



Sex, Drugs & Violence

Negligent Premises Security Litigation Seminar



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The following is a report on "Sex, Drugs & Violence: Negligent Premises Security Litigation," a continuing legal education seminar provided by Leighton Law, P.A., on November 4 at the SunTrust International Bank Building in downtown Miami. Attorney Peter A. Ariz, Esq., of Ariz, Mendez & Gonzalez, P.L., moderated the session, which was presented by John Elliott Leighton, Esq. and hosted by the *Daily Business Review*.

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Editor's Note: John Elliott Leighton is the managing partner of Leighton Law, P.A., a trial law firm with offices in Miami and Orlando. A board certified trial lawyer, his practice is focused on the representation of severely injured victims, including the failure to maintain reasonable or adequate security at commercial premises, as well as Resort Torts, medical malpractice, admiralty, aviation, and consumer product liability. He is the author of Litigating Premises Security Cases published by Thomson West, and a national lecturer on trial skills.

Negligent premises security litigation is a fascinating and important area of law, especially in the State of Florida – a leader in both tourism and violent crime. In 2008 there was one violent crime every 4 minutes and 11 seconds in our state, according to the Florida Department of Law Enforcement. While the overall crime rate has recently been trending down, violent crime has not.

On a national level, our society seems to be obsessed with violent crimes, from murder to assault, rape, and armed robbery. We are particularly fascinated by celebrity criminals, from O.J. Simpson to Robert Blake, and we make ordinary people into celebrities when they commit a violent crime, like the now-famous Menendez brothers and Casey Anthony.

There is a higher rate of violent crime in Florida in part because of the large number of visitors here, who are natural targets for criminals. Vacationers naturally and purposely let their guard down, tend to drink more, carry more cash, and are often unfamiliar with their surroundings.

Florida's now-defunct rental car license plate rule was an invitation to crime. It required all rental car plates to start with a Z – practically a "rob me" sign for criminals, who would follow visitors around until they saw an opportunity. That law changed, but visitors are still vulnerable. Criminals also realize that if they are caught, a tourist is less likely to return from elsewhere to testify at trial.

With South Florida as the cruise ship capital of the world, we also provide multiple floating cities for tourists and residents alike, where crime is also a fact of life. This summer, Congress passed the Cruise Ship Security Act of 2010, which requires U.S. cruise lines to meet certain security criteria, such as having peepholes on doors. Cruise lines must now have someone on board each ship who knows how to preserve evidence and is trained to conduct a rape investigation. It's taken years of work, but this is a big step forward for cruise line passengers.

The growth of premises security litigation

Parallel to the growth of violent crimes, the field of premises security litigation has grown in the last two decades. Florida is the number three state for inadequate security claims behind Texas and New York, but ahead of California.

Premises securities cases are important not only for compensating clients, but also for bringing about positive societal changes. The new cruise ship act is just one recent example. Through the years, plaintiff's lawsuits have helped to increase corporate America's awareness of the need for security. In many cases, better security policies, procedures and practices have been able to reduce, deter or displace crime.

In the commercial realm, people are particularly vulnerable at places like malls, schools, hotels, shopping

centers and apartment complexes. There has been a great evolution in the business world since the 1980s, for example, when companies would argue that hiring a security guard or putting in a closed-circuit TV (CCTV) system would scare away customers. Now, we are more comfortable at businesses with guards and security devices because we feel more protected there.

Challenging cases

Negligent premises security matters can be very challenging cases, in large part because they seek to recover from someone other than the party who committed the violent act. While the plaintiff may decide to sue the criminal for strategic reasons or because that person has the solvency to satisfy a judgment, in virtually all cases, you are seeking to recover from a third party.

Therefore, jurors tend to be skeptical even before hearing the case. If you tell the jury you are suing a hotel where the client was assaulted, most jurors would ask, "Why is the hotel responsible?"

Therefore, it is important to consider the question of negligence right from the start. Who was negligent? How were they negligent? And would a jury reasonably infer that they were negligent? In most cases it is useful and effective to have an expert witness explain the issue of negligence. In some ways, these cases are similar to medical malpractice cases. In both, it must be shown that a standard of care was breached.

Expert witnesses are needed to establish causation – the connection between the negligence and the crime – and show that the crime could have been prevented if better security measures had been taken. While Florida law allows victims to bring an action against a party who failed to provide reasonable security, the matter of causation can be hotly disputed. The defense will say, "This was not a preventable crime. Even if we did all those things, it would still have occurred."

With the need to hire expert witnesses, negligent premises security cases are expensive and time-consuming from a plaintiff attorney's point of view. Yet it is helpful and advisable to engage at least one expert early on, to help evaluate the facts and analyze potential strategies.

Plaintiffs' attorneys should be reasonably sure that a premises security case involves serious injuries before signing on. Knowing the relevant law and how it applies in the case and employing experts to help match the facts of the case to the law are key steps to success. It can also be helpful to bounce ideas off experienced trial lawyers; most are willing to share knowledge and wisdom acquired through experience.

The screening process

A thorough screening process is the first step toward building a solid premises security case. It is easy to get caught up in a client's sad story or an appealing set of facts. But if holes start to appear in the story or the facts, it may be preferable to turn it down. Experience dictates generally avoiding the following types of cases:

- Crimes committed by a friend, neighbor or acquaintance rather than a stranger.
- Crimes committed in the heat of passion, unless it's possible to develop a negligent security case relating to a bar or tavern.
- A targeted victim who is being stalked by a criminal.

- A client who is involved in criminal activity. Someone seeking recovery for being shot in the parking lot of an apartment building at 2:00 a.m. may sound like a good case until you discover the person was at the scene to participate in a drug deal.

If it seems there are more problems than benefits after completing the screening, it is best to walk away from the case. Plaintiff's attorneys have the luxury of choice over the cases they handle; the defense does not.

Key facts that can support a case

From a plaintiff's perspective, there are a number of facts that can be helpful to negligent premises security cases:

- **A decrease in security, either in terms of the budget or the number of guards.**
- **A comparable property with better security. For instance, one defendant had a higher level of security at a "nicer" apartment complex than at the lower-rent complex where the crime took place.**
- **An increase in the size of the premises without a comparable rise in the security budget. For example, a shopping mall that adds 100,000-square-feet of retail space without changing the number of security guards.**
- **A change in the nature of the property. Bringing in a tattoo parlor or a pawnshop may change the clientele who come to the property and necessitate an increase in security measures.**
- **A change in the local crime rate, such as more incidents or violent crimes.**
- **Any prior requests from tenants for additional security or complaints about safety.**
- **If the owner or business has violated an ordinance, statute, rule, or its own procedures.**

Issues of ethics

There are a number of ethical questions that arise in negligent security matters. For instance, how can you be sure the event took place the way your client says it did, particularly with unwitnessed sexual assault cases? After all, there are plenty of false claims made against businesses and individuals. Who do you believe? Who do you trust? What do the canons of ethics require of you when representing the victim?

As a lawyer, you have to be satisfied that you have conducted a reasonable investigation. Of course, many times events like sexual assaults are unwitnessed, occur under the cloak of darkness, and there is no extrinsic evidence. It is wise to have the potential client polygraphed as part of the initial case screening, even though the test may not be 100 percent accurate. The test

results may reveal reactions from the client that wouldn't otherwise surface.

A background check is another important step in the screening process. It may reveal a criminal history, something your client did not disclose previously, or something in their employment background that doesn't make sense. Inconsistencies and untruths may be revealed, signaling that it might be better to drop the case. In some cases, it might be helpful to employ a psychologist or counselor to evaluate the client's emotional and mental state.

Ethics require you to consider carefully who your client is and what the ramifications of their personal situation are. For example, if the victim is a minor or an elderly person who is legally incompetent, whose interests do you then need to serve? To whom do you defer in the litigation? Another particularly challenging situation is a victim who is a child with divorced or separated parents who are not acting in concert with regard to the case.

When a minor is involved, a plaintiff's attorney can and should ask the court to appoint a *guardian ad litem*, who will be needed to resolve a case with a settlement or when going to trial. Before trial, a plaintiff's attorney may also ask to have a guardian of the property appointed.

When the trial begins, it is important to explain the concepts of *guardian ad litem* and guardian of the property in the courtroom. The jury needs to hear and understand how these mechanisms work to protect the child's interests.

Types of security cases

Negligent security cases fall into several types, each with its own nuances. They range from the nature and deployment of security systems to an organization's screening and training practices. Here are some examples:

- **Policies and procedures.** A business might have failed to draw up a security policy for its employees, or it might have a good policy in theory, but fail to implement those steps.
- **Negligent hiring and retention practices.** In some businesses, it's important to do polygraph testing, as well as standard background checks. At the very least, it's a reasonable question to ask why someone has left the last job. If there is something that raises a red flag, it must be investigated further. The applicant can sign a form that gives authorization to review employment records.
- **Inadequate training.** In a recent case, a deposition was taken from an assistant manager of security at a South Florida hotel. He had been promoted to the position without any training or experience in the security field. In another case, a bank officer was shot by a bank guard during a robbery. The guard attempted to shoot at the robber and missed, hitting the bank officer. There was a strong case against the security company that provided the bank guard, and whose own rules stated that armed guards were not supposed to fire their weapons.
- **Inadequate supervision.** This may involve children in a preschool or school, adults in a nursing home or other long-term care institution. For example, a father dropped his schizophrenic

daughter off at a day-care facility and an employee led her to a room where she was raped – a clear case of negligent supervision.

- **Negligent patrol practices.** A property might not have enough guards to protect people, or those guards might not be patrolling the property effectively, leaving "blind spots" for criminals. Sometimes security guards avoid the summer heat and rain, and opt for the food court or social locations instead of patrolling the parking lot, even though criminals know this is the best place for a quick hit-and-run robbery.
- **Inadequate or poorly maintained lighting.** Almost every jurisdiction has a minimum lighting requirement because lighting is a key factor for deterring crime. If there is a lighting violation on the property, this might signal evidence of negligence.
- **Ineffective security equipment,** such as access control, locking mechanisms and CCTV. Again, the systems may be inadequate or the operational procedures may be faulty. If one guard must keep track of 25 TV screens all night, the chances are high that he could miss a potential intruder.
- **Perimeter control,** which involves limiting access to a property through fencing, landscaping or other means. Some experts are specialists in crime prevention through environment design (CPTED).
- **Poor key control.** This is a huge issue in Florida with all the hotels and resorts, as well as schools, dormitories and apartments. Problems were occurring at apartments with a traditional lock and key if management didn't rekey a unit when someone moved out. A criminal could simply wait a couple of months and then go back and commit a robbery. Many properties now use key cards – the failure to do so makes for a strong plaintiff's case.
- **Unauthorized access.** When a crime is committed in a guest room or apartment, it must be determined who else might have access to an individual or master key card. Computers can track when a card is used, but if it has been stolen from housekeeping, bad things can happen.

A standard of care

Although there are many complexities inherent in negligent security litigation, these cases have basic premises liability law at their heart. That means that the owner, tenant or landlord has a certain standard of care to persons who come onto the property. Therefore, it is essential to understand the concepts of "duty" and "foreseeability."

As in all tort cases, a duty must first be established as a threshold for liability. The nature and extent of that duty will depend on the nature of the premises, the foreseeable criminal activity on or near the premises, and the relationship of the parties. Even when a property owner or business hires a firm for security services, they still have a duty to the people who enter their premises. In other words, legally they are still on the hook. In general, if the owner or

landlord can't protect against a danger, there is still an obligation to warn, as in placing a warning sign in the corresponding area.

Here is a closer look at those issues, including significant cases:

- In general, a landowner breaches the duty to use reasonable care by failing to make diligent searches or inspections at reasonable intervals for dangerous conditions that might be created by invitees or third parties. *Boatwright v. Sunlight Foods*, 592 So.2d 261 (3d DCA 1992).
- A landowner has two basic duties: reasonable care to maintain the premises in reasonably safe condition, and to give warning of concealed perils which are or should be known and which are unknown to invitee. See *Williams v. Madden*, 588 So.2d 41 (1 DCA 1991).
- In fulfilling its duty to maintain its premises in a reasonably safe condition, "a landowner must conduct inspections appropriate for the premises involved." *Yuniter v. A & A Edgewater of Florida, Inc.*, 707 So.2d 763 (Fla. 2d DCA 1998).
- A retailer's general standard of care may include an obligation to protect a customer from a known ongoing attack. *Butala v. Automated Petroleum and Energy Company*, 656 So.2d 173 (Fla. 2d DCA 1995).
- A landlord has a duty to protect an invitee from a criminal attack that is reasonably foreseeable. *Ameijeiras v. Metropolitan Dade County*, 534 So.2d 812 (Fla. 3d DCA 1988).
- As a matter of law a landlord of an apartment complex is obliged to protect its tenants from reasonably foreseeable criminal conduct. *L.K. v. Water's Edge Ass'n*, 532 So.2d 1097 (Fla. 3d DCA 1988).
- Duty of care owed by a landowner to invitee with respect to protection from criminal acts is dependent upon foreseeability of such acts. *Admiral's Port Condominium Ass'n. v. Feldman*, 426 So.2d 1054 (Fla. 3d DCA 1983); Accord: *Medina v. 187th Street Apartments*, 405 So.2d 485 (Fla. 3d DCA 1981).
- Standard of care in providing security will vary according to particular circumstances and location [of hotel]. *Orlando Executive Park v. P.D.R.*, 402 So.2d 442 (5th DCA 1981).

The issue of foreseeability

Foreseeability is usually the crux of these cases. The extent of foreseeability determines the extent of the duty of care. In other words, you don't win just because your client was a victim of crime on that property. You must determine the owner's or landlord's duty and whether the crime was foreseeable and reasonably preventable.

In the United States court system, there are two primary standards for foreseeability. In some states, the rule is "prior similar" – a similar act must have occurred on the premises in the past for this crime to be foreseeable.

In Florida, and many other states, the courts look at the "totality of the circumstances," including, for example, the owner's internal records, police records, industry trends, and evidence of prior crimes that occurred on the premises or in the immediate area. A prior similar crime is not a prerequisite.



One of the tools used to analyze foreseeability is a police crime grid, which has been held admissible at trial. This involves obtaining from a police agency a record of the service calls for the area around the address, perhaps a one-mile grid. This provides a good starting point for an expert's analysis.

The grid can be used to begin pulling incident reports that are relevant to the crime and its location. Incident reports are almost always available and more helpful than investigative reports, which may refer to a crime that has not yet been solved. When "open" case files have been sitting in a police file for years, it's important to talk to the people in records about releasing the reports, then go up the chain of command.

Another good source of information is a business' internal records, which often contain items that will be painful for the defendant to see in trial.

Public records should also be reviewed to determine whether the defendant has been sued in a similar matter in the past few years. That information could provide a solid boost to the case.

Selecting expert witnesses

Expert witnesses, from academics to real-world professionals, are crucial to most negligent security cases. They are important at every step in these cases. However, they must be vetted very carefully, because there is no standard or certification for securities experts.

An expert can perform a security assessment of the property. It is important to also determine whether the defendant had an audit done before the crime, and whether or not those findings were followed. Remember that security is a loss leader for owners and businesses; it doesn't generate revenue.

Another strategy to consider is "reverse surveillance," which can involve sending an investigator to the property at the same time of the day the incident took place, to videotape and record what they see. That provides proof if the defense says, "We always do this" or "We never do that" in relation to their security procedures. A reverse surveillance can turn the tables on the defense and is most effective when done early in the case.

Investigations are time consuming and expensive, and bringing in experts at the beginning to help evaluate

the case will be the best money spent. If it does turn into a viable case, the expert will have been on board from the start and can help frame the discovery and guide the investigator. It's also a way to avoid the biggest mistake: getting deep into a case and finding a big problem later on.

Insurance coverage

In recent years, the insurance industry has added numerous exclusions to avoid paying claims. Under Florida's mandatory liability insurance disclosure statute, Fla. Stat. §627.4137, insurance must be disclosed. It is important to review not just the declaration sheet but also a certified copy of the entire policy, which may reveal an exclusion.

Many policies today have sublimits, such as a \$25,000 cap for intentional acts or \$50,000 for sexual misconduct. However, the insurer may still have a duty to defend and indemnify the defendant in the case. E&O (errors and omission) actions might also be filed against insurance agents for failing to advise the insured of coverage exclusion or failure to procure appropriate coverage.

Terrorism: The next wave

In 1997, Mr. Leighton delivered a lecture in Las Vegas to the American Trial Lawyers on the likelihood of domestic terrorism, including hijacking U.S. aircraft. Since then, we have seen the terrorist attacks of 9/11 and more recently letter bombs sent to U.S. judges. Terrorism on our own soil is definitely a foreseeable act and property owners and businesses should take that into account as part of any comprehensive security assessment.

Looking back to the Pam Am Lockerbie crash in 1988 or the first World Trade Center bombing in 1993, there is clear evidence of the foreseeability of terrorism. In fact, a judge in one of the 9/11 cases said the jets crashing into the twin towers was "within reasonable foreseeability" should hijackers take control of a plane.

Jurors are also looking more closely at anti-terrorism security procedures. In the trial against Pam Am in the Lockerbie case, the jury found Pan Am had not provided adequate security. The evidence showed that Pam Am had ignored similar failed bombing attempts, as well as a telephone threat regarding the exact route of the targeted aircraft. Even worse, from the jurors' perspective, Pan Am had initiated an extra security fee to passengers and was pocketing the money.

The jury in the 1993 World Trade Center case also came back with an inadequate security-related verdict, in this case for \$5.8 million, saying a reasonably prudent landlord would have undertaken better security measures.

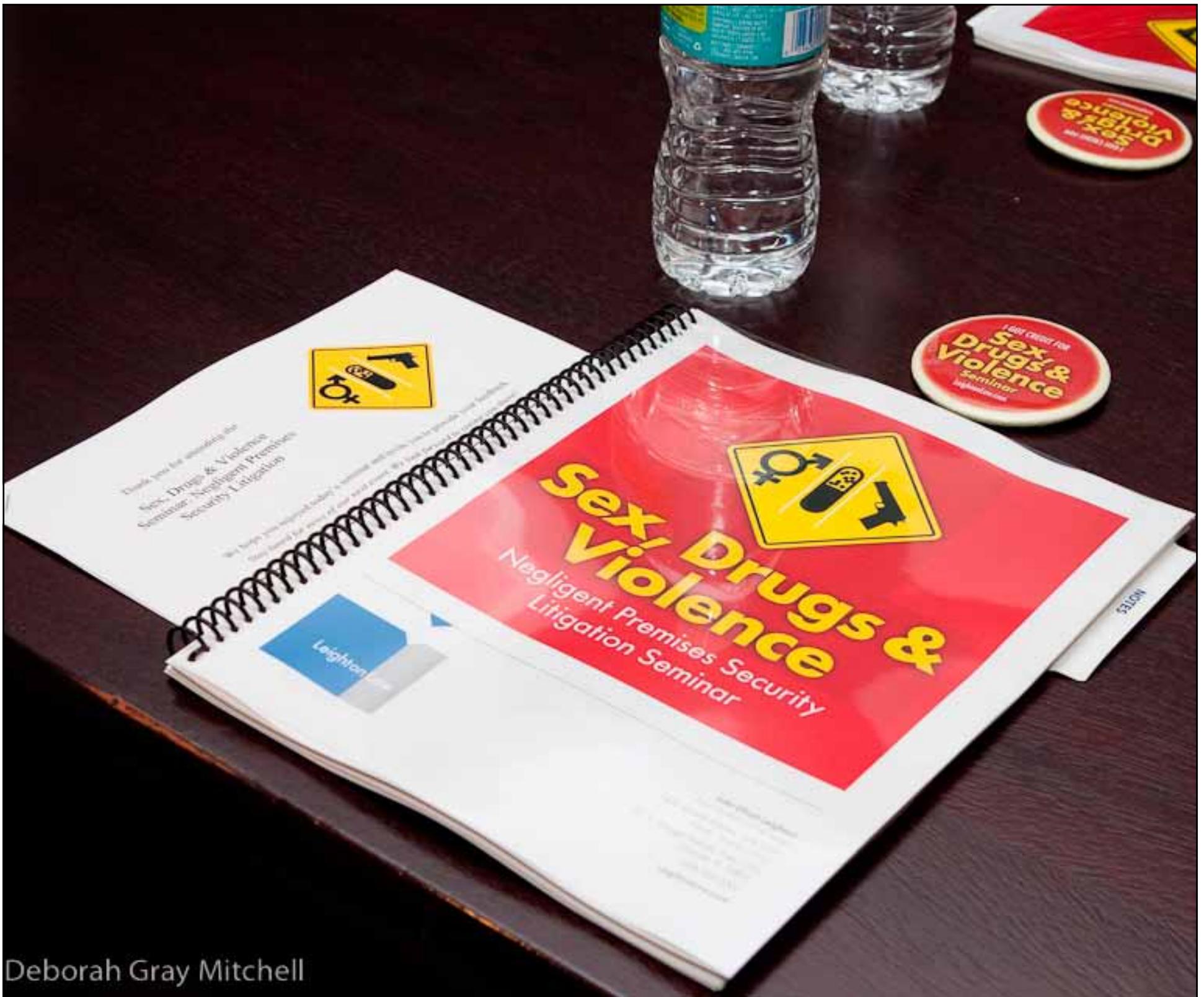
After the 9/11 attacks, the Association of Trial Lawyers of America (ATLA) organized the largest pro bono project in U.S. history, ultimately helping obtain \$7 billion for 2,880 survivors of victims and 2,680 individuals who were injured in the attacks or rescue efforts.

Today, terrorists are most likely to attack "soft targets" such as shopping centers, nightclubs and amusement parks, where many people tend to gather.

Therefore it is vital for these types of facilities and venues to include the once unthinkable concept of a terrorist attack in their security plans.

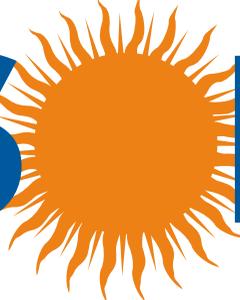
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Spring 2011

NEGLIGENT PREMISES SECURITY LITIGATION

Q&A

Q. If you're involved in a celebrity case, does that skew the jury?

A. Some celebrities have gotten away with serious crimes because they are celebrities. The jurors don't want to believe a celebrity would do something that bad. Sometimes it distracts from the real issues in the case.

Q. Have you ever taken on a case involving a sudden, unprovoked attack where the owner or innkeeper didn't have a previous history?

A. I have seen those cases and heard that defense. If a crime was truly not foreseeable, then a plaintiff may not succeed. But sometimes a crime may be preventable, even if not foreseeable. That turns on questions of fact, such as whether the property had reasonable security. This sometimes arises in tavern cases.



Q. How deep is your screening process?

A. It is different for each case. Sometimes I have a gut feeling about the client, but with others I have to obtain records and review the law. I may even retain an expert before I decide to take on the case. Sometimes I polygraph my client for my own satisfaction where it involves an unwitnessed crime.

Q. Why is speculative after-the-fact testimony by the perpetrator even admissible?

A. Most courts will allow that to come in, but you can attack it. I have seen experts say, "Based on my training in forensic psychology, this criminal would have done it anyway." You can try to exclude it, but most of the time the judges will allow it as being relevant to preventability.

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And sometimes the criminal can also be an ally. The offender might want the victim's help down the road at a parole hearing, so the criminal might want to help your case rather than hurt it. It is generally admissible where an expert opines and relies upon it.

Q. Have you been involved in cases where a valet makes a copy of the house key and break into the home?

A. No, but I can see how that happens. That's why you never give a house key to the parking valet.

Q. When you're in discovery with a third-party security company, do you ever run into proprietary information?

A. Occasionally. Sometimes you can reach an agreement to use the material and return it at the end of the case. Sometimes a court will rule on it and may determine that some documents are trade secrets and some are not. Those considered trade secrets would be subject to a confidentiality order.

Q. What about violent crimes against a spouse?

A. Florida abolished interspousal immunity in 1993, so civil battery can be brought as an independent tort or within a dissolution of marriage case. You have to look at those from a strategic point of view. Is there any solvency? Does the spouse have any money? In family court,

you might want to use that tort for equitable distribution purposes. Sit down with a family law practitioner who knows what he or she is doing before deciding whether and how to bring that case.

Q. Do you walk away from a case with an insurance exclusion or take it?

A. It depends on the case. What is the nature of the defendant? Is there another party to go after? Is there any solvency of a defendant? Can I get around the exclusion? After all, any ambiguity is resolved in favor of coverage. But you have to look closely at a small mom and pop defendant with full exclusion, and say, "Do I want to sink \$100,000 of my money into the case?"

Q. Does this create an incentive not to have coverage?

Key Takeaways

- Don't litigate these cases unless there are serious injuries.
- Be careful of unwitnessed crimes.
- Engage one or more experts at an early stage of the case.
- Conduct a criminal record search on the client.
- Be tenacious during discovery and throughout the trial.

A. I would think most businesses want to have insurance coverage. These cases are expensive for them and have substantial exposure. And sometimes you can turn an exclusion into an E&O [errors and omissions] claim against the insurance agent for failing to advise the business.

Q. How do you present the lie detector test to your client?

A. I tell them it's mandatory if I'm going to represent them. All but one have passed that test.

Q. You mentioned piercing the corporate veil when there are byzantine ownership arrangements. But is the only way to do that through fraud or improper conduct?

A. You don't need to have to have fraud or improper conduct. There could be comingling of funds or the same ownership or management structure.

Q. In the last few years, the price of gold has been going up. When a "we buy gold" store opens in a strip mall, does that increase the owner's or landlord's liability or require additional security?

A. In my opinion, it does. When the nature of a business changes or when you have different clientele the security requirements change. Look for industry studies that show certain patterns or robberies or other crimes. When a new business opens that has valuable merchandise easily stolen and lots of cash because they are buying gold, that suggests it may be a target. Remember Willie Sutton's response when asked why he robs banks: "Because that's where the money is."

Q. With regard to a decrease in security, what about an apartment complex that is under construction? To prevent vandalism, the landlord provides extensive security, but when the building is completed, the security goes away?

A. I would argue there needs to be continuity, and show that the defendant put more money into protecting its own assets than protecting people.

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John Elliott Leighton is the Managing Partner of Leighton Law, P.A. with offices in Miami and Orlando, Florida. Mr. Leighton litigates and tries significant cases on behalf of individuals throughout Florida and the United States. He has been called upon to provide his trial skills to represent plaintiffs throughout the country, including New York, Texas, Indiana, Wisconsin, Georgia, Illinois and North Carolina.

Mr. Leighton is the author of *Litigating Premises Security Cases*, a two-volume text published by Thomson-West, which provides comprehensive information on investigating, preparing and trying inadequate security cases and representing crime victims. His trial in *Jeffery v. Publix Super Markets*, a landmark inadequate security case, was the subject of an entire chapter in the book, *Persuasive Jury Communication: Case Studies from Successful Trials*, Chapter 10 (Shepard's/McGraw-Hill, 1995).

Mr. Leighton received the Advocate of Justice Award from the National Crime Victim Bar Association for his work in representing violent crime victims against corporate defendants. He is a frequent lecturer at national legal programs and has spoken and taught at seminars, colleges and conventions in over a dozen states. He is Chairman of the Inadequate Security Litigation Group of the American Association for Justice (AAJ) and Chairman of the Academy of Trial Advocacy.

Many of Mr. Leighton's cases are high profile or have wide reaching social implications. Several cases have resulted in policy or procedure changes on the part of the businesses or governmental entities sued. He is often called upon by local and national media to comment on legal issues, including NBC's *The Today Show*, *Inside Edition*, and many other news programs.

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