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The Walking Dread – Criminal Acts of Third Parties Creating Liability for Bars and Restaurants

I. Litigation Aspect of the Negligent Security Claim and Resulting Lawsuit.

A. The Negligent Security Claim

Negligent security cases apply to businesses, parking lots, apartment buildings, nursing homes, concerts, sporting and special events, casinos, bars, and restaurants. Every business owner and commercial landowner, from major hotels and chain restaurants to local convenience stores and “mom and pop” shops, all must be aware of the rising cause of action of negligent security cases. These cases have been removed from bar fights and concert crowd injuries and have been placed into the forefront of the litigation stream. They involve the most unpredictable catalyst of facts preventing, for the most part, a motion striking the claim. These claims can only be predicted to grow with popularity in this post-9/11 world where private security is becoming a prominent thought by jurors and politicians alike.

This presentation takes a practical approach to the topic of “security claims,” including two interactive real live scenarios for the audience’s participation.

The easiest reference guide of the law is the Model Jury Charge. That will be how a jury will learn the law to apply to the facts of your case. This is truly an East Coast vs. West Coast race to become the most liberal. An examination will take place of the New Jersey Model Jury Charge which provides for a very liberal and simplistic level to include a cause of action against any business. The comparison between New Jersey’s liberal standard, requiring any criminal activity, versus California’s standard of a reasonably anticipated crime make business owners an easy and prime target.

New Jersey Model Jury Charge 5.72, “Negligence – Proprietor’s Duty of Care to Patrons Against Criminal Activity of Third Persons,” provides in relevant part as follows:

The owner/operator . . . owes a duty of reasonable care to its [customer, patrons] to provide a reasonably safe place. . . . It is a duty to take steps that are reasonable and prudent under all the circumstances for . . . safety. The duty owed requires the owner/operator . . . to exercise ordinary care to protect [customers, patrons] from potential injury inflicted by individuals that the

owner/operator could have reasonably foreseen might be present on the premises. This legal duty of care does not make [owners/operators] guarantors of a [customer's/patron's] safety. However, if criminal activity on the premises is reasonably foreseeable, then the [owner/operator] had a duty to take reasonable steps to protect its [customers/patrons] from that danger.

When determining whether or not criminal activity on defendant's property was reasonably foreseeable, you may consider the following factors: prior criminal acts that occurred on or around defendant's property even if not as bad as the one committed against the plaintiff; the property's size and location; the absence of adequate security; the architectural design of the building in relation to the area where the crime occurred (for example, the size of the parking lot); the type of business defendant operates; the nature and circumstances of nearby businesses; and the increasing level of crime in the general neighborhood. You, the jury, must look at the totality of the circumstances to decide whether or not the defendant should have reasonably foreseen the danger. . . . (Emphasis added.)

The term "reasonable" appears numerous times in New Jersey's Model Jury Charge expressing the Court's change from deciding the case based upon particular criminal acts to determinations based upon the "totality of the circumstances." Whenever the word "reasonable" is used, this is for the jury to determine what steps it felt were prudent under the circumstances.

In order to understand this "totality of the circumstance" standard, we need to review the historic origin of this claim. Before 1997, there was no cause of action in New Jersey for lack of security cases without an actual history of a "similar criminal conduct." Plaintiffs' attorneys have referred to this as the "one free crime rule."

In 1997, *Clohesy v. Food Circus Supermarket*, 149 N.J. 496, replaced the similar crime rule with the "totality of circumstances" test. This means that evidence of previous non-related criminal activity can be considered by the jury in addition to similar criminal conduct. Basically, not a murder-for-murder, but an assault for murder. From the defense perspective, liability can be anticipated even where an innocent landowner is in a location unmarred by any past serious criminal activities. Under this new rule, loitering, minor thefts, and other crimes that do not rise to the level of the assault, murder, or rapes will be considered by the Court to allow the matter to proceed to trial and, importantly, formulate the critical element of the test for criminal activities and foreseeability.

In contrast, California Civil Jury Instruction 1005, "Business Proprietor's Liability for the Negligent/Intentional/Criminal Conduct of Others," provides as follows:

[An owner of a business that is open to the public/A landlord] must use reasonable care to protect [patrons/guests/tenants] from another person's harmful conduct on [his/her/its] property if the [owner/landlord] can reasonably anticipate such conduct.

Recent case law in California clearly shows that there must be some heightened foreseeability when the exact same crime occurs. The anticipation that the exact criminal act will take place is a

necessary element for the plaintiff to proceed with his or her cause of action. In effect, this is a “one free bite” rule.

B. The Lawsuit

Defenses to the lawsuit may include the following:

1. Unforeseeable: This is not the “one free bite” rule but rather, the totality of the circumstances. Even utilizing an absurd example that a man walks into a bar and proceeds to assault another patron sitting at the bar, there was no way to perceive this activity or that it is a definite cause of action.
2. Targeted Event: This means that no matter what security precautions would or could have been taken, this event would have occurred, i.e., the assassination attempts of Ronald Regan and the Pope and the two subway bombings in London.
3. A Percentage of Fault to be Assigned to the Assailant/Mad Dogs of Society: If police cannot control them, how can a business entity? It beyond our control. There are individuals in society that cannot be controlled.
4. Reasonable Security Measures: See Section II below.
5. The Victim’s Contribution: Assumption of the risk and/or comparative negligence. Basically, plaintiff is not using the security protocols that are in place; i.e., opening a door without looking through a peep hole; the shuttle case.
6. Section 8 HUD and Other Specialty Properties: Certain facilities have governmental inspections and security protocols, other agency’s security plans and prior inspections failing to provide notice.
7. Public Entity Immunity: An assault on a train platform found that plaintiff’s claim boiled down to a failure to provide police protection and found the transit authority immune.

In order to properly investigate the claims, either pre-suit or in-suit, one must go to the site. In addition to inspecting the site, the premises itself and the surrounding neighborhoods are critical target areas. Meeting with local police and crime prevention units will be necessary. There are certain “Weed and Seed” programs in effect for blighted areas to improve safety for the residents. Specifically, what is the criminal history at the premises and what is the criminal history in the surrounding neighborhood; what is the property’s reputation?

If there is a criminal history, what security measures have been taken? Are there any of the following: neighborhood watches; sufficient lighting; maintenance person onsite or living in the area; people or pedestrian traffic on the premises; 24-hour calls; security plan/protocols; cameras/video surveillance; communications and relationship with the police/prosecutor; security surveys and security guards; landscaping design; and United States crime report statistics?

Plaintiff’s history and the existence of a relationship between the plaintiff and the criminal actors will be critical. Is there a history? Is there anything that could have been a deterrent?

Immediately seek and speak with former employees and security guards. These interviews will be critical to determine who is a friend to your client and who is not.

Conduct newspaper and internet searches of the site. Obtain, in specialty properties, reports including Section 8 HUD housing inspections, all of the HUD reports, and local building code violations.

Follow and get the prosecutor's criminal file. A crime has been committed. Has there been an arrest, has there been a criminal conviction, will there be? Develop the relationship with the prosecutor and attend the criminal trial. Get the criminal file.

There are two schools of thought for finding and naming the criminal defendants as third-party defendants. While percentages can be assigned to the criminal actors, you are still dealing with individuals that may enrage a jury and increase the overall award. Regardless, the criminal actors must be deposed and at least brought into the case for discovery purposes in order to determine if the site was an easy target or if the crime was a targeted event.

If the criminal matter has not been completed, stay the civil action. Await the criminal action to be completed. A criminal conviction will allow both the investigation of the criminal and the prosecutor's file to be readily accessible.

Obtain aerial photographs, tax maps, interrogatories, investigations of fact witnesses, and all crimes in your property and that of the surrounding area. Subpoena and depose investigating officers. Confirm and check all of your security measures.

Be sure that you and your client are prepared for the deposition.

II. A Preventative Plan.

A. The Security Audit

Security protocols should include but not limited to:

1. Store front windows;
2. Phones;
3. Inspections;
4. Director of security;
5. Selection of security;
6. Training versus common sense;
7. Recordkeeping;
8. Duty of the guards/limitations;
9. Protocols;
10. Key controls;
11. Pre-employment search;
12. Tenant screening;
13. Local police involvement;
14. Post-accident investigation and changes; and
15. Reevaluation of security/surveillance systems

III. Risk Management.

Hospitality venues must take a unified approach to managing risk. This means learning from past mistakes through company-wide education and training; using resources that are readily available and making sure that an accident arising from the same or similar circumstances is prevented from happening. The best accident is the one that doesn't happen. Make changes before history repeats itself.

A. Insurance Coverage

Purchase insurance at "worst case scenario" levels and manage as much exposure as possible within SIR limits. Leverage business and personal relationships with insurance brokers and use only those who are trusted partners in protecting your company and employees. Expect favorable terms and premiums from year-to-year through effective negotiating by your broker and through your own effective risk management.

B. You Have to Make a Change

Knowledge without change often equals negligence. Without change and attention to detail you can expect to be faced with preventable accidents that will be increasingly costly and you will have lost your ability to say "this has never happened before." It is your choice to pay now or pay later.

IV. Presentation of Some Deadhead Scenarios.

A. Incapacitated Adult

It must be remembered that dealing with an incapacitated adult is the same as dealing with a child. In the scenario to be discussed, a woman and her two male companions went to a club which contained a private club upstairs. The door of the private club was manned by a security guard. During the course of the evening in the club downstairs, the woman became highly intoxicated to the point of incapacitation. The men she was with took her upstairs to the security guard at the door of the private club and left her there. The woman was left partly behind a door and was vomiting over the balcony and anyone passing by could see that she was incoherent. During the course of the evening, the security guards manning the door of the private club were switched in and out, each of them apparently knowing the incapacitated woman was there. At the end of the night, all of the security guards left, leaving the incapacitated woman alone in the same spot where she was left by her friends. There is video evidence reflecting that after the incapacitated woman was left alone, a man came along, helped her up, and she is seen walking off with this man. The woman then filed suit against the club alleging negligent security due to allegations that the man who came along and helped her up had taken her across the street to a hotel and raped her.

A "What Would You Do" question and answer session follows this scenario presentation concerning the outcome of the case and what were the right and wrong things that happened and what could the club have done to prevent the outcome as well as what it can now do to make sure a similar situation does not happen in the future.

B. Parking Lot Riot

In this scenario, a minor was attending a tailgating event in a stadium parking lot prior to a Blink 182 concert. The minor admitted that he was consuming alcohol at the tailgating event. At some point, another group of individuals unknown to the minor began throwing bottles and cans at another group of

tailgaters. A fight broke out and quickly escalated into a riot involving many individuals fighting each other. The minor decided to enter into the fray and got involved in the fight with one group of individuals. Upon doing so, the minor was attacked, punched, beaten, and kicked by this group of individuals. There is video footage showing that prior to the minor entering the fray, an unconscious/unresponsive party can already be seen on the ground as a result of the brawl. The video footage also shows the minor entering into the melee with the already fighting crowd. The minor brought a lawsuit against the company that was responsible for providing event staff at the stadium; another company that had entered into a contract with the local police department for the purpose of performing services in the parking lot during the concert event; and one individual who the minor alleged was responsible for his injuries.

A “What Would You Do” question and answer session follows this scenario presentation concerning the outcome of the case and what were the right and wrong things that happened and what could have been done to prevent this fight as well as what steps can be taken now to make sure a similar situation does not happen in the future.

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