

MANAGING NEGLIGENT SECURITY RISKS: COPING WITH IMPERFECTION

By Stacy Fulco and Jon D. Groussman, J.D.

OUT OF THE COUNTLESS NUMBER of negligent security cases filed each year, only a handful of those matters ever go to trial. Most cases settle out of court, and the outcomes go unreported. However, the legal costs involved in the discovery and settlement process continue to rise, and the payouts to claimants are often substantial.

When negligent security cases do go to trial, they typically involve victims of violent crime, which can mean broad press coverage, sympathetic juries and oversized awards. One landmark case — where an individual was shot in a nightclub parking lot and permanently paralyzed — resulted in a jury award of nearly \$103 million, which was later negotiated down to the insurance policy's limit of \$26 million.

Negligent security cases are a significant and growing subset of premises liability and based on the obligation of a property owner or manager to provide

a safe environment for their customers, residents or visitors. A key factor in determining liability in these cases involves the concept of foreseeability, which examines whether the property owner knew, or should have known, that a security risk existed.

Property owners and their insurance carriers can address foreseeability in two ways. Ideally, they can apply proven crime prevention best practices, in advance of any crime that might occur on the property, so they are prepared to demonstrate that they followed reasonable precautions. After a violent incident has already occurred, they can also conduct a comprehensive investigation to either establish or disprove the foreseeability of that crime.

RISK MANAGEMENT BEFORE AN INCIDENT

Converting potentially dangerous conditions into preventative action requires a shared appreciation and commitment

between the insured and the underwriter involving the need to evaluate the property's exposure to criminal activity, and to take whatever steps are appropriate to address those conditions.

The starting point for understanding an insured's exposure involves a review of all security policies and practices, which provides insight into how seriously the client is addressing the reasonably anticipated risks. How the client manages security-related issues on a day-to-day basis not only enables the claims professional to help remedy exposures but also to provide quick and effective service following an event.

There are several ways that a claims professional can evaluate an insured's security practices to be prepared before and after any attack, including:

- Obtain a copy of any security manuals or emergency procedure manuals, which are often the focus of any litigation after the event. It is impor-



tant to keep updated copies of this material.

- Learn what types of incident and security reports the insured maintains so requested information is quickly obtained following an event.
- Understand how the insured's security department is organized; including reporting structure and individual roles and responsibilities.
- Know exactly what type of security measures exist at the property. Whether employees or outside contractors are used, obtain copies of contracts to understand how the scope of their responsibilities is described.
- Learn which employees were trained in security-related practices at the property level, how and when that training was provided, and how the insured can prove the training was effective.

Best practices call for all of this information to be organized for each insured,

and that those files be updated and disseminated each year to all claims professionals handling security cases. Legal counsel can assist in this effort by preparing a convenient worksheet that identifies the information needed.

IMPORTANCE OF IMMEDIATE RESPONSE FOLLOWING AN INCIDENT

If despite your insured's best efforts a violent attack occurs on their property and people are harmed, response time is the most critical aspect of managing the claim. Any delays in investigating, retaining legal counsel, engaging a premises security expert and developing a defense plan can negatively affect the outcome and value of the case.

The most effective defense in these matters is always found in the details, and as time passes, those details can fade or be lost completely. In the majority of negligent security cases, the plaintiff relies on

emotions to win, while the defense must rely on facts and the law. Because these are fact-intensive cases, the only way to learn all the facts is to investigate the incident immediately.

To win, the plaintiff must put a company in a position to take the blame for the criminal acts of a third-party individual or individuals. And to establish liability, the plaintiff must try to find any weak spot — a security protocol not followed, physical security measures not functioning properly, insufficient training or retention, a lack of security staffing, a disgruntled employee — anything to ground their argument so that blame for the tragic event can be shifted from the criminal to the property owner or manager.

If an adjuster can react quickly and thoroughly investigate the claim, he is in a significantly stronger position to validate the conditions and circumstances; to control the witnesses; to calculate any potential weakness in the case and to develop

an initial defense plan even in advance of plaintiff's counsel being retained.

Most often, this is accomplished by engaging, as quickly as possible, defense counsel who is experienced in these matters, as well as a seasoned security expert, to organize the investigation, evaluate the liability and establish a strategy tailored to the circumstances of the case. Security is not 'one size fits all'.

By following this protocol, a security incident can be fully investigated, and the liability can be assessed, often within a matter of days. This not only can be accomplished in a fraction of the time and expense it will take to investigate the same matter following a long delay; it also delivers results that are unlikely to be achieved if months or years are allowed to pass following the event.

INVESTIGATION PROTOCOL FOLLOWING AN ATTACK

The most important goal for a claims professional after a violent attack is to learn about the event as soon as possible, and the most effective way to ensure the investigation happens quickly is to have someone from the claims group included on the "Emergency Call List" for the insured. (If the insured does not have an Emergency Call List, then address that issue immediately.) This enables the claims professional to learn about the event in real-time, to determine if the incident is sufficiently serious, and to send counsel and a security expert to the scene immediately, based on that initial evaluation.

Having legal counsel at the scene of the event can provide a blanket of privilege over much of the contents of the investigation if performed correctly. Engaging counsel who specialize in these types of cases — even if it means utilizing out-of-state counsel — can be vital in high stakes matters involving serious injury or death, because those attorneys understand how to properly investigate the case, and what information should be gathered. They are also well versed in the legal arguments typically at issue in these cases.

A KEY FACTOR IN DETERMINING LIABILITY IN THESE CASES INVOLVES THE CONCEPT OF FORESEEABILITY...

During the first 24-48 hours following the incident, the investigation protocol should include the following steps:

- Secure all surveillance footage that covers a long period before and after the actual incident. If the incident is significant, preserve the entire DVD player and give it to legal counsel to preserve.
- Cooperate with police in every respect. If your defense counsel is able to establish a positive relationship with police from the outset, this will pay off throughout the entire case.
- Obtain a list of all employees working at the time of the incident. Defense counsel will interview all parties present at the time so that those conversations are privileged and there are no discoverable witness statements.
- For any employees who are directly involved in the incident, obtain proof of any relevant security training.
- Collect all incident and witness reports relating to the event from the police or any other third parties.
- Collect all security/crime-related incident reports connected to the property going back at least two to three years.
- Determine if any physical security equipment was not operating at the time of the incident in any relevant area and if so, obtain full repair

history and repair requests for that equipment.

- Obtain a drawing, which shows where all security cameras were located on the property and determine if they were fixed or moveable.
- Obtain a copy of all security policies, procedures, protocols and manuals in effect for the property.
- Obtain a copy of any security vendor contracts and post orders and put the security vendor on notice regarding the incident.

Once these initial materials are secured, you will need to examine the crime history of the specific property as well as the surrounding area. Throughout the country, the law is fairly consistent in that a business can be found liable for the criminal act of a third party when a customer is injured and the crime was reasonably foreseeable.

Businesses can also be found negligent related to their security measures, either for failure to have proper security or failure to have sufficient security considering the history of the property.

In addition, liability will be determined based on whether it was reasonably foreseeable that:

- the third party was likely to be a security threat based on past knowledge of that individual, or that
- a crime similar to the one that occurred might occur again, based on the history of crime at that location or surrounding area.

The most effective way to analyze all of these factors — both in advance of and immediately following an incident — is with the assistance of a recognized security risk professional.

IMPORTANCE OF A PREMISES SECURITY RISK PROFESSIONAL

To validate claims of negligent security, the plaintiff's counsel will almost always engage an expert witness who will attempt to provide an objective explanation of how and why the insured's security measures were inadequate or missing,

given the prior risk profile. The opinions of the plaintiff's security risk professional — who is likely to be well-versed in the latest tools and techniques necessary to protect lives, property and goods — can have a significant impact on the outcome of the case.

Without the assistance of an experienced and credible security risk expert of its own to counter the plaintiff expert's opinion, the insured is unlikely to succeed in avoiding liability. However, unlike expert witnesses used in many other types of litigation, security risk professionals do not render opinions on an abstract or theoretical basis.

To be of value in negligent security matters, a security management expert should be engaged as soon as possible at the outset of the investigation and be physically on-site at the location of the incident to examine and evaluate firsthand the circumstances and evidence.

Their role is not simply to render an opinion during negotiation or at trial; but more importantly, to advise clients on their potential exposure, to help devise a rational defense strategy, and to shape an effective narrative. Importantly, a security management expert helps to demonstrate to a jury all of the measures that were done effectively by the client to protect people and property because very often the best defense is a strong offense in negligent security cases.

Throughout the investigation of the incident, a seasoned security risk expert will also identify shortcomings or conditions that are likely to expose the insured to future claims of negligence. In many respects, a professional security risk expert is both a practitioner and an educator.

RETHINKING NEGLIGENT SECURITY RISK MITIGATION

Over the course of our professional careers — much of which has involved premises liability and negligent security matters — we have encountered a diverse range of approaches and disciplines

across the insurance industry concerning how those exposures are managed by individual carriers.

Some carriers have established comprehensive, pro-active protocols for monitoring and communicating with their insured clients, both to increase the ongoing safety and security of people and properties, and to be well prepared to respond to the foreseeability and security posture evaluation following an incident. Some firms, however, apply relatively lax standards of security compliance for their insureds and appear to be content to roll the dice concerning the potential for a significant loss related to a tragic incident on an insured's property.

Despite the level of rigor that a property owner applies to premises security risk, however, there can never be a 100% guarantee that a crime will not occur. Statistics demonstrate that violent crimes can and will occur anywhere, and at any time.

Based on this unfortunate reality, and on the acknowledgment that absolute

perfection in premises security is unlikely to be achieved, all carriers should have the same goal: that their insureds apply whatever safeguards are reasonably necessary to protect the welfare of the people who live in, work at or visit their properties.

The public benefit achieved in properly managing security risk far exceeds whatever effort is required to maintain those reasonable standards or practices, and the insurance industry is in the strongest position to foster that point of view.

Stacy Fulco (SFulco@bodellbove.com) is a partner with Bodell Bove, LLC in Chicago and has represented retail, restaurant and hospitality companies for over 20 years, specializing in negligent security claims. Jon D. Groussman, J.D., (jgroussman@lowersriskgroup.com) is executive vice president-consulting practice with Lowers Risk Group and has been providing security management/crime risk mitigation consulting services to organizations for over 25 years.



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