CASENOTES

PREMISES LIABILITY—Evidence of Prior General Criminal Activity at Mall Raised a Genuine Issue of Material Fact as to Whether Sexual Attack on Patron Was Reasonably Foreseeable—*Galloway v. Bankers Trust Co.*, 420 N.W.2d 437 (Iowa 1988).

In November 1985, Bruce V. Galloway was the alleged victim of a homosexual rape which occurred while he was using a restroom located on the premises of Midlands Mall (the "Mall"), a shopping center in downtown Council Bluffs, Iowa.[1] Mr. Galloway brought an action against the owners, managers, and security personnel of the Mall for negligence, claiming that they failed to protect him from the rape.[2] Specifically, Galloway claimed that the Mall had failed to exercise ordinary care, failed to warn him of the risk of such an attack, and failed to provide adequate security at the mall.[3] All of the defendants filed motions for summary judgment,[4] which the district court sustained, on the grounds that such an attack was not reasonably foreseeable by the defendants.[5]

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1. Galloway v. Bankers Trust Co., 420 N.W.2d 437, 438 (Iowa 1988).

2. *Id.* The defendants were: First National Bank of Chicago and Bankers Trust Co., co-owners of the Mall under a Trust agreement; Maenner Company, operator and manager of the Mall; and American Security Services, provider of security services for the Mall. Brief for Appellee Maenner Co. at 3-4, Galloway v. Bankers Trust Co., 420 N.W.2d 437 (Iowa 1988) (No. 86-1879).

3. Brief for Appellee Maenner Co., at 4, Galloway v. Bankers Trust Co., 420 N.W.2d 437 (Iowa 1988) (No. 86-1879). Galloway's claims relied upon section 344 of the *Restatement (Second) of Torts*. This section states:

> 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 . . . intentionally harmful acts of third persons . . . 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) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

RESTATEMENT (SECOND) OF TORTS § 344 (1965).

4. Brief for Appellee Maenner Co. at 4, Galloway v. Bankers Trust Co., 420 N.W.2d 437 (Iowa 1988) (No. 86-1879).

5. Galloway v. Bankers Trust Co., 420 N.W.2d 437, 438 (Iowa 1988).

Mr. Galloway appealed to the Iowa Supreme Court,[6] and asserted that the defendants should have foreseen the attack based on: (1) evidence of past criminal activity in the Mall; and (2) evidence that patrons of restrooms in regional shopping centers are likely to be endangered by third parties.[7] On appeal, the Iowa Supreme Court *held* that the evidence of prior criminal activity was sufficient to raise a genuine issue of material fact as to whether the attack on Mr. Galloway was reasonably foreseeable by the defendants. *Galloway v. Bankers Trust Co.*, 420 N.W.2d 437 (Iowa 1988).

The critical analysis of the foreseeability issue in *Galloway* began with an examination of the recent Iowa Supreme Court decision in *Martinko v. H-N-W Associates*.[8] The *Martinko* suit was brought by the father of a young woman who was murdered in the parking lot of a Cedar Rapids shopping mall.[9] He alleged that the defendant mall owners and operators were negligent in failing to provide reasonable security in the mall lot.[10] Summary judgment was granted in favor of the defendants when the court found the evidence of foreseeability insufficient to create a genuine issue of material fact.[11]

The court in *Martinko* had applied section 344 of the *Restatement (Second) of Torts* in determining the issue of foreseeability of the murder.[12] Section 344 focuses on two aspects of foreseeability: (1) whether there has been "past experience" of criminal activity on the premises involved; and (2) whether the character of the premises is such that the owner is likely to foresee the danger which has occurred.[13] The court in *Martinko* concluded

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6. *Id.* The appeal was taken from the Iowa District Court for Pottawattamie County, James M. Richardson, Judge. Brief for Appellee Maenner Co. at 3, Galloway v. Bankers Trust Co., 420 N.W.2d 237 (Iowa 1988) (No. 86-1879).

7. Brief for Appellant at 8, Galloway v. Bankers Trust Co., 420 N.W.2d 437 (Iowa 1988) (No. 86-1879).

8. Martinko v. H-N-W Assocs., 393 N.W.2d 320 (Iowa 1986).

9. *Id.* at 321.

10. *Id.* at 320.

11. *Id.* at 323. The court in *Martinko* was divided on the foreseeability question: "Despite the majority's protestations to the contrary, I believe the effect of this decision is to give crime a free bite in the shopping center before such occurrences may be considered foreseeable." *Id.* (Larson, J., dissenting; Schultz and Carter, JJ., joined this dissent).

12. *Id.* at 321.

13. These two aspects of foreseeability are derived from the RESTATEMENT (SECOND) OF TORTS § 344 comment f (1965). Comment f states:

> 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

that there had been insufficient evidence offered by the plaintiff, under the *Restatement* criteria, from which they could find a genuine issue of foreseeability.[14] The court emphasized that there was "no evidence that [the] mall, or even its surrounding area, suffered from *any* crimes, much less violent ones."[15] Nor was any evidence offered which would indicate that the character of shopping malls was such that the defendants would be likely to foresee a murder in the mall lot.[16]

In contrast, Galloway put on evidence relating to both aspects of foreseeability—evidence of past criminal activities at the Mall, as well as expert testimony that the character of regional malls was such that an owner might reasonably anticipate injury to a patron by a third party.[17] Although the evidentiary differences were significant, the critical distinction between *Martinko* and *Galloway* was the court's new interpretation of "past experience" in determining a question of foreseeability. In defining "past experience" in *Galloway* the Iowa Supreme Court departed from the *Martinko* definition. *Martinko* had limited evidence of "past experience" to the showing of a "history of *similar* acts in the area in question."[18] In *Galloway*, evidence of *prior criminal activity* was sufficient to raise a genuine issue of material fact on the question of foreseeability.[19]

The defendants in *Galloway* admitted that there was *some* history of criminal activity at the Mall.[20] However, they strongly objected to permitting evidence of *some* criminal activity to indicate foreseeability of a homosexual rape.[21] The defendants' argument relied upon the *Martinko* standard of "similar acts."[22] Based on that standard, the defendants contended that the crimes reported were not similar to rape, and consequently, were not sufficient to establish foreseeability on the part of the Mall.[23] Applying the

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against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection.

Id. (emphasis added).

14. Martinko v. H-N-W Assocs., 393 N.W.2d at 322-23. The speculative nature of the evidence resulted, in part, from the circumstances. The Cedar Rapids mall had been opened only two months prior to the Martinko murder, and therefore, there was no history of crime at that time. *Id.* at 321. The plaintiff, however, did produce evidence of 126 crimes at 26 other malls around the country in which the defendants owned interests. *Id.* at 322.

15. *Id.* (emphasis in original).

16. *Id.*

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

18. Martinko v. H-N-W Assocs., 393 N.W.2d at 322 n.3 (emphasis in original).

19. Galloway v. Bankers Trust Co., 420 N.W.2d at 440 (emphasis added). All of the justices concurred in this decision except Justice Harris, who dissented on the issue of foreseeability. He stated that "[u]nder our holding in *Martinko*, . . . the trial court holding was correct. I am persuaded that nothing in the past history of criminal activities would cause these defendants to foresee the tort alleged here." *Id.* at 442.

20. *Id.* at 439.

21. *Id.*

22. *Id.*

23. *Id.*

Martinko standard, the district court had agreed; the criminal activities which had occurred at the Mall were not "similar" to the alleged sexual rape.[24]

In reconsidering the nature of the previous criminal activities at the Mall, the court in *Galloway* reviewed the incident reports of the Mall's security company and selected representative statistics from 1983:[25]

> Shoplifting 29
> Trespass 4
> Beer in parking lot 3
> Vandalism 2
> Robbery 1
> Open door 1
> Medical emergency 1

With the possible exception of a report indicating an assault on a young boy, none of the reported crimes involved assaults of a sexual nature.[26] Further, the court noted that there were few crimes of any kind directed toward persons.[27] Rather, the vast majority had been crimes against property.[28] The new definition of "past experience" emerged from the court's statement that "[w]e do not believe . . . that crimes initially directed toward property are without probative value on the question of foreseeability of injury."[29] This was a clear departure from *Martinko*. In adopting this new interpretation, the court relied heavily on the Delaware court's reasoning in *Jardel Co. v. Hughes*.[30]

In *Jardel* the shopping mall owner argued that absent some prior indication of a specific criminal attack or rape, such an attack could not be considered foreseeable.[31] Thus, evidence of general criminal activity, such as property crimes, created no duty to anticipate violent assaultive crimes.[32] The Delaware Supreme Court responded that the defendant's proposed foreseeability standard—limited to specific crimes—was unrealistic.[33] Quoting from *Jardel*, the Iowa Supreme Court stated:

> Criminal activity is not easily compartmentalized. So-called 'property crimes,' such as shoplifting, may turn violent if a chase ensues . . . .

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24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.* Security reports indicated an assault on a child in August 1983, an attempted assault with a deadly weapon in October 1981, and a report of gun fire in the Sears Store in June 1981. Brief for Appellant at 12, Galloway v. Bankers Trust Co., 420 N.W.2d 437 (Iowa 1988) (No. 86-1879).
28. Galloway v. Bankers Trust Co., 420 N.W.2d at 439.
29. *Id.*
30. Jardel Co. v. Hughes, 523 A.2d 518 (Del. 1987).
31. *Id.* at 524-25.
32. *Id.* at 525.
33. *Id.*

> 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.[34]

The Iowa court found that the evidence in *Galloway* supported the conclusion reached in *Jardel*.[35] The court noted that the Mall's security reports had indicated three incidents of fleeing shoplifters found in possession of dangerous weapons.[36] The reports showed that one fleeing shoplifter possessed a gun, one slashed at a guard with a knife, and one had tried to run down a guard with his car.[37] Again quoting *Jardel*, the court stated: " '[C]rimes of whatever type and whenever occurring on the premises are part of the circumstantial setting in which security needs are measured.' "[38]

Returning to the *Restatement* criteria, the court in *Galloway* considered the second aspect of foreseeability: whether the character of the shopping mall was such that the defendants should reasonably have anticipated injury to a patron by a third party.[39] Galloway offered an affidavit which was prepared by an expert on security.[40] In reviewing all of the evidence in the case, the expert had concluded that the assault was foreseeable "due to the high incidents of criminal activity in public restrooms in regional shopping centers generally, and previous incidents of crimes against persons including assaults on patrons at Midlands Mall."[41] This characterization of mall restrooms, as places where there is a likelihood of injury to mall patrons, provided further evidence upon which a determination of foreseeability could be based.[42]

In concluding its discussion of the evidence in the case, the court added that a finding of foreseeability requires only that one foresee "the 'general character' or 'general type' of the event or harm, and not its 'precise' nature, details, or above all [the] manner of [its] occurrence."[43] Citing other courts which have allowed evidence of non-violent activity to show foreseeability of

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34. Galloway v. Bankers Trust Co., 420 N.W.2d at 439 (quoting Jardel Co. v. Hughes, 523 A.2d at 525).

35. *Id.* (citing Nallan v. Helmsley-Spear, Inc., 50 N.Y.2d 507, 407 N.E.2d 451, 429 N.Y.S.2d 606 (1980); Foster v. Winston-Salem Joint Venture, 303 N.C. 636, 281 S.E.2d 36 (1981); Murphy v. Penn Fruit Co., 274 Pa. Super. 427, 418 A.2d 480 (1980)).

36. *Id.*

37. *Id.*

38. *Id.* (quoting Jardel Co. v. Hughes, 523 A.2d at 526).

39. *Id.* at 440.

40. *Id.*

41. *Id.*

42. The court refers extensively to the impressive credentials of the plaintiff's security expert, notes his thorough review of the pleadings, depositions, and incident reports in the case, and quotes the expert's conclusions of foreseeability based upon the "previous incidences" of criminal activity and his expert opinion on the character of shopping malls generally. *Id.* at 439-440.

43. *Id.* at 440 (citing W. PROSSER & W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 43, at 299 (5th ed. 1984)).

personal-confrontation crimes,[44] the Iowa court stated that "[a] history of crimes against persons would, of course, make a stronger case of foreseeability, but we do not believe it is a prerequisite . . . ."[45]

Following its discussion of foreseeability, the Iowa court considered additional grounds for affirming the trial court's granting of summary judgment in favor of the defendants. American Security Services, the security contractor for the Mall, claimed that the attack on Galloway was an intervening cause.[46] The court rejected this argument, stating that the question of proximate cause was one for a jury to decide.[47] American Security also asserted that it owed no duty to protect mall patrons. The court rejected this argument as well, because the duty to protect customers of the Mall was expressly stated in the American Security contract.[48] Finally, the court rejected American Security's argument that the expert's affidavit should be disregarded "because it consists of 'mere opinions and conclusions.' "[49] The court stated that "affidavits are properly used in resistance to a motion for summary judgment."[50]

The final issue on appeal was raised by the defendant owner of the Mall, First National Bank of Chicago.[51] The district court had dismissed First National from the petition when they concluded that First National was not in possession of the property at the time of the incident.[52] On appeal, the dismissal was upheld on the ground that First National did not have the full incidents of ownership, including the right of possession, at the time of the alleged assault.[53] Because they had relinquished possession and control to the defendant owners, Bankers Trust, the court held that First

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44. *Id.* (citing Isaacs v. Huntington Memorial Hosp., 38 Cal. 3d 112, 126, 695 P.2d 653, 659, 211 Cal. Rptr. 356, 362 (1985); Foster v. Winston-Salem Joint Venture, 303 N.C. 636, ____, 281 S.E.2d 36, 40 (1981); Murphy v. Penn Fruit Co., 274 Pa. Super. 427, ____, 418 A.2d 480, 483 (1980)).

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 440-41. The security contract provided: "DUTIES: Contractor will assist Bankers Trust's managing agent in preparing policies and procedures for the protection of Midlands Mall Property assets, tenants, and *customers*. Specific duties include, *but are not limited to*, patrolling, traffic control, reporting, physical plant, arrests, and assisting customers and tenants." *Id.* (emphasis added by the court).

49. *Id.* at 441.

50. *Id.* (citing IOWA R. CIV. P. 237(c), (e)).

51. *Id.* The legal title to the land rested with Bankers Trust as "ancillary trustee" under a trust agreement with First National Bank. *Id.*

52. *Id.*

53. *Id.* The court analogized the trustee relationship between First National and Bankers Trust to that of an absentee landlord, stating that "possessory rights may be 'loaned' to another, thereby conferring the duty to make premises safe while simultaneously absolving oneself of responsibility." *Id.* (citing Merritt v. Nickelson, 407 Mich. 544, 553, 287 N.W.2d 178, 181 (1980)).

National Bank did not qualify as a "possessor of land"[54] under section 328E of the *Restatement (Second) of Torts*.[55]

The *Galloway* decision is a significant and laudable departure from *Martinko*. In interpreting "past experience" to include evidence of crime, in general, the *Galloway* standard promotes the public policy of encouraging landowners to take precautionary steps toward prevention of crime. The mere fact that a particular crime has not yet occurred does not obviate the possibility that such an act is foreseeable.[56] Nor should the fortuitous absence of a particular crime justify the failure of an owner to take the proper precautions.[57] Further, the *Galloway* standard eliminates the "free bite" clause in a landowner's contract with the public. The court no longer will insist that one unactionable rape occur before a subsequent victim of rape may succeed. Finally, the elimination of a "specific acts" limitation will permit questions of foreseeability to reach the appropriate officiate. As the Iowa Supreme Court reminds us: "Questions of foreseeability are ordinarily for the fact finder."[58]

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54. *Id.* Section 344 of the *Restatement (Second) of Torts* imposes liability on a "possessor of land." *See supra* note 3.

55. *Id.* Section 328E of the *Restatement (Second) of Torts* defines a "possessor of land" as follows:

> A possessor of land is
> (a) A person who is in occupation of the land with intent to control it, or
> (b) A person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it, or
> (c) A person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a) and (b).

Id. (citing RESTATEMENT (SECOND) OF TORTS § 328E (1965).

56. Isaacs v. Huntington Memorial Hosp., 38 Cal. 3d 112, 126, 695 P.2d 653, 659, 211 Cal. Rptr. 356, 362 (1985).

57. *Id.*

58. Galloway v. Bankers Trust Co., 420 N.W.2d at 440 (citing Isaacs v. Huntington Memorial Hosp., 38 Cal. 3d 112, 126, 695 P.2d 653, 659, 211 Cal. Rptr. 356, 362 (1985)). The court in *Isaacs* allowed evidence of general crimes to go to the jury, stating: "A rule that limits evidence of foreseeability to prior similar incidents deprives the jury of its role in determining that question." Isaacs v. Huntington Memorial Hosp., 38 Cal. 3d 112, 126, 695 P.2d 653, 659, 211 Cal. Rptr. 356, 362 (1985). "It may be decided as a question of law only if, 'under the undisputed facts there is no room for a reasonable difference of opinion.' " *Id.* (quoting Bigbee v. Pacific Tel. & Tel. Co., 34 Cal. 3d 49, 56, 665 P.2d 947, 950, 192 Cal. Rptr. 857, 860 (1985)).