



Security in knowledge

Your Honor, It Was Self Defense *a panel discussion*

Honorable John M. Facciola

U.S. Magistrate Judge

U.S. District Court for the District of Columbia

Honorable Andrew J. Peck

U.S. Magistrate Judge

U.S. District Court for the Southern District of New York

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Points to Ponder

- ▶ What are the possible grounds for a civil litigation?
- ▶ Is there any parallel to Microsoft taking over a botnet?
- ▶ Are there ethical considerations for Telluria's counsel when the decision was made to neutralize the attacking systems?
- ▶ Where did the litigants go wrong?
- ▶ Is there an arrest in the future?
- ▶ Does a company have a duty to ensure their systems can not be used as a platform for attacking someone else?
- ▶ What were the technical missteps?

Computer Fraud and Abuse Act 18 U.S.C. §1030

- ▶ Fraud and related activity in connection with computers
- ▶ Elements of the crime of cyberattacking:
 - 1 Knowingly...
 - 2 Transmits a program, code or command and, as a result, intentionally causes damage

Or

 - 2 Accesses a protected computer without authorization and, as a result, recklessly causes damage

Or

 - 2 Accesses a protected computer without authorization and, as a result, causes damage

Civil Action

Suffers damage by reason of a violation of criminal provisions

- 1 Loss is greater than \$5000
- 2 Or causes:
 - A. Impairment of medical examination or treatment of a person; or,
 - B. Physical injury of a person; or,
 - C. Threat to public health or safety; or,
 - D. Damage affecting government computer used in administration of justice, national defense, or national security.

Intentional tort

- ▶ Trespass to chattels
- ▶ Elements:
 - ▶ Intentional act, not negligent
 - ▶ Harm to, diminution of value of, or destruction of an object
 - ▶ Used as theory of recovery:
 - ▶ Bots exceeding scope of access permitted by MSN by downloading massive amounts of data
 - ▶ Spam
 - ▶ Gaining access code to gain free long distance service

Damage is usually a prerequisite to tort

Justification at common law

- ▶ Privileged to use reasonable force but not protected if force mistakenly used against an innocent third party.
- ▶ Force intended to inflict death or serious injury is never justified in defense of property.
- ▶ Slight force is unreasonable if a verbal request to cease would suffice.
- ▶ Defense of habitation is historically an aberration for it may, under older cases, permit use of deadly force to protect invasion of one home.
- ▶ Modern view is that such force is unreasonable to prevent an intrusion.

Use of force

- ▶ Can use reasonable force to protect property from imminent harm.
- ▶ Reasonable—the amount of force that a reasonable person in that situation with that knowledge would believe is necessary.
- ▶ Consider all the facts and circumstances, and what a reasonable person would do in a similar situation.
- ▶ If beliefs were reasonable, the danger does not need to have actually existed.

Necessity as a defense

Necessity may be a defense when force harms an innocent third party to prevent a greater injury. It exists when party injures a private property interest to protect a private interest valued greater than the injured property.

Defendant must prove that it was necessary, or reasonably appeared to the defendant to be necessary, to take the action to prevent serious harm to person or property.

Limited defense: party may still have to pay for the damage done to the chattel.

Duty of care

- ▶ A party is negligent when that party fails to exercise the amount of care that a reasonable person would exercise under the circumstances. That means that you may not find for the plaintiff merely because something went wrong. Instead, you may find for the plaintiff only if you find that the defendant failed to exercise the care that a reasonable person would have exercised under the same circumstances.

Proximate cause

- ▶ A party is responsible only for the damages that are proximately caused by the party's negligent act. To establish proximate cause, the party must show that the damages the party suffered were reasonably foreseeable at the time the negligent act occurred.

Superceding intervening cause.

A party who is negligent may still be excused from damages if the damages were caused by an unforeseen supervening and intervening cause. In other words, damages are not proximately caused if despite the other party's negligent act a superceding, intervening cause is the reason for the damages suffered.

Comparative negligence

- ▶ In California, however, you are permitted to compare the negligence if you find that the plaintiff was also negligent. You therefore may find that plaintiff was comparatively negligent and may reduce the award to plaintiff by the percentage you believe accurately reflects plaintiff's negligence.



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