

Spring 1989

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Recommended Citation

David A. Roodman, *Business Owners Duty to Protect Invitees from Third Party Criminal Attacks -or- Business Owners Beware: Missouri Ups the Ante*, 54 MO. L. REV. (1989)

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BUSINESS OWNERS DUTY TO PROTECT INVITEES FROM THIRD PARTY CRIMINAL ATTACKS -OR- “BUSINESS OWNERS BEWARE: MISSOURI UPS THE ANTE”

*Madden v. C & K Barbecue Carryout, Inc.*¹

INTRODUCTION

On December 15, 1984, Opel Madden parked her car in the parking lot of C & K Barbecue in St. Louis, Missouri. As she returned to her car after purchasing food in the restaurant, a male stranger asked her for help in jump starting his car.² The stranger then brandished a gun, forced his way into Opel's car and kidnapped her.³ He subsequently physically and sexually assaulted her.⁴

In a similar but more dramatic case, on December 14, 1982, Gary and Donna Decker went shopping at a plaza⁵ in North St. Louis County, Missouri. Two unknown assailants forcibly abducted both Gary and Donna as they returned to their car.⁶ The assailants raped and sodomized Donna⁷ before leaving the two dead in a vacant lot in East St. Louis, Illinois.⁸

In both *Madden v. C. & K. Carryout, Inc.* and *Decker v. Gramex Corp.*, the plaintiffs brought actions in negligence against the business owners. They alleged that the business owners were negligent in failing to

1. *Madden v. C & K Barbecue Carryout, Inc.*, 758 S.W.2d 59 (Mo. 1988) (en banc). Two cases, *Madden v. C & K Barbeque Carryout, Inc.* and *Decker v. Gramex Corp.* were consolidated for purpose of appeal.

2. *Id.* at 60.

3. *Id.*

4. *Id.*

5. The plaza consisted of a grocery store and a discount department store. *Id.* at 60-61.

6. *Id.*

7. *Id.*

8. *Id.* East St. Louis, Illinois is a city located across the Mississippi river from St. Louis, Missouri.

provide adequate security, and for failing to warn invitees⁹ of the potential danger on the business premises.¹⁰ In both *Madden* and *Decker*, the plaintiffs alleged that the frequent criminal activity on the premises during the preceding three years gave the defendants sufficient notice of the potential danger of criminal attacks.¹¹ The trial courts in both cases dismissed the actions.¹² On appeal, the Missouri Supreme Court consolidated the two cases, reversed both lower courts, and held that "business owners may be under a duty to protect their invitees from the criminal attacks of unknown third persons. . . ."¹³ The court held that if the plaintiffs establish prior crimes on the business premises, such crimes would be "sufficient to put the defendant on notice to the possibility that his invitees may be exposed to danger from the criminal attack of unknown third persons. . . ."¹⁴ The court remanded the case to the lower court for a jury determination on whether the defendants satisfied their respective duties of care.¹⁵

While claims against business owners for injuries resulting from unknown third party criminal attacks upon business premises are rapidly becoming common and viable in tort, the standards to impose a duty upon business owners to aid potential victims or to provide safe premises are quite dissimilar from jurisdiction to jurisdiction.¹⁶ This Note will review the various recognized theories of recovery, emphasizing the application and effect of the prior violent crimes exception¹⁷ in imposing a duty upon business owners.

NEGLIGENCE AND DUTY

As in *Madden* and *Decker*, invitees usually seek recovery from business owners under a negligence theory¹⁸ for injuries resulting from criminal

9. This Note will use the terms "invitee" and "business invitee" throughout the text to refer to an individual who has been "invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land." See RESTATEMENT (SECOND) OF TORTS § 332(3) (1965).

10. *Madden*, 758 S.W.2d at 60-61.

11. *Id.* In the three years preceding the criminal attack in *Madden*, the plaintiff alleged that there were six armed robberies, six strong arm robberies, one assault, and one purse snatching. In *Decker*, the plaintiff alleged the occurrence of four armed robberies, three purse snatchings, forty-five assorted thefts, one robbery in the second degree, one attempted armed robbery, one assault, and one assault with a deadly weapon. *Id.*

12. In *Madden* the case was dismissed for failure to state a claim upon which relief may be granted, and in *Decker* upon motion for summary judgment. *Id.* at 60.

13. *Id.* at 62.

14. *Id.*

15. *Id.* at 63.

16. This Note will discuss the various standards used in respective jurisdictions throughout the text.

17. See *infra* notes 38-39 and accompanying text.

18. Business invitees who have been subjected to a criminal attack have a

attacks which occur upon a business owner's premises. To seek damages for negligence, according to *Faheen v. City Parking Corp.*, a "plaintiff must allege ultimate facts which, if proven, show (1) the existence of a duty on the part of [the] defendant to protect [the] plaintiff from injury, (2) failure of [the] defendant to perform that duty, and (3) injury to the plaintiff resulting from such failure."¹⁹ Proving the existence of a duty is initially the most important threshold a plaintiff must overcome.²⁰

The basic premise that supports a business owner's duty to protect invitees from criminal attacks rests upon the business owner's presumed control.²¹ Such control includes control over some third parties, the business premises, as well as the ability to "restrain or expel" dangerous individuals from the premises where a crime could have been anticipated and guarded against.²² The majority of jurisdictions, as well as the Restatement of Torts,²³ have recognized that if certain conditions are present²⁴ business owners have a duty to protect invitees from third party criminal attacks. While there is generally no duty upon a business owner to protect an

very limited selection of potential defendants should they choose to seek recovery for injuries they may have incurred. The primary potential defendants include the criminal attacker and the business owner. In order to recover from the attacker the individual must first be identified and apprehended. In addition, the criminal may not have sufficient assets to compensate the plaintiff. Therefore, business owners are a much more attractive defendant due to the likelihood of sufficient insurance coverage, as well as assets to satisfy the plaintiff's claim. If the business owner contracted with a third party to provide security, the third party may also be a potential defendant.

19. *Faheen v. City Parking Corp.*, 734 S.W.2d 270, 272 (Mo. Ct. App. 1987) (citing *Meadows v. Friedman R.R. Salvage Warehouse*, 655 S.W.2d 718, 720 (Mo. Ct. App. 1983)); RESTATEMENT (SECOND) OF TORTS § 281 (1965).

20. The determination as to whether duty exists is a preliminary question to be determined by the court. See RESTATEMENT (SECOND) OF TORTS § 328B (1965). Therefore, the plaintiff must first establish that a duty exists in order to present a case to a jury.

21. See *Nappier v. Kincade*, 666 S.W.2d 858, 861 (Mo. Ct. App. 1984); *Meadows*, 655 S.W.2d at 721.

22. *Nappier*, 666 S.W.2d at 861.

23. RESTATEMENT (SECOND) OF TORTS § 344 (1965) provides:
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) give warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

24. This Note will examine the conditions which are necessary to impose a duty with respect to recognized exceptions throughout the text.

invitee from such attacks,²⁵ courts have imposed a duty under two exceptions:²⁶ 1) where "special facts and circumstances"²⁷ are present,²⁸ or 2) where a "special relationship" exists.²⁹

THE SPECIAL FACTS AND CIRCUMSTANCES EXCEPTION

This Note will focus primarily on the "special facts and circumstances" exception. Jurisdictions that recognize it give the exception a variety of standards.³⁰ These standards and definitions contain some inherent ambiguities.

The special facts exception "requires some relationship between the plaintiff and the defendant which encourages the plaintiff to come upon the defendant's premises."³¹ This condition will almost always be met where a business-invitee relationship exists.³² Within this requirement, two situations support a court's use of the special facts and circumstances exception³³ in placing a duty upon a business owner: "(1) an intentional infliction of injury by known and identifiable third persons; or (2) frequent and recent occurrences of violent crimes against persons on the premises by unknown assailants."³⁴

25. See *Madden*, 758 S.W.2d at 59 (citing *Meadows v. Friedman R.R. Salvage Warehouse*, 655 S.W.2d 718, 721 (Mo. Ct. App. 1983)); see also *Faheen v. City Parking Corp.*, 734 S.W.2d 270, 272 (Mo. Ct. App. 1987).

26. These two exceptions are recognized by the Restatement. RESTATEMENT (SECOND) OF TORTS § 302B comment e (1965).

27. The phrases "special facts," "special circumstances," and "special facts and circumstances" will be used interchangeably throughout the text.

28. *Faheen*, 734 S.W.2d at 272; RESTATEMENT (SECOND) OF TORTS § 302B comment e (1965).

29. The "special relationship" exception is widely accepted and relatively simple to recognize and apply. See *Faheen*, 734 S.W.2d at 272. Special relationships evolve from situations where an individual has either explicitly or implicitly relied upon another for his protection or safety. Commonly recognized relationships found to impose such a duty have been those of innkeeper and guest, common carrier and passenger, school and student, occasionally employer and employee, and in certain circumstances, landlord and tenant. Missouri courts have long recognized these relationships to impose a duty of care. See *Faheen*, 734 S.W.2d at 272; see also *Meadows*, 655 S.W.2d at 721; RESTATEMENT (SECOND) OF TORTS § 302B comment e, illustration B (1965).

30. The specific exceptions and the variations which are recognized by different jurisdictions will be discussed in the following text.

31. *Faheen*, 734 S.W.2d 270, 272.

32. Inducement or encouragement is a relatively easy element to satisfy in a business-invitee relationship and is virtually always satisfied. Inducement may be as simple as a product or service advertisement, a sign in front of a business, a television advertisement, or even telephone solicitation.

33. See *infra* note 38.

34. *Faheen*, 734 S.W.2d at 272 (citing *Irby v. St. Louis Cab Co.*, 560 S.W.2d 392 (Mo. Ct. App. 1977)).

The first "special facts" classification includes circumstances where "a known dangerous or violent individual is present, or where an individual present has conducted himself so as to indicate danger and sufficient time exists to prevent injury."³⁵ In this situation, the business owner faces an exigent circumstance which gives rise to a duty to take some affirmative action where he has sufficient time and opportunity to do so.³⁶ Therefore, the key elements to invoke duty within the classification are the present knowledge of the danger and the ability to take some remedial measure to protect the potential victim.³⁷

The second "special facts" classification,³⁸ "prior violent crimes," is comprised of numerous public policy and fairness considerations. Although all jurisdictions do not follow the exception,³⁹ it is quickly gaining acceptance and critical appeal.⁴⁰ Prior to *Faheen* and *Madden*, Missouri courts were inconsistent in their treatment of the prior violent acts exception.⁴¹ The Missouri court of appeals in *Faheen* recognized the viability of the prior violent crime theory,⁴² and the Missouri Supreme Court's *Madden* decision

35. *Meadows v Friedman R.R. Salvage Warehouse*, 655 S.W.2d 718, 721 (Mo. Ct. App. 1983) (citing *Scheibel v. Hillis*, 531 S.W.2d 285 (Mo. 1976) (en banc)); *accord Pizzurro v. First North County Bank & Trust Co.*, 545 S.W.2d 348 (Mo. Ct. App. 1976).

36. *See Meadows*, 655 S.W.2d at 721.

37. *See id.*

38. The second "special facts" exception is commonly referred to as the "prior violent crimes" or "prior violent acts" exception. These terms will be used interchangeably throughout the text. *See Vorbeck v. Carnegie's at Soulard, Inc.*, 704 S.W.2d 296 (Mo. Ct. App. 1986).

39. Many courts not utilizing foreseeability as the standard for duty where a criminal act has occurred will not hold a business owner liable merely because prior violent acts have taken place on the premises. *See, e.g., Gillot v. Washington Metro. Area Transit Auth.*, 507 F. Supp. 454 (D.C. 1981) (rape occurred in parking lot); *Cook v. Safeway Stores, Inc.*, 354 A.2d 507 (D.C. 1974) (shopper assaulted while trying to recover her purse after it was snatched); *Cornpropst v. Sloan*, 528 S.W.2d 188 (Tenn. 1975) (assault occurred on shopping center parking lot); *Castillo v. Sears, Roebuck & Co.*, 663 S.W.2d 60 (Texas Ct. App. 1983) (assault on mall parking lot).

40. The extension of liability adopted by the Missouri Supreme Court in *Madden* is representative of the growing trend to impose this liability upon business owners. *See Butler v. Acme Markets, Inc.*, 89 N.J. 270, ___, 445 A.2d 1141, 1144 (1982) ("The historical classifications of the degree of care owing to visitors upon land are undergoing gradual change in the favor of a broadening application of a general tort obligation to exercise reasonable care against foreseeable harm to others.").

41. *See infra* note 42.

42. *Faheen*, 734 S.W.2d at 273. *Faheen* appears to be the first time a Missouri court articulated the adoption of the "prior violent crimes" theory as a viable method to invoke duty. *See Warren v. Lombardo's Enter., Inc.*, 706 S.W.2d 286, 287 (Mo. Ct. App. 1986) (it has not been decided whether prior criminal acts on the premises constituted "special facts" sufficient to invoke an exception to the general rule of no duty). *But see Brown v. National Supermarkets, Inc.*, 679

affirms the viability of the prior violent acts exception.⁴³ This recognition and acceptance of the prior violent acts exception brings Missouri into the growing trend of broadening the scope of a business owner's duty.

POLICY CONSIDERATIONS

Courts have examined a number of pertinent policy considerations to evaluate the advantages and disadvantages of the prior violent acts exception. These considerations include a variety of public policy concerns including fairness, public interest, and economic consequences.⁴⁴ "It is the court's 'expression of the sum total of [these] considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.'"⁴⁵

Fairness

Courts adopting the prior violent crimes exception have not been consistent in defining the scope of the duty and degree of care a business owner must follow to avoid liability. Most decisions rely upon one of two different principles to determine the standard of care.⁴⁶ Historically, most courts held that the determination of such duty "depends ultimately on the question of fairness, which in turn is decided by a weighing of the relationship involved,⁴⁷ the nature of the risk, and the public interest⁴⁸ in the proposed solution."⁴⁹ The question of fairness appears to hinge upon the business owners ability "to ascertain in advance of a jury's verdict

S.W.2d 307 (Mo. Ct. App. 1984) (actual or constructive notice of prior violent acts upon the business premises may invoke the duty of reasonable care upon the business owner).

43. See *Pickle v. Denny's Restaurant, Inc.*, No. W.D.-40480 (Mo. Ct. App., Dec. 20, 1988) (WESTLAW Mo. Database).

44. See *Goldberg v. Housing Auth.*, 38 N.J. 578, 186 A.2d 291 (1962).

45. *Vandermost v. Alpha Beta Co.*, 164 Cal. App. 3d 771, 776, 210 Cal. Rptr. 613, 615 (1985) (quoting PROSSER, LAW OF TORTS 325-26 (4th ed. 1971)).

46. These two principles are "fairness and public policy" and "foreseeability." This Note will discuss each of these principles in the following text. See *infra* notes 47-55 and accompanying text.

47. The nature of the relationship may invoke duty through the "special relationship" exception to liability, or a business-invitee relationship will satisfy one element of the "special facts and circumstances" exception. See *Faheen*, 734 S.W.2d at 272. See also *supra* note 37.

48. Public interest may be characterized in a number of ways. It may be the interest in leaving police action to the state or possibly choosing the best economic alternative. It should also be noted that economic alternatives may also be characterized in different manners.

49. *Meadows*, 655 S.W.2d at 721 (citing *Goldberg v. Housing Auth.*, 38 N.J. 578, —, 186 A.2d 291, 293 (1962)).

whether the duty is his and whether he has performed it."⁵⁰ The element of fairness considers whether the law provides business owners with sufficient specific notice to ascertain the degree of safety required to avert liability.⁵¹ The recent Missouri opinion in *Madden* bypasses the standard of fairness, and instead approves the use of foreseeability as a standard.⁵²

Foreseeability

Third party criminal acts are inherently uncertain for a business owner. While it is generally recognized that crime is foreseeable in today's society,⁵³ using criminal activity as an indicator of whether future crimes are foreseeable, or whether particular safety measures are adequate, is fraught with numerous uncertainties.⁵⁴ Factors such as whether safety measures actually deter crime, or whether a business owner's lack of safety measures is sufficient to prove causation, present courts and juries with "extraordinary speculation."⁵⁵

FREQUENCY AND SIMILARITY

Where prior crimes have occurred on a business owner's premises, an important question becomes the frequency and type of crime necessary to impose a duty upon the business owner to protect invitees from future criminal acts. If business owners are to be obliged to protect invitees from criminal attacks, they should be able to determine the degree, type of prior crimes that will give rise to such a duty as well as the measure of care requisite to avoid liability.⁵⁶

In *Faheen v. City Parking Garage*,⁵⁷ the plaintiff brought an action for the wrongful death of her father who died in a car bombing in the

50. *Goldberg*, 38 N.J. at ____, 186 A.2d at 297 (case involved an action by a milk delivery man who was beaten and robbed in a self-service elevator in a building).

51. *See id.*

52. *See Madden*, 758 S.W.2d at 62 ("The touchstone for the creation of a duty is foreseeability.").

53. *Meadows*, 655 S.W.2d at 721.

54. *Goldberg*, 38 N.J. at ____, 186 A.2d at 297.

55. *See id.* at ____, 186 A.2d at 297 ("It would be quite a guessing game to determine whether some unknown thug of unknowable character and mentality would have been deterred if the owner had furnished some or some additional policeman."). *See also* Tipton, *Business Insecurity; "Negligent Security" Suits Rise*, St. Louis Post Dispatch, Oct. 17, 1988, at 35BP ("Some business owners and lawyers say many negligence cases are unfair because no existing security system, no matter how elaborate, could stop a determined criminal."); *cf.* Galloway v. Bankers Trust Co., 420 N.W.2d 437, 439 (Iowa 1988) (court used foreseeability but stated that "even shoplifting cases can turn ugly").

56. *See Goldberg*, 38 N.J. at ____, 186 A.2d at 297.

57. 734 S.W.2d 270 (Mo. Ct. App. 1987).

defendant's parking garage.⁵⁸ She alleged that during the five years before the fatality there had been numerous incidents of crime reasonably sufficient to give the defendant notice of the need for reasonable precautions to protect tenants.⁵⁹ The court held that a specific element of the prior violent crimes exception requires that "the incident causing the injury must be sufficiently similar in type to the prior specific incidents occurring on the premises."⁶⁰ The appellate court accordingly held that the case was properly dismissed for lack of sufficient similarity and frequency of crimes.⁶¹

The standard which the *Faheen* court articulated is inherently ambiguous. There still exists a question as to how similar or frequent a crime must be before a business owner has a duty to protect invitees under the prior violent crimes exception. In *Madden*, while the court appeared to affirm the "sufficient similarity" standard set out in *Faheen*, it established a broader standard.⁶² The court attached "reasonable foreseeability" to the prior violent crime exception, thereby allowing a case to go to a jury if the invitee's injury could have been reasonably foreseen in the context of the prior violent crimes committed.⁶³ Although this standard is not uncommon,⁶⁴ it unfortunately does not give business owners any specific guidance or predictability in determining when a duty or potential liability will be triggered.⁶⁵ Rather, the standard leaves the question to the trier of fact.⁶⁶

58. *Id.* at 271.

59. *Id.* at 271-72 (prior incidents of crime on the premises and within close proximity included arson, robbery, assault, burglary, stealing, and various misdemeanors).

60. *Id.* at 274.

61. *Id.* ("Most important to our decision are the types of crimes reported.").

62. See *Madden*, 758 S.W.2d at 62-63. The court distinguished the lack of similarity of prior crimes in *Faheen*, from those in *Madden* and *Decker*, by finding that "[a]n assassination by car bombing may not be reasonably foreseeable to a business owner based on prior incidents of violent street crime, but abduction, sexual assault, and even murder committed by use of a firearm should be foreseeable based on such street crimes." *Id.* at 62 n.2.

63. *Id.* at 62.

64. See, e.g., *Banks v. Hyatt Corp.*, 722 F.2d 214 (5th Cir. 1984); *Cohen v. Southland Corp.*, 157 Cal. App. 3d 130, 203 Cal. Rptr. 572 (1984); *Taco Bell, Inc. v. Lannon*, 744 P.2d 43 (Colo. 1987); *Antrum v. Church's Fried Chicken, Inc.*, 40 Conn. Supp. 343, 499 A.2d 807 (1985); *Jardel Co. v. Hughes*, 523 A.2d 518 (Del. 1987); *Stevens v. Jefferson*, 436 So. 2d 33 (Fla. 1983); *Levitz v. Burger King Corp.*, 526 So. 2d 1048 (Fla. Dist. Ct. App. 1988); *Galloway v. Bankers Trust Co.*, 420 N.W.2d 437 (Iowa 1988); *Martinko v. H-N-W Assocs.*, 393 N.W.2d 320 (Iowa 1986); *Taylor v. Hocker*, 101 Ill. App. 3d 639, 428 N.E.2d 662 (1981); *Harris v. Pizza Hut*, 455 So. 2d 1364 (La. 1984); *Butler v. Acme Markets, Inc.*, 89 N.J. 270, 445 A.2d 1141 (1982).

65. See *Taco Bell*, 744 P.2d at 52-53 (Erickson, J., dissenting) (the use of foreseeability provides a business owner with no guidance or standard on which to base his performance).

66. Jurisdictions utilizing the foreseeability standard have not generated a

Many courts which have evaluated the application of the "reasonably foreseeable" standard to the occurrence of crimes have stated that the occurrence of crime is always foreseeable.⁶⁷ The difficulty associated with the predictability of crime is why some courts still utilize "fairness and public policy" to determine the existence of duty, rather than foreseeability.⁶⁸ The use of a foreseeability standard to determine if a present criminal act could have been anticipated by reviewing prior criminal acts on a business premise could easily lead to unfair liability. A simple purse snatching illustrates the problem. If a purse snatching occurs in a parking lot, it is reasonably foreseeable that a woman may be physically harmed in a similar attempt in the future. If the woman resists or can identify the assailant, it is reasonably foreseeable that the assailant may injure, silence, or even abduct the woman. If the assailant abducts or injures the woman, it is reasonably foreseeable that he may eventually rape or even murder her.

The attenuated circumstance in this example simply shows that a business owner may anticipate almost any severity or type of crime from simple criminal conduct.⁶⁹ Some jurisdictions using the standard of foreseeability have held that prior nonviolent criminal acts may substantiate a finding

solution to provide business owners with predictable liability. *See, e.g., Antrum v. Church's Fried Chicken, Inc.*, 40 Conn. Super. 343, 499 A.2d 807 (1985) (court submitted the question of foreseeability to the jury to determine whether the business owner should have realized the potential danger); *see also Levitz v. Burger King Corp.*, 526 So. 2d 1048 (Fla. Dist. Ct. App. 1988) (plaintiff was beaten up in the parking lot of the defendant's restaurant and the court found that there were sufficient prior similar acts to allow the issue of "reasonable foreseeability" to go to the jury). *But see Castillo v. Sears, Roebuck & Co.*, 663 S.W.2d 60 (Texas Ct. App. 1983) (while plaintiffs were shopping in a mall they met some other men and went with them to the parking lot where they were physically assaulted. The court found no duty upon the business owner.).

67. *See Meadows v. Friedman R.R. Salvage Warehouse*, 655 S.W.2d 718, 721 (Mo. Ct. App. 1983) ("crime . . . is regrettably foreseeable in today's society any place, any time"); *see also Goldberg v. Housing Auth.*, 38 N.J. 578, 583, 186 A.2d 291, 293 (1962) ("Everyone can foresee the commission of crime virtually anywhere and at any time.").

68. *See, e.g., Castillo v. Sears, Roebuck & Co.*, 663 S.W.2d 60, 66 (Tex. Ct. App. 1983) ("it would be patently unfair to impose the vague duty of section 344, Restatement of Torts (Second) (1966) on the shopkeepers and merchants of Texas to exercise reasonable care to discover the sudden criminal acts of unknown and unidentifiable persons are being done or likely to be done"); *see also Gillot v. Washington Metro. Area Transit Auth.*, 507 F. Supp. 454 (D.D.C. 1981); *Henley v. Pizitz Realty Co.*, 456 So. 2d 272 (Ala. 1984); *Davis v. Allied Supermarkets, Inc.*, 547 P.2d 963 (Okla. 1976); *Shipes v. Piggly Wiggly St. Andrews, Inc.*, 269 S.C. 479, 238 S.E.2d 167 (1977); *Cornpropst v. Sloan*, 528 S.W.2d 188 (Tenn. 1975).

69. *Cf. Galloway v. Bankers Trust Co.*, 420 N.W.2d 437, 439 (Iowa 1988) (discusses the relationship between several simple crimes and the ability for such crimes to escalate into serious or violent crimes, although the court uses the theory of foreseeability; "even shoplifting cases can turn ugly").

that a future violent crime was foreseeable.⁷⁰ Such dangers suggest analysis utilizing the doctrines of proximate, intervening, and superseding cause.⁷¹ Courts which refuse to adopt the foreseeability standard for the prior violent acts exception frequently rely upon the criminal act constituting a superseding cause due to the "difficult problem of determining foreseeability of criminal acts."⁷²

Another difficult situation exists when a business is located in an area where the incidence of crime is high. A number of courts have addressed this issue.⁷³ Courts relying upon the principle of "fairness" typically have found the sole element of being in an area of high crime insufficient to invoke the prior violent crimes exception.⁷⁴ But jurisdictions utilizing foreseeability will typically submit the question to the jury.⁷⁵ If an individual business has not experienced any crime, should it be subject to the same standard of liability as businesses in the same area which have experienced

70. See *id.* at 440.

71. See *Nappier v. Kincade*, 666 S.W.2d 858, 860 (Mo. Ct. App. 1984) (citing *Cornpropst v. Sloan*, 528 S.W.2d 188, 195 (Tenn. 1975)).

72. *Gillot v. Washington Metro. Area Transit Auth.*, 507 F. Supp. 454 (D.D.C. 1981); *Davis v. Allied Supermarkets, Inc.*, 547 P.2d 963 (Okla. 1976); *Cornpropst*, 528 S.W.2d at 195.

73. See, e.g., *Faheen v. City Parking Corp.*, 734 S.W.2d 270, 273 (Mo. Ct. App. 1987) ("fact that crimes in general have occurred in an area or that a business is located in a 'high crime' area is insufficient to invoke the duty") (assassination in apartment house parking garage); see also *Banks v. Hyatt Corp.*, 722 F.2d 214 (5th Cir. 1984) (hotel patron shot outside hotel on sidewalk); *Harris v. Pizza Hut*, 455 So. 2d 1364 (La. 1984) (restaurant located in an area of high crime, robbery was reasonably foreseeable, more than a case of mere possibility); *Nappier v. Kincade*, 666 S.W.2d 858 (Mo. Ct. App. 1984) (wrongful death action for fatal injury from an assault in an all night fast food restaurant parking lot); *Meadows v. Friedman R.R. Salvage Warehouse*, 655 S.W.2d 718 (Mo. Ct. App. 1983) (woman assaulted and shot while on premises); *Irby v. St. Louis County Cab Co.*, 560 S.W.2d 392 (Mo. Ct. App. 1977) (wrongful death action where deceased cab driver dispatched to "high crime area"); *Cornpropst v. Sloan*, 528 S.W.2d 188 (Tenn. 1975) (woman assaulted on shopping parking lot). *But see* *Madden v. C & K Barbecue Carryout, Inc.*, 758 S.W.2d 59 (Mo. 1988) (en banc) (question of business owner's liability for attack on invitee should go to the jury).

74. See *Faheen*, 734 S.W.2d at 27 ("fact that crimes in general have occurred in an area or that a business is located in a 'high crime' area is insufficient to invoke the duty;" assassination in apartment house parking garage); see also *Irby v. St. Louis County Cab Co.*, 560 S.W.2d 392 (Mo. Ct. App. 1977) (wrongful death action where deceased cab driver dispatched to "high crime area"); *Cornpropst v. Sloan*, 528 S.W.2d 188 (Tenn. 1975) (woman assaulted on shop parking lot).

75. See *Pickle v. Denny's Restaurant, Inc.*, No. WD-40480 (Mo. Ct. App., Dec 20, 1988) (WESTLAW Mo. Database) ("whether the defendant satisfied that duty is a jury question"); see also *Harris v. Pizza Hut, Inc.*, 455 So. 2d 1364 (La. 1984) (court held that an area of high crime presented reasonable foreseeability that a robbery would occur). *But see* *Henley v. Pizitz Realty Co.*, 456 So. 2d 272 (Ala. 1984); *Uihlein v. Albertson's Inc.*, 282 Or. 631, 580 P.2d 1014 (1978).

crime? In jurisdictions adopting the standard of foreseeability, the jury will decide these questions.

Madden, and other jurisdictions using the foreseeability standard leave unanswered the question as to what degree of care will exculpate a business owner from liability. The court in *Nappier v. Kincaid*⁷⁶ stated that "reasonable measures must be taken to control the conduct of third persons, or to give adequate warning to enable patrons to avoid possible harm."⁷⁷ The Restatement addresses the question of whether a mere warning indicating an area of high crime will satisfy a business owner's duty.⁷⁸ In jurisdictions adopting the Restatement view the answer would be no.⁷⁹ The Restatement recognizes that warnings may sometimes be sufficient, but a business owner must take reasonable means to protect invitees if a warning is not reasonably likely to work.⁸⁰ The actual degree of care necessary to avoid liability appears to be left to the trier of fact in jurisdictions adopting foreseeability in conjunction with the prior violent crimes exception.

ECONOMIC CONSIDERATIONS

There are persuasive economic arguments to support, as well as to reject, the recognition of a prior violent acts exception. The economic consequences of such liability appear quite different depending upon how the affected class is characterized. If viewed in the broadest economic sense, one may argue that the imposition of liability upon the business owner will benefit society.⁸¹ This view is premised upon the belief that the increased cost of imposing liability will be spread out among consumers.⁸² The imposition of tort liability for third party criminal acts upon a business owner is an indirect method of transferring the costs and damages which

76. 666 S.W.2d 858 (Mo. Ct. App. 1984).

77. *Id.* at 862.

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

79. *Id.*

80. See *id.* § 344 comment d (1965) which provides:

In many cases a warning is sufficient care if the possessor reasonably believes that it will be enough to enable the visitor to avoid the harm, or protect himself against it. There are, however, many situations in which the possessor cannot reasonably assume that a warning will be sufficient. He is then is required to exercise reasonable care to use such means of protection as are available, or to provide such means in advance because of the likelihood that third persons, or animals, may conduct themselves in a manner which will endanger the safety of the visitor.

81. See, e.g., *Taco Bell, Inc. v. Lannon*, 744 P.2d 43 (Colo. 1987) (plaintiff sustained injury when shot attempting to exit a Taco Bell after becoming aware a robbery was in progress).

82. See *id.* at 49 (court expressed an opinion that minimum increases in the cost of services or products would offset the expense incurred by business owners).

an individual victim incurs to the public.⁸³ A business owner, with a duty under the prior violent crimes exception, will likely experience increased costs through higher insurance premiums, safety programs, additional employees, safety hardware, and expenses related to liability claims.⁸⁴

Proponents of the prior violent acts exception contend that without such a duty business owners who encounter criminal conduct will eventually experience diminished sales due to the customer's fear of crime associated with a lack of adequate security.⁸⁵ It follows that business owners would have to increase prices to make up for the decreased revenues, resulting in the cost of the crime being transferred to the consumer anyway.⁸⁶ The argument continues that the end result, without imposing liability upon the business owner, has the same economic repercussion without deterring crime.⁸⁷ Thus, the cost to society could be virtually the same if the prior violent crime exception were imposed, but society could potentially enjoy the benefits of fewer crimes, safer environments, increased business, and potentially decreased insurance costs.⁸⁸ Of course, this entire argument is based upon the assumption that increased safety measures due to the imposition of liability will deter crime.

The flip-side to this argument is most persuasive when the economic effect is characterized by the effect on the individual businesses. As stated previously, the cost of doing business will increase due to the cost of safety programs, additional employees, safety hardware, liability claims, and higher insurance premiums.⁸⁹

83. *Warren v. Lombardo's Enter. Inc.*, 706 S.W.2d 286, 288 (Mo. Ct. App. 1986).

84. The business owner's actual costs will vary depending upon the individual circumstances. Some courts express the view that a number of safety measures are available to a business owner at little expense. *See, e.g., Taco Bell*, 744 P.2d. at 49 (lighting, video cameras, keeping a small amount of cash in the register, posting a sign indicating minimum cash on hand, training employees how to react to criminal situations). The costs of liability claims may include legal fees, insurance deductibles for successful claims, as well as expenses or judgments beyond the scope of the business owner's insurance policy.

85. *See Comment, A Landowner's Duty to Guard Against Criminal Attack: Foreseeability and the Prior Similar Incidents Rule*, 48 Ohio St. L.J. 247, 264 (1987).

86. *Id.*

87. *Id.*

88. Decreased insurance costs could result in the long run due to the decrease in crime resulting from increased safety measures caused by the imposition of liability. The court in *Taco Bell* stated that the economic burden placed upon the business owner may be offset by an increased number of customers due to the increased security. *Taco Bell*, 744 P.2d at 49.

89. *See Madden v. C & K Barbecue Carryout, Inc.*, 758 S.W.2d 59, 67 (Mo. 1988) (en banc) (Welliver, J., dissenting). Some courts and commentators have suggested that such decisions which effect society to this degree should be made by legislatures, not courts. *See id.* at 66-67 (Donnelly, J., and Welliver, J., dissenting); *Warren v. Lombardo's Enter., Inc.* 706 S.W.2d 286, 288 (Mo. Ct. App. 1986).

One policy argument against the prior violent crimes exception is that it may deter investments in new businesses within a state. If a business were directly competing with businesses or markets in communities which did not recognize the prior violent crimes exception, the foreign business might enjoy a cost advantage.⁹⁰ Potential investors may choose to do business or invest in businesses in jurisdictions where the cost of doing business and potential liability is less. The economic effects of a prior crimes exception reaches beyond the scope of burdening competition. Business owners in high crime areas may be faced with the alternative of either moving their business to a safer location or raising their prices to offset the increased cost of doing business.⁹¹ Unfortunately, areas of high crime are typically inhabited by families in lower income brackets. Thus, not only are business owners saddled with a financial burden, but this burden is transferred through increased prices to consumers "who are less economically able to handle it."⁹²

The economic consequences of a broad reaching prior violent crimes exception could have a substantial effect on the business sector. The aggregate economic effect will likely be based upon the scope of duty, and the severity of prior criminal incidents which the courts will require in invoking the prior violent acts exception.

CONCLUSION

The imposition of liability upon business owners for third party criminal attacks upon their premises is quickly becoming a well recognized and viable theory of recovery. Although strong arguments support the acceptance of this theory of tort liability, the specific parameters of liability are scarcely defined. As the incidence of such actions brought against business owners increases, business owners are left with no clear guidelines or predictability by which to insure their protection against liability. The occurrence of criminal conduct, as well as specific types of criminal acts, is inherently unpredictable. Placing the decision of whether prior violent crimes are sufficiently similar upon the trier of fact fails to provide business owners with sufficient certainty in which to ascertain potential liability. In addition, business owners are left in the dark as to what types of safety measures will allow them to escape liability. Using the mere standard of "reasonable foreseeability" as a guide for businesses in determining liability is insufficient. Specific statutes or ordinances specifying safety measures for

90. States with major communities bordering neighboring states' communities would likely be the most effected.

91. See Tipton, *Business Insecurity: "Negligent Security" Suits Rise*, St. Louis Post Dispatch, Oct. 17, 1988, at 35BP.

92. *Id.*

businesses is an alternative which would provide businesses with sufficient guidelines, as well as potentially create a uniformly safer environment. State legislatures should address and define these areas of ambiguity.

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