



## Opening Up Stairwells for Physical Activity

### *An Analysis of the National Tort Liability Landscape for Stairwell Use*

#### INTRODUCTION

Obesity and physical inactivity in America have reached crisis proportions, with devastating consequences for Americans' health and enormous costs for workplace productivity and medical expenses.<sup>1</sup> As Americans look for practical and realistic ways to improve their health and well-being, increasing attention is being given to that simple staple of urban life – the stairwell.

Many Americans, particularly office workers, lead relatively sedentary lives and spend many of their waking hours working in multi-floor buildings. Using the stairs is a quick and easy way for people to add aerobic activity to their day. Research shows that regular use of stairwells can help reduce a number of common but serious health problems, including obesity, high blood pressure, heart disease, stroke, and osteoporosis, while also reducing stress<sup>2</sup> and overall mortality rates.<sup>3</sup> Often, hectic schedules make it hard to find time to get out of the office and exercise. As explained by a director at Kaiser, one major employer that has embraced stairwell use, “A practical solution such as taking the stairs every day is a way to incorporate healthier habits into our lifestyle.”<sup>4</sup> Taking the stairs requires “little additional time, no wardrobe change, and few additional costs because building code[s] require stairs.”<sup>5</sup>

The United States Centers for Disease Control and Prevention encourage use of stairs,<sup>6</sup> and some companies have embraced stair use as a relatively simple way to improve the health of their employees.<sup>7</sup> Many property owners and managers, however, either do nothing to encourage stairwell use or keep stairwells locked. In the latter case, the stairs are used only to provide an emergency exit in the event of a fire or other disaster, rather than to transport people up and down the building in the same manner as an elevator.<sup>8</sup>

A common reason cited for either the exclusive or primary reliance on elevators is a fear of liability if accidents or other injuries occur on a stairwell.<sup>9</sup> This memorandum explores these concerns, providing an overview and assessment of the liability issues that could potentially arise from the use of stairwells in buildings. Liability is controlled by state law.<sup>10</sup> This memo will not delve into the law of any one state, but will provide a high level overview of the national landscape as it relates to stairwells and liability.

Section I gives an overview of the legal landscape that governs the recovery for accidents or other injuries that occur on a stairwell. Sections II through V address the various different kinds of incidents that could potentially occur on a stairwell: (1) accidental injuries, (2) injuries stemming from criminal acts, (3) injuries arising from a fire or other natural disasters, and (4) injuries stemming from medical emergencies.<sup>11</sup> Section VI addresses whether the act of encouraging stair use through prompts and signs affects liability risk. Finally, in Section VII, the memo evaluates the effect of stairwell accessibility on overall building risk management.

## I. INTRODUCTION TO PREMISES LIABILITY

### A. Overview of Tort Law and Premises Liability

The term “tort law” refers to the laws that govern recovery of damages for injuries. As a general rule, tort law imposes a legal duty to exercise reasonable or ordinary care to avoid injuring others. A failure to comply with this duty is called negligence. A plaintiff (a person bringing a lawsuit) cannot, however, collect any damages for negligence unless the plaintiff can prove *all* of the following:

- (1) the defendant (the person or entity sued) owed a *duty* to exercise ordinary or reasonable care *to the plaintiff*;
- (2) the duty was *breached* or violated because the defendant did not meet the standard of care owed;
- (3) the breach *actually and proximately caused* the injury to the plaintiff (i.e. the defendant’s breach not only caused the injury but injury was also reasonably foreseeable); and
- (4) the plaintiff suffered *damages* as a result of the injury.

Premises liability is a subset of tort law. It addresses the issue of what tort liability exists when someone is injured on the property of another. The same basic tort principles apply: the property owner, manager, or tenant owes a legal duty to exercise reasonable or ordinary care to keep property in a reasonably safe condition if it is expected to be used by others.<sup>12</sup> This long-established rule applies to all areas of a building that are used by others, including stairwells.

As might be expected, much of tort law turns on identifying exactly what the “duty to exercise ordinary or reasonable care” actually means in a particular circumstance, and whether it was, in fact, breached in any given case. Most of this memo (Sections II-VI) is devoted to discussing this issue in the context of different types of injuries that could potentially arise in a stairwell.

There are, however, other important issues well. First, the duty of care does not exist in a vacuum. A plaintiff can only sue a defendant who owes the plaintiff a duty of care with respect to the stairwell at issue. This issue can become somewhat complicated as there are potentially multiple parties (building owners, commercial lessors and tenants, property managers, and independent contractors) that can owe the plaintiff a duty of care. Thus, this section discusses *who* is potentially liable for an injury occurring on a stairwell due to negligence.

In addition, there are circumstances that may result in reduced or no liability for the defendant. First, defendants who are government entities may enjoy protections and defenses from tort suits that are not available to private parties. Second, in many states, defendants owe less care to certain plaintiffs depending on whether the plaintiff is classified as a trespasser, licensee, guest, or invitee. Finally, if the plaintiff’s injury in the stairwell occurs on the job, workers’ compensation statutes may limit the recovery of tort remedies. All of these issues are addressed in turn below.

### B. Who May Be Liable When an Injury Occurs in a Building Stairwell?

The issue of who has liability for an injury on a commercial stairwell generally turns on who has the duty to exercise reasonable care to keep the stairwell in a reasonably safe condition.

## ***1. Property Owners Who Occupy the Property***

As a general rule, the party occupying the property has a duty to exercise ordinary care to keep the premises in a reasonably safe condition.<sup>13</sup> Thus, commercial building owners who also occupy the building face potential liability if their negligence causes an injury on the stairwell.

This duty of care is often “non-delegable.” Thus, building owners who occupy their property typically cannot pass along (“delegate”) their duty of care by contracting with a property management firm or other independent contractor. Rather, if the property manager or repairperson is negligent, the building owner may be liable as well.<sup>14</sup> In short, while state laws vary, the general rule is that building owners who occupy their buildings “may contract out the *performance* of [their] nondelegable duty, but may not contract out [their] ultimate legal responsibility.”<sup>15</sup>

## ***2. Property Owners Not Occupying the Property***

If, however, a commercial building owner does *not* occupy the premises, but functions solely as a landlord, different rules generally apply. Typically, the duties of commercial landlords will be governed by the terms of the lease. Thus, many commercial building owners who do not occupy the building are only potentially liable for injuries on a stairwell if, under the terms of the lease, the owner maintains control or responsibility over the common areas or the stairwell in particular.<sup>16</sup> The building owner, however, may still owe a non-delegable duty with respect to hidden defects or hazards.<sup>17</sup>

## ***3. Commercial Tenants***

As noted above, the traditional rule is that the possessor of the property has a non-delegable duty to exercise ordinary care to keep it in a reasonably safe condition. In the case of commercial tenants, however, courts will often look to the terms of a lease to determine the *scope* of the tenant’s possession. Thus, if the lease provides that the building owner or some third party maintains control of the common areas or stairwells, the commercial tenant may owe no duty of care with respect to the stairwell except in cases of known hazards.<sup>18</sup> Conversely, if the lease provides that the tenant is responsible for common areas or the stairwell, then, not only does the tenant owe a duty of care, but just like the property owner who occupies the building, the duty may likely be considered non-delegable.

## **C. Limited Liability for Governmental Entities**

### ***1. Federal Defendants***

The United States government enjoys “sovereign immunity” that protects it from suits for damages unless it has explicitly waived its immunity. Sovereign immunity can be traced to medieval times when kings prohibited lawsuits against themselves, but also serves the modern purpose of protecting public coffers.

In the case of tort claims, the federal government partially waived its sovereign immunity with the enactment of the Federal Tort Claims Act (“FTCA”).<sup>19</sup> Under this law, the federal government is held to the same tort standards that a private person would be held to under similar circumstances. When the FTCA applies, the tort law of the state in which the alleged negligence occurred will govern, just as if there were no historic immunity.<sup>20</sup> For example, when a person sued the United States under the FTCA after he fell on the steps in a Veteran’s Administration Hospital stairway, which were left dark by a burned-out light bulb, Missouri tort law governed the claim. This is because the alleged negligence – the hospital administrators’ failure to replace the light bulb – occurred in Missouri.<sup>21</sup>

There are, however, certain exceptions to the FTCA’s waiver for tort claims. Most important, for purposes of this memorandum, is that the waiver does not apply – and so, the government remains immune – if the

government's alleged negligence involved the exercise of a "discretionary function."<sup>22</sup> In general, a "discretionary function" refers to government actions that involve discretionary policy and planning decisions. The purpose of this exception is to prevent courts from second-guessing government decisions based on social, economic, or political policy through the medium of a tort case.<sup>23</sup> In contrast, tort claims that involve only the implementation of government policies or plans do not fall within the discretionary function exception.<sup>24</sup> Exactly what counts as a "discretionary function" is not clear cut, and the case law in this area is notoriously inconsistent.<sup>25</sup>

With respect to tort claims involving stairwells, whether the FTCA discretionary-function exception would apply will turn on how the court characterizes the alleged negligent conduct. Take, for example, a case in which the alleged negligent conduct is that a stairwell was dimly lit. If the agency persuades the court that the dim lighting was a policy choice (even a misguided one), intended, perhaps, to reduce strain on people's eyes, immunity would likely apply.<sup>26</sup> If, however, the court characterizes the negligent conduct as a simple failure to carry out proper maintenance of the stairwell, immunity would likely not apply.<sup>27</sup> Section VI, below, concludes that there is little risk of liability for the act of encouraging people to take the stairs. Because encouraging or supporting use of the stairs would likely be deemed a discretionary policy decision, such risk would be even less for the federal government or for state or local governments following this rule.

## ***2. State Defendants***

Like the United States government, state governments enjoy sovereign immunity but have partially waived it for tort claims. The scope of these waivers, however, varies significantly from state to state. Some states follow the FTCA approach and provide an exception to the waiver for "discretionary" policy decisions, although there is wide variation in how each state defines discretionary.<sup>28</sup> Other states take a somewhat different approach and look at whether the state was acting in a "propriety" role (i.e. commercial role) versus a "non-propriety" role (i.e. a governmental role).<sup>29</sup> State immunity from tort claims can also depend on such factors as (1) whether the state agency at issue has liability insurance,<sup>30</sup> (2) whether the state has adopted a public buildings exception, which waives immunity with respect to liability arising out of defective or dangerous conditions in public buildings,<sup>31</sup> and (3) whether the state has specifically waived its immunity for negligently maintained state property. Thus, while sovereign immunity provides significant protection from lawsuits to state actors, the law of each state must be individually examined to determine whether immunity is likely to apply in a given case.

## ***3. Local Government Defendants***

Although local governments are not sovereigns (they are corporations chartered by the state), courts have accorded them a separate "governmental immunity" under state common law. Many states have also enacted statutory schemes that govern local government immunities. Like state sovereign immunity, local governmental immunity varies widely by state. Also, many of the issues are the same. Thus, local government immunity may depend on (1) whether the activity at issue was governmental or proprietary, (2) whether liability insurance exists, and (3) whether state statutes explicitly provide for tort liability in cases of negligently maintained municipal property. Many local governments also enjoy immunity for discretionary decisions.<sup>32</sup> In sum, local governments may enjoy reduced tort exposure for stairwell related injuries; the state law governing immunity for each municipality, however, would need to be individually consulted to determine whether immunity is likely to apply to a given situation.

The upshot of this brief review of sovereign and governmental immunity is that when local, state, or federal governments or agencies make their stairwells accessible, they may well be protected from liability for injuries that occur on them, even if they have been negligent, and their immunity is particularly likely to apply to policy decisions related to opening stairwells.

#### **D. Other Protections for Defendants: Reduced Responsibility for Trespassers and “Licensees” in Some States**

Property owners, managers, and tenants may have reduced responsibility – and so, less risk of liability – for certain categories of people using stairwells. Owners and occupiers of land historically received special treatment in tort law that allows them to owe less than the usual “duty of reasonable care” to certain classes of plaintiffs. Under this traditional approach, the standard of care owed by the property owner or occupier turns on whether the injured person is classified as an invitee, licensee, or trespasser.<sup>33</sup> The full “duty of reasonable care” is only owed to plaintiffs classified as “invitees” – that is, people who enter the property to provide a tangible benefit to the owner.<sup>34</sup> Typical “invitees” are customers, clients, and repair people.

Licensees or trespassers are owed less care. Licensees are defined as those who enter the property with permission but for their own purposes or for social purposes and do not provide an economic benefit to the landowner. Somewhat confusingly, guests are considered licensees, not invitees. Salespersons are also typical licensees. Licensees are only owed the duty to warn of known concealed dangers and to refrain from unreasonably dangerous active conduct.<sup>35</sup>

Trespassers (persons on the land unlawfully or without permission) are owed no duty except to avoid willful and wanton harm to the trespasser.<sup>36</sup> In most states, however, if the landowner actually discovers the trespasser “in circumstances that suggest he might encounter danger,” the landowner’s duty increases to one of reasonable care.<sup>37</sup>

In recent times, a number of states, starting with California in 1968,<sup>38</sup> rejected the classification approach and applied the standard duty of reasonable care in all premises liability cases, regardless of the status of the plaintiff.<sup>39</sup> Other states have eliminated the invitee/licensee distinction but kept a lower standard of care for trespassers. Currently, the majority of courts continue to apply either the full classification system or a partial classification system with reduced duties to trespassers.<sup>40</sup> Delaware has a statute that immunizes owners of private residences or farms from liability to social guests and trespassers for acts involving ordinary negligence.<sup>41</sup>

Thus, in states that retain the full classification system, the usual duty to exercise reasonable care with respect to a stairwell would apply only to “invitees” such as customers, clients, and repair people. With respect to social visitors and sales people, building owners and possessors would only owe the lesser duty of warning of known concealed dangers on a stairwell and to refrain from unreasonably dangerous active conduct. Finally, every state protects against unreasonable liability to trespassers either through a greatly reduced duty to trespassers or other limitations. The overall effect of these rules is to decrease the likelihood of liability.

#### **E. Injuries that Occur to Employees**

For employees who are injured while working, state workers’ compensation statutes are usually the only avenue for compensation from an employer. Because workers’ compensation provides employees’ exclusive remedy, if an employee happens to be injured on a staircase while on the job, as a general rule the employee cannot sue the employer for tort damages even if the employer would otherwise be liable under tort law as the owner or occupier of the property.<sup>42</sup> In some states, workers’ compensation exclusivity also bars tort suits under these circumstances against co-employees and, under certain conditions, subcontractors and their employees.<sup>43</sup>

Workers’ compensation statutes do not, however, usually preclude tort suits against third parties who are *not* the employer or are not covered by an exclusivity provision. For example, if an employee who was on the job

was injured in a building stairwell due to the negligence of a third-party repair company, the employee could sue the repair company for tort damages. If, however, the employee obtained tort damages from a third party, the employer or insurer could recover workers' compensation benefits already paid to that employee to prevent the employee from receiving a windfall by being compensated twice for the same injury.

Even if the employee does not seek recovery from the negligent third party, the employer can bring a "subrogation" action against that third party to recover the amount of payment made via workers' compensation to the employee. In such a subrogation action, the employer or insurer is asserting the rights of the injured employee.<sup>44</sup>

In short, in most instances, a building owner or possessor who is also an employer will have no tort liability for a stairwell injury if the injury was suffered by an employee while working on the job. Rather, the employee's recovery will be limited to workers' compensation benefits.

## II. PREMISES LIABILITY IN CASES OF ACCIDENTAL INJURY ON STAIRWELLS

### A. Overview

As noted above, the basic tort duty to avoid negligence – to exercise reasonable or ordinary care to avoid injury to other persons on real property – applies to stairwells. This does not mean, of course, that building owners, managers, and tenants are liable every time someone enters their premises and suffers an accident.<sup>45</sup> Rather, tort law only imposes a duty to take *reasonable* precautions with respect to stairwell maintenance and safety. If defendants act with reasonable care, they are not negligent, and thus they are not liable for injuries that may have occurred.

What is considered "reasonable" is evaluated on a case-by-case basis through a common-sense inquiry.<sup>46</sup> Typically, the following factors are weighed: (1) the extent to which the injury was foreseeable, and the magnitude of the risk, (2) the cost and effort of implementing an absent precaution or precautions, and (3) the likelihood that the precaution would have avoided the injury.<sup>47</sup> Naturally, a lack of reasonable care is most likely found when there is a highly foreseeable, serious injury and a relatively minimal precaution would have likely avoided it. Conversely, if the accident was unlikely, the risk of serious injury was relatively low, and further precautions would have been difficult, expensive, and of questionable effect, a finding that the defendant breached the duty of care would be highly unlikely. In short, there is a balancing of many factors, with *reasonableness* under the circumstances being the touchstone consideration.<sup>48</sup>

In some cases, the violation of a statute may be sufficient to prove breach of the "standard of care" in a negligence claim. For example, if a state statute requires handrails for all stairwells over a certain height, then a court will likely find that the failure to install one (absent a valid excuse) is sufficient to prove a breach of the standard of care. This doctrine is called "negligence per se."<sup>49</sup> Even where there is negligence per se, however, recovery is not automatic. The plaintiff still has to prove that the absent handrail proximately caused the injury and damages in order to recover.<sup>50</sup>

If the plaintiff shows that a regulation or ordinance was violated (rather than a statute), jurisdictions differ as to whether a violation of the regulation or ordinance would constitute "negligence per se" or just some evidence of negligence.<sup>51</sup>

On the other hand, compliance with a statute or regulation is not necessarily sufficient to show that the defendant acted with reasonable care under the circumstances. This is because a statute or regulation usually defines a minimum standard of conduct which "does not preclude a finding that a reasonable person would have taken additional precautions under the circumstances."<sup>52</sup> However, statutory compliance may be accepted by the court or jury as relevant to whether the defendant acted with reasonable care.<sup>53</sup>

Safety laws or regulations that may be relevant to stairwell injuries, in addition to railing requirements, are laws covering such issues as stair design (e.g. slope, angle or height), slip-resistant tread, and lighting. Federal or state laws governing accessibility requirements for people with disabilities may also be relevant.<sup>54</sup>

It is worth emphasizing that the duty of reasonable care owed to stairwell users is actually *lower*, in some states, than the duty owed to elevator users. In jurisdictions that consider elevators to be “common carriers” that carry “passengers,” the owner or operator of the elevator owes the “highest degree of care, or a standard of care higher than ordinary or reasonable care.”<sup>55</sup>

## **B. Typical Accidental Injuries on Interior Stairwells on Commercial Premises**

Cases involving accidental injuries on stairs typically involve either (1) an alleged hazardous condition, such as inadequate lighting or debris, or (2) an alleged defect in the design of the stairs or railings. Often, one or more hazards or defects can combine to cause the accident.

### ***I. Hazardous Conditions***

#### ***(a) Lighting***

Many claims involving accidents on stairwells allege poor lighting. While the duty to keep commercial premises reasonably safe includes keeping stairways reasonably illuminated,<sup>56</sup> plaintiffs seeking to recover based on faulty lighting face significant hurdles. First, as a general rule, no “presumption of negligence” arises merely because a plaintiff is injured on darkened premises.<sup>57</sup> Rather, plaintiffs must usually establish that the lack of lighting created a “dangerous condition” to prove a breach of the duty of care.<sup>58</sup>

Second, the defendant must have actual or constructive knowledge of the dangerous condition. Thus, if the dangerous lighting conditions were temporary in nature (e.g. a recently broken light), plaintiffs must establish that the defendant either actually knew or should have known about the dangerous condition in order to demonstrate a breach of the duty to exercise reasonable care.<sup>59</sup> If the lack of lighting represented the defendant’s standard practice, then defendants will generally be presumed to have notice of the condition.<sup>60</sup>

While each lighting case turns on its own facts and witness credibility, as a general matter, plaintiffs who allege an additional hazard or defect (such as debris or a missing handrail) are more likely to prevail than if lighting is the only issue.<sup>61</sup> In addition, as discussed in section II(B)(3)(a) below, lighting cases often raise issues regarding the plaintiff’s share of fault.

Building owners and managers can protect against this type of liability by ensuring that the amount of light provided in stairwells is adequate to allow an ordinary person to use the stairs with reasonable safety. Broken lights should be promptly repaired when they come to the notice of the owner or manager.

#### ***(b) Debris or Slippery Substance on Stairs***

Similar rules apply to cases involving falls caused by debris or other substances on the stairs. In order to prevail, a plaintiff must generally show that the debris or substance in the stairwell created (1) a dangerous condition, of which (2) the defendant knew or should have known.<sup>62</sup>

In one case, for example, the plaintiff was going down the main stairwell of a busy office building when she fell as a result of debris on the steps.<sup>63</sup> She produced evidence that (1) the stairwell became littered with debris that accumulated toward the end of every week, and (2) that defendants failed to take reasonable measures to

sweep the stairway despite knowing that garbage was being regularly strewn about the stairs. The court found that the plaintiff had sufficient evidence to submit her case to a jury.<sup>64</sup>

In contrast, the court dismissed a case in which the plaintiff asserted that a “half-wet” service stairwell made him fall.<sup>65</sup> Since the stairs were heavily traveled, the court reasoned, the wetness could have been caused only minutes before the accident and any other conclusion would be “pure speculation.”<sup>66</sup> Accordingly, plaintiff failed to establish defendant’s knowledge of the dangerous condition.<sup>67</sup>

In addition, courts are not hesitant to dismiss cases in which the allegedly dangerous condition is simply “worn stairs.”<sup>68</sup> Where stairs are worn but contain no hidden defect or serious problem, courts are unlikely to find that the defendant has negligently maintained the stairs.<sup>69</sup>

## II. Design Defects in Stairs or Railings

The duty of care can also be violated if there are defects in the design of the stairs. This typically arises because the stairs vary in height or are strangely angled, sloped or pitched.<sup>70</sup> With respect to handrails, the issue can be either the lack of a railing altogether, or the design or location of the railing.<sup>71</sup> Often, these design defect issues are covered by local building codes or regulations.<sup>72</sup> If so, compliance with the code can help indicate that the duty of care has been satisfied; conversely, failure to comply with the code may be considered evidence of negligence or negligence per se.<sup>73</sup>

Negligence liability for such defects usually turns on the specific facts of the case, including whether the defendant either knew about or should have known about the defect.<sup>74</sup> For example, if a handrail was loose, and the defendant “in the exercise of ordinary care, knew or should have known that its handrail was loose,” the defendant faces potential liability if the plaintiff falls as a result.<sup>75</sup>

### 3. Common Issues and Defenses

#### *(a) When the Plaintiff Is Partially at Fault*

In most states, a defendant’s damages for committing negligence will be reduced or eliminated depending on how much the plaintiff was at fault for his or her injuries. This legal rule is referred to as “comparative fault.”<sup>76</sup> In some states, the plaintiff’s recovery is simply reduced by the plaintiff’s share of fault, no matter how large it may be. For example, plaintiffs who are 70% at fault can still recover but the defendant will only have to pay 30% of the damages.<sup>77</sup> In other states, the plaintiff’s recovery is similarly reduced according to the plaintiff’s share of fault, except that a plaintiff cannot recover anything if his or her share of fault equals or exceeds 50%.<sup>78</sup> Finally, a few states follow a “contributory negligence” rule that prevents plaintiffs from recovering anything unless the defendants are found 100% at fault.<sup>79</sup>

In stairwell injury cases, the plaintiff’s share of fault is frequently an issue. For example, while a property owner or occupier may owe a duty to light the premises adequately, plaintiffs may not recover damages if they fail to take sufficient actions to protect their own safety.<sup>80</sup> Indeed, “the very condition that the plaintiff seeks to establish as evidencing negligence of an owner or occupier of premises—inadequacy of lighting—is likely to suggest proof on behalf of the defendant that the plaintiff was contributorily negligent in proceeding onto darkened premises.”<sup>81</sup> The variety of approaches in these types of cases, however, has “led to discordant holdings on substantially similar sets of facts.”<sup>82</sup>

Also, if a plaintiff is well-familiar with the “defect” in the stairwell (e.g. the lack of a handrail or the height of the stairs), because the stairs are traversed frequently, the plaintiff’s recovery may be reduced or precluded.<sup>83</sup> Along a similar vein, some courts apply the “open and obvious” doctrine. Under this doctrine, a landowner is



not liable for failing to warn of a known dangerous condition if the problem is “open and obvious.”<sup>84</sup> In short, plaintiffs who either knew or should have known of the alleged defect or dangerous condition on a stairwell, but voluntarily chose to proceed on the stairwell anyway, will face significant issues concerning their comparative fault.

#### *(b) When the Plaintiff Suffers a Greater Injury than Expected*

Another issue that may arise is the extent of liability when the plaintiff suffers a greater injury than expected. Take, for example, the scenario in which the defendant negligently creates a dangerous condition on the stairwell and the plaintiff falls as a result. Although a person of normal health would only suffer a sprained ankle, the plaintiff, due to her fragile medical condition, suffers a broken hip and minor stroke. Under established tort principles, the defendant will be liable for the full extent of the plaintiff’s injuries because the defendant “takes the plaintiff as he finds her.”<sup>85</sup> Importantly, this rule does not mean that defendants have a higher duty of care to avoid injury to persons who may be in poor health. Rather, it only means that if a defendant has acted in an unreasonable manner that would put even a person of normal health at risk, the defendant is liable for all the injuries actually caused, even if they are more severe than expected or more serious than a normally healthy person would suffer.<sup>86</sup>

#### *(c) When the Defendant Takes Remedial Action after the Accident*

Sometimes a defendant adopts precautions or remedial measures *after* an accident to fix whatever caused or contributed to the accident. The Federal Rules of Evidence,<sup>87</sup> as well as the law of almost every state, provide that such subsequent measures may not be admitted into evidence for the purpose of proving negligence.<sup>88</sup>

The sole exception is Rhode Island, where such evidence is admissible.<sup>89</sup> Even there, however, the plaintiff must still establish that the defendant knew or should have known of the dangerous condition but failed to take reasonable care to address the condition in a reasonable amount of time.<sup>90</sup> In one case, for example, the defendant installed motion sensor lights after the plaintiff fell on the stairs walking down from the fourth floor of an office building after the lights were turned off.<sup>91</sup> Although this action was admitted as evidence of negligence, the jury nonetheless ruled that the defendant was not negligent, and that verdict was upheld on appeal.<sup>92</sup>

### **4. Conclusion**

Negligence liability for accidents on a stairway may be imposed where the duty to act with reasonable care is violated. But building owners and occupiers will not be liable, even if an accident occurs, if they have not been negligent. Negligence can usually be avoided by (1) taking reasonable steps to regularly maintain stairwells, (2) ensuring that there is a reasonable amount of light for stairwells, (3) fixing problems promptly when they become known, and (4) complying with building codes and regulations.

## **III. PREMISES LIABILITY FOR INJURIES STEMMING FROM CRIMINAL ACTS ON STAIRWELLS**

### **A. Introduction**

Historically, property owners, managers, and tenants had no common law duty to protect against criminal acts on property they owned or occupied.<sup>93</sup> The criminal act itself was considered to be an “intervening act” that immunized the property owner or manager from any liability.<sup>94</sup> Starting in the middle of the twentieth century, however, courts began expanding the common law duty to take reasonable care to avoid accidental injuries into the realm of intentional injuries arising from criminal activity. This was partly a natural evolution

of the duty of care doctrine and partly a response to rising crime rates.<sup>95</sup> By the 1980s, most jurisdictions recognized that tort law principles include a duty to take “reasonable care” to protect against “foreseeable” criminal attacks that occur on commercial premises,<sup>96</sup> including common areas.<sup>97</sup> This principle generally also applies to employers.<sup>98</sup> Claims based on this expanded duty of care are generally referred to as *negligent security* claims.

The typical negligent security claim involves an attack in a residential apartment complex, shopping mall, or parking lot or garage, along with allegations that the defendant failed to take reasonable security precautions that would have likely prevented the attack.<sup>99</sup>

While the concept of negligent security is now a “broadly accepted theory of liability,”<sup>100</sup> there is tremendous variation in how the theory has been applied in practice, and it is still an evolving doctrine.<sup>101</sup> Indeed, courts have found it a difficult area as they “struggle[] to balance the rights of crime victims to seek redress for their injuries, and the rights of property owners, who, it must be recognized, are not insurers of public safety.”<sup>102</sup>

## **B. Trends in Scope of Duty to Provide Security on Commercial Premises**

As indicated above, negligent security law is not only an evolving doctrine that presents a “patchwork quilt” of approaches among the 50 states, but even within a state, the law can be in flux.<sup>103</sup> Some broad trends, however, have been observed. When negligent security claims were first recognized, courts tended to narrowly construe them in a manner favorable to property owners and possessors. Over time, most states adopted a more expansive approach, and in the 1990s courts’ approach to whether a crime was foreseeable became more favorable to plaintiffs.<sup>104</sup> Whether this trend is shifting yet again is difficult to discern, and attempts at such analysis represent more art than science. One former co-chair of the Association of Trial Lawyers of America,<sup>105</sup> has observed, however, that there may be movement toward a middle ground: “[T]he trend into the mid-1990s favored plaintiffs ‘harmed as a result of [inadequate] security at stores, hotels, and other businesses. . . . Courts in about half the states have eased burdens on plaintiffs who try to show that landowners should be held liable for crime-related injuries when they fail to safeguard their premises. . . . [However] [c]onservative jurisdictions have been moving to liberal decisions, and liberal jurisdictions have been retreating.”<sup>106</sup>

## **C. Key Issues in Negligent Security Claims**

Even in the most plaintiff-friendly jurisdictions, however, plaintiffs still have a “substantial burden to overcome” before liability can be established.<sup>107</sup> Consistent with general tort principles, a plaintiff must affirmatively establish that: (1) the crime was foreseeable by the defendant, (2) the defendant owed a duty to protect the plaintiff, (3) the defendant breached its duty to provide protective measures, and (4) the defendant’s breach of duty was a proximate cause of the crime committed.<sup>108</sup> In short, such claims turn on whether the crime was foreseeable by the defendant, and if so, whether the defendant failed to take reasonable security measures that would have likely prevented the crime.<sup>109</sup> Each of these issues is discussed in turn.

### ***1. Foreseeability***

The foreseeability of the crime is often the crucial issue in a negligent security claim. It is perhaps not surprising, then, that courts have differed in their approaches as they attempt to balance the interests of both crime victims and property owners and occupiers. Currently, at least four different tests are in use around the country. Going from most to least restrictive, they can be summarized as follows:<sup>110</sup>

*Specific imminent harm test:* This test strictly limits liability to cases in which the defendant knew or should have known that the *specific* criminal harm was *occurring* or *about to occur* on the premises.

*Prior similar incidents test:* This test looks at whether the defendant should have foreseen the crime based on prior similar crimes on or near the property. Sub-issues concern the degree of similarity and how recently or often the prior crimes occurred.

*Balancing test:* This approach weighs “the foreseeability of the harm against the burden imposed on a [landowner] by protecting against that harm.”<sup>111</sup> Thus, the “degree of foreseeability needed to establish a duty decreases in proportion to the magnitude of the foreseeable harm’ and the burden upon defendant to engage in alternative conduct.”<sup>112</sup> Factors considered under the balancing test include the probability of and likely magnitude of harm; the importance or social value of the activity engaged in by the defendant; the relative costs and burdens of alternative, safer conduct, and the relative usefulness and safety of the alternative conduct.<sup>113</sup> Courts following this approach, however, tend to require at least some showing of previous criminal acts on or near the property at issue.<sup>114</sup>

*Totality of the circumstances test:* This test determines foreseeability based on a review of all the surrounding circumstances, including, but not limited to, prior criminal incidents, the nature and location of the premises, and the character of the neighborhood.<sup>115</sup> A prior criminal incident on or near the premises is relevant but not required.

Currently, very few jurisdictions adhere to the most restrictive test (specific imminent harm). While the similar incidents test was adopted more frequently early on, and became the majority rule, many courts later rejected it as unduly restrictive, and the totality of the circumstances approach became increasingly popular.<sup>116</sup> The balancing test is used by a handful of states.<sup>117</sup>

## **2. Appropriate Security Measures**

The level of security measures deemed reasonable varies greatly depending on the unique facts of each case. It can range from providing and maintaining locks and adequate lighting to, in more extreme cases, use of security guards.<sup>118</sup>

Some courts will look to the defendant’s own policies or past practices to determine what is reasonable.<sup>119</sup> Courts are divided, however, as to whether the failure to maintain security measures initiated by the defendant should give rise to liability.<sup>120</sup> Industry practices may also be considered relevant. “For example, if every other office building in a downtown area had restricted access to parking garages, the owner of a building that did not take this precaution would find difficulty defending a negligent security claim.”<sup>121</sup>

All in all, the level of appropriate security measures will be a “fact-specific determination based upon the balancing of the relative benefits and burdens of undertaking particular precautionary measures.”<sup>122</sup>

## **3. Whether the Alleged Security Breach Caused the Criminal Activity**

Even if a plaintiff establishes that the crime was foreseeable, and that the defendant breached its duty to provide certain security precautions, the plaintiff must also establish that the alleged security breach proximately caused the attack<sup>123</sup> – that is, was sufficiently closely related to the attack to be fairly said to have caused it. This issue “of causation has . . . been the subject of considerable judicial analysis.”<sup>124</sup> If the crime occurred inside a building, plaintiffs must generally establish how the assailant gained entry in order to establish that the security breach was the proximate cause of the attack.<sup>125</sup> This can be challenging, especially where the assailant is unknown.<sup>126</sup>

## **D. Application to Commercial Building Stairwells**

Reported judicial opinions concerning negligent security claims in commercial buildings primarily involve shopping malls, entertainment venues, and parking lots and garages.<sup>127</sup> Negligent security claims involving incidents on stairs in office buildings or commercial premises generally are few and far between. Nor did any of the case law found indicate that making a stairwell accessible created an undue safety risk or that commercial stairwells were a magnet for criminal activity. Notably, one extensive collection of negligent security cases<sup>128</sup> identified only one case involving an interior stairwell in an office building.<sup>129</sup>

In that case, the plaintiff, a resident of New Jersey, arrived at work at 7:30 a.m. and entered her building through an unlocked door.<sup>130</sup> The first floor contained a machine shop. As the plaintiff neared the top of the stairs to the second floor she was grabbed and knocked unconscious. The unknown assailant was seen fleeing the building but not apprehended.<sup>131</sup> The defendant (who owned the building and occupied the first floor factory),<sup>132</sup> provided no security measures other than locks on the doors and screens on the windows.<sup>133</sup> There had been no similar attacks in the building (one breaking and entering had been reported 6 years earlier) although a “number of crimes” had been committed in the vicinity of the building in the previous few years.<sup>134</sup>

The court rejected plaintiff’s negligent security claim. Applying a balancing approach, it stated that whether a duty arises “involves a weighing of the relations of the parties, the nature of the risks and the public interest in the proposed solution.”<sup>135</sup> Given the evidence that plaintiff had presented at trial, the court found “nothing” to show that the kind of criminal attack at issue “was a reasonably foreseeable risk in this factory setting against which” the landlord should have taken “additional security measures,” nor anything to indicate “what steps the landlord reasonably should have taken.”<sup>136</sup> It also distinguished the case from one involving “an apartment house or similar residential premises where the landlord had notice of a particular defect which required correction in order to minimize the probability of the occurrence of a criminal event.”<sup>137</sup> “In our view,” the court concluded, “to impose liability on the landlord of a factory building under the facts here presented would not be fair or just, nor would it serve the public interest . . . . [T]o hold otherwise would make the landlord an insurer of the safety of those utilizing its premises.”<sup>138</sup>

While negligent security claims about commercial building interior stairwells may be rare, the following two cases involving incidents in other parts of an office building provide some additional insight into how stairwell claims might fare. The plaintiff prevailed in the first case; the defendant prevailed in the second.

In the first case, the plaintiff was assaulted inside her office in a medical office building in Puerto Rico.<sup>139</sup> Affirming a jury verdict for the plaintiff, the court emphasized that (1) the building was located in a high crime area and many of the transactions in the building were cash transactions, (2) defendants had failed to implement a number of security recommendations made to the board, (3) there were virtually no security measures in place, and (4) that implementation of a few modest measures (a \$285 electronic lock, a \$45 buzzer, and a \$78.00 security camera, along with changing office practice to require locking the front door (and requiring patients to ring a buzzer) when no one was at the front desk, would have prevented the attack.<sup>140</sup>

In the second case, the plaintiff was assaulted when walking through the lobby of his office building at 1:30 a.m. on his way to a rest room.<sup>141</sup> Plaintiff speculated that the attacker, who fled and was not apprehended, may have entered the building when a service door was left open by the cleaning crew in the evening. Plaintiff closed the door himself at 10:00 p.m. Defendant provided security guards for the building from 5:00 p.m. to midnight, and the building was secured by an entry key pad system on all exterior doors except the service door.<sup>142</sup>

The court granted judgment for the defendant emphasizing that (1) the defendant did not know that employees in the building worked past midnight or that the cleaning crew left the service door open, and absent “notice

of the imminent probability of harm to the plaintiff, [was] . . . under no duty to provide security for the building past midnight,”<sup>143</sup> and (2) no other criminal assaults had occurred in the building at night.<sup>144</sup> The court dismissed as insufficient a prior attack on an employee by a co-employee that occurred in the women’s restroom at 1:30 p.m. in the afternoon.<sup>145</sup> The court concluded that the facts failed to show that the defendant had notice of an unreasonable risk of harm to the building employees, and that even if such notice could be shown, there was no evidence that improved security would have prevented the attack since the plaintiff could not prove how the assailant gained access to the building.<sup>146</sup>

In sum, while a negligent security claim can be asserted in the event of a criminal attack on an interior commercial or government building stairwell, case law involving such incidents is sparse. Nor have courts imposed any unusual or extra precaution requirements with respect to stairs. Rather, liability for a negligent security claim involving an interior, non-residential building stairwell would depend on the same types of case-specific factors utilized in commercial cases generally. Depending on the particular jurisdiction, such factors would likely include, among other things:

- (1) prior similar criminal attacks in the stairwell or other common areas in the building (or in nearby buildings or the neighborhood) of which the defendant was aware;
- (2) knowledge that security measures used to protect the stairwell (e.g. entry way security, key pass or electronic system, locks on back doors, lighting, etc.) were inadequate, defective, broken, or not reasonably maintained;
- (3) failure to implement adequate security precautions proportionate to the risk of injury in light of known prior criminal activity in the building or nearby area;
- (4) industry standards regarding building security in the neighborhood; and
- (5) proof that the assailant obtained access to the stairwell as a result of the security breach, and thus, absent the alleged security breach, the attack would not have occurred.

As the above discussion indicates, plaintiffs seeking to recover under a negligent security theory for an attack on a stairwell inside a building face substantial hurdles. Even under the more expansive approaches to foreseeability, it appears that plaintiffs must present fairly compelling facts in order to establish not only that the defendant breached a duty of care, but that the breach proximately caused the attack. Nor is there any indication in the case law that, absent unusual circumstances, maintaining accessible stairwells would likely be deemed a security breach.

#### **IV. PREMISES LIABILITY IN THE EVENT OF FIRE, EARTHQUAKES, OR SIMILAR NATURAL DISASTERS**

The common law tort duties discussed above also apply in cases of fire, earthquake or similar natural disaster. Thus, “[l]andowners and other possessors have a duty to take reasonable fire safety measures as part of their more generalized duty to maintain their properties in a reasonably safe condition.”<sup>147</sup>

In order to recover for an injury under these circumstances, a plaintiff must, of course, prove that her injury was proximately caused by the failure to take reasonable fire or other safety precautions. Such cases can arise, for example, when the defendant fails to have any fire protection devices, keeps the exit doors locked, fails to properly evacuate a building, “maintains his or her property in the condition of a tinderbox” without adequate precautions against the risk of fire,<sup>148</sup> or, in the case of an earthquake, fails to perform seismic retrofitting.<sup>149</sup>

Keeping stairwells locked or inaccessible is not a part of any reasonable fire safety protocol. The Uniform Fire Code does not require or in any way encourage the locking of interior stairwells.<sup>150</sup> Rather, it mandates that means of egress be “continuously maintained free of all obstructions or impediments to full instant use in the case of fire or other emergency,” and that any door assemblies preventing re-entry into the interior of the building meet strict requirements.<sup>151</sup>

Indeed, accessible stairwells may reduce fire-related injuries (and thus liability exposure) on three counts. First, as stairwell use increases, occupants become more familiar with the location of stairwells and emergency exits and can access them more quickly during a fire or other emergency. Second, stairwell accessibility provides more flexible escape routes during a fire. If, for example, someone encounters heavy smoke while descending the stairs, the ability to re-enter the building at a different floor level could help avoid injury or death.<sup>152</sup> Third, stairwell accessibility may improve the ability of firefighters, police or other first responders to reach a victim more quickly and avoid injury to themselves.

A case involving a high-rise building fire in Chicago illustrates the latter point. While firefighters usually cannot recover tort damages for injuries caused by a fire itself, in many states they can recover for injuries suffered because of negligence unrelated to the cause of the fire.<sup>153</sup> In the Chicago case, two firefighters died after a sequence of events, involving a locked door and a defective elevator, led them to fall into an open elevator shaft. The plaintiffs alleged in part that the defendants were negligent by keeping the stairwell doors to the 25<sup>th</sup> floor locked, which impeded rescue efforts and contributed to the deaths.<sup>154</sup> A jury verdict in favor of the plaintiffs was upheld.<sup>155</sup>

In sum, making stairwells accessible should not increase liability exposure in the event of fire or natural disaster. Building managers must simply ensure that they comply with the duty to keep stairwells reasonably maintained despite any increased use due to being generally open. Rather than increasing liability, stairwell accessibility may aid rescue workers and facilitate faster escapes, reducing injuries and potential liability.

## **V. PREMISES LIABILITY IN THE EVENT OF A MEDICAL EMERGENCY ON THE STAIRS**

Some property owners, managers, and tenants may worry that if they allow stairwell use, they may be liable under tort law if someone suffers a heart attack or stroke while walking up or down the stairs. Absent unusual circumstances, however, this is highly unlikely under general tort law principles. Notably, no cases involving tort recovery for health incidents related to stair use have been identified.

First, making a stairwell accessible does not alone exhibit any lack of ordinary or reasonable care. Even if the heart attack or stroke occurred in a stairwell, that alone does not demonstrate any negligence.

Second, absent proof that any alleged negligent conduct *caused* the heart attack or stroke, there is no tort liability.

Third, tort law requires plaintiffs to accept responsibility for injuries arising from a risk they voluntarily choose to assume.<sup>156</sup> Thus, plaintiffs who voluntarily choose to use the stairwell and then suffer an injury because of overexertion will likely be found to have “assumed the risk.” Accordingly, they would likely be found either partly or fully at fault and thus unable to recover (or subject to a reduced recovery). Of course, if the person suffering the heart attack is an employee, she or he may be eligible for workers’ compensation benefits, even if tort damages are unavailable.<sup>157</sup>

Similarly, any claim that an injury was exacerbated because the plaintiff was discovered less quickly than they might have been had travel been by elevator is unlikely to succeed under tort law principles. Again, a

plaintiff who voluntarily chooses to go alone to a less populated area of a building assumes a risk of being discovered more slowly in the event of a medical emergency. Furthermore, if stairwells are opened and their use encouraged, they are likely to be much more populated, and thus any disparity in discovery times between stairwells and elevators would likely be reduced or eliminated.

## **VI. PREMISES LIABILITY FOR ENCOURAGING THE USE OF STAIRS**

In order to maximize the benefits of accessible stairwells, some property owners, managers, or tenants may want to actively encourage stairwell use through motivational signs or special initiatives.<sup>1</sup> They may be concerned, however, that such encouragement could, in the event of a stairwell injury, be used to establish liability for the injury. Absent unusual circumstances, however, the fact of encouragement is very unlikely to be the source of any premises liability.

First, as discussed in Section V (Premises Liability in the Event of a Medical Emergency on the Stairs), simply making a stairwell accessible does not, by itself, exhibit any lack of ordinary or reasonable care. Similarly, simply encouraging the use of an accessible stairwell through motivational signage or initiatives does not demonstrate a lack of ordinary or reasonable care.

Whether premises liability exists will depend on whether there is any underlying negligence that caused the injury, *not* whether there was encouragement to use the stairs. Assume, for example, that ordinary precautions have been taken to keep the stairwell reasonably maintained and safe, and thus there is no negligent conduct. If an injury nonetheless occurs, the mere fact that stairwell use was encouraged could not independently form a basis for liability. Notably, no reported cases have been identified that even attempted to base liability on such a theory.

Now assume that such precautions had not been taken and thus there was already underlying negligence, say for failing to repair a broken railing or warn about a known danger within a reasonable time. The fact that stairwell use was actively encouraged under these circumstances could potentially be cited as *additional* evidence of negligence, but it could not form the basis of a negligence case by itself.

Further, encouragement is just a form of invitation; it does not require anyone to use the stairs. Thus, the principles of assumed risk, discussed in Section V above, would still apply in the case of a medically induced injury.

In sum, encouragement to use the stairs should not, absent unusual circumstances, create any additional premises liability for property owners, managers or tenants.

## **VII. EFFECT OF STAIRWELL ACCESSIBILITY ON OVERALL RISK MANAGEMENT**

As with any change in operation, an increase in stairwell use involves both risks and benefits. A review of both, however, suggests that the benefits may significantly outweigh the risks.

### **A. Risks**

The risk associated with increased stairwell use is that there will be a corresponding increase in stairwell-related injuries. While the number of stairwell-related injuries could potentially increase if more people use the stairs, the degree of increased risk is likely to be small.

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<sup>1</sup> See *supra* notes 6 and 7.

First, so long as basic stairwell safety and maintenance practices are followed, any increased risk of accidental injuries will likely be minimized. Kaiser Permanente, for example, has not experienced any increase in stairwell accidents in the two years since it began its program promoting stairwell use among roughly 55,000 employees in Southern California.<sup>158</sup> In addition, in areas where crime is an issue, security concerns can often be addressed through a system that limits access to interior stairwells to employees or people provided with keys, electronic I.D. cards, or security codes.<sup>159</sup> Moreover, fears regarding increased health incidents may also be overstated. According to the Public Health Agency of Canada, building managers need not “be concerned that people will be more susceptible to having a heart attack on the stairs” if stairway use is promoted. Rather, “through gradual increase of exercise, users will decrease the likelihood of heart attacks. Today, building occupants who could be called upon to use the stairway in an emergency situation may be more at risk from sudden, fast exertion on the stairway than they are from the hazard they are trying to escape. [Programs promoting stairway use] allow[] participants to reduce their risk of heart attacks while familiarizing themselves with the emergency exits.”<sup>160</sup>

## **B. Benefits**

The benefits of increased stairwell use on overall risk management are often overlooked. The benefits are particularly significant for building owners, managers or tenants who (1) are also employers or (2) control or operate the alternative to stairs, namely elevators. While more study is needed to provide specific data, some considerations are discussed below.

### ***1. Work Force Benefits***

Improving employee health is associated with reduced absenteeism and an increased employee sense of well being, which in turn reduces employer costs.<sup>161</sup> Policies permitting or encouraging stairway use can provide one relatively low-cost vehicle for achieving these benefits. Canada has taken this approach with its “Active Living at Work” program, which includes stair use as a component.<sup>162</sup>

Kaiser Permanente in Southern California also reports a positive experience with its Stairwell to Health program. Begun in the spring of 2009, the program promotes stairwell use in 35 to 40 Kaiser hospitals and medical office buildings, which employ roughly 55,000 employees across Southern California.<sup>163</sup> While Kaiser has not clinically tracked health outcomes linked specifically to stairwell use, it believes that stairwell use is a factor which, along with other wellness initiatives, has led to improved employee health overall.<sup>164</sup> There has also been positive employee feedback about the stairwell project specifically.<sup>165</sup> Healthier employees may also reduce employers’ health care costs in the long run.

### ***2. Reduction in Exposure to Elevator Related Injuries***

Any increased stairwell use will generate a corresponding reduction in elevator use, thus reducing exposure to liability for elevator-related injuries. Such injuries typically arise from elevator malfunctions, including door malfunctions, misleveling with floors, elevator shaft defects, abrupt stops or plummets, and stalling between floors.<sup>166</sup> Criminal attacks can also occur in elevators.<sup>167</sup> Building owners often employ elevator maintenance companies, and so may not directly benefit from this reduced risk. However, as noted earlier, some jurisdictions impose a higher standard of care with respect to elevators than stairwells – in fact, the “highest degree of care, or a standard of care higher than ordinary or reasonable care” – and prohibit building owners and operators from delegating this duty to elevator maintenance companies.<sup>168</sup>

### ***3. Reduction in Fire and Emergency Related Injuries***

Increased familiarity with emergency exits and stairwells can reduce injuries and deaths in case of fire or other emergency. Easier stairwell access can also assist rescue efforts and reduce injuries to first responders.



#### ***4. Reduction in Electricity Costs***

To the extent that increased use of stairwells reduces the number of elevator trips, this may reduce building demands for electricity.<sup>169</sup>

#### ***5. Benefits to Stairwell Maintenance***

Whether or not interior stairwells are locked, property owners, managers, and tenants have a duty to maintain stairwells in a reasonably safe condition given that they may be used during fire drills, fires, or other emergencies. Increased usage of stairwells can assist in efforts to ensure that stairwells are properly maintained by serving as informal inspectors. “With many extra eyes climbing and descending the stairwells on a regular basis, problem such as burnt out light bulbs, debris, slippery surfaces, loose railings . . . and more, can be much more readily identified and repaired, thus reducing the likelihood of slips, trips and falls.”<sup>170</sup>

#### **Conclusion**

As explored throughout this memo, building owners, managers, and tenants have some risk of liability from injuries that occur in stairwells. Permitting and encouraging stairwell use will result in more traffic on stairwells, which may in turn increase the risk of stairwell-related injuries. However, accessible stairwells do not appear to pose a greater risk of liability than other common areas within a building.

Rather, our research reveals that although liability risks exist related to accidental injuries and injuries caused by criminal attacks, they can be avoided or minimized as long as building owners, managers, and tenants take fairly basic precautions. Moreover, injuries in stairwells due to fires or to medical emergencies are quite unlikely to lead to any liability at all as a result of increased access to stairwells.

As Kaiser Permanente’s experience reflects, any increased risk is likely to be minimal if reasonable safety and security precautions, already required by tort law, are followed. Further, this minimal risk is likely to be substantially outweighed by other benefits, such as healthier employees, reduced elevator-related injuries, reduced fire and rescue-worker related injuries, improved stairwell maintenance, and lower electrical usage.<sup>171</sup>

Every activity has risks associated with it, and it is important to consider both the risks and the benefits in deciding what steps to take. As long as reasonable, common-sense precautions are taken, opening stairwells to use by employees or the public will have significant benefits and is not likely to lead to any distinct or significant increase in risk for building owners, managers, or tenants.

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<sup>1</sup> Finklestein E, Trogon J, Cohen J, and Dietz W. “Annual Medical Spending Attributable to Obesity: Payer- and Service-Specific Estimates.” *Health Affairs*, 28(5), 2009: w822-w831; *see also* US Department of Health and Human Services, Office of the Surgeon General. *The Surgeon General’s Call to Action to Prevent and Decrease Overweight and Obesity*. 2001, [http://surgeongeneral.gov/topics/obesity/calltoaction/fact\\_adolescents.htm](http://surgeongeneral.gov/topics/obesity/calltoaction/fact_adolescents.htm); US Department of Health and Human Services, Centers for Disease Control and Prevention. *Preventing Obesity and Chronic Diseases Through Good Nutrition and Physical Activity*. 2005, [www.cdc.gov/nccdphp/publications/factsheets/Prevention/pdf/obesity.pdf](http://www.cdc.gov/nccdphp/publications/factsheets/Prevention/pdf/obesity.pdf).

<sup>2</sup> *See, e.g.*, Wellness Council of America, *Welcoa’s On-Line Bulletin for Your Family’s Safety: Step Up To Better Health . . . Take the Stairs!*, [www.fcps.edu/DHR/employees/benefits/wellness/pdfs/bs\\_v10\\_no1.pdf](http://www.fcps.edu/DHR/employees/benefits/wellness/pdfs/bs_v10_no1.pdf) (last visited Mar. 25, 2011) (“Taking the stairs burns more calories per minute than most other forms of physical activity. The average man will use about 150 calories in 10 minutes of stair climbing or about the amount used in a 20 minute brisk walk. Women will use slightly fewer calories . . . Even 2 flights of stairs climbed per day can lead to a 5.94 lb. weight loss over one year”); *see also* *Women’s Health*, “Take the Stairs.” Feb. 19, 2009, [www.womenshealthmag.com/fitness/benefits-of-using-the-stairs](http://www.womenshealthmag.com/fitness/benefits-of-using-the-stairs) (citing study published in *European Heart Journal* showing that 69 hospital employees who used stairs exclusively for 12 weeks increased their lung capacity 8.6 %, and reduced their body fat by 1.7%, blood pressure by 2.3%, and cholesterol by 3.9%); Simon H. “Stairs as Fitness Tool?” June 15, 2009, <http://consults.blogs.nytimes.com/2009/06/15/stairs-as-fitness-tool/>; Mansi I, Mansi N, Shaker H, et al. “Stair Design in the United States and Obesity: The Need for Change.” *Southern Medical Journal*, 102 (6): 610-614, 2009; Public Health Agency of Canada. *Stairway to Health: Benefits of Stairway to Health Programs*. 2007, [www.phac-aspc.gc.ca/sth-evs/english/benefits-eng.php](http://www.phac-aspc.gc.ca/sth-evs/english/benefits-eng.php).

<sup>3</sup> *See Step Up to Better Health . . . Take the Stairs!*, *supra* (studies show that participants who climbed more than 55 flights per week reduced their risk of mortality); *see also* “Stairs as Fitness Tool?” *supra* (citing Harvard Alumni Study finding that men who climb an average of “at least eight flights a day enjoy a 33 percent lower mortality rate than men who are sedentary . . . even better than the 22 percent lower death rate men earned by walking 1.3 miles a day.”).

<sup>4</sup> “Kaiser Permanente Employees Take the Stairwell to Health.” *Health Promotion Practitioner*, 19(6): 6-8, 2010 (no authors given) (comments of Andy Gallardo, Director of Fitness, Health Workforce, for Kaiser Permanente).

<sup>5</sup> Centers for Disease Control and Prevention. *Healthier Worksite Initiative: StairWell to Better Health*. 2010, [www.cdc.gov/nccdphp/dnpao/hwi/toolkits/stairwell/index.htm](http://www.cdc.gov/nccdphp/dnpao/hwi/toolkits/stairwell/index.htm).

<sup>6</sup> *Id.*; *see also* Wellness Councils of America, “StairWell to Health: How the Centers for Disease Control and Prevention rejuvenated stairwells to increase physical activity.” 2006, [www.welcoa.org/freeresources/pdf/stairwell.pdf](http://www.welcoa.org/freeresources/pdf/stairwell.pdf).

<sup>7</sup> *See, e.g.*, “Kaiser Permanente Employees Take the Stairwell to Health,” *supra* note 4, at 7 (Southern California Kaiser Permanente “stairway to health” program is designed to increase stairwell usage as an alternative to elevators by positive messaging and making the stairwells more attractive. Tracking data shows that during a promotion period, downstairs usage can double and upstairs usage can increase by up to 20%); *see also* Kaiser Permanente, “10,000 Steps Program,” <http://kp.10k-steps.com> (last visited April 7, 2011) (encouraging walking); Hawkins C, O’Garro M, and Wimsett K. “Engaging employers to develop healthy workplaces: the WorkWell initiative of Steps to a Healthier Washington in Thurston County.” *Prev. Chronic Dis.*, 6(2): 2009. Available at: [www.cdc.gov/pcd/issues/2009/apr/08\\_0209.htm](http://www.cdc.gov/pcd/issues/2009/apr/08_0209.htm).

<sup>8</sup> Robbins L. “Great Workout, Forget the View.” *New York Times*, Feb. 19, 2009 (a “common obstacle” in Manhattan office buildings since 9/11 is that stairwells are inaccessible except in an emergency).

<sup>9</sup> *See e.g.*, Public Health Agency of Canada. *Stairway to Health: Concerns of Building Managers*. 2007, [www.phac-aspc.gc.ca/sth-evs/english/risk\\_management-eng.php](http://www.phac-aspc.gc.ca/sth-evs/english/risk_management-eng.php) (discussing concerns of building managers that more people on the stairs will create more liability for slips and falls).

<sup>10</sup> The laws that govern liability for injuries on stairwells are state laws. As such, there can be significant variation between the states with respect to certain issues, and even within a state on occasion. It is beyond the scope of this memo to detail the laws of each state, or any individual state. Thus, this memo should not be relied on to evaluate the law of any particular state. Rather, it provides a national overview and, where relevant, notes significant variations in state approaches.

<sup>11</sup> Given the purpose of this memo, its scope is limited to a review of the law governing injuries on non-residential stairwells.

<sup>12</sup> *See, e.g.*, *Myrick v. Mastagni*, 185 Cal. App. 4th 1082, 1087 (Ct. App. 2010) (citing *Rowland v. Christian*, 69 Cal. 2d 108, 119 (1968)) (“The basic rule of tort liability for property owners is that an owner must use ordinary care in the management of his or her property to prevent injury to another. . . .”); *Title, Inc. v. Engineered Lubricants Co.*, 664 S.W.2d 556, 558 (Mo. Ct. App. 1983) (“The possessor of property must use and maintain it in such manner as not to create an unreasonable risk of harm

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to others....”) (citing Prosser W. *The Law of Torts* § 57 (1971)).

<sup>13</sup> Hursh R. “Liability of proprietor of store, office, or similar business premises for injury from fall due to defect in stairway.” 64 *A.L.R.2d* 398 § 3[a] (1959, updated weekly) (rule that proprietor of business premises must exercise ordinary care is “well established”).

<sup>14</sup> See 2 Dobbs D, *The Law of Torts* § 337 at 920, 923 (2001, updated 2010) (hereinafter Dobbs); *Gazo v. City of Stamford*, 765 A.2d 505, 512 (Conn. 2001) (commercial property owner equally liable with independent contractor for negligence of contractor). This non-delegation rule can extend to government property owners as well. See, e.g., *Miller v. State of New York*, 62 N.Y.2d 506, 508, 511 (1984).

<sup>15</sup> *Gazo*, 765 A.2d at 511 (emphasis in original) (noting that this rule applies in other jurisdictions as well, at 512); 2 Dobbs, *supra* note 14, § 337 at 923; but cf. *Camerlin v. Marshall*, 411 Mass. 394, 397 (1991) (holding that, unlike residential landlords, commercial landlords owe a duty of reasonable care only for conditions on premises under their control).

<sup>16</sup> See, e.g., *Nikolaidis v. La Terna Restaurant*, 40 A.D.3d 827, 827 (N.Y. App. Div. 2007) (out-of-possession commercial property owner not liable for injuries from fall on staircase “unless the owner has retained control over the premises or is contractually obligated to perform maintenance and repairs”). See also Massachusetts Continuing Legal Education. 2 *Massachusetts Tort Law Manual* § 17.3.5 (2009) (“Many jurisdictions . . . continue to base liability on control in commercial leases.”).

<sup>17</sup> See e.g., *General Elec. Co. v. Moritz*, 257 S.W.3d 211, 215 (Tex. 2008) (owner who relinquishes possession still has duty to warn of concealed defects).

<sup>18</sup> See note 15, *supra*.

<sup>19</sup> 28 U.S.C. §§ 1346, 2671-80.

<sup>20</sup> See 1 Dobbs, *supra* note 14, § 261 at 695-96.

<sup>21</sup> *Preston v. United States*, 624 F. Supp 523, 525 (E.D. Mo. 1986); see also *Hartzell v. United States*, 539 F.2d 65, 68 (10th Cir. 1976) (Colorado law governed FTCA suit by person who fell down stairs while leaving U.S. Air Force Academy football stadium).

<sup>22</sup> 28 U.S.C. § 2680(a); 1 Dobbs §§ 261-62 at 696-98.

<sup>23</sup> *Berkowitz v. United States*, 486 U.S. 531, 536-37 (1988) (internal quotation marks omitted).

<sup>24</sup> 1 Dobbs § 262 (2001 & Supp. 2010). See also *Whisnant v. United States*, 400 F.3d 1177, 1181 (9th Cir. 2005) (“[W]e have generally held that the *design* of a course of governmental action is shielded by the discretionary function exception, whereas the *implementation* of that course of action is not.” (emphasis in original)).

<sup>25</sup> See *O’Toole v. United States*, 295 F.3d 1029, 1035 (9th Cir. 2002) (“As has been noted by numerous courts, reconciling conflicting case law in [the discretionary function] area can be difficult.”).

<sup>26</sup> Federal courts have often found that a planning decision to allocate fewer resources to something that results in a defective or dangerous condition is considered a discretionary act that is protected by immunity. See, e.g., *Baum v. United States*, 986 F.2d 716 (4th Cir. 1993) (decision by federal agency to use certain materials in bridge project that resulted in allegedly unsafe guardrails was protected by immunity); *Hughes v. United States*, 110 F.3d 765 (11th Cir. 1997) (decisions by federal agency to provide allegedly inadequate lighting and security in parking lot were resource decisions and thus discretionary decisions protected by immunity). This view was not followed, however, in *O’Toole*, 295 F.3d 1029 (federal agency’s failure to allocate funds to irrigation system which then damaged nearby land was not a protected discretionary decision).

<sup>27</sup> 1 Dobbs § 262 at 702 & n.33. At least in the Ninth Circuit, this is true even if the lack of maintenance was due to a decision to forego maintenance for fiscal reasons. See *O’Toole*, 295 F.3d at 1036.

<sup>28</sup> For example, see Ariz. Rev. Stat. Ann. §12-820.01; Cal. Gov’t Code §820.2; Del. Code Ann. tit. 10 § 4001; Haw. Rev. Stat. §662-15; Kan. Stat. Ann. §75-6104; Nev. Rev. St. §41.032; Tex. Civ. Prac. & Rem. Code Ann. §101.056. For more information and a comprehensive list, see National Conference of State Legislatures. *State Sovereign Immunity and Tort Liability*. 2010, [www.ncsl.org/default.aspx?tabid=20628](http://www.ncsl.org/default.aspx?tabid=20628).

<sup>29</sup> The rationale behind this approach is that while the state should be immune from suit over activities that are truly

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governmental, when it engages in commercial activities, it should be subject to the same tort duties as apply to the private sector. However, many state courts have difficulty making this distinction in a consistent manner. *See, e.g., Kentucky Ctr. for the Arts v. Berns*, 801 S.W.2d 327, 328 (Ky. 1991) (determining when an entity can be sued as if it were a private entity and when the defense of sovereign immunity applies has been “historically troublesome . . . resulting in diverse decisions difficult to reconcile”). In *Kentucky Center for the Arts*, the court found the state art center not immune from liability in a case involving an unstable stair railing because the art center was not carrying out a function integral to state government. *Id.* at 332.

<sup>30</sup> In some states, specific immunities will be waived to the extent that the public entity is covered by liability insurance. 1 Dobbs, *supra* note 14, § 268 at 717 & n.17.

<sup>31</sup> *See e.g.,* Me. Rev. Stat. Ann. Tit. 14, § 8104-A; Mich. Comp. Laws Ann. § 691.1406. These statutes typically do not waive immunity from liability arising from the negligence of people working in the buildings, only from liability arising from the dangerous defect or condition itself. Some states with a public building waiver, however, include an exception to the waiver for discretionary activities, such as decisions about the design of the building, which may limit the impact of the waiver. *See, e.g.,* Me. Rev. Stat. Ann. Tit. 14 § 8104-A(2).

<sup>32</sup> 1 Dobbs, *supra* note 14, §§ 269-270.

<sup>33</sup> Lee J & Lindahl B. 4 *Modern Tort Law: Liability and Litigation* § 39:2 (2d ed. 2010) (hereinafter *MTLLL*).

<sup>34</sup> *Id.* § 39:5. The traditional tort duty owed to persons classified as employees has been superseded by workers’ compensation statutes. *See* section 2(E), below page 9.

<sup>35</sup> *MTLLL* § 39:2.

<sup>36</sup> *Id.*

<sup>37</sup> 1 Dobbs § 232 at 593 & n.13.

<sup>38</sup> *See Rowland v. Christian*, 69 Cal. 2d 108 (1968).

<sup>39</sup> Jurisdictions taking this approach often conclude that the requirement of “foreseeability” provides adequate protection against unfair liability to trespassers. *MTLLL*, *supra* note 33, §§ 39:21 n.2, 39:22 & n.12; *Gulbis V.* “Modern status of rules conditioning landowner’s liability upon status of injured party as invitee, licensee, or trespasser.” 22 *A.L.R.*4th 294 § 2[a] (1983, updated weekly).

<sup>40</sup> 22 *A.L.R.*4th 294, *supra* note 39, § 2[a]; *see also* *MTLLL*, *supra* note 33, § 39:21; *Pinnell v. Bates*, 838 So. 2d 198, 200-01 (Miss. 2002) (identifying states that have refused to abrogate the traditional common law distinctions).

<sup>41</sup> 25 Del. Code § 1501 (“No person who enters onto private residential or farm premises owned or occupied by another person, either as a guest without payment or as a trespasser, shall have a cause of action against the owner or occupier of such premises for any injuries or damages sustained by such person while on the premises unless such accident was intentional on the part of the owner or occupier or was caused by the wilful or wanton disregard of the rights of others.”)

<sup>42</sup> “Workers’ compensation as exclusive remedy,” 1 *Modern Workers Compensation* § 102:1 (2011); *see also* Eskenazi A. “Overview of Workers’ Compensation Law,” *Cal. Civ. Prac. Workers’ Compensation* § 15:1 (2010). As with any general rule, there are exceptions. *See, e.g., Patton v. Simone*, 1992 WL 183051, at \*5 (Del. Super. Ct. July 16, 1992) (unpublished) (allowing case to go to trial against landowner/employer despite workers’ compensation exclusivity).

<sup>43</sup> 1 *Modern Workers Compensation* § 102:1.

<sup>44</sup> *See generally* 3 Harper F, James F, and Gray O. *Harper, James and Gray on Torts* § 10.2 at 72-73 (3d ed. 2007); *see also* Eskenazi A. “Tort Actions Against Third Parties,” *Cal. Civ. Prac. Workers’ Compensation* §§ 16:1-16:8. Employer/lessees should note, however, that if the commercial lease provides that the employer will indemnify the lessor for injuries relating to stairways, elevators, or other common areas, some jurisdictions may find that such provision is enforceable even without an express waiver of worker’s compensation immunity. *See, e.g., Szymanski-Gallagher v. Chestnut Realty Co.*, 597 A.2d 1225, 1226-27 (Pa. Super. Ct. 1991).

<sup>45</sup> 64 *A.L.R.*2d 398, *supra* note 13, § 3[a].

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<sup>46</sup> 4 *MTLLL*, *supra* note 33, § 39:21, *see generally* § 3:6.

<sup>47</sup> 4 *MTLLL* § 39:21; *Peralta v. Henriquez*, 100 N.Y.2d 139, 144 (2003) (whether property owner met duty of care by acting as reasonable person in maintaining property in reasonably safe condition depended upon all the circumstances, including likelihood of injury to others, seriousness of injury and burden of avoiding risk).

<sup>48</sup> *See, e.g., Myrick*, 185 Cal. App. 4th at 1087 (“The test is whether a [property] owner has acted as a reasonable person in view of the probability of injury....”); 4 *MTLLL* § 39:21; Stewart M, Warner R, and Portman J. *Every Landlord’s Legal Guide*. Nolo Press, ch. 10 at 225-26 (10th ed. 2010) (hereinafter Nolo Press).

<sup>49</sup> 1 Dobbs, *supra* note 14, § 134 at 315-16; 13 Am. Jur. 2d *Buildings* § 40 (2010) (negligence per se in stairway context); *Burns v. Frontier II Properties, Ltd. P’ship*, 106 S.W.3d. 1, 3-4 (Mo. Ct. App. 2003). A few courts have rejected the “negligence per se” rule and treat statutory violations simply as evidence of negligence. *See* 13 Am. Jur. 2d *Buildings* § 40 n.6 (cases rejecting negligence per se in the stairwell context).

<sup>50</sup> In *Burns*, for example, the plaintiff sued a commercial building owner after falling down the garage steps. Although there was negligence per se based on a violation of a law governing the height of the riser between the steps, the jury still found in favor of the defendant. *Burns*, 106 S.W.3d at 3.

<sup>51</sup> 1 Dobbs § 134 at 316-17.

<sup>52</sup> *Myrick*, 185 Cal. App. 4th at 1087, 1090 (upholding jury verdict for plaintiff although statutory deadline for completing seismic retrofit of building had not yet expired).

<sup>53</sup> *Id.* at 1087.

<sup>54</sup> Some states also have “safe place to work” statutes that require employers to use reasonable care to provide their employees a safe place to work. *See* 2 Am. Jur. *Proof of Facts* 2d 517 §§ 2, 8 (1974, updated 2010). (The Federal Employer’s Liability Act, 45 U.S.C. §§ 51 *et seq.*, imposes a comparable duty on railroads.) Claims under safe place to work statutes may, however, be subject to workers’ compensation exclusivity provisions, depending on the jurisdiction and the specific facts of the case. 2 Am. Jur. 2d *Proof of Facts* 517 § 2 & n.6; *Ex Parte Progress Rail Serv’s Corp. v. Progress Rail Serv’s Corp. et al.*, 869 So. 2d 459 (Ala. 2003) (exclusivity provisions of workers’ compensation law precluded tort claims for breach of employer’s duty to provide safe place to work); *Catalano v. Lorain*, 161 Ohio App. 3d 841 (Ct. App. 2005) (same result); *see also* section IIE, above page 9, discussing Workers’ Compensation.

<sup>55</sup> Lehr L, 1 *Premises Liability* 3d § 2:12 (2010); *see also Johns Hopkins Hosp. v. Correia*, 921 A.2d 837 (Md. Ct. Spec. App. 2007).

<sup>56</sup> Hursh R. “Liability of proprietor of store, office, or similar business premises for fall due to improper lighting of steps or stairway.” 66 *A.L.R.2d* 443 § 2 (1959, updated weekly).

<sup>57</sup> 24 Am. Jur. 2d *Proof of Facts* 385 § 11 & n.93 (1980, updated 2010); 66 *A.L.R.2d* 443 § 2.

<sup>58</sup> 66 *A.L.R.2d* 443 §§ 5[a]-[b], 6.

<sup>59</sup> *Id.* §§ 2, 7[b].

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* § 2; *see, e.g. Safeway, Inc. v. Johnson*, 311 F.2d 387 (5th Cir. 1962) (upholding verdict for plaintiff where combined effect of inadequate lighting and faulty handrail created a dangerous condition).

<sup>62</sup> *See* 62A Am. Jur. 2d *Premises Liability* § 542 (2010).

<sup>63</sup> *Weisenthal v. Pickman*, 545 N.Y.S.2d 369 (N.Y. App. Div. 1989).

<sup>64</sup> *Id.* at 370-372.

<sup>65</sup> *Soto v. Michael’s New York, Inc.*, 723 N.Y.S.2d 454 (N.Y. App. Div. 2001).

<sup>66</sup> *Id.* at 455.

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<sup>67</sup> *Id.*

<sup>68</sup> *See, e.g., Cintron v. New York City Transit Authority*, 908 N.Y.S.2d 190, 192 (N.Y. App. Div. 2010) (suit against Port Authority dismissed where plaintiff claimed only that stairs were “slippery and appeared a little bit worn,” there was no substance on the stairs, and photographs of the stairs at the time of the accident revealed no “trap or major defect”).

<sup>69</sup> *Id.*

<sup>70</sup> 3 *Premises Liability* 3d, *supra* note 55, § 50:1 & nn.18-27; 1 *Premises Liability* 3d § 2:31.

<sup>71</sup> 3 *Premises Liability* 3d § 50:2.

<sup>72</sup> 1 *Premises Liability* 3d § 2:31.

<sup>73</sup> 24 Am. Jur. 2d *Proof of Facts* 385 § 4 & nn.36-37 (1980, updated 2010) (discussing regulations governing lighting).

<sup>74</sup> 3 *Premises Liability* 3d, *supra* note 55, § 50:2.

<sup>75</sup> *See Spencer v. Little Brownie Properties, Inc.*, 416 S.E.2d 851, 852 (Ga. Ct. App. 1992).

<sup>76</sup> *See* 1 Dobbs, *supra* note 13, §§ 199-201; Nolo Press, *supra* note 48, ch. 10 at 230-31.

<sup>77</sup> *See* 1 Dobbs § 201 at 504-05.

<sup>78</sup> *Id.* § 201 at 505 & nn.15-18.

<sup>79</sup> *Id.* § 199. The four states of Alabama, Maryland, North Carolina and Virginia still bar all recovery if the plaintiff has any fault. 1 Dobbs § 201 at 504. The District of Columbia also follows this approach. *Burton v. United States*, 668 F. Supp. 2d 86, 107 (D.D.C. 2009), *appeal dismissed*, 09-5409, 2010 WL 1633172 (D.C. Cir. 2010); *Elam v. Ethical Prescription Pharmacy, Inc.*, 422 A.2d 1288, 1289 n.2 (D.C. 1980) (“In this jurisdiction, the contributory negligence of the plaintiff is a complete bar to recovery.”).

<sup>80</sup> In *Lieberman v. Bliss-Doris Realty Associates, L.P.*, 819 A.2d 666, 668-69 (R.I. 2003), for example, a plaintiff fell walking down an interior fourth floor stairwell in an office building when someone turned off the lights after she was part-way down. The evidence showed, however, that 1) the plaintiff could have turned on a light at the fourth floor landing but chose to rely on a light from the bottom floor, 2) the plaintiff did not try calling for help when the light suddenly went out but chose to proceed, and 3) the lack of any other defect in the stairwell. The jury found for the defendant.

<sup>81</sup> 24 Am. Jur. 2d *Proof of Facts* 385 § 11.

<sup>82</sup> 24 Am. Jur. 2d *Proof of Facts* 385 § 1 & n.6.

<sup>83</sup> 3 *Premises Liability* 3d § 50:2 & n.8.

<sup>84</sup> *See e.g., O'Sullivan v. Shaw*, 726 N.E.2d 951, 956, 959 (Mass. 2000) (finding that open and obvious danger of diving into a shallow pool obviated defendants of the duty to warn); *but cf. Michalski v. Home Depot, Inc.*, 225 F.3d 113, 122 (2d Cir. 2000) (interpreting New York law) (appellate court found that the open and obvious presence of a forklift and palette in the shopping aisle did not preclude plaintiff's recovery after she tripped over it).

<sup>85</sup> 1 Dobbs, *supra* note 14, § 188 at 465 & n.4.

<sup>86</sup> *Id.* at 465.

<sup>87</sup> Fed. R. Evid. 407.

<sup>88</sup> *E.g.*, Cal. Evid. Code § 1151; Fleming T. “Admissibility of Evidence of Repairs, Change of Conditions, Or Precautions Taken After Accident—Modern State Cases.” 15 *A.L.R.*5th 119 (1993, updated weekly) (“[a]lmost all American jurisdictions”).

<sup>89</sup> R.I. R. Evid. 407; Fielding B. “Note: Rhode Island's 407 Subsequent Remedial Measure Exception: Why It Informs What Goes Around Comes Around In Restatements (Second) & (Third) Of Torts, and A Modest Proposal,” 14 *Roger Williams U. L. Rev.* 298, 300-301 (2009) (fifty-state survey).

<sup>90</sup> *See, e.g., Bliss-Doris Realty*, 819 A.2d at 672.

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> Bublick E. “Upside Down? Terrorists, Proprietors, and Civil Responsibility for Crime Preventions in the Post-9/11 Tort-Reform World.” 41 *Loy. L.A. L. Rev.* 1483, 1506, 2008. Available at: <http://llr.lls.edu/docs/41-4bublick.pdf>.

<sup>94</sup> *See generally* Feezer L. “Intervening Crime and Liability for Negligence.” 24 *Minn. L. Rev.* 635, 641-43 (1939-1940).

<sup>95</sup> Bublick, *supra* note 93, at 1508-11.

<sup>96</sup> *Id.* at 1511.

<sup>97</sup> *See, e.g., Whittaker v. Saraceno*, 635 N.E.2d 1185, 1187-88 (Mass. 1994) (recognizing duty of commercial landlords to take reasonable precautions to prevent foreseeable criminal acts of third parties in common areas, although the crime at issue was not reasonably foreseeable). Some courts have stated that commercial landlords owe their tenants a lower duty of care in the area of security than that owed by residential landlords because “commercial landlord[s] do[] not have a special relationship with [their] tenants.” *Id.* at 1187; *see also Kwaitkowski v. Superior Trading Co.*, 123 Cal. App. 3d 324, 328, 333 (Ct. App. 1981) (finding that defendant landlord who failed to fix defective lock despite knowledge of past similar crimes in building common area owed duty to tenant attacked in apartment lobby, in part due to the special landlord-tenant relationship).

<sup>98</sup> 2 *Premises Liability* 3d, *supra* note 55, § 44:25. The majority view is that employers have a duty to use “reasonable” care to protect employees at work from “reasonably foreseeable criminal acts of third parties.” A minority view rejects such a duty on the ground that the employment relationship is “not the type of special relationship that gives rise to a duty to protect against foreseeable criminal acts by third person.” *Id.* In either case, however, the employer can still be liable if it negligently increases the risk of criminal attack or the risk of injury during an attack (e.g. by failing to call the police). *Id.*

<sup>99</sup> *See, e.g., Kwaitkowski.*, 123 Cal. App. 3d 324 (apartment building lobby); *Whittaker*, 635 N.E.2d 1185 (commercial underground garage).

<sup>100</sup> Bublick, *supra* note 93, at 1512.

<sup>101</sup> Steiner R. “Policy Oscillation in California’s Law of Premises Liability.” 39 *McGeorge L. Rev.* 131, 132-135, 2008 (“[C]ase law developments in California and other states suggests [sic] that plaintiffs in premises [security] liability cases face a patchwork quilt of case law in which virtually no issue is settled...” (internal quotation marks omitted)); Merriam D. “Homeland Security and Premises Liability.” 21 No. 4 *Practical Real Estate Lawyer* 15, \*5, 2005 (star page numbers not available as of April 11, 2011; page break numbers used in substitution) (“Jurisdictions vary substantially on when a duty is owed [in negligent security cases] and on what is required to adequately discharge that duty....”).

<sup>102</sup> Kaminsky A. *A Complete Guide to Premises Security Litigation*, 186 (3d ed. 2008).

<sup>103</sup> Steiner, *supra* note 101, at 133-35 (*see* analysis of trends in California – from narrow view of negligent security claims to broader view and back to narrower approach).

<sup>104</sup> Kaminsky, *supra* note 102, at 31 (noting recent expansion of obligations on landlords generally to provide security); Steiner, *supra* note 101, at 135.

<sup>105</sup> Currently named the American Association for Justice (“AAJ”).

<sup>106</sup> Steiner, *supra* note 101, at 135.

<sup>107</sup> Kaminsky, *supra* note 102, at 31, 122 (“even with a somewhat relaxed standard of proof on certain important issues, premises security cases present considerable challenges at trial for plaintiffs”).

<sup>108</sup> *Id.* at 31-32.

<sup>109</sup> *Id.* at 186-87 (based on review of hundreds of negligent security decisions, “[t]he majority of jurisdictions seem to suggest that a landowner may only be held responsible [in negligent security cases] . . . where the landowner had reason to know of the likelihood of criminal activity being committed on his or her property, failed to provide a reasonable level of security under the existing circumstance, and the failure [to provide such security] . . . was a prominent factor in causing the underlying crime”).

<sup>110</sup> *See generally* Clarkson W. “Premises Liability in South Carolina: Should you Expect Criminal Activity on your Property?”

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3 *Charleston L. Rev.* 619, 2009.

<sup>111</sup> *Id.* at 627 & n.58.

<sup>112</sup> *Id.* at 627 & n.63.

<sup>113</sup> Montgomery B & Nahrstadt B. “A Primer for the Entertainment Community: Legal and Practical Issues About Venue Safety--What You Should Know.” 3 *VA. Sports & Ent. L.J.* 257, 270 & n.73, 2004.

<sup>114</sup> Clarkson, *supra* note 110, at 627 & n.65.

<sup>115</sup> Merriam, *supra* note 101, at \*8; Clarkson at 625-26.

<sup>116</sup> Steiner, *supra* note 101, at 134-35; Kaminsky, *supra* note 102, at 185.

<sup>117</sup> For a sampling of states that follow each approach (as of 2004), see Montgomery & Nahrstadt, *supra* note 113, at 269-270 nn.70-73. In some states it may be ambiguous as to which test is being used. See Clarkson, *supra* note 110, at 620 n.11.

<sup>118</sup> Merriam, *supra* note 101, at \*\*5-6; 2 *Premises Liability* 3d, *supra* note 55, § 43:16 (“While there may be circumstances where the hiring of security guards will be required to satisfy a landowner’s duty of care, such action will rarely, if ever, be found to be a minimal burden, so that a high degree of foreseeability is required in order to find that the scope of a landowner’s duty of care includes the hiring of security guards. This high degree of foreseeability can rarely, if ever, be shown in the absence of prior similar incidents of violent crime on the landowner’s premises.” (footnotes omitted)).

<sup>119</sup> Merriam, *supra* note 101, at \*6.

<sup>120</sup> See *Funchess v. Cecil Newman Corp.*, 632 N.W.2d 666, 674-75 (Minn. 2001).

<sup>121</sup> Merriam, *supra* note 101, at \*6.

<sup>122</sup> *Id.*

<sup>123</sup> See, e.g., *Allmond v. Koger Properties, Inc.*, 1994 WL 706323 \*1, \*4 (Tenn. Ct. App. 1994) (plaintiff could not show that defendant building owner and operator’s failure to provide better security proximately caused plaintiff’s injuries when he was attacked in the building lobby).

<sup>124</sup> Kaminsky, *supra* note 102, at 187.

<sup>125</sup> See, e.g., *Allmond*, 1994 WL 706323 at \*4.

<sup>126</sup> *Id.*; see also *Gomez v. New York City Hous. Auth.*, 672 N.Y.S.2d 676 (N.Y. App. Div. 1998) (rev’d in *Burgos v. Aqueduct Realty Corp.*, 92 N.Y.2d 544 (1998)). *Gomez* illustrates how, even in the course of a single case, the ultimate outcome on this issue can be hard to predict. In *Gomez*, the assailant followed the plaintiff up the large apartment complex building elevator, then exited on her floor and the attack followed. (See *Gomez by Gomez v. New York City Hous. Auth.*, 636 N.Y.S.2d 271, 273 (N.Y. App. Div. 1995) for a complete statement of the facts.) According to the plaintiff, the assailant (who was never apprehended) entered through a rear door that had been broken for some time, notwithstanding the fact that other violent crimes had occurred in the building. The defendant argued that this security breach was not, however, the proximate cause of the attack because there was evidence that the assailant had been afforded voluntary entrance through the front door as either a building resident or the guest of a resident. The first trial ended in a verdict for defendant. A retrial ended in a verdict for the plaintiff. The trial court, however, set aside the verdict on the ground that there was insufficient evidence to show that the attacker obtained entry through the defective rear door. This decision was upheld on appeal but then reversed by state’s highest court. See *Kaminsky*, *supra* note 102, at 187-88 (discussing *Gomez*).

<sup>127</sup> See, e.g., Bateman T & Thomas S. “Landlord’s liability for failure to protect tenant from criminal acts of third person.” 43 *A.L.R.5th* 207 § 82 (1996, updated weekly) (reviewing cases brought by commercial tenants against landlords over criminal attacks in property common areas). While there are crimes that occur on stairs in residential buildings, e.g. *Gomez*, 636 N.Y.S.2d 271, this memorandum focuses on stairwell incidents on commercial property.

<sup>128</sup> 43 *A.L.R.5th* 207 (“Landlord’s liability for failure to protect tenant from criminal acts of third person,” spanning roughly 316 pages of text).



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<sup>129</sup> *Czech v. Aspen Indus. Ctr.*, 368 A.2d 938, 939 (N.J. Super. Ct. App. Div. 1976).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* (citations omitted).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* (citation omitted).

<sup>138</sup> *Id.* at 939-40.

<sup>139</sup> *Rodriguez-Quinones v. Jimenez & Ruiz, S.E.*, 402 F.3d 251, 253 (1st Cir. 2005).

<sup>140</sup> *Id.* at 254-56.

<sup>141</sup> *Allmond*, 1994 WL 706323 at \*1.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at \*3.

<sup>144</sup> *Id.* at \*4.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> Merriam, *supra* note 101, at \*7 (citing *In re September 11 Litig.*, 280 F. Supp. 2d 279, 299, (S.D.N.Y. 2003)); *Custom Craft Tile, Inc.*, 664 S.W.2d at 558 (“defendant may be held liable for the spread of fire caused by the premises being maintained in a negligent condition”).

<sup>148</sup> 1 *Premises Liability* 3d, *supra* note 55, § 2:19.

<sup>149</sup> See, e.g., *Myrick*, 185 Cal. App. 4th at 1084.

<sup>150</sup> The Uniform Fire Code, which is promulgated and updated frequently by the National Fire Protection Association (“NFPA”), “is basically an industry standard [and] is widely adopted by counties, cities, and other local entities.” Zitter J. “Validity, Construction, and Application of the Uniform Fire Code.” 46 *A.L.R.5th* 479 § 2[a] (1997, updated weekly).

<sup>151</sup> See National Fire Protection Association. *1 Fire Code* (2009 ed.), §§ 14.4, 14.5.2.7, 14.5.2.7.1.

<sup>152</sup> See [LawyersandSettlements.com](http://LawyersandSettlements.com), *Chicago Fire Settlement Reaches \$100 Million* (May 1, 2008), [www.lawyersandsettlements.com/features/wrongful\\_death/wrongful-death-chicago-admin-building-fire.html](http://www.lawyersandsettlements.com/features/wrongful_death/wrongful-death-chicago-admin-building-fire.html) (describing lawsuits resulting from locked stairwells that led six office workers to die in smoke-filled stairwells).

<sup>153</sup> This doctrine is usually referred to as the “firefighter’s rule” or “professional rescuer doctrine.” See 4 *MTLLL* at § 39:23 (first responder cannot, as a general rule, recover tort damages if injuries are caused by the very wrong that initially required the presence of the responder and subjected him or her to harm). See also *McShane v. Chicago Inv. Corp.*, 601 N.E.2d 1238, 1243 (Ill. App. Ct. 1992) (“[T]he fireman’s rule has been refined to mean that when a fireman enters upon a person’s property to fight a fire, he assumes the risk of being injured by causes related to the fire. He does not assume, however, the risk of being injured by causes unrelated to the fire, *i.e.*, causes that might be faced by an ordinary citizen entering upon the property. [citation omitted]”). Various exceptions apply and the doctrine has been “abandoned or limited in a number of jurisdictions.” *MTLLL* § 39:23 & n.8.10.

<sup>154</sup> *McShane*, 601 N.E.2d at 1248 (“[P]laintiffs argued that the locked stairwell door on the 25th floor was a safety hazard and that because the door was locked the firefighters were forced to seek other means of investigating the fire. Therefore, the

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locked stairwell door put all of the subsequent events into motion, thereby causing the injuries to occur.”).

<sup>155</sup> *Id.* at 1242. (The verdict was reduced by 50 percent due to the firefighters’ contributory negligence. *Id.* at 1249.)

<sup>156</sup> Historically, the doctrine of “assumed risk” was considered a separate defense. In most states, today, however, the issue of assumed risk has been absorbed into the analysis of either comparative fault, the existence of a duty, or whether a duty was breached. 1 Dobbs, *supra* note 14, § 211 (Assumed Risk).

<sup>157</sup> Compare, e.g., *Royal Ins. Co. of America v. Goad*, 677 S.W.2d 795, 797 (Tex. App. 1984) (upholding workers’ compensation award to employee who suffered heart attack after walking 300 yards from car to General Motors factory and then up two flights of stairs to work station), with *Black v. Barnell County*, 134 S.E.2d 753, 755 (S.C. 1964) (denying workers’ compensation benefits to a jailor who suffered heart attack the morning after climbing jailhouse stairs because the heart attack was not “induced by unexpected strain or over-exertion in the performance of the duties of his employment, or by unusual and extraordinary conditions in the employment”).

<sup>158</sup> Telephone Interview with Andy Gallardo, Director of Fitness, Health Workforce, Southern California Kaiser Permanente (March 4, 2011).

<sup>159</sup> *Id.* Kaiser employees in Southern California access interior stairwells with an employee I.D. mechanism. As far as Mr. Gallardo is aware, there have been no injuries -- accidental or criminal -- related to the Stairwell to Health program.

<sup>160</sup> See Public Health Agency of Canada. *Stairway to Health: Concerns of Building Managers*. 2007, [www.phac-aspc.gc.ca/sthevs/english/risk\\_management-eng.php](http://www.phac-aspc.gc.ca/sthevs/english/risk_management-eng.php). In addition, there is evidence that regular exercise also helps reduce the risk of falling among older adults. Centers for Disease Control and Prevention. *The Benefits of Physical Activity*. 2011, [www.cdc.gov/physicalactivity/everyone/health/index.html](http://www.cdc.gov/physicalactivity/everyone/health/index.html) (“Research shows that doing balance and muscle-strengthening activities each week along with moderate-intensity aerobic activity, like brisk walking, can help reduce [older adults’] risk of falling.”).

<sup>161</sup> See Public Health Agency of Canada and the Canadian Council for Health and Active Living at Work. *The Business Case for Active Living at Work*. 2007, [www.phac-aspc.gc.ca/alw-vat/index-eng.php](http://www.phac-aspc.gc.ca/alw-vat/index-eng.php) (click “download the presentation”). According to the site, available research and anecdotal evidence indicate that in Canada, the cost of absenteeism exceeds 15 billion dollars a year; 16 million adult Canadians spend half of their waking hours at work; Canadians need help in making active, easy choices; stress-related illness is on the increase; most adults hold strong beliefs that physical activity will reduce stress; and enabling physical activity can make a difference. *Id.* at 8. Making “stair climbing accessible and post[ing] highly visible signs” is identified as a “low cost solution[.]” *Id.* at 17. Research also indicates that corporate wellness programs reduce workplace turnover and absenteeism rates. *Id.* at 16.

<sup>162</sup> *Id.* at 11.

<sup>163</sup> Telephone Interview with Andy Gallardo, Director of Fitness, Health Workforce, Southern California Kaiser Permanente (March 4, 2011).

<sup>164</sup> “Kaiser Permanente Employees Take the Stairwell to Health,” *supra* note 4, at 7.

<sup>165</sup> *Id.*

<sup>166</sup> See generally White P. “Liability of Building Owner, Lessee, or Manager for Injury or Death Resulting from Use of Automatic Passenger Elevator.” 99 *A.L.R.*5th 141 (2002, updated weekly); 1 *Premises Liability* 3d §§ 2:12-2:16; 7 *Am. Jur. Trials* § 377 (1964, updated 2010) (“Elevator Accident Cases”).

<sup>167</sup> See *Doe v. Grosvenor Properties (Hawaii) Ltd.*, 829 P.2d 512, 514 (1992) (office employee robbed and sexually assaulted in office building elevator; no liability found given lack of history of problems in the building).

<sup>168</sup> 1 *Premises Liability* 3d § 2:12; *Johns Hopkins Hosp. v. Correia*, 921 A.2d at 849-850.

<sup>169</sup> See “Step it Up New York – City Wants You Taking the Stairs,” [www.allbusiness.com/print/13844611-1-22eeq.html](http://www.allbusiness.com/print/13844611-1-22eeq.html) (no authors listed) (last visited April 6, 2011) (reporting on New York City Green Codes Task Force 2010 Report recommending use of stairwells to promote health and reduce electrical usage); “Kaiser Permanente Employees Take the Stairwell to Health,” *supra* note 4, at 8 (stairwell initiatives likely to reduce electrical usage); Younger M, Morrow-Almeida H, Vindigni S, et al.

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“The Built Environment, Climate Change, and Health: Opportunities for Co-Benefits.” *American Journal of Preventive Medicine*, 35(5): 517-526, 2008 (buildings use energy in their operation, including elevator operation, which could be supplanted by the use of stairs, *see* Table 1).

<sup>170</sup> Public Health Agency of Canada. *Enhanced Risk Management with Stairway to Health*. 2007, [www.phac-aspc.gc.ca/sthevs/english/risk\\_management-eng.php](http://www.phac-aspc.gc.ca/sthevs/english/risk_management-eng.php).

<sup>171</sup> *Id.* (Programs promoting stairwell use “can be used to not only improve the conditioning of those taking the stairs, but also it can provide major enhancements to the building risk management plan.”).