

# INVESTIGATING, PREPARING, LITIGATING AND TRYING THE NEGLIGENT SECURITY CASE

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## THE NEGLIGENT SECURITY CASE: AN OVERVIEW

Negligent security cases generally involve an injury to an individual as a result of a criminal assault or robbery at a commercial premises. These frequently occur at malls, shopping centers, hotels, motels, office buildings, schools or parking garages. The majority of cases arise from strong arm robberies and sexual assaults. A strong arm robbery is a robbery by force or threat of force (it does not require a weapon). An armed robbery involves the use of a weapon. A "purse snatch" may be a strong armed robbery (if force or the threat of force is used), an armed robbery (if threatened with a weapon), or a larceny (when a purse is taken without threat or any contact). It is often a matter of semantics whether a purse snatch is a larceny or a robbery.

In most negligent security cases, the plaintiff who has been injured due to a criminal act brings an action against the owner, manager and/or occupier of the premises. These are the entities that are in control of the location where the plaintiff was injured. You will look to those parties who are in any position to control or prevent the incident from taking place.

The general common law principle is that there is no duty to protect against harm caused by the criminal act of a third party. The exception is that a duty is imposed to take reasonable measures where such criminal acts are foreseeable. Thus each of these cases turn on the issue of foreseeability.

The Restatement (2d) of Torts §344 provides that landowners are liable for

failing to exercise reasonable care to (a) discover that such acts are being done, or (b) give adequate warning so visitors can avoid the harm. There is usually no duty unless the owner/occupier knows or has reason to know of the acts of third persons.

## **I. TYPES OF NEGLIGENT SECURITY CASES**

- A. Inadequate security
- B. Inadequate lighting
- C. Inadequate security mechanisms, procedures, facility design
- D. Inadequate key control (hotels/motels/apartments)
- E. Inadequate supervision (children, incompetents)

## **II. ISSUES IN NEGLIGENT SECURITY CASES**

- A. Foreseeability
- B. Negligence
  - apportionment of fault
- C. Preventability (causation)
- D. Damages

## **III. DEVELOPING FORESEEABILITY**

The first task in any case like this is to determine the level of crime in an attempt to determine foreseeability. To do this you must obtain police reports of the crime on the premises (first) and in the surrounding areas (second). Much of your ability to do this successfully/efficiently/economically will be dependent upon your law enforcement agency's record keeping methods.

There are several sources of crime record data. The broadest and best starting point is a printout of calls for service, also known as "grids" because they are usually broken down by area. These are computerized records which list each time a call has been made to the police agency for service at a particular location or area. It usually only provides a basic code for the type of incident, such as "Signal 29 (robbery)" and the time of response.

The second source is what you obtain from the grids, and these are incident reports (police reports), which have the information about the crime, what happened, where it occurred, the time, injuries, weapons, and a description of the incident. There will also often be a narrative continuation, usually completed by the detective, if so indicated. This provides further details and a follow-up.

A third source of information is the internal records of the defendant itself. Often they will send memos to the corporate office or those in charge of security, safety or risk management. Sometimes this is by policy, other times its done by custom and practice. One thing you can almost always be sure of: they will not have records for many of the incidents you will find in the police reports. Occasionally there will be some incidents which they have records on that the police will not.

Lastly, many larger defendants, such as mall managers/owners, will complete incident reports for their insurance carriers as a matter of course. Expect to fight for these records, but stress the fact that they may be the only source of information about what the defendant knew was happening at its premises. This again goes to the defendant's *actual knowledge* of criminal incidents.

Some agencies have everything computerized, which makes this much easier. Others have to do hand searches by date of incident (the worst). In any event, you must do the following to establish foreseeability in a case where it arose out of an economic crime of opportunity (e.g., strong arm robbery):

- Eliminate all domestic crimes, those where the perpetrator and victim know each other;
- Categorize all crimes by type, determine where each crime occurred, whether there was a weapon used, and if injury occurred.

One of the more difficult aspects is obtaining full incident reports. They are routinely withheld or redacted in cases that are still "open". Cases may remain open forever. You will sometimes need to wait until suit is filed and avail yourself of the court's subpoena powers of your jurisdiction does not voluntarily produce all records or if you do not have a public records law that allows you to obtain them. Sometimes you can be successful in meeting with the commander in charge of the records section or robbery division, who usually decides what will be released. In difficult circumstances you can agree to leave the victim's name and even perpetrator data blacked out as long as you can get the what, when and where of the crime.

If foreseeability is conceded by the defendant, either by stipulation or testimony (or because the defendant had already utilized security, which in itself concedes that it was foreseeable), do not accept the concession in lieu of introducing testimony and evidence on the priors on the premises. The extent of prior crime on and near the

subject premises is not just a factor in developing foreseeability, but also relates to the reasonableness of the security in place. The reasonableness of the security is determined at least in part by the nature and extent of the prior crimes. Thus the level of priors, both in frequency and severity) will determine what precautions are necessary.

It used to be that to establish foreseeability you had to prove that there were many prior incidents of a similar or identical nature ("similar acts rule"). That is no longer the mandate in most jurisdictions, which have little by little applied a "totality of circumstances" rule to analyzing foreseeability. Thus even absent any prior similar acts, a landowner may be liable based upon an analysis of all surrounding facts and circumstances. See, e.g., *Isaacs v. Huntington Memorial Hospital*, 695 P.2d 653 (Cal. 1985), *Frances T. v. Village Green Owners Assn.*, 723 P.2d 573 (Cal. 1986), *Stevens v. Jefferson*, 436 So.2d 33 (Fla. 1983), *Mullins v. Pine Manor College*, 449 N.E.2d 331 (Mass. 1983), and *Harris v. Pizza Hut of Louisiana*, 455 So.2d 1364 (La. 1984).

Some of the more conservative courts include Alabama, *Moye v. Gaston Motels*, 499 So.2d 1368 (Ala. 1986); *Ortell v. Spencer Cos.*, 477 So.2d 299 (Ala. 1985), Michigan, *Williams v. Cunningham Drug Stores*, 418 N.W.2d 381 (Mich. 1988), and Virginia, *Wright v. Webb*, 362 S.E.2d 919 (Va. 1987).

A more recent development in this field has been with regard to incidents occurring off-premises. This is generally where the plaintiff has been injured near the subject premises and the owner/manager knew that the public would use these off-premises areas in conjunction with their visit. An example is where the plaintiff parks in a nearby parking lot that is off-premises because there is no parking at the subject premises. The plaintiff is then injured off-premises, but the owner of the subject premises knew that patrons were using the off-premises location.

A leading case in this area is *Holiday Inns, Inc. v. Shelburne*, 576 So.2d 322 (Fla. 4th DCA 1991). Here the plaintiffs were injured in a shooting outside of a bar. The shooting took place at a location adjacent to the defendant's premises, where the plaintiffs had parked because the defendant's security guard had denied the plaintiffs access to the parking lot. The evidence was that the defendant knew and/or encouraged patrons to park off the premises. The court held that the fact that the shooting occurred off premises did not preclude the imposition of liability under those facts. See also, *Ember v. B.F.D., Inc.*, 490 N.E.2d 764 (Ind. 2d DCA 1986)(the premises may not be limited to an area actually owned or leased by the defendant because business activities extend beyond legal boundaries).

#### **IV. APPORTIONMENT OF FAULT**

Doctrinal basis:

- A. abolition of joint and several liability
- B. listing of nonparties on the verdict form
- C. comparison of negligent and intentional conduct

## V. EXPERT WITNESSES

The sub-field of negligent premises security and lighting has become a vast arena for exciting developments in cutting-edge trial law as well as a means for opportunistic "experts" of questionable credentials to reap financial and professional rewards. Other than medical malpractice and product liability cases, there is no other type of case that demands the retention of expert witnesses more than the negligent security case. Without expert testimony it is unlikely that you will even make it to the jury. Thus the need to retain qualified and presentable experts should be one of your primary considerations.

You usually have one advantage over the defendant: you can retain the expert(s) of your choice before you ever file suit and, generally, before the defendant ever has any idea that it is going to be sued. This will allow you first choice of experts. Even if the expert of your choice does not like your case, you will generally have conflicted him/her out of further involvement in the case. In some cases this will leave the defendant with a choice of questionable experts to retain. Rest assured, however, that they will always find someone to say what they want.

There are several types of security experts generally available into a few categories:

- ◆ "Experts" who really aren't
- ◆ Regression analysts/statistical manipulators
- ◆ Flip-floppers: those who will say anything for a price
- ◆ Joe Friday's: former cops with missing personalities
- ◆ Pointy-headed academics who know little about the real world but who rely on studies and publications
- ◆ Qualified experts who know their stuff
  - 2 types: those who testify well, those who don't (consulting vs. testifying)

Keep in mind that there are many other types of experts out there, including those in related fields like lighting, architecture/physical structure, meteorology, etc. that you may use.

Focus the testimony of your expert on the fact that malls/shopping centers/hotels/motels/hospitals are magnets for crime and attract ideal victims. As one police commander said in a deposition in one of these cases, "Everybody is shopping for something." Thus the criminals will shop where the merchandise they want is and where the price (risk) is lowest -- just like when we go to the store. Even in an area that is otherwise not "high crime" in nature, the risk to the public may be great. You will generally find a grouping of crimes in nice areas at malls and other commercial premises. So by looking only at the area's crime rate you get a false picture of what the true crime problem is at the particular commercial location.

## **VI. DIFFICULT CASES WHERE YOU CAN WIN**

Frequently the case will seem very difficult or impossible for any number of reasons. The first is the one defense attorneys will constantly tell you: the person responsible for this is the attacker/robber/rapist and he/she is in jail/gone. This is a fallacious argument and is inconsistent with the law in most jurisdictions. The defendant is the actor whose negligence permitted a foreseeable act to occur. The criminal act is not a supervening act which breaks the chain of causation if the act was foreseeable and the defendant was negligent, *i.e.*, failed to take reasonable measures to protect the public and the plaintiff after the foreseeability is established.

Fortunately in today's urban and suburban communities it is common to find commercial establishments using private or proprietary security to protect the public who enter the premises. This militates in favor of both the foreseeability ("Didn't you notice that the Pillaged Oaks Shopping Center down the block had 5 uniformed armed guards patrolling its parking lot?") and reasonableness of measures taken (an informal standard may have been set by competitors or the defendant itself at this or another premises). In either case, there are numerous private security agencies more than willing to provide consultation, analysis, and security services to small, medium and large malls, shopping centers, hotels, motels, stores, schools and any other type of commercial facility. These companies can be a good source of information for you.

Some of the most common difficulties in security cases fall into one of the following categories:

**PROBLEM:** The Defendant had security at the time ("we aren't insurers of safety")

- RESPONSE:
- a. It wasn't adequate (in number or type)
  - b. It wasn't competent or trained properly
  - c. It wasn't deployed properly

PROBLEM: Perpetrator was apprehended/caught in the act

- RESPONSE:
- a. Too late--the damage is done
  - b. Proves that the crime was foreseeable/preventable
  - c. Remember that the issue in the case is *deterrence*, not interdiction or apprehension. If caught after the crime, criminal wasn't deterred.

PROBLEM: No similar or significant prior crime on the premises

- RESPONSE:
- a. look to surrounding areas
  - b. look to other properties owned/managed by defendant
  - c. knowledge of problem in general
  - d. presence of any existing security = foreseeability
  - e. other crimes on premises--totality of circumstances (*e.g.*, problem with car thefts, auto burglaries can be indicative of a crime problem in the parking lot)
  - f. many economic crimes like larceny, car theft, burglary/burglary of a car can become violent if the perpetrator is confronted, either intentionally or inadvertently
  - g. Nature of business venture/type of industry

Determine whether the defendant violated any codes, statutes, standards or customs. There are a plethora of industry standards for virtually every field. This includes the American Society for Industrial Security (ASIS), International Association for Shopping Center Security, Illuminating Engineering Society (IES), etc. Since there are mandated minimum requirements for lighting, if your case involves lighting in any way the IES standards should be the first place you look.

## VII. FACTS THAT MAY HELP YOU WIN

There are certain facts about your case that, if discovered, can help you win your case even when the other facts are working against you. These are issues upon which juries will often place great weight and which tend to obscure other facts. Some of these include:

1. When another property the defendant owns/controls/manages has security or service that the subject premises did not have;
2. When the security level and/or security budget is decreased;
3. When the size of the premises or square footage increases, but the security operations do not increase or do not increase in proportion;
4. When the crime rate significantly increases or when there are such serious and repeated crimes on the premises;
5. When there is a change in the nature of activity being conducted on the premises:

This can either be a change in the criminal acts (robberies instead of larcenies) or a change in the commercial facility (change in types of stores like from "Gwendolyn's Flower Shop" to "Charles Manson's Skinhead Bar and Tattoo Parlor")

6. When there have been requests or demands for additional security or complaints about safety by employees, customers or citizens.
7. Where the defendant has violated a statute. This happens more often than you would think, everything from lighting statutes (many counties codify minimum lighting requirements) to landlord-tenant codes (*Nixon v. Mr. Property Management*, 690 S.W.2d 546 (Tex. 1985)[landlord allowed vacant apartment to fall into disrepair and remain unsecured, in violation of city ordinance, and could be held liable for sexual assault of a young girl in vacant unit]).
8. Remember the old saying, when you've got good facts, argue the facts. If you have bad facts, argue the law." Likewise in these cases you have to rely on your strengths. If you have lots of priors on the premises, argue foreseeability and hammer it home. If you have few priors, focus on the pitiful security which made this crime a catastrophe waiting to happen.



## VIII. KEY DISCOVERY STRATEGIES

You must set the tone for the litigation and, in particular, for the discovery. You must obtain all records relating to the facility and its security operations. It is in the discovery that you will often win your case, particularly with regard to the depositions of the defendants and defendant employees.

From defendant employees:

- ◆ Get admissions
- ◆ Show their ignorance of industry standards
- ◆ Show their disassociation with the premises, lack of concern for people vs. profits
- ◆ Demonstrate that there were no security plans, that security was ad hoc
- ◆ Determine what knowledge they had about crimes on the premises
- ◆ Establish that the defendant did little or no inquiry into crimes on or near the premises

It is important to get all evaluations of security that were ever done for this premises as well as any owned/controlled by the defendant. If they had one done at another location and not this one, determine why. Discover all correspondence, especially any which might indicate that a request for security was made by a tenant, customer or anyone else. Determine as early as possible what if any security the defendant had. More often than not any security used is undercover/plainclothes, which has no deterrent effect. It again helps prove that the defendant was more concerned with apprehending shoplifters (protecting its property) than it was with preventing injury to its customers.

If the premises has its own security, get all security logs and reports for at least two years before the incident (better to get 4 years), as well as all policies, procedures, post orders, SOPs, manuals, etc. You will also find that most commercial premises have been contacted by one or more private security companies like Wackenhut, Pinkertons, etc. Get all documents related to this, and see if there was a proposal made by any such company. You may need to contact the service directly and possibly depose its records custodian.

One of the best sources of testimony and information is former employees. Early

on obtain a list or payroll records of all persons employed by the defendant at the time of the attack (and before) and determine which of those are no longer employed. It is much easier to get candid testimony from a person whose livelihood is not dependent upon the paycheck signed by the defendant in the case.

Sometimes one of the best witnesses is the defendant's security manager. This person will often be poorly educated and trained. He or she may have come from an unrelated field, or have washed out of law enforcement. Use that to your advantage. If you can show that the security manager is incompetent and that he or she was responsible for training the other employees, the entire security program is shown to be negligent.

Through discovery the leasing agreements and other documents related to responsibilities of the defendant should be obtained, as well as the records evidencing income and rental on the property.

### **REVERSE SURVEILLANCE**

In one situation I have tried to develop discovery in an unusual way. In a case where the issue was going to be what procedures the defendant used and whether the employees followed that procedure, I had an investigator conduct surveillance on the defendant's premises before I filed suit. By doing that, I minimized the chance that the defendant would alter the it operated and I would be able to get candid video surveillance.

This can be of great assistance in the typical mall/shopping center case where you have a strong armed robbery in the parking lot. The mall will typically have several security guards to patrol a multi-acre site. Your position will be that there should be thorough patrol of the parking lot. We know from experience that security guards do not particularly like to walk around parking lots -- they would rather be inside the mall. The defendant will claim that it had two guards patrolling the parking area at all times. By taking videotape surveillance with a time clock, you can deflate their claims and often catch the security guards doing things they would not like a jury to see.

### **REFERENCE SOURCES FOR INDUSTRY STANDARDS AND LITERATURE:**

American Society for Industrial Security (ASIS)  
1655 N. Ft. Myer Dr., Suite 1200  
Arlington, VA 22209

International Association for Shopping Center Security  
2830 Clearview Place, NE, Suite 300

Atlanta, GA 30340

International Association of Professional Security Consultants  
835 Deltona Blvd., Suite 77  
Deltona, FL 32725  
International Council of Shopping Centers  
665 Fifth Avenue  
New York, NY 10022

Illuminating Engineering Society of North America  
345 East 47th Street  
New York, NY 10017

National Association of Convenience Stores  
1605 King Street  
Alexandria, VA 22314

## **IX. PROVING PREVENTABILITY**

Even if the plaintiff proves foreseeability and negligence, it is possible for the defendant to prevail if the plaintiff fails to prove that the assault was preventable by something that the defendant should have reasonably done. This is the "so what" defense, often used by defendants in failure to diagnose cancer medical malpractice cases.

Even though the plaintiff will generally prevail if s/he proves foreseeability and negligence, it is still important to prove that this incident would likely have been prevented. This is an important opinion for your expert to render. If your expert falls down on this question, you will probably have a summary judgement or directed verdict rendered against you. Thus it is important not only for your expert to testify about preventability, but it is generally fair game to require the plaintiff (through the expert) to testify about how the security *should* have been. This is like requiring the plaintiff in a product liability design defect case to show how the product should have been designed. Although not technically required, it has become a *de facto* element of the case.

Some states have imposed arduous causation requirements. Texas requires that the plaintiff establish that the crime and injury would not have taken place "but for" the act of the defendant. *East Texas Theatres, Inc. v. Rutledge*, 453 S.W.2d 466 (Tex. 1970). Most states, fortunately, hold that the defendant's negligence must be a "substantial factor" in the crime and injury. see, *e.g.*, *Nallan v. Helmsley-Spear, Inc.*, 407 N.E.2d 451 (1980).

## **X. CONCLUSION**

The field of inadequate premises security law is constantly evolving. It is a relatively new phenomenon, much like products liability in the 60's and 70's. Due in part to an ever escalating crime problem in this country, negligent security cases will continue to redefine the law of premises liability. Since commercial premises owners financially benefit from having members of the public visit them, they are in the best position to guard against the harm which has become more prevalent each year.

Although many of these cases seem terribly difficult on their face, through hard work and creative, purposeful lawyering, the defense can be cracked and you can secure a substantial recovery for your client. It requires a thorough investigation and hard, tenacious litigation. Rare is the case that is not defended vigorously. Experts are essential and expensive; often it is the defendants themselves who help make your case strong enough to convince a jury.

CHECKLIST FOR PREMISES SECURITY CASES

**PRE-SUIT:**

**WORKUP AND INVESTIGATION**

Interviews with:

- initial police officer \_\_\_\_\_
- crime scene personnel \_\_\_\_\_
- photographs from police, others \_\_\_\_\_
- detectives \_\_\_\_\_
- security guards (if any) \_\_\_\_\_
- store/premises employees \_\_\_\_\_
- witnesses \_\_\_\_\_
- prior victims (if any) \_\_\_\_\_
- police who normally work the area--  
find out about the area, priors,  
defendant's knowledge \_\_\_\_\_
- statements \_\_\_\_\_
- crime grids \_\_\_\_\_
- priors on premises \_\_\_\_\_
- canvassing neighborhood \_\_\_\_\_
- photos of scene \_\_\_\_\_
- photos of victim \_\_\_\_\_
- diagrams/maps of premises \_\_\_\_\_

newsletters from condo/management \_\_\_\_\_

condo by-laws \_\_\_\_\_

management co. organizations,  
 assn's. newsletters, journals \_\_\_\_\_

Courthouse check: prior cases  
 against same defendant, prior  
 owner/manager \_\_\_\_\_

Conduct property records check  
 on owner/president/officers \_\_\_\_\_

FCIC/NCIC checks on all  
 security personnel/management personnel \_\_\_\_\_

**LEGAL**

Is this Landlord/Tenant issue, Fla. Stat. §83.51 etc.?

Were there locks/doors/windows that failed? What was pt. of entry?

- possible strict liab. against component part mfr.
- use video to show how easily it is defeated

Were there any security measures that were useless or created a false sense of security? (i.e. CCTV, etc.)

Any statutes or ordinances violated?

- Convenience Store Act
- Minimum lighting standards--industry, county, local?

Violate own standards? (Create a std. by deploying security in greater force previously?)

Violate representations of security--flyers, ads, promotional materials? "Is this a safe place to live/work/own business?" Most people ask. Get all brochures ever produced.

Violate terms of lease (examine lease provisions--small print)  
--what is landlord responsible for?

Who has master keys?

## IN SUIT – DISCOVERY:

List of all organizations to which defendant belongs

get copies of all relevant publications, newsletters

what does it take to be in org--training, educ, qualifies.? Or just \$\$?

Priors to defendant's knowledge--what files kept?

Insurance co.--subpoena their records of incidents **after** getting from def. It may differ sharply from what they say they know about.

Prior employees--sometimes the best source

All current employees (all employees on D/A)

Tenant listing

Tenant organization/association?

Other premises owned/managed by defendant

--discover problems there

--photograph premises for differences/similarities

Get personnel files of all key employees; check references