NOTES

THE TORT LIABILITY OF MALL OWNERS FOR THE CRIMINAL CONDUCT OF THIRD-PARTIES

I. INTRODUCTION

A woman[1] carrying her packages walks across a mall parking lot to her car. As she approaches her car she is assaulted and robbed by two unidentified assailants. This scenario has become all too familiar to the owners and lessees of shopping centers across the country.

The increased crime in the inner-cities resulted in a migration to the suburbs.[2] As the flight from the cities to the suburbs continued, the modern commercial phenomenon known as the shopping mall emerged.[3] The shopping mall is a microcosm of the community in which it is situated and often reflects many of the same crime problems.[4] Unfortunately, the same crimes which caused the migration from the city to the suburbs are the ones associated with patron attacks: murder, rape, and assault.[5] As the victims of these crimes begin to seek civil restitution, a new vista in the concept of tort liability has arisen.[6] Commercial landowners, in particular the owners of malls and shopping centers, are confronted with a dynamic and unpredictable area of the law which profoundly affects the way they conduct business. Conversely, this new theory of tort liability affords the victims of these

---

1. Bayzler, *The Duty to Provide Adequate Protection: Landowners' Liability for Failure to Protect Patrons From Criminal Attack*, 21 ARIZ. L. REV. 727, 730 n.18 (1979) [hereinafter *Landowners' Liability*]. A study of the spatial distribution of crime found that, "Crimes against women were concentrated on the fringes of the downtown shopping area of neighborhood commercial centers, suggesting that women are highly vulnerable while moving between active shopping areas and parked cars or nearby residences." *Id.*

2. *See generally* NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, A NATIONAL STRATEGY TO REDUCE CRIME (1973) [hereinafter NATIONAL STRATEGY TO REDUCE CRIME].

3. NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT OF TASK FORCE ON PRIVATE SECURITY, 44 (1976) [hereinafter REPORT OF TASK FORCE ON PRIVATE SECURITY].

4. *Id.*

5. *Landowners' Liability*, *supra* note 1, at 730-31.

6. Cornpropst v. Sloan, 528 S.W.2d 188, 199 (Tenn. 1975) (Henry, J., dissenting).

power to make the necessary repairs or to provide the necessary protection.[25] The *Kline* court held that "[t]he landlord is no insurer of his tenants' safety, but he certainly is no bystander."[26]

The *Kline* standard was applied and expanded in the commercial setting in *Samson v. Saginaw Professional Building, Inc.*[27] In *Samson* an employee of one of the tenants was accosted in the elevator by a mental patient visiting an out-patient clinic in the building.[28] Although there had been no prior incidents of violent behavior by visiting mental patients, other tenants had complained of the possibly dangerous conditions created by their presence.[29] The court found the incident foreseeable because of the magnitude of risk involved in allowing the criminally insane to come and go as they please through the common areas.[30] The court imposed the twin duties of investigation and taking available preventative measures.[31] The court found that if the defendant had made the proper inquiry the risk of the danger would have become sufficiently foreseeable.[32] The failure to make inquiry supported a finding of negligence.[33]

III. The Business-Patron Exception

In *Goldberg*, the residential landlord did not have a duty to provide police protection for the safety of his tenants.[34] In *Davis v. Allied Supermarkets, Inc.*[35] the "no duty" concept of *Goldberg* was applied to the commercial landowner. In *Davis* the plaintiff was assaulted and robbed by an unknown assailant in defendant grocery store's parking lot.[36] The *Davis* court, similar to *Goldberg*, cited the problems of proving negligence and proximate cause as the most troublesome.[37] The court reasoned that requir-

---

25. *Id.*
26. *Id.*
27. 393 Mich. 393, 224 N.W.2d 843 (1975).
28. *Id.* at ___, 224 N.W.2d at 845.
29. *Id.* at ___, 224 N.W.2d at 848.
30. *Id.* at ___, 224 N.W.2d at 849.
31. *Id.* at ___, 224 N.W.2d at 851.
32. *Id.* at ___, 224 N.W.2d at 846.
33. *Id.* at ___, 224 N.W.2d at 846.
34. *See supra* note 13 and accompanying text.
35. 547 P.2d 963 (Okla. 1976). The *Davis* decision was expressly overruled by the Oklahoma Supreme Court. Lay v. Dworman, 732 P.2d 455, 459 (Okla. 1987). The *Dworman* court found that a negligence cause of action exists against a residential landlord for criminal activity occurring on the premises which proximately results in injury to a tenant. *Id.* at 459-60. In *Dworman*, the plaintiff's amended petition stated an extant duty on the defendants as a result of their averred knowledge of criminal activities in the complex and their knowledge of the defective lock on plaintiff's apartment. *Id.* at 459. The plaintiff averred a breach of duty by alleging that defendants had been informed of the defective lock, but failed to make the necessary repairs. *Id.*
36. Davis v. Allied Supermarkets, Inc., 547 P.2d at 963.
37. *Id.* at 964.

ing a business property owner to supply enough guards to prevent crime would put the owner in the position of an insurer.[38] The court found that imposing the burden to prevent all crime, although possible, was unduly burdensome to property owners.[39] The court stated that "[i]t does not seem that shifting the financial loss caused by crime from one innocent victim to another innocent victim is proper."[40]

The "no duty" theory of *Goldberg* was abandoned in *Kline* in favor of a rule which imposed on residential landlords the duty to protect tenants from foreseeable criminal conduct. Similarly, the *Restatement (Second) of Torts* section 344[41] mitigates the rather harsh general rule that business property owners have no duty to protect their patrons. Section 344 states that a possessor of land who holds it open for business purposes is liable for physical harm to patrons caused by the intentional acts of third persons. Comment f. to section 344 provides some additional guidance as to the duty to police the premises.[42] The possessor's duty arises when he is put on notice of the dangerous conduct of third persons generally. The possessor may then be under a duty to take precautions and provide a reasonably sufficient number of servants to afford reasonable protection.

---

38. *Id.* at 965.

39. *Id.* at 964. The court quoted Oklahoma precedent: "To hold what the plaintiffs want us to hold would result in saying that every business man in the town of Pincher is guilty of negligence toward those he employs and is answerable to them for damages suffered as the result of the act of some criminal." McMillin v. Barton-Robinson Convoy Co., 182 Okla. 553, 78 P.2d 789 (1938) (overruled by Lay v. Dworman, 732 P.2d 455. *See supra* note 35).

40. Davis v. Allied Supermarkets, Inc., 547 P.2d at 965.

41. Section 344 states as follows:

> Business Premises Open to Public: Acts of Third Persons or Animals. A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to (a) discover that such acts are being done or are likely to be done, or (b) to give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

Id.

42. Comment f. of section 344 states:

> Duty to police premises. Since the possessor is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring, or are about to occur. He may, however, know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual. If the place or character of his business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford reasonable protection.

Id.

There are two policy arguments noted by courts and commentators as justification for section 344: (1) the economic benefit theory and (2) the nature of modern commercial settings.[43]

The economic benefit theory[44] is simply that the land owner profits from the presence of invitees on his premises and the landowner is "best able to reduce the problem" at the lowest cost.[45] The landowner has many options open to him which are both less expensive and more effective in deterring crime than the patron's sole option of staying home.[46]

Closely related to the economic benefit theory is the argument that modern commercial shopping, shopping malls and centers in particular,[47] warrant imposing a duty on merchants.[48] The primary incentive for patronizing shopping malls is the convenience of "one stop" shopping and the availability of adequate free parking.[49] The modern shopping mall has aptly been referred to as a "city within a city"[50] because of the "enormous congregations of potential and actual shoppers in relatively compact areas."[51] Having brought these people together, merchants must realize that some of

---

43. Note, *Merchant's Duty to Protect its Customers From Third-Party Criminal Acts*, 18 WAKE FOREST L. REV. 114, 123 (1982) [hereinafter Note, *Merchant's Duty*].

44. *See* W. PROSSER, HANDBOOK ON THE LAW OF TORTS § 61, at 386-87 (4th ed. 1977). Dean Prosser explained, "[T]he duty of affirmative care to make the premises safe is imposed upon the man in possession as the price he must pay for the economic benefit he derives . . . ." *Id.* at 386. *See also* Cornpropst v. Sloan, 528 S.W.2d 188 (Tenn. 1975) (Henry, J., dissenting). Justice Henry explained the economic benefit theory in the context of modern commercial shopping:

> The primary incentive to the utilization of these shopping areas is the availability of adequate and free parking facilities, which the public, in general, is invited to use without let or hindrance, but always with the expectancy that the tradesman in the market place will profit by such use.

Id. (Henry, J., dissenting). *But see* Note, *Merchant's Duty*, *supra* note 43, at 123, n.70. "The merchants suggest[ed] that free market forces remedy the problem and thus make tort liability unnecessary. The merchant relies on business to make a profit. It is in his self-interest to keep crime as low as possible, thereby making his premises attractive to customers." *Id.* (quoting brief for Amicus Curie at 3, Foster v. Winston-Salem Joint Venture, 303 N.C. 636, 281 S.E.2d 36 (1981)).

45. *Landowner's Liability*, *supra* note 1, at 747.

46. *Id.* at 748.

47. *See* Morgan v. Bucks Assocs., 428 F. Supp. 546 (E.D. Pa. 1977) (the principles of landlord-tenant law, which impose upon the landlord the duty to keep common areas safe, are applicable to a shopping center); St. Phillips v. O'Donnell, 137 Ill. App. 3d 639, 484 N.E.2d 1209 (1985) ("The landlord here has retained the right to control the common areas in the shopping center and is best able to prevent harm to others in the common areas."). *Id.*

48. Note, *Merchant's Duty*, *supra* note 43, at 123.

49. Cornpropst v. Sloan, 528 S.W.2d at 199 (Henry, J., dissenting).

50. *Id.* (Henry, J., dissenting). The implication to be drawn from the "city within a city" approach is that merchants should assume some of the duties that a city undertakes, such as police protection. Note, *Merchant's Duty*, *supra* note 43, at 123, n.71. *But cf.* Goldberg v. Housing Auth., 186 A.2d at 292. The Supreme Court of New Jersey rejected the appellate court's description of the housing project as "a city within in a city." *Id.*

51. Cornpropst v. Sloan, 528 S.W.2d at 199 (Henry, J., dissenting).

these persons are probably criminals and therefore a duty to protect patrons is justified.

IV. The Mall Owner-Patron Relationship

A. *The Limited Duty Theory*

The *Goldberg* and *Davis* courts held that in the residential and commercial settings respectively, the landowner is under no duty to protect tenants from the criminal conduct of third parties. In the mall owner-patron context, no court has held that the mall owner owes no duty whatsoever to the patron. Those courts which reject the applicability of section 344, however, impose a very limited duty upon shopkeepers for the protection of patrons from third party criminal conduct. The leading case in the limited duty area is *Cornpropst v. Sloan*.[52]

The *Cornpropst* court relied heavily on the *Goldberg* rationale that the imposition of a duty to provide police protection would be unfairly vague.[53] The *Cornpropst* court distinguished *Kline* in that it "presents a different relationship and vastly different circumstances . . . ."[54] The court found that while it might not be unfair to impose upon the landlord the duty of protecting against criminal acts, it would be "patently unfair and unjust to impose the vague duty of section 344 on the shopkeepers and merchants of Tennessee."[55] The *Cornpropst* court instead found:

> There is no duty upon the owners or operators of a shopping center . . . whose mode of operation of their premises does not attract or provide a climate for crime, to guard against the criminal acts of a third party, unless they know or have reason to know that acts are occurring or about to occur on the premises that pose imminent probability of harm to an invitee; whereupon a duty of reasonable care to protect against such act arises.[56]

---

52. 528 S.W.2d 188 (Tenn. 1975).

53. *Id.* at 193.

54. *Id.* at 195. In distinguishing *Kline*, the court noted that every reason cited by the *Kline* court for imposition of the duty to protect residential tenants from criminal attack strongly militates against imposing a similar rule on the owners and operators of business premises. *Id.* The reasons cited by *Kline* and distinguished in *Cornpropst* are as follows:

> [J]udicial reluctance to tamper with the traditional common law concept of the landlord-tenant relationship; the notion that the act of a third person in committing an intentional tort or crime is a superseding cause of the harm to another resulting therefrom; the oftentimes difficult problem of determining foreseeability of criminal acts; the vagueness of the standard which the landlord must meet; the economic consequences of the imposition of the duty; and conflict with the public policy allocating the duty of protecting citizens from criminal acts to the government rather than the private sector.

Id. at 195 (quoting Kline v. Massachusetts Ave. Apartment Corp., 439 F.2d at 481).

55. Cornpropst v. Sloan, 528 S.W.2d at 195.

56. *Id.* at 198.

The *Cornpropst* view of premises liability is "some mode of operation or condition . . . that lures, aids or abets the special danger."[57]

The plaintiff in *Cornpropst* was assaulted in a shopping center parking lot.[58] The plaintiff's complaint alleged that prior to the attack there had been various crimes, assaults, and acts of violence on or in the immediate vicinity of the defendant shopping center.[59] Additionally, there were no security guards on duty and no other protective measures used or installed at the shopping center.[60] Despite what seemingly constitutes a high degree of foreseeability, the Tennessee Supreme Court affirmed the trial court's motion to dismiss for "failure to state a claim upon which relief can be granted."[61]

The Supreme Court of Alabama relied heavily on the *Cornpropst* decision in *Latham v. Arnov Realty Co.*[62] In *Latham*, an employee of a shopping mall tenant was assaulted in defendant shopping mall's parking lot.[63] The plaintiff argued that his injury was foreseeable in that a crowd was present in the parking lot at 1:00 a.m. and the security guard failed to take action to reduce the danger.[64] In holding that plaintiff's assault was not reasonably foreseeable, the court rejected the plaintiff's argument for the adoption of section 344.[65] The court instead cited and quoted extensively from *Cornpropst* and adopted the luring and abetting theory of premises liability.[66]

The Alabama Supreme Court reaffirmed the *Latham* decision in *Stripling v. Armbrester*.[67] In *Stripling*, the plaintiff's car was stolen from the defendant shopping center's parking lot.[68] The plaintiff produced evidence that two auto thefts had occurred in the mall parking lot only two months prior to the theft of the plaintiff's car.[69] The plaintiff also introduced evidence that there has been "several purse snatchings, two robberies and a kidnapping . . . in and around the parking lot."[70] In addition, the parking lot was near a highway entrance ramp which made the lot particularly susceptible to crime.[71] In affirming the trial court's grant of summary judgment in favor of the defendant, the court noted that section 344 embraces only

57. *Id.* at 197.
58. *Id.* at 190.
59. *Id.*
60. *Id.* at 190-91.
61. *Id.* at 190.
62. 435 So. 2d 209 (Ala. 1983).
63. *Id.* at 210.
64. *Id.* at 212, 213.
65. *Id.* at 213.
66. *Id.*
67. 451 So. 2d 789 (Ala. 1984).
68. *Id.* at 789-90.
69. *Id.* at 790.
70. *Id.*
71. *Id.*

physical harm which a patron suffers at the hand of a third person.[72] The court determined that the plaintiff must produce evidence that defendants knew, or had reason to know from prior criminal activity, that there was a likelihood of criminal conduct by third persons which would harm the plaintiff.[73]

The Texas Court of Appeals, in *Castillo v. Sears, Roebuck & Co.*,[74] adopted the language and reasoning of *Cornpropst*. The *Castillo* court refused to impose a duty to provide security upon the mall owners or their tenants.[75] The plaintiffs in *Castillo* were assaulted in defendant's mall parking lot.[76] The court borrowed the *Cornpropst* language in stating, "it would be patently unfair and unjust to impose the vague duty of section 344 on the shopkeepers and merchants of Texas."[77] Without citation to *Cornpropst*, the *Castillo* court stated verbatim and adopted the *Cornpropst* luring and abetting theory of premises liability.[78]

B. *Implied Adoption of Section 344*

1. *Illinois*

In *O'Brien v. Colonial Village, Inc.*[79] the Illinois Appellate Court adopted the common law duty of reasonable care to persons lawfully on its premises.[80] Although the court did not mention section 344, the court's dictum is consistent with those courts which apply section 344.[81] The *O'Brien* court found that in order to impose a duty, the owners must have knowledge of previous incidents.[82]

The *O'Brien* court left unanswered the question of exactly what is sufficient to charge landowners with notice. The question was answered several years later by the same court in *Taylor v. Hocker*.[83] In *Taylor* the plaintiffs were assaulted and stabbed by an unknown assailant in a mall parking lot.[84] The plaintiffs were able to show only one previous incidence of violence and

---

72. *Id.* at 791 n.2.

73. *Id.* at 791. The court elaborated, "[a]bsent such specialized knowledge on the part of the defendants, the mere recital of prior criminal activity occurring in or around the parking lot or the lack of appropriate security measures will not constitute constructive knowledge on the part of defendants sufficient to satisfy this foreseeability standard." *Id.*

74. 663 S.W.2d 60 (Tex. Ct. App. 1983).

75. *Id.* at 64.

76. *Id.*

77. *Id.* at 66.

78. *Id.*

79. 119 Ill. App. 2d 162, 255 N.E.2d 205 (1970).

80. *Id.* at ____, 255 N.E.2d at 207.

81. Note, *Merchant's Duty*, *supra* note 43, at 124, 125.

82. O'Brien v. Colonial Village, Inc., 119 Ill. App. 2d at ____, 255 N.E.2d at 207.

83. 101 Ill. App. 3d 639, 428 N.E.2d 662 (1981).

84. *Id.* at ____, 428 N.E.2d at 663.

dent, the shopping center was well-lighted and located in a low-crime area.[108] The incident also occurred so quickly that even with security guards nearby, the attack and purse snatching would have occurred.[109]

C. *Express Adoption of Section 344*

There are five jurisdictions which have expressly adopted section 344.[110] These courts have construed section 344 as mandating a broad scope of foreseeability. As the scope of foreseeability widens, the likelihood that a duty to provide protection for patrons correspondingly increases.

The first court to adopt section 344 was a Pennsylvania federal district court in *Morgan v. Bucks Associates.*[111] The language and rationale of the *Morgan* decision has been adopted by the other courts which have chosen to apply section 344 in assessing mall owner liability.[112] In *Morgan*, the plaintiff was assaulted in a mall parking lot.[113] The plaintiff produced evidence of numerous car thefts in the parking lot.[114] The defendants contended that car thefts obligated them to protect cars against being stolen from the parking lot, but did not obligate them to protect patrons from being attacked.[115] The court rejected the defendants' argument by holding that even if the plaintiff suffered a different kind of harm than that which was threatened by defendants' negligence, the defendants are not relieved of liability.[116] The property crimes constituted a "constructive" notice that activities were occurring on the premises which might cause injuries to patrons.[117] In the *Morgan* court's view, the fundamental difference between the limited duty

---

108. Miles v. Flor-Line Assocs., 442 So. 2d at 586.

109. *Id.*

110. Federated Dep't. Stores, Inc. v. Doe, 454 So. 2d 10 (Fla. Dist. Ct. App. 1984); Martinko v. H-N-W Assocs., 393 N.W.2d 320 (Iowa 1986); Foster v. Winston-Salem Joint Venture, 303 N.C. 636, 281 S.E.2d 36 (1981); Brown v. J.C. Penney Co., 297 Or. 695, 688 P.2d 811 (1984); Morgan v. Bucks Assocs., 428 F. Supp. 546 (E.D. Pa. 1977).

111. 428 F. Supp. 546 (E.D. Pa. 1977).

112. *See* REPORT OF TASK FORCE ON PRIVATE SECURITY, *supra* note 3 at 110.

113. Morgan v. Bucks Assocs., 428 F. Supp. at 547.

114. *Id.* at 548.

115. *Id.* at 550.

116. *Id.*; *see* RESTATEMENT (SECOND) OF TORTS § 281 comment j (1965). *Accord* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 43, at 259-60 (4th ed. 1977).

117. Morgan v. Bucks Assocs., 428 F. Supp. at 550. The *Morgan* court quoted from Pennsylvania precedent:

> Under Section 344 of the Restatement of Torts, it is not necessary for defendants to be specifically aware of the exact location on their premises where patrons might be injured by the tortious acts of third persons. It is sufficient to establish a jury question of liability if the evidence, as in this case, shows that the defendants had notice, either actual or constructive, of prior acts committed by third persons within their premises which might cause injuries to patrons.

Id. (quoting Moran v. Valley Forge Drive-In Theatre, Inc., 431 Pa. 432, 436-37, 246 A.2d 878-79 (1968)).

and the broad duty is the scope of foreseeability.[118]

A North Carolina court, in *Foster v. Winston-Salem Joint Venture*,[119] found the holdings in *Morgan* and *O'Brien* "well reasoned" and in line with general tort law.[120] In *Foster*, the plaintiff was assaulted in a shopping mall parking lot.[121] The plaintiff produced evidence that at least 29 incidents of crime were reported in the mall parking lot.[122] The court found these allegations sufficient to state a cause of action in negligence.[123] In line with *Morgan*, the *Foster* court made it clear that foreseeability requires only knowledge of general criminal activity and a "plaintiff need not prove that defendant foresaw the injury in the exact form in which it occurred."[124]

Oregon, in *Brown v. J.C. Penney Co.*,[125] somewhat expanded the scope of foreseeability to include incidents of criminal activity in the area of a shopping center.[126] The plaintiff was attacked and robbed by a purse snatcher in a shopping center parking lot.[127] The plaintiff adduced evidence that complaints of criminal activity in and around the shopping center had been reported to the local police.[128] The plaintiff's expert witness, a chief of security at another mall, testified that such statistical information was important in determining the strength of security forces needed, as well as deployment of available forces.[129] Because the police statistics could have assisted the defendants in analyzing the risks to patrons, the court found the defendants negligent in not knowing of their availability.[130]

The court also found it significant that during the Christmas season, due to the influx of shoppers, there was a corresponding influx of undesirables.[131] In past years extra personnel had been hired to handle the increased need for security during Christmas, but during the season in which the plaintiff was injured, no extra personnel were hired.[132] The court found the defendants negligent because they failed to hire extra personnel when they knew, or should have known, that the incidence of crime increased during the Christmas season.[133] The scope of foreseeability envisioned by the *Brown* court is not unlike the twin duties of inquiry and pre-

---

118. *Merchant's Duty*, *supra* note 43, at 124.
119. 303 N.C. 636, 281 S.E.2d 36 (1981).
120. *Id.* at ___, 281 S.E.2d at 39.
121. *Id.* at ___, 281 S.E.2d at 37.
122. *Id.* at ___, 281 S.E.2d at 39.
123. *Id.*
124. *Id.* at ___, 281 S.E.2d at 40.
125. 297 Or. 695, 688 P.2d 811 (1984).
126. *Id.* at ___, 688 P.2d at 820.
127. *Id.* at ___, 688 P.2d at 813.
128. *Id.*
129. *Id.* at ___, 688 P.2d at 818.
130. *Id.* at ___, 688 P.2d at 820.
131. *Id.* at ___, 688 P.2d at 818.
132. *Id.*
133. *Id.*

ventative measures suggested in *Samson*.[134]

The *Morgan*, *Foster* and *Brown* courts' construction of the foreseeability requirement of section 344 is sufficiently broad to impose a duty on the landowner in most cases. There is a propensity on the part of these courts to send the case to the jury rather than to grant a defendant's motion for directed verdict or summary judgment.[135] Those courts have found that prior incidents need not be similar in order to impose constructive notice on defendants.[136] The *Brown* decision further expanded the foreseeability concept to include the duty to investigate and take preventative measures.[137]

A recent Iowa Supreme Court decision seemingly departs from the broad scope of foreseeability suggested by these decisions. In *Martinko v. H-N-W Associates*,[138] the plaintiff's daughter was murdered in her car which was parked in the defendant mall owner's parking lot.[139] The court recognized that foreseeability was the test in determining the extent of a landowner's duty.[140] The court's interpretation of what constitutes foreseeability, however, was unduly restrictive in light of previous case law. The plaintiff produced evidence that in four previous years, 126 crimes had been reported at malls around the country in which the defendants owned an interest.[141] The court found that, absent evidence that shopping malls are characterized by a likelihood that third persons may endanger patrons,[142] crimes occurring at defendant's other malls in other cities, states, and countries are not probative of foreseeability.[143] The *Martinko* court's characterization of foresee-

---

134. *See supra* note 31 and accompanying text.

135. Morgan v. Bucks Assocs., 428 F. Supp. at 550. "It is merely necessary under the Restatement of Torts, section 344, that reasonable measures be taken to control the conduct of third persons . . . it then becomes a question of fact for the jury . . . ." *Id.* (quoting Moran v. Valley Forge Drive-in Theater, 431 Pa. at 437-38, 246 A.2d at 879); Brown v. J.C. Penney Co., 297 Or. at ___, 688 P.2d at 820. "[T]he jury could have found these defendants negligent . . . under . . . Restatement (Second) of Torts, section 344." *Id. See also* Foster v. Winston-Salem Joint Venture, 303 N.C. at ___, 281 S.E.2d at 41. ("Since a triable issue of fact exists, summary judgment in favor of defendants was improperly granted.").

136. *See supra* note 124 and accompanying text.

137. *See supra* note 134 and accompanying text.

138. 393 N.W.2d 320 (Iowa 1986).

139. *Id.* at 321. The mall had been open only two months prior to the murder. *Id.*

140. *Id. See* Foster v. Winston-Salem Joint Venture, 303 N.C. at ___, 281 S.E.2d at 39. *But see* Martinko v. H-N-W Assocs., 393 N.W.2d at 323 (Carter, J., dissenting) ("[T]he existence of the duty . . . is not dependent upon foreseeability of harm. Foreseeability only bears on the question of whether the duty has been breached").

141. Martinko v. H-N-W Assocs., 393 N.W.2d at 322.

142. *But cf.* A. Potter, *Mall Security in the 1980s: An Overview*, NATIONAL MALL MONITOR, Sept./Oct. 1986, at 82 ("The vast majority of crimes against persons (assaults, robberies and abductions) occur in parking lots . . . .") [hereinafter *Mall Security*]; Gomez v. Ticor, 145 Cal. App. 3d 622, 193 Cal. Rptr. 600 (1983) ("[I]n its very operation of a parking structure, defendant may be said to have created 'an especial temptation and opportunity for criminal misconduct,' thus increasing the foreseeability of the attack.").

143. Martinko v. H-N-W Assocs., 393 N.W.2d at 322.

ability is more similar to the luring and abetting theory of premises liability of *Cornpropst*[144] than to the express adoption of section 344 evidenced by *Morgan*, *Foster* and *Brown*.

The dissenters in *Martinko* argued that the majority had given crime a "free bite" before such occurrences may be considered foreseeable.[145] The majority protested this characterization, arguing that foreseeability could be established by such factors as the place and character of the business.[146] Thus, *Martinko* suggests that the general unsafe character of the neighborhood might be sufficient to establish foreseeability.[147] This would seem to exemplify a flexible interpretation of foreseeability, yet the Iowa court's insistence on a prior similar act is clearly not in harmony with the liberal and broad scope of foreseeability suggested by the other courts adopting section 344.

Moreover, a prior similar incidents rule is flawed in several respects.[148] Such a rule discourages landowners from taking adequate measures to protect premises which they know are dangerous.[149] Additionally the first victim always loses, while subsequent victims are allowed recovery.[150] This result is not only unfair, but is contrary to the rule of compensating injured parties.[151] Third, a prior incidents rule leads to arbitrary results and distinctions, inviting courts to enunciate different standards of foreseeability.[152] Fourth, "the rule erroneously equates foreseeability of a particular act with previous occurrences of similar acts."[153] Fifth, the rule improperly removes too many cases from the consideration of the jury.[154] Finally, the rule may

---

144. *See supra* note 57 and accompanying text.

145. Martinko v. H-N-W Assocs., 393 N.W.2d at 323 (Larson, J., dissenting).

146. *Id.* at 322.

147. *See, e.g.*, Brown v. J.C. Penney Co., 297 Or. at ____, 688 P.2d at 820. *But see* Gomez v. Ticor, 145 Cal. App. 3d at 628, 193 Cal. Rptr. at 603 ("[E]vidence of the frequency of violent crimes in the neighborhood does not establish sufficient foreseeability to warrant the imposition of a duty.").

148. Isaacs v. Huntington Memorial Hospital, 38 Cal. 3d 112, 125, 695 P.2d 653, 658, 211 Cal. Rptr. 356, 361 (1985).

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 126, 695 P.2d at 658-59, 211 Cal. Rptr. at 361-62.

153. *Id.* at 126, 695 P.2d at 659, 211 Cal. Rptr. at 362.

154. *Id.* *But cf.* Martinko v. H-N-W Assoc., 393 N.W.2d at 322 n.3 ("In the absence of a history of similar acts in the area in question, most jurisdictions have not allowed plaintiffs to present their claims to juries.") *See, e.g.*, Gillot v. Washington Metro. Area Transit Auth., 507 F. Supp. 454, 457-58 (D.C. Cir. 1981) (rape in parking lot; no history of criminal attacks; defendant granted summary judgment); Tolbert v. Captain Joe's Seafood, Inc., 170 Ga. App. 26, ____, 316 S.E.2d 11, 12-14 (1984) (robbery and rape in restaurant parking lot; history of one previous theft; summary judgment for defendant affirmed); Taylor v. Hocker, 101 Ill. App. 3d 639, ____, 428 N.E.2d 662, 663-65 (1981) (stabbing in mall parking lot patrolled by security force; history of numerous shoplifting incidents, theft from and of cars, and one assault; summary judgment for defendant affirmed); Shipes v. Piggly Wiggle St. Andrews, Inc., 269 S.C. 479,

act to the detriment of landowners once the occurrence of a prior similar act has been established. In such a situation mall owners may find it exceedingly difficult to establish that the security measures at the time of subsequent incidents were reasonable and adequate. The mall owner would become an "insurer" of patron safety, and thereby subject to a form of strict liability.

The Iowa Supreme Court recently reassessed its interpretation of the scope of foreseeability suggested by section 344. In *Galloway v. Bankers Trust Co.*,[155] the plaintiff was the victim of a homosexual rape in a restroom at defendant's mall.[156] The plaintiff profferred evidence of a variety of past criminal activity at the mall.[157] Most of the reported crimes involved shoplifting, while only a few involved crimes against the person.[158] There were no prior reports involving assaults of a sexual nature, with the possible exception of an assault on a young boy by a man in the mall.[159] The defendant mall relied on a footnote in *Martinko* providing that "[i]n the absence of a history of *similar* acts in the area in question, most jurisdictions have not allowed plaintiffs to present their claims to juries."[160] The defendant in *Galloway* argued that after *Martinko* "some" criminal activity is not sufficient to establish foreseeability; there must be a history of similar crimes.[161]

The Iowa Supreme Court in *Galloway* rejected this narrow interpretation of the *Martinko* decision.[162] The court instead found that property crimes are not without probative value on the question of foreseeability of

---

——, 238 S.E.2d 167, 168-69 (1977) (assault in store parking lot; history of one theft at store and one arrest in parking lot; directed verdict for defendant affirmed); Cornpropst v. Sloan, 528 S.W.2d 188, 190, 198 (Tenn. 1975) (assault in shopping center parking lot; complaint stated history of other crimes, assaults, and acts of violence in immediate vicinity; dismissal granted and affirmed).

155. 420 N.W.2d 437 (Iowa 1988).

156. *Id.* at 438.

157. *Id.* at 439.

158. *Id.* The court noted that a representative year revealed the following statistics:

Shoplifting	29
Trespass	4
Beer in Parking Lot	3
Vandalism	2
Robbery	1
Open Door	1
Medical Emergency	1

Id.

159. *Id.*

160. *Id.* (quoting Martinko v. H-N-W Assocs., 393 N.W.2d 320, 322 n.3 (Iowa 1986)) (emphasis in original).

161. *Id.*

162. It is noteworthy that Justice Larson wrote the majority opinion in *Galloway* as it was he, joined by Justices Carter and Schultz, who dissented in the *Martinko* decision. Martinko v. H-N-W Assocs., 393 N.W.2d at 323-24. *See supra* note 144 and accompanying text.

injury.[163] The Iowa court in *Galloway*, relying extensively on the reasoning of *Jardel Co. v. Hughes*,[164] adopted the following language from the Delaware court opinion:

> Criminal activity is not so easily compartmentalized. So-called "property crimes," such as shoplifting, may turn violent if a chase ensues and, as the evidence in this case indicates, family quarrels may become violent with the risk that deadly weapons may be used. Moreover, the repetition of criminal activity, regardless of its mix, may be sufficient to place the property owners on notice of the likelihood that personal injury, not merely property loss, will result.[165]

The Iowa Supreme Court accordingly held that crimes against persons are not a prerequisite to proof of foreseeability.[166] Thus, the "similar" acts required under *Martinko* may include crimes in general.

V. Security

The crimes partially responsible for the migration from the inner cities to the suburbs are the same crimes which are associated with patron attack: murder, rape, and assault.[167] These crimes have been labeled "high fear" crimes by the National Commission on the Causes and Prevention of Violence.[168] The fear is not fear of the actual occurrence of the crime itself, but fear of the stranger, the unknown person who commits an unpredictable and violent act on a vulnerable and innocent citizen.[169] The economic costs of these crimes to the commercial landowner are considerable. If people are afraid to leave their homes at night, commercial landowners suffer a loss of business.[170]

In order to protect profits and insulate themselves from tort liability, nearly all mall owners provide some form of security service.[171] The contribution which security can make to the profitability of a mall is the provision

---

163. Galloway v. Bankers Trust Co., 420 N.W.2d at 439.

164. 523 A.2d 518 (Del. 1987). In *Jardel* the plaintiff, an employee of a tenant in a shopping mall, was abducted and raped while leaving her employment. *Id.* at 521. The Delaware Supreme Court in adopting section 344 noted that it is a question for the jury as to whether a property owner meets the section 344 standard of reasonable care. *Id.* at 525. The court in *Jardel* found that "[t]he extent of the security protection provided by Jardel in this case raised a factual issue and the jury was entitled to conclude that, under the circumstances, the protection provided was an insufficient response to the known history of criminal activity." *Id.* at 525-26. Accordingly, the court upheld the jury's award of $530,000.00 in compensatory damages. *Id.* at 527.

165. Galloway v. Bankers Trust Co., 420 N.W.2d at 439.

166. *Id.*

167. *See supra* note 5 and accompanying text.

168. National Strategy to Reduce Crime, *supra* note 2, at 7.

169. *Landowners' Liability*, *supra* note 1, at 731.

170. *Id.* at 731-32.

171. Report of Task Force on Private Security, *supra* note 3, at 44.

of a crime-free environment attractive to both tenants and shoppers.[172] The presence of highly visible security officers deters criminal activity and is a source of reassurance to tenants and the shopping public.[173] Security also provides an affirmative defense against the highly publicized and costly civil lawsuit brought by an aggrieved invitee.[174] In the jurisdictions which adopt section 344, the reasonableness and adequacy of security measures is a jury question.[175]

The mall parking lot should be of special concern to landowners because that is where the vast majority of "high fear" crimes occur.[176] The use of roof top observation posts is not recommended because the security officer is not visible to the general public and therefore the deterrent effect is minimal.[177] The ideal vehicle for patrolling the parking lots is a high riding utility vehicle capable of observing a much greater area of the parking lot.[178] The visibility to and from the lot can also be increased by clearing store windows of promotional signs.[179] It has also been suggested that controlling access to the lot by limiting entrances and exits acts as a psychological deterrent.[180]

The proper lighting of mall parking lots is a must for all mall owners.[181] There are recognized quantitative standards promulgated by the Illuminating Engineering Society of North America, and all mall owners should ensure that they are in full compliance with these standards.[182] It is also important to implement a system to ensure that all lights are properly functioning and non-working lights are promptly replaced.[183]

It is imperative that mall owners maintain up-to-date records of police reports of crimes committed on mall property.[184] Some courts have held that the existence of police reports constitutes constructive knowledge[185] to the landlord/landowner, and allow such reports as evidence probative of foresee-

---

172. *Mall Security*, *supra* note 142, at 80.

173. *Id.* at 81. *See also*, Brown v. J.C. Penney Co., 688 P.2d at 818 ("Visibility of security men in uniform is a deterrent to crime.").

174. *Mall Security*, *supra* note 142, at 80-81.

175. *See supra* note 135.

176. *Mall Security*, *supra* note 142, at 82. *See generally* Cherry, *Liability of Business Property Owners for Injury to Customers in Parking Lots by Criminal Attacks From Third Parties*, 13 REAL ESTATE L. J. 141 (1984).

177. *Mall Security*, *supra* note 142, at 82.

178. *Id.*

179. M. Hunter, *How Vital Security?*, Shopping Centers Today, May 1986, at 32 [hereinafter *How Vital Security?*].

180. *Id.*

181. *Mall Security*, *supra* note 142, at 82.

182. *Id.*

183. *Id.*

184. *Id.* at 84.

185. Kline v. 1500 Mass. Ave. Apartment Corp., 439 F.2d at 480 n.3.

ability.[186] The records are useful in allowing directors to redeploy officers and to identify and concentrate on problem areas.[187]

A leading security consultant[188] commented, "A cosmetologist is required to take 1500 hours of training, but a security officer can be armed and given powers of arrest after training for 12 hours."[189] Inadequate training has resulted in an increased number of lawsuits from intentional torts (i.e., false arrest, malicious prosecution, excessive use of force) committed by mall security personnel.[190] Additionally, under *Pippin* the landowner can be found liable for the negligent hiring of a security service.[191] Some states have established minimum standards for security personnel, but the majority have not.[192]

A recent survey of fifty shopping centers showed that only sixteen percent allow security officers to carry guns.[193] If a landowner believes it is necessary that security officers carry guns, the officers should be psychologically screened and complete a National Rifle Association certified training program and requalify on a regular basis.[194] While the use of firearms may be justified in some situations, less lethal weapons such as chemical mace and police batons are likely to be sufficient means of defense against attackers.[195]

Rather than contracting for security services, some malls ensure the presence of local police by providing the county or municipal police with a substation or precinct in the mall.[196] The law enforcement agency normally reciprocates with a dedicated police patrol of the mall.[197] Other malls have hired police officers to patrol the malls on a full-time basis by reimbursing or sharing the officers' salary with the city.[198] Because these alternatives are not always available, many malls hire off-duty police as part-time help. The advantages of hiring off-duty officers is that they have full police power, and are armed, equipped and trained.[199] As one former police chief stated, however, "Off-duty cops — and I can say because I was a cop — don't feel like they work for you. They don't recognize you as their boss."[200] Additionally,

---

186. *Mall Security*, *supra* note 142, at 82. *See*, Brown v. J.C. Penney Co., 297 Or. at ____, 688 P.2d at 820.

187. *Id.*

188. Anthony N. Potter, Jr. CPP, managing partner of Potter, Winkfield & Associates, an Atlanta-based security consulting firm.

189. *How Vital Security?*, *supra* note 167, at 32.

190. *Mall Security*, *supra* note 142, at 84.

191. *See supra* note 98 and accompanying text.

192. *Mall Security*, *supra* note 142, at 84.

193. *Id.* at 82.

194. *Id.* at 84.

195. *Id.*

196. *Id.* at 86.

197. *Id.*

198. *Id.*

199. *How Vital Security?*, *supra* note 167, at 148.

200. *Id.* at 34.

off-duty police are never really "off-duty" because they always respond to a 10-13 (officer needs help) and thus leave the mall owner open for charges of negligence.[201]

VI. Conclusion

In general, the tort liability of landowners for the criminal conduct of third parties is a controversial and constantly evolving area of the law. The mall owner's duty to protect patrons from criminal attacks is most closely akin to the landlord's duty to protect tenants. The mall owner's control of the common areas may justify the imposition of a duty. Furthermore, the mall owner profits from the use of these common areas which are crowded with potential shoppers.

It would be patently unfair, however, to impose a strict duty upon mall owners for the protection of patrons. Such a rule would discourage the growth and development of commercial shopping centers, which are profitable to mall owners and tenants, as well as convenient to the general public. The courts which have addressed the question of a mall owner's duty to patrons agree that the scope of the foreseeability determines the extent of the duty. There has been substantial disagreement, however, among these courts as to what constitutes foreseeability.

Those courts which envision a limited scope of foreseeability are more likely to grant a defendant's motion for summary judgment or directed verdict. The courts which adopt a more flexible and liberal approach to foreseeability have shown a propensity to allow the trier of fact to determine whether the criminal act was foreseeable. Because foreseeability is a fluid concept involving many questions of fact such as the location of the mall, the nature of prior acts, and the sufficiency of security under the circumstances, the determination of foreseeability is well suited for the jury.

Thomas J. Duff

---

201. *Id.*