



**2016 CLM Annual Conference
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“Negligent Security”

1. Introduction to Negligent Security

a. Reptile Theory

One of the issues that a Defendant in a premises security case will face is the Reptile Theory. Instead of focusing on gaining sympathy by focusing on the plaintiff’s injuries, the plaintiff will instead focus on the defendant’s behavior and how it is unsafe. This is done based on the understanding that humans share an instinct also found in reptiles of protecting and defending themselves. A defendant can counter this by focusing on safety precautions in place such as hiring procedures, safety manuals, and quick incident investigations, among other factors.

b. Victims & Statuses

A victim can be classified as a trespasser, licensee, or invitee. Generally, a property owner will owe no duty to a trespasser. On the other hand, there are greater duties owed to licensees and invitees. A licensee is a person that is a social guest on the property, and the property owner owes a duty to exercise reasonable care to disclose any dangerous condition known to landowner and unlikely to be discovered by the licensee. The greatest duty is owed to the invitee, who is a business guest on the premises for the benefit of the owner. The duty owed to the invitee is a premise kept in a reasonably safe condition. This means that business owners may have a reasonable duty to protect invitees from crime, which is using reasonable care from foreseeable criminal acts.

c. Claims for Negligent Security

While a person or entity generally has no duty to take precautions to protect another against criminal acts of third parties coming onto an owner’s premises, there are two important exceptions. The first is when there is a “special relationship,” which is when the property owner assumes a duty to protect based on some special relationship arising out of law (landlord-tenant, common carrier-passenger, rental car company-driver, hotel-guest, etc.). The second exception is when the owner has control over the property in questions and, as a result, assumes a duty of reasonable care commensurate with the legal status of the victim.

2. Foreseeability

Foreseeability encompasses both the duty and proximate causation of a negligence claim. Once a crime becomes foreseeable, the issue then becomes whether it could have been prevented. The duty of the property owner will focus on whether the Defendant's conduct "created a broader zone of risk." The proximate cause will focus on "whether and to what extent the defendant's conduct foreseeably and substantially cause the specific injury that actually occurred." Foreseeability can be shown by either providing evidence that a property owner knew or should have known or had actual or constructive knowledge of the danger. This is done by using crime rates, prior incidents, geographic proximity of other events, or other factors.

3. Theories of Liability

a. Prior Incidents Doctrine and Totality of the Circumstances

Generally, there are two theories of liability used to analyze a premises security case: "prior similar acts" and the "totality of the circumstances." The "prior similar acts" theory imposes liability if there were many prior incidences of a similar or identical nature, but this theory is somewhat outdated and not followed by many jurisdictions. The "totality of the circumstances" theory has the court look to factors such as the history of the property, the relationship of the property owner to the victim, past similar complaints, temporal proximity of prior incidents, and geographic proximity of prior incidents.

b. Lessor/Lessee Issues

Generally, a landlord does not insure his tenants' safety against third party criminal attacks, and there must be a breach of a duty to exercise ordinary care in keeping the premises safe for a claim to arise. However, even where the landlord has not control or possession of the property, a duty will arise if there is knowledge that a dangerous condition rendered the property unsafe for the tenant's public use (e.g. parking lot cases). The landlord may also have a duty if he undertakes to provide security measures himself, such as hiring his own security staff. Because the landlord undertook this responsibility, the landlord may be liable for negligently undertaking the hiring. The property owner owes a duty to take reasonable steps to secure areas that are under his control, and reasonableness may be considered compliance with building, house and health codes. With respect to convenience stores, Florida law provides specific rules for premises security such as a requirement for a security camera system, a drop safe or cash management device, a lighted parking lot, a silent alarm, and a notice that the cash register contains less than \$50.

c. Negligent Hiring and Negligent Retention

Negligent hiring is also a concern for premises security. Generally, an employer is not liable for the criminal acts of employees because it is outside the scope of employment. However, "negligent hiring" occurs when, prior to the time the employee is actually hired, the employer knew or should have known of the employee's unfitness. The duty that is owned by the employer in this situation is to conduct an employment background check. Similar to negligent hiring is "negligent retention," where the employer discovers after hiring that the employee is unfit for work.

4. Defense and Insurance Issues

a. Defense Issues

A claim based upon an allegation of negligent security is premised upon a three part analysis. The first is “foreseeability,” the second is “adequacy of security,” and the third is a determination as to whether or not the lack of adequate security caused injury or death to the claimant. The concept of preventability or deterrence is linked to the causation element, in that once a crime becomes foreseeable, the issue then turns on whether or not it was deterrable or preventable with adequate security. If a jury determines as a factual matter that a particular crime (such as a crime of passion) or a particular criminal (urban terrorist) was not preventable, a plaintiff stands little chance of success. Another defense is contributory or comparative negligence, where the defendant may show that the conduct of the plaintiff constituted an intervening cause relieving the defendant of liability. Other defenses include statutes of limitation, criminal profiling, and apportionment of fault.

b. Insurance Issues

Important issues to consider with respect to insurance are whether there are assault and battery exclusions within the policy. Also, an employer should be aware to what degree an insurance policy may cover worker’s compensation. Additionally, most policies will also contain a terrorism exclusion.

5. How to Approach Premises Security Claims

a. Investigative Stages

Claims representatives need to be proactive as soon as a premises security claim comes in with respect to investigating and assisting the attorney handling the case to develop a theme. It is important to obtain the following information regarding the claim: crime grids, any and all prior claims and suits pertaining to the specific property owner, any and all prior incidents on the location and surrounding locations, any surveillance videos, and marketing material, any internal documents pertaining to safety procedures, police reports, incident reports, hiring guidelines, copies of any lease agreement, photographs of the area, and security measures in place.

b. Litigation Stages

Once the case has moved to the litigation stage, remain focused on the fact that the insured is not the party who committed the crime, and evaluate the case from this perspective, not from the perspective of the perpetrator. Be sure to use subject matter experts such as criminologists, security experts, and law enforcement experts. As mentioned above, make sure that you look at for the reptile theory at all times.