resulting in such

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<sup>44</sup> 178 Ga. App. 703, 705 (1986).

<sup>45</sup> 155 Ga. App. 773 (1980).

<sup>46</sup> Id.

<sup>47</sup> 287 Ga. App. 316, 319 (2007).

<sup>48</sup> 450 A.2d 508 (N.J. 1982).

<sup>49</sup> Id.

harm constitutes negligence.<sup>50</sup> The duty to use due care arises from probabilities rather than from bare possibilities of injury.<sup>51</sup>

In Estate of Becker v. Olson, the Wisconsin Court held that when a homeowner allowed her boyfriend, a violent person, to keep a sawed-off shotgun in her house, she foreseeably created an unreasonable risk of harm to others.<sup>52</sup> The owner's failure to insist that on removal of the sawed-off shotgun from her home, thus giving the shooter easy access to a deadly weapon, was a cause of death.<sup>53</sup> However, because the court found that "the link between the homeowner's negligence and the death was too attenuated, it declined to impose liability on public policy grounds".<sup>54</sup>

### **Prohibited Open Carry**

In California, the standard is a balancing test with full recognition that an owner is not an insurer of the safety of customers. The obligation to customers is limited to the exercise of reasonable care and the owner is liable only for negligence in receiving or harboring guests with known violent or vicious propensities.<sup>55</sup> Furthermore, knowledge that a certain danger exists does not rise to the level of knowledge necessary for negligence.<sup>56</sup>

In an action brought against a fast-food restaurant arising out of a shooting at the restaurant, a California appellate court found that the restaurant had no duty to protect against the kind of criminal activity at issue in the case.<sup>57</sup> The court held that the duty to protect customers from reasonably anticipated criminal conduct of unknown third parties did not include the unprecedented conduct because it was so remote and unexpected that, as a matter of law, a failure to provide security did not cause it.<sup>58</sup>

2. If a customer knows that guns are on the premises, does the owner automatically considered as having superior knowledge of the risk?

### **Restricted Open Carry**

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<sup>50</sup> Coffey v. City of Milwaukee, 74 Wis.2d 526, 537 (1976)

<sup>51</sup> Buel v. LaCrosse Transit Co., 77 Wis.2d 480, 491 (1977).

<sup>52</sup> 218 Wis. 2d 12 (1998).

<sup>53</sup> Id.

<sup>54</sup> Id.

<sup>55</sup> Saatzer v. Smith, 122 Cal App 3d 512 (1981).

<sup>56</sup> Di Muro v. Masterson Trusafe Steel Scaffold Co., 193 Cal App 2d 784 (1961).

<sup>57</sup> Lopez v. McDonald's Corp., 193 Cal App 3d 495 (1987).

<sup>58</sup> Id.

"The basis of the owner's liability is his superior knowledge and if his invitee knows of the condition or hazard there is no duty on the part of the owner to warn him and there is no liability for resulting injury because the invitee has as much knowledge as the owner does and then by voluntarily acting, in view of his knowledge, assumes the risks and dangers incident to the known condition. It is when the perilous instrumentality is known to the owner or occupant and not known to the person injured that a recovery is permitted."<sup>59</sup> Thus, if an invitee is just as aware of the danger as the owner yet continues despite the knowledge, he or she assumes the risk of injury and "is therefore deemed guilty of a failure to exercise ordinary care for himself and cannot recover."<sup>60</sup>

### **Unrestricted Open Carry**

In Wisconsin, landowners owe a duty of ordinary care toward all persons who come upon their property with their consent. However, the duty of ordinary care is not breached if the dangerous condition is "open, unconcealed, and obvious."<sup>61</sup>

### **Prohibited Open Carry**

If injured person has equal, if not superior, knowledge of the dangerous condition that caused the injury, and the danger was obvious, an owner is entitled to assume that the injured person would perceive that which would be obvious to him upon the ordinary use of his own senses, and the defendant is not guilty of negligence.<sup>62</sup> Further, one assumes the risk when he freely, voluntarily and knowingly manifests his assent to dangerous, and voluntarily exposes himself to that danger when he knows, or in exercise of ordinary care would know, that danger exists, and voluntarily places himself or remains within area of danger.<sup>63</sup>

3. Should owners that allow gun carry on premises provide extra security measures? And if extra security measures are provided, do they establish negligence for the owner if a customer is injured?

### **Restricted Open Carry**

The fact that an owner's security measures were not sufficient to prevent an injury does not establish negligence.<sup>64</sup> Rather, to establish a negligence claim, a plaintiff has the burden to present evidence showing specifically how the owner's measures made the security situation

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<sup>59</sup> Ramsey v. Mercer, 142 Ga. App. 827, 829 (1) (237 S.E.2d 450) (1977).

<sup>60</sup> Clark v. Carla Gay Dress Co., 178 Ga. App. 157, 159-160 (1986).

<sup>61</sup> Treps v. City of Racine, 73 Wis. 2d 611, 617-18, (1976).

<sup>62</sup> Funari v. Gravem-Inglis Baking Co., 40 Cal App 2d 25, (1940).

<sup>63</sup> Bazzoli v. Nance's Sanitarium, Inc., 109 Cal App 2d 232,(1952).

<sup>64</sup> Yearwood, supra, 316 Ga. App. at 157.

worse, or how those measures were inadequate or insufficient.<sup>65</sup> If an owner undertakes to provide additional security for its premises, it must exercise diligence and consistency to avoid a potential finding of negligence.

### **Unrestricted Open Carry**

A duty is established if it is foreseeable that an act or omission to act may cause harm to someone. In A. E. Investment v. Link Builders, Inc., the Wisconsin court found that in meeting its standard of ordinary care a hotel must provide security commensurate with the facts and circumstances that are apparent to the ordinarily prudent person.<sup>66</sup> Thus, the standard of care in providing security will vary according to the particular circumstances and location of the business, and the necessary degree of care will vary in relation to the circumstances. Relevant factors in deciding if adequate security has been provided include: "industry standards, the community's crime rate, the extent assaultive of criminal activity in the area or in similar business enterprises, the presence of suspicious persons, and the peculiar security problems posed".<sup>67</sup>

### **Prohibited Open Carry**

The California Supreme court has found that "a high degree of foreseeability is required in order to find that the scope of a landlord's duty of care includes the hiring of security guards."<sup>68</sup> In Ann M. v. Pacific Plaza Shopping Ctr., the court recognized the additional costs involved and the fact that the presence of guards does not guarantee an adequate deterrence against crime. Thus, "the requisite degree of foreseeability rarely, if ever, can be proven in the absence of prior similar incidents of violent crime on the landowner's premises. To hold otherwise would be to impose an unfair burden upon landlords and, in effect, would force landlords to become the insurers of public safety, contrary to well established policy in this state."<sup>69</sup>

In Noble v. Los Angeles Dodgers, Inc., the court found that although an expert testified that in his opinion the stadium security was inadequate, plaintiffs offered no evidence that there were any reasonable steps defendant could have taken to prevent the assault or that inaction on the part of the defendant in any way cause their injuries.<sup>70</sup>

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<sup>65</sup> Id.

<sup>66</sup> 62 Wis.2d 479, 214 N.W.2d 764 (1974).

<sup>67</sup> Peter v. Holiday Inns, Inc., 89 Wis.2d at 124.

<sup>68</sup> Ann M. v. Pacific Plaza Shopping Ctr., 25 Cal. Rptr.2d 137 at 145-46.

<sup>69</sup> Id.

<sup>70</sup> 168 Cal App 3d 912 (1985).

4. Can a landlord be held liable for a tenant's failure to keep the premises safe from criminal activity?

### **Restricted Open Carry**

A landlord who has relinquished possession of the premises to the tenant is not liable to third parties for damages arising from the tenant's negligence.<sup>71</sup> A landlord will still be deemed to have fully parted with possession of a leased premises under OCGA § 44-7-14, even if he retains limited entry or inspection rights for landlord-related purposes.<sup>72</sup>

### **Unrestricted Open Carry**

In Pagelsdorf v. Safeco Ins. Co. of America, the Wisconsin court held that a landlord owes his tenant or anyone on the premises with the tenant's consent a duty to exercise ordinary care.<sup>73</sup> However, it is unclear whether a landlord's duty extends beyond defective conditions in the leased premises. Since Pagelsdorf, there is not a case that has extended a landlord's duty of reasonable care beyond defects in the physical premises.

### **Prohibited Open Carry**

After a tenant has taken possession of the premises, a landlord is generally not subject to liability for injuries caused by a dangerous condition.<sup>74</sup> However, California courts have imposed greater duties on landlords of premises leased for purposes that allow the public access. Courts have applied a multifactor test for the existence of a duty:

1) the foreseeability of harm to plaintiff; 2) the degree of certainty that the plaintiff suffered injury; 3) the closeness of the connection between the defendant's conduct and the injury suffered; 4) the moral blame attached to the defendant's conduct; 5) the policy of preventing future harm; 6) the extent of the burden to the defendant and the consequences to the community of imposing a duty; and 7) the availability, cost, and prevalence of insurance for the risk involved.<sup>75</sup>

Under this test, courts recently have found that commercial landowners, even when out of possession, must act reasonably toward the tenant and unknown third persons. As part of this duty, the landlord generally has a responsibility to inspect the

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<sup>71</sup> See Boone, supra, 323 Ga. App. at 486-487; see also Lake v. APH Enterprises, 306 Ga. App. 317, 319 (702 SE2d 654) (2010).

<sup>72</sup> See Boone, 323 Ga. App. at 487; Lake, 306 Ga. App. at 319.

<sup>73</sup> 91 Wis. 2d 734, 745, (1979).

<sup>74</sup> Copfer v. Golden, 135 Cal. App. 2d 623, (1955).

<sup>75</sup> Rowland v. Christian, 69 Cal. 2d 108,113 (1968).

premises and ensure that they are safe for the purpose intended.<sup>76</sup> If a landlord knows of a danger and has a degree of control over the premises allowing the landlord to remove it, an enlightened public policy requires the imposition of a duty of ordinary care.<sup>77</sup> However, in Leakes v. Shamoun, the court found that “in giving up possession of the premises to the tenant who ran the arcade, the owner necessarily gave up his ability to control conditions existing on his land and thus did not have direct control over [a] security guard”.<sup>78</sup>

5. Should the carrying of weapons and the applicable circumstances be addressed in the lease?

To the extent that a landlord or a tenant could be held liable for an incident involving guns on the premises, there are issues to consider that address the weapons carry election in the lease:

(a) Between the landlord and the tenant, which party should be vested with the authority to decide whether guns will be allowed on the premises?

This is one area rarely addressed in lease agreements. However, some states have restrictions on landlords, and other states do not address it at all. In Tennessee, “under the general principles of contract law, a tenant can contractually agree to give up rights as long as the waiver is not unconscionable or in violation of a statute”.<sup>79</sup> A 2009 legal opinion by Tennessee Attorney General Bob Cooper addressed the question: “Can a landlord prohibit tenants who possess valid handgun carry permits from possessing firearms in the apartment if the tenant has a permit issued by the State?” The opinion states: “A landlord can prohibit tenants, including those who hold handgun carry permits, from possessing firearms with lease premises. Such a prohibition may be imposed through a clause in the lease.”<sup>80</sup> However, Minnesota statutes provide: “A landlord may not restrict the lawful carry or possession of firearms by tenants or their guests”.<sup>81</sup> In Virginia, the restriction is only on landlords of residential housing. The Virginia statute states “A rental agreement shall not contain provisions that the tenants agrees [...] to a prohibition or restriction of any lawful possession of a firearms within individual dwelling units.”

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<sup>76</sup> Portillo v. Aiassa, 27 Cal. App. 4th 1128 (1994).

<sup>77</sup> Uccello v. Laudenslayer, 44 Cal. App. 3d 504 (1975).

<sup>78</sup> Leakes v. Shamoun, 187 Cal. App. 3d 772 (1986).

<sup>79</sup> Tenn. Code Ann. § 66-28-204.

<sup>80</sup> Attorney General Opinion October 26, 2009, “Firearms, Vehicle Towing, Guests, and Security Deposits of Leased Property”, <http://attorneygeneral.tn.gov/op/2009/t9content.html>

<sup>81</sup> Minn. Stat. § 624.714 (17)(e).

(b) If the tenant makes the decision to allow guns on the premises, can the landlord require the tenant to provide additional protections such as:

- Implementation of additional security measures?
  - As discussed above the implementation of security measure depends upon foreseeability of future harm. However, a landlord can create a contractual obligation for added security measures. In doing so the landlord should take into account what would be considered adequate security looking at the factors that would help prevent a premise liability claim. These factors include: lighting, fencing, security camera, security guards and the size of the property.
- Increase in its insurance coverage for bodily injury and property damage?
  - Since landlords have a certain amount of responsibility to ensure the safety of their tenants and invitees, landlords should consider the option of requiring tenants with firearms to obtain gun liability insurance, to protect themselves against lawsuits and legal liability in the event an accident or other tragedy takes place.

(c) Can the landlord include a provision in the lease that revokes an election allowing guns on the premises if multiple incidents of violence occur during the term of the lease?

In states that allow provisions banning gun carry on the premises, these provisions appear to be enforceable. Given foreseeability standards, it would be prudent in the states that allow these types of lease terms to include them. Once it becomes openly known that violent incidents occur on the premises, a landlord could possibly be liable for failure to use reasonable care. This risk raises additional questions to consider:

- How many incidents of violence would justify a finding that the tenant has failed to keep the premises safe such that there may be a revocation of the gun carry authorization or the termination of the lease?
  - In Atamian v. Supermarkets General Corp., the court held that evidence of five assaults on the premises, shortly before the attack on the plaintiff, was sufficient to give rise to a duty in the defendants to offer protection to its customers.<sup>82</sup> Although the court conceded that doubt remained "as to the precise number, kind and location of criminal acts necessary to give rise to the proposed duty . . . it need only be said that evidence of five similar occurrences on the defendant's premises . . . was sufficient to give rise to the proposed duty."<sup>83</sup>

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<sup>82</sup> 146 N.J. Super. 149 (1976).

<sup>83</sup> *Id.*

- However, courts differ on what is determined as a foreseeable crime. The factors that are usually looked at include: similarity of the prior crime, geographical proximity of the prior crimes and temporal proximity of the prior crimes.
- Would the tenant have cause to challenge or disagree with such a provision on the ground that it interferes with its quiet enjoyment of the premises?
  - In states with statutes that do not allow for landlords to ban weapons on the premises tenants could have a cause of action for interference with quiet enjoyment.