

# Staying Out of Court

BY MICHAEL HAGGARD AND RACHEL MCCREARY

## **FOR PLAINTIFFS' ATTORNEYS, NEGLIGENCE**

security is a rapidly growing field, and the number of lawsuits continues to increase each year. To help security professionals reduce the risk that their own properties might become the subject of a negligent security lawsuit, we look first at the law that governs these cases and then at some recent examples from our practice to illuminate the problems that can cost companies millions.

PHOTO-ILLUSTRATION BY STEPHEN WEBSTER

## The Law

For a property owner to be found negligent when someone is hurt on its property, four elements must be proven.

First, it must be established that the property owner or management company had a duty to protect individuals who are lawfully on the property against the type of risk in the specific situation. The case law stands strong behind the presumption that property owners and property managers have a legal duty to supply safe grounds for guests, patrons, invitees, customers, or any individual lawfully on the premises. That presumption is even stronger if the property is located in a high-crime area or in cases where the invitees might be particularly vulnerable, such as at a hotel, for example.

Those who own or manage businesses must remember that liability is placed on the individual or entity that has control of the premises and is not solely based on ownership. In these cases, the lessee, not the lessor, has the obligation or duty. This theory is explained in a precedent-setting case (*Bovis v. 7-Eleven, Inc.*, Florida District Court, 1987). The court noted that "the duty to protect others from injury resulting from a dangerous condition on a premises does not rest on legal ownership of the dangerous area but on the right to control access by third parties which right usually exists in the one in possession and control of the premises."

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Furthermore, landowners are expected to give warning of hidden dangers that are known or should be known to the landowner and unknown to the invitees. This is based on the premise that property owners are in a better position to know what is happening on their own property than the invitees.

The second element of negligence is more difficult to establish. It must be shown that the property owner breached its duty to protect. That is determined in

part by determining whether the type of incident was foreseeable and preventable. From a legal standpoint, there is currently no bright line rule to apply to the preventability and foreseeability components.

To assess foreseeability, plaintiffs’ attorneys will hire a security expert, who will review the records on the types and fre-

quency of crime that occurred in the vicinity of the incident in question. Those records are obtained from the local police department and through other avenues during the discovery process. The prior crime history of a property is an important focal point for any security expert who is evaluating the foreseeability component, whether that person is serving the plaintiff or the defendant. The expert will pair the crime statistics with the specific facts of the case and determine

whether the crime that is the subject of litigation was foreseeable in his or her expert opinion. It boils down to what the property owner knew or should have known with respect to the dangerous climate of the premises.

Preventability is approached differently, as there are numerous theories on crime prevention, such as the commonly referenced crime prevention through environmental design (CPTED) method. Preventability is summed up by the National Crime Prevention Institute as "the anticipation, recognition, and appraisal of a crime risk and the initiation of some action to reduce or remove that risk."

Regardless of the method for crime prevention, a security expert will pair his or her crime prevention beliefs and methodologies with the facts of the case to determine whether the crime was preventable and, if so, what would have prevented the crime from occurring, such as better lighting, surveillance cameras, warning signs that the property is under surveillance, or security guards. The expert will make a final determination of whether the crime was preventable in the exercise of ordi-



nary care and present that finding. The ultimate decision is made by the jury.

The third element is causation. The plaintiff must show that the property owner's failure to reasonably secure the premises caused the plaintiff's injuries. A jury must consider whether the negligence on the part of the defendant—the lack of some security measure—caused the plaintiff's injury. The negligent act need not be a direct cause of the plaintiff's injury if the injury was a reasonably foreseeable consequence of the negligent act.

The fourth and last element a jury considers is damages. If the jury feels the company's actions (or lack of actions) resulted in severe physical injuries to the plaintiff, it will make its displeasure known in the amount of damages awarded to the plaintiff. In almost every case our firm handles, the damages are astronomical, something that companies weighing the costs and benefits of security seem rarely to consider beforehand.

### Lawsuits

Company executives may think that they have to take extraordinary and costly precautions to protect themselves from litigation. But that is not the case. In our experience, the company being sued often failed to take even the most rudimentary steps to improve security. These companies either refused to address security at all or they neglected to consider rampant crime or respond to an imminent threat. When this lack of effort on the part of companies is combined with the horrific injuries of the victims, juries are willing to award millions in damages.

For example, in the 2008 case *Barrak v. Report Investment Corporation*, Sami Barrak was seriously injured during an attempted robbery in the parking lot of a nightclub. The 25-year-old Barrak was sitting in his car outside Tootsie's Cabaret waiting for a friend when he was approached by an unknown assailant. The robber shot Barrak in the neck with a shotgun, leaving him a ventilator-dependent quadriplegic.

Barrak sued the owners of the nightclub, claiming that they failed to adequately maintain the property and failed to provide adequate security to safeguard

its customers, patrons, and guests. The lawyers argued that the parking lot at Tootsie's Cabaret was inadequately illuminated and lacked the proper foot patrol.

It was established that the defendant, Report Investment Corporation, which owned the nightclub, had a duty to maintain the premises in a reasonably safe condition. In the course of the case, the jury learned that during the seven years prior to Barrak's attack, there were approximately 26 violent crimes on the property. Yet, the company admitted, it had never spent one dollar on security or safety.

The damages awarded to Barrak were \$102.7 million, which was the largest jury verdict recorded for a negligent security case. The damages included \$1.4 million for past medical expenses, \$164,000 for past lost earnings, \$28 million for future medical expenses, \$650,000 for lost earning ability, \$2.5 million for past pain and

suffering and an additional \$70 million for future pain and suffering.

Another case decided in 2012 (*Gerald May v. Ekerd Bank*) involved an elderly man (May) who was shot during a bank robbery. As a result of his injuries, he became a quadriplegic.

May sued the bank and the shopping center where the bank was located, claiming negligent security. The lawyers argued that numerous earlier robberies and violent crime should have put the properties' owners on notice.

At trial, the owners of the bank and the shopping center admitted that they had taken no steps to address the threats posed by the previous robberies. The case was settled out of court. While the exact amount of the damages is undisclosed, it was a multimillion dollar settlement.

We see many cases arising in low-income, high-crime areas where property

## » SYNOPSIS

**For plaintiffs' attorneys**, negligent security is a rapidly growing field and the number of lawsuits continues to increase each year. To help security professionals reduce the risk that their own properties might become the subject of a negligent security lawsuit, we look first at the law that governs these cases and then at some recent cases from our practice to illuminate the problems that can cost companies millions.

**For a property owner to be found negligent when someone is hurt on the property**, four elements must be proven. First, it must be established that the property owner or management company had a duty to protect individuals lawfully on the property against the type of risk in the specific situation. The second element of negligence is more difficult to establish. It must be shown that the property owner breached its duty to protect.

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**To avoid liability**, the first step a company must take is to conduct a security analysis. Obviously, companies must follow the analysis with actions that address vulnerabilities. Proper maintenance is also key. A company that quickly responds to broken locks and burned-out lights is demonstrating that security is important.

owners feel the area is so dangerous that crime will continue to happen no matter what intervention they attempt. Therefore, the owners consider it an unnecessary expense to implement proper security measures.

This trend became evident to us in a string of cases against one apartment complex. Our firm represented five plaintiffs who were victims in three different

shooting incidents on the property occurring between 2007 and 2011. After a resident was killed in the first shooting and another injured in the second shooting, the property owners took no steps to improve security on the premises. The third shooting also resulted in a fatality. Each case resulted in significant damages.

In another case, a shooting during a home robbery resulted in a lawsuit

against a homeowner's association. In the incident, a resident came home with his family and stumbled into a robbery in progress. The robbers shot the homeowner, causing devastating and permanent injuries.

The homeowner's association knew who the assailants were. In fact, the assailants were a group of young people who lived in the neighborhood. During the preceding years, these residents had become increasingly problematic, committing burglaries and assorted thefts in the neighborhood. The association was notified, but allowed these individuals to remain as residents.

The plaintiff sued the homeowner's association, claiming that it should have taken steps to evict the residents and increase security. This property did have security consisting of a basic perimeter security system and lighting. However, the plaintiff argued that the security was inadequate and should have included security guards as a deterrent to the robbers. In 2012, the case was settled out of court for more than \$10 million.

**Response.** In some of the cases we litigate, the negligent security charges arise as a result of the lack of a proper response to an incident.

For example, in one case that was settled in 2012, a man and woman were shot in the parking lot of a national restaurant chain. Before the incident occurred, the shooter had entered the restaurant and confronted the pair while they were dining. The assailant was screaming, yelling obscenities, throwing his hands in the air, and making various threats towards the two patrons. The assailant left the restaurant after a few minutes.

An hour later, when the man and woman left the restaurant and were walking to their vehicle, it turned out that the shooter had been waiting for them. As he approached them, the two got into their vehicle and attempted to drive away, but the assailant fired multiple shots into the vehicle. The female was killed and the male was rendered unable to walk.

The surviving victim sued the restaurant for negligent security, claiming that it violated its own policies by failing to call the police after the assailant made a

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scene inside the dining area. Had the police been called, argued the plaintiff, the shooter likely would not have remained lurking in the parking lot. The case resulted in a multimillion dollar settlement.

In another case (*Peinado v. Miami-Dade County School Board*), which garnered much media attention in 2011, Juan Rivera was stabbed and killed on the premises of Coral Gables High School in Coral Gables, Florida, by a student with a record of suspensions who had been barred from the campus.

Rivera's parents sued the school, claiming that it failed to provide a safe environment for students and that the school had violated its own policies by allowing the barred student on campus and then failing to break up the fight that resulted in the fatal stabbing. Plaintiffs also argued that the school failed by taking no security measures to respond to previous violence on campus and taking no steps to prevent weapons on the premises.

Rivera's parents received a \$1.875 million settlement.

Because of qualified immunity—a legal theory that exempts the government from liability in some cases—the plaintiffs received only \$700,000 of their settlement. However, the Florida Legislature passed a law to provide Rivera's parents with the rest of the settlement money.

The cases discussed here are all from the state of Florida. Other states have similar cases, with Texas, New York, and California being top negligent security litigation contenders.

### Avoiding Lawsuits

The first step a company must take is to conduct a security analysis. That doesn't have to cost money. The local police departments will sometimes provide free security analyses. In these cases, law enforcement comes out to a property, inspects the premises, and provides recommendations as to what reasonable se-

curity measures and devices a given property needs. The company can also examine crime grids and police reports to learn about the number and types of crimes occurring in its area. These can usually be obtained for a minimal charge from local police departments.

Obviously, companies must follow the analysis with actions that address any vulnerabilities. Proper maintenance is also key. A company that quickly responds to broken locks and burned-out lights is demonstrating that security is important.

Juries are looking to property owners to take crime prevention seriously and take action, which may include changes to policies, added surveillance cameras, more effective access control, and better maintenance of the premises. ■

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