

# Investigation and Discovery in a Negligent Security Case

*By Amanda A. Farahany, Esq.*

**T**o succeed in a negligent security case, you must do an exhaustive investigation and thoroughly pursue discovery. The strength of these cases is highly dependent upon the unique circumstances of the crime in question. The purpose of this article is to describe the types of information and documentation you should seek during investigation and discovery of a negligent security case.

Negligent security cases can differ significantly based on the type of security involved. The issues in an apartment break-in will be different from the issues in a bank robbery. A case arising out of a campus sexual assault is different from one involving a kidnapping at a shopping center. Because cases can differ so much, discussing how to handle “a negligent security case” is challenging, and the ideas presented in this article may not fully apply to every type of case.

## Elements of a Negligent Security Case

One challenge in proving any negligent security case is the threshold issue of “duty.” Before a defendant can be held liable, the plaintiff must prove that the defendant had a duty to provide a certain level of security. Whether a defendant had a duty to provide security in a particular set of circumstances is an issue of

law for a judge to decide. Defendants are often successful at convincing judges to dismiss negligent security cases at the summary judgment stage. Therefore, it is essential to uncover and bring together the evidence that will enable you to survive a dispositive motion.

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A question central to the issue of duty is whether the crime that harmed the plaintiff was foreseeable to the defendant. If an owner has reason to anticipate a criminal act, then he or she has a duty to exercise ordinary care to guard against injury caused by such an act. Negligent security law varies from state to state. Whether a defendant had a duty to provide some level of security for a victim depends on the type of case being pursued and the state’s laws being

applied. In some states, you must prove that a crime was foreseeable based exclusively on evidence of prior similar crimes occurring on the same property where the plaintiff was victimized. Other states use a “totality of the circumstances” standard pursuant to which further relevant evidence may be offered to prove that a criminal act was foreseeable.<sup>1</sup> State laws differ on which types of prior crimes can be used as evidence of foreseeability and on the size of the geographic area that can be used in determining whether the premises are in a “high-crime” locale.

Whichever legal standards apply, you should search for evidence to prove the essential elements of the cause of action, including whether the crime was foreseeable, whether the defendant took sufficient reasonable steps to prevent the crime, and whether the defendant’s failure to take these steps caused the plaintiff’s injuries. The object is to be tenacious and thorough in uncovering as much evidence as possible to prove that the defendant knew or should have known that its failure to provide reasonable security measures would cause harm to people on the property.

## Law Enforcement’s Investigative File

The police should have an investigative file relating to the crime in question. If the case has been closed, request a copy of

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the file under the state freedom of information or open records act. If the case is still open, contact the investigators, police detectives, and prosecutors to determine what information they will share with you.

### Prior Criminal Activity on the Premises

Many jurisdictions will provide a crime analysis or a police grid for the property address and for other nearby addresses. A crime analysis will list all police reports of crimes that have occurred on the property. After obtaining such analysis, you should order the police report of each crime listed in order to evaluate whether any of the crimes could be used to prove the foreseeability of the crime in your case. Check the law in your jurisdiction to determine what types of crimes can be used to prove foreseeability. In some states, even property crimes can be used to show foreseeability of, for example, crimes of physical violence. Prior automobile break-ins may be relevant to show the extent or escalation of crime in the area. Evidence of such crimes may also support expert testimony that it was likely that there would be an increase in violent crime on the premises because it was located in a "high-crime" area.

Order the 911 calls report from the county as soon as possible. Many jurisdictions save the tapes of these calls for short periods of time before discarding or reusing the tapes. Many times you will find that there is not a corresponding police report for calls that have been made to 911. For calls that may be useful in proving your case, you can also order the actual tape recordings of the calls. You should also order the recording for all 911 call(s) reporting the incident that involved your client. Such audio evidence can have a strong impact, especially when used in conjunction with visual evidence (*e.g.*, photographs).

Another source of prior crimes evidence is local government or FBI crime statistics. Local governments may provide statistics from particular neighborhoods or larger areas. The FBI publishes the Uniform Crime Reports

which contain information about eight types of major crimes in both cities and rural areas.

### Potential Witnesses

Contact every crime victim whom you have identified in your review of the prior crime records. These victims may be able to provide you with not only a more detailed version of what happened to them, but they can also tell you whether they informed the property owner about crime occurring on the property, which could be evidence of actual notice to a defendant. If prior victims have filed suit against the defendant, contact their attorneys and request a copy of their investigation and discovery files. It is not uncommon to find evidence of similar prior crimes when a defendant is claiming that it had no reason to know of past problems on the property.

Your client may be able to identify current or former employees of the defendants in the case. Consistent with the ethical rules of your state regarding contact with employees of parties to a suit, contact each employee to determine what types of crimes occurred on the property, what the property owner's awareness was of these crimes, and what security measures the defendants took in response to the crimes. Ask each of these individuals to identify other crime victims or knowledgeable employees.

### Scene of the Crime

Personally visit the scene of the crime and document its condition. The best time to do this is immediately after the crime, or if a substantial amount of time has passed, during the same month and time of day as the crime. Prior to using the documentation as evidence in your case, determine whether improvements or other changes have been made to the property. Look for problems like holes in fences or a lack of fences around the property, broken locks, inadequate lighting, or other evidence of carelessness and disregard for safety in the maintenance of the property. Graffiti, broken windows, and high, uncut foliage are signs of poor property management and

can indicate a lackadaisical attitude about the safety of the people on the property.

Foreseeability may also be established by the nature of the property. Because of the unique opportunity for criminal activity presented by automatic teller machines (ATMs), in some states a criminal attack at an ATM is foreseeable without any additional evidence.<sup>2</sup> Crime at other categories of properties, such as convenience stores, may also be *per se* foreseeable. Additionally, it may be possible to compare crime on one type of property with crime occurring on other types (*e.g.*, crime at convenience stores and gas stations.)

### Information About Corporate Defendants

Newspaper articles can contain a wealth of information. Research the property owner, landlord, management company, security company, criminal, and other parties involved, as well as the surrounding neighborhood to determine whether prior crimes have occurred. Ascertain whether the neighborhood has experienced a crime spree or a recent increase in particular crimes. Articles may feature quotes from property managers about prior crimes. Also, locate any newspaper articles relating to your client's claim.

Determining the appropriate defendant(s) is essential. In order to be liable, the property owner, management company, or landlord must have some measure of control over the property. A courthouse search of the property records will reveal the property owners and, perhaps, whether the property is leased to others. Also check for the owner, tenant, or management company's business license. Check local government planning and development offices, building inspector records, building departments, and registers of deeds for any blueprints, surveys, aerial photographs, or applications for licenses or building permits. Sometimes plans will have been submitted for security measures that were never implemented.

The Internet can also provide useful information about a company. Most

companies have Web sites now. Locate the defendant's Web site and review it for information about the company, promises of safety, rules and regulations, and other relevant information. Dun & Bradstreet ([www.dnb.com/us](http://www.dnb.com/us)), freeEDGAR ([www.freeedgar.com](http://www.freeedgar.com)), and Hoover's Online ([www.hoovers.com/free](http://www.hoovers.com/free)) all can provide background information about the company, including whether any prior lawsuits have been brought against the defendant. Other information, such as a company's financial situation also may be available. If a Web site lists a company's employees, you may be able to identify potential witnesses for the case.

### Standard of Care

After establishing a duty to take reasonably necessary steps to prevent a crime, the plaintiff still must prove that the defendant breached its duty of care. The standard of care will depend on the circumstances of the case, the type of property, and the level of crime on or around the property. It is imperative to hire an expert to testify in this area, as

for the benefit of others. Performing such measures in a negligent manner may be a breach of an assumed duty. Other sources to determine the standard of care include the industry, professional, and trade association standards.<sup>3</sup> Many industries publish magazines and books that include information on the standard of care. Associations publish newsletters and often have extensive information contained on their Web sites. Many government agencies have conducted studies relating to the standard of care in specific industries. Insurance companies often publish guidelines relevant to the standard of care as well.

### Did Negligence Cause the Injury?

Many companies defend negligent security cases by arguing that the plaintiff cannot prove the crime in question was foreseeable. However, the law is evolving, and more courts are accepting that crimes are foreseeable. Defendants are finding their strongest defense is that the plaintiff cannot prove proposed security measures would have kept the plaintiff from being victimized. If the plaintiff cannot prove the defendant's negligence had a causal connection to the injury, then the plaintiff's case will not survive summary judgment.

It is important to use an expert

early in the case to help you determine how to establish proximate cause. The expert also can help you in determining what evidence can be uncovered during pre-suit investigation as well as during discovery.

### Damages

Negligent security cases cover a wide variety of injuries. Proving the physical injury requires the same type of proof as any other personal injury case. However, one of the most significant injuries to the plaintiff is often mental anguish and emotional distress. In some states, damages are only recoverable for

emotional harm if the victim also suffered a physical injury. An exception may exist if a defendant acted with specific intent, recklessness, or wantonness.

Many victims of violent crimes suffer from posttraumatic stress disorder (PTSD). PTSD impacts a victim with three categories of disabling responses including recurring intrusive recollections (like flashbacks); emotional numbing and constriction of life activities; and a physiological shift in the fear threshold, which affects sleep, concentration, and sense of security. Other common psychological effects of crime include acute stress disorder, adjustment disorder, psychosis, dissociation, and dissociative identity disorder.<sup>4</sup>

A psychiatric or psychological expert can be retained to explain how being victimized has impacted the plaintiff's mental and emotional states. Counselors from local rape crisis centers can make strong expert witnesses for sexual assault survivors.

### Litigation Discovery Process

In negligent security discovery, the third-party defendants often possess information the plaintiff will need to prove his or her case. It is not unusual to contend with stonewalling and other discovery tactics designed to prevent the plaintiff from obtaining relevant information. To defeat such tactics, tailor the plaintiff's written discovery requests to the specific circumstances of the case, focusing on elements you will have to prove.

Some potentially fruitful categories for document-production requests include:

- security policies and procedures manuals;
- security logs books;
- periodic security reports;
- reports on prior criminal incidents;
- original and final budgets relating to security on the property;
- internal memos relating to property crime or security issues;
- documents about property maintenance, tests, and inspections, and any materials about any security malfunctions and attempts to correct such problems;
- inventories of all security equipment

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well as to prove that the failure to provide reasonable security was the cause of the injury. However, before you hire an expert, you should research the standard of care in the relevant industry so that you hire the appropriate individual.

There are several sources to look to when attempting to determine the standard of care. You can use government standards/regulations governing property conditions or activities to show the standard of care. A violation of statutes or local ordinances may be negligence *per se*. Many times, a company's own written materials or manuals can show that the company undertook security measures

on the premises, including barriers, fences, lighting, locks, and alarm sirens;

- photographs of the property;
- documents indicating ownership and control of the premises;
- information on the management company, including how long it has been in business and its relationship to the property company; and
- materials about security services, including security guards or animals, training for guards, credentialing, and written orders for security personnel.

If you are successful in obtaining such discovery, you may receive voluminous documents. Consider using a database program to enter information about each document and to code the document for future use. By utilizing a database, you will be able to uncover links between the documents you might not otherwise discover.

Expect to take more depositions than you would take in other personal injury cases. Because negligent security cases are won or lost based on the facts you present to the judge, your chances of proving that

there is a disputed issue of material fact that a jury should decide improve with the more evidence you uncover. Depositions will be a vital source for uncovering the facts. Start from the bottom of an organization and work your way up through each person who may have any information relating to the standard of care, the negligent conduct, and your client's injuries. Depending on the facts of the case, those you may want to depose will include:

- security personnel,
- courtesy officers,
- architects,
- builders,
- contractors,
- financial officers and others with responsibility for budgets,
- property owners,
- individuals responsible for creating security plans, and
- building maintenance companies and personnel.

If you diligently pursue all avenues of information in a negligent security case, you will often be successful in pursuing

recovery for your injured client. Negligent security cases are time consuming and expensive, yet the rewards are plentiful. Injured clients may receive compensation for their injuries, and you can help create a safer environment for others in the future. **VA**

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1. See Jeffrey P. Fritz & Daniel P. Hartstein, *Prior Criminal Acts Evidence in Negligent Security Cases*, VICTIM ADVOCATE, Vol. 1 No. 4 (Spring 2000).
  2. *Sun Trust Banks, Inc. v. Killebrew*, 266 Ga. 109, 113, 464 S.E.2d 207, 208 (1995).
  3. See Norman Bates, *Recent Developments in Nationwide Security Standards: The General Security Risk Assessment Guideline*, in this issue of *Victim Advocate*.
  4. Frank M. Ochberg, M.D., *PTSD 101 For Lawyers*, 2 Ann.2002 ATLA-CLE 2125 (2002).

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### **Q: Can you talk more about the disgruntled worker situation?**

**A:** Often the employee has been a problem for some time. Equally as often, companies try to ignore such problems, hoping they will go away. When the threatening behavior escalates, the employer is faced with difficult choices. The employee should be referred to a behavioral health specialist who does a fitness-of-duty evaluation on him and then makes recommendations, whether it be anger management, Alcoholics Anonymous, individual counseling, etc. It is very important that the recommendations come from the professional. If the behavior has escalated to a firing offense, employers often think that it solves the problem by firing the guy. In that situation, it becomes extremely important to have a safety protocol. If the plan is to have the individual return to

work, then there must be specific recommendations and a probationary period during which the individual must maintain his or her behavior and comply with the treatment recommendations.

### **Q: There have been several incidents of workplace violence in which the physical set up of the work space hindered employees' ability to escape to safety. Do you encourage companies to get advice to make sure the physical workplace is safe?**

**A:** Yes, that is one aspect of improving workplace safety. I have an acronym. It is S.A.F.E.T. Security assessment—Have a security assessment that evaluates the physical layout and security. Administrative preparedness—Make sure you have all your policies and procedures in place. Facilitation of resources—Know how to call the police department, and

how to call the fire department and ambulances, how to summon the necessary resources should there be any type of crisis. Employee services—If there is going to be a downsizing or a layoff, do you have employee assistance programs, outplacement services, and a process by which you are going to lay people off, whether it be for cause or cost? Have you done employee education around these policies and procedures? Train your supervisors—They are the ones that run the front line and have to implement these things. That is how you protect the workplace. **VA**

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