Missouri Law Review

Volume 67
Issue 1 *Winter 2002*

Article 9

Winter 2002

Come One, Come All but Watch Your Back - Missouri Sides with Business Owners in Negligent Security Action

Matthew J. Landwehr

Notes

"Come One, Come All, but Watch Your Back!" Missouri Sides with Business Owners in Negligent Security Action

Hudson v. Riverport Performance Arts Centre[1]

I. INTRODUCTION

The thought of being attacked and injured by an unknown person is frightening. In a concert setting, it is comforting to know that paying high prices to see one's favorite act also purchases a security force charged with maintaining order and providing safety. Security, however, cannot prevent every incident of unruliness. When such incidents occur, courts are often left to decide who should bear the burden of making things right.

Courts long have recognized that common carriers and innkeepers owe a duty to protect their passengers and guests.[2] In the 1970s, however, states began to impose such a duty on the owners of other kinds of real property.[3] Now, plaintiffs are bringing suits against the owners of apartment complexes,[4] shopping malls,[5] hospitals,[6] grocery stores,[7] schools,[8] and other businesses.[9] Given the current rise in the amounts of jury awards, it is little wonder that such actions are becoming more common across the country.[10]

---

1. 37 S.W.3d 261 (Mo. Ct. App. 2000).

2. GLEN WEISSENBERGER & BARBARA B. MCFARLAND, THE LAW OF PREMISES LIABILITY § 11.2, at 330-31 (3d ed. 2001).

3. *Id.*

4. *See* Kline v. 1500 Mass. Ave. Apartment Corp., 439 F.2d 477, 478-80 (D.C. Cir. 1970).

5. *See* Seibert v. Vic Regnier Builders, Inc., 856 P.2d 1332, 1334 (Kan. 1993).

6. *See* Isaacs v. Huntington Mem'l Hosp., Inc., 695 P.2d 653, 662 (Cal. 1985).

7. *See* Clohesy v. Food Circus Supermarkets, Inc., 694 A.2d 1017, 1019 (N.J. 1997).

8. *See* Mullins v. Pine Manor Coll., 449 N.E.2d 331, 333-34 (Mass. 1983).

9. *See* Hardee v. Cunningham & Smith, Inc., 679 So. 2d 1316, 1317 (Fla. Dist. Ct. App. 1996).

10. Steven C. Minson, *A Duty Not to Become a Victim: Assessing the Plaintiff's Fault in Negligent Security Actions*, 57 WASH. & LEE L. REV. 611, 614 (2000).

In terms of sheer volume, premises-liability cases form one of the largest subcategories within the broad spectrum of tort law.[11] Courts are dealing with this influx of lawsuits in a variety of ways. Some courts act as gatekeepers, devising rigid tests to ensure only the most deserving cases get to a jury.[12] Other courts are more lenient, adopting flexible tests that allow more cases to reach juries.[13] Which approach is better is the subject of much debate. This Note will discuss Missouri's law governing negligent security actions, its application in *Hudson v. Riverport Performance Arts Centre*,[14] its policy ramifications, and competing theories.

II. FACTS AND HOLDING

On July 26, 1996, David and Susan Hudson filed suit to recover for injuries and loss of consortium resulting from an assault on David by an unknown third party.[15] The assault occurred at Riverport Amphitheater in St. Charles, Missouri, during a Lynyrd Skynyrd and Doobie Brothers concert.[16] Hudson named Riverport Performance Arts Centre ("Riverport")[17] and BMW Entertainment Services, Inc., ("BMW") as defendants.[18]

On the night in question, a "long-haired gentleman" struck David Hudson ("Hudson") in the face with a whiskey bottle after an argument over a blanket.[19] Hudson testified that, a few minutes before the assault, he and the "long-haired gentleman" had exchanged words.[20] The "long-haired gentleman" proceeded to walk away, and Hudson "just assumed it was over."[21] However, the "long-haired gentleman" approached Hudson again and struck Hudson with the bottle.[22] The "long-haired gentleman" immediately faded into the crowd.[23] Hudson's friends quickly escorted him to medical treatment, while Susan

---

11. WEISSENBERGER & MCFARLAND, *supra* note 2, §1.1, at 1.
12. WEISSENBERGER & MCFARLAND, *supra* note 2, §1.1, at 1.
13. WEISSENBERGER & MCFARLAND, *supra* note 2, §1.1, at 1.
14. 37 S.W.3d 261 (Mo. Ct. App. 2000).
15. *See id.* at 263.
16. *Id.*
17. *Id.* "Riverport" includes Riverport Performance Arts Centre, Joint Venture, Contemporary Investment Corp., Sverdrup/MDRC Joint Venture, McDonnell Douglas Realty Co., and Contemporary Productions, Inc. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*

Hudson went to find security personnel.[24]

At the time of this incident, Riverport was party to a contract with BMW under which BMW was responsible for providing security for the concert.[25] On the night in question, BMW employed ninety security personnel, fourteen of whom were monitoring the lawn area where David and Susan Hudson sat.[26] Susan Hudson testified that two or three security personnel were standing about twenty feet from them but were unaware of the assault until she ran to them for help.[27] BMW placed additional security personnel at the entrance of the amphitheater to conduct pat-down searches, and to check bags and blankets.[28] Bottles were not allowed on the premises of the amphitheater and were immediately confiscated if found.[29]

Hudson argued that Riverport and BMW were liable for the injuries he suffered because they assumed a duty to protect him while attending the concert.[30] Hudson claimed this duty arose out of the "special facts and circumstances" exception to the general rule that there is no duty to protect a business invitee from the criminal acts of unknown third persons.[31] Hudson further argued that Riverport and BMW were put on notice that such "special facts and circumstances" existed based on evidence of fifty-five other assaults that occurred at Riverport between 1992 and 1996.[32]

BMW filed a motion for summary judgment, arguing Hudson failed to offer evidence that BMW fell within a recognized exception to the general rule that there is no duty to protect business invitees from the criminal acts of unknown third persons.[33] Riverport subsequently adopted the motion.[34] Thus, the trial court treated it as a joint motion for summary judgment.[35] The trial court granted the motion for summary judgment, stating that Hudson failed to prove he was owed a duty of protection.[36]

---

24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* at 264.
31. *Id.*
32. *Id.* at 265.
33. *Id.* at 263.
34. *Id.*
35. *Id.*
36. *Id.* The night before the summary judgment hearing, Hudson filed a motion for leave to file a third amendment to the petition. *Id.* Hudson sought to add a claim that "the search conducted by the Defendants was negligent in failing to discover a glass bottle of alcohol on the perpetrators that engaged in a fight at the performance on the

On appeal, Hudson argued that the trial court erred in granting summary judgment because he introduced sufficient facts to establish that Riverport and BMW had assumed a duty to protect him and were negligent by failing to provide adequate security to prevent attacks by third persons.[37] The Missouri Court of Appeals for the Eastern District of Missouri rejected Hudson's argument and held that an injured invitee may not recover in negligence against a premises owner for the criminal acts of an unknown third person absent sufficiently numerous or similar prior acts of violence.[38]

III. LEGAL BACKGROUND

It is a general principle of negligence law that a private person has no duty to protect another from criminal attack by a third person, absent a contrary statute or some special relationship or circumstance.[39] Similarly, early case law on this subject refused to hold premises owners liable for harm inflicted upon their invitees as a result of the criminal acts of third persons.[40] In 1965, however, the *Restatement (Second) of Torts* recognized the general duty owed by business owners to their guests to provide reasonable protection from foreseeable criminal assaults.[41]

Defendant Riverport's premises, by which Plaintiff, David Hudson, was struck, resulting in the injuries he sustained." *Id.* The trial court denied Hudson's proposed amendment, finding that it lacked merit and appeared to be put forth to avoid summary judgment. *Id.* at 263-64. Hudson raised the denial of this amendment on appeal. *Id.* at 264. This issue, however, is beyond the scope of this Note.

37. *Id.*

38. *Id.* at 265.

39. 57A AM. JUR. 2D. *Negligence* § 104 (1989 & Supp. 2001).

40. William Edward Taylor & Joseph M. Taylor, *A Plaintiff's Approach to the Preparation of Premises Liability Cases Based on the Criminal Acts of Third Persons*, 53 J. MO. B. 98, 99 (1997).

41. RESTATEMENT (SECOND) OF TORTS § 344 (1965). Section 344 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 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 a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

Id. In addition, comment f to Section 344 suggests that:

> [a business owner] 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.

Since the publication of the *Restatement (Second) of Torts* and its expansion of the duty owed by business owners, states have struggled with whether to impose this duty and, if so, how to define its scope.[42] All states now recognize that business owners owe, under circumstances that vary from state to state, a duty to protect customers from the criminal acts of third persons.[43] Recent case law, however, suggests that the scope of the duty and the proper test for measuring it are still unsettled issues.[44]

In *Madden v. C & K Barbecue Carryout, Inc.*,[45] the Missouri Supreme Court held that while there was no general duty to protect invitees from the criminal acts of third persons occurring on the premises, under certain circumstances, a duty would exist.[46] Missouri has adopted two well-recognized exceptions to the general rule of non-liability.[47] The first is based on the connection, or relationship, between the plaintiff and defendant (the "special relationship exception"), while the second is based on other factors that make the criminal act foreseeable (the "special facts and circumstances exception").[48] Some states, however, have adopted a more expansive approach to liability based on a wide variety of factors (the "totality of the circumstances").[49]

A. Special Relationship Exception

The "special relationship exception" applies when "a party entrusts himself to the protection of another and relies upon that person to provide a place of safety.... Historically, special relationships have been limited to relationships such as those of common carrier-passenger, school-student, innkeeper-guest, and, sometimes, employer-employee."[50] The key rationale for labeling these relationships as special relationships is that the victim has placed himself or

---

Id. § 344 cmt. f.

42. Minson, *supra* note 10, at 616-18.

43. ALAN KAMINSKY, A COMPLETE GUIDE TO PREMISES SECURITY LITIGATION 109-78 (1995) (providing a state-by-state summary of leading negligent security cases and noting a very limited duty in Alabama and Michigan); WEISSENBERGER & MCFARLAND, *supra* note 2, § 11.3, at 331-32 (noting that support for the broad, no-duty rule is "virtually non-existent").

44. Minson, *supra* note 10, at 618.

45. 758 S.W.2d 59 (Mo. 1988).

46. *Id.* at 61-62.

47. William M. Corrigan, Jr. & Timothy W. VanRonzelen, *Liability for Criminal Acts of Third Persons*, 52 J. MO. B. 359, 359-60 (1996).

48. *Id.*

49. *Id.* at 361.

50. Groce v. Kan. City Spirit, Inc., 925 S.W.2d 880, 884 (Mo. Ct. App. 1996).

herself under the control and protection of the other party with the consequent loss of ability to protect himself or herself.[51]

The element of control, itself, however, does not usually characterize the relationship between business possessors and entrants.[52] Therefore, a general invitor-invitee relationship does not create a special relationship under this exception.[53] In cases that involve a special relationship, the relationship alone creates the duty.[54] Thus, prior criminal acts that would establish foreseeability are not necessary to establish the existence of this duty.[55] For this situation, Missouri courts have established the "special facts and circumstances" exception.[56]

B. Special Facts and Circumstances Exception

The "special facts and circumstances exception" represents two theories of liability proposed by the *Restatement (Second) of Torts*.[57] The first involves injuries inflicted by persons with known dangerous proclivities ("known third person").[58] The second involves frequent and recent occurrences of violent crimes against persons on the premises ("prior violent crimes").[59]

1. Known Third Person

The most straightforward and conservative theory of a business owner's liability for the criminal acts of third persons against invitees is the "known third person" theory.[60] Under this theory, when a property owner knows or has reason to know of a particular person's dangerous or threatening tendencies yet takes no action to prevent a violent act, a duty arises as a direct function of the owner's knowledge.[61] Proof of prior violent crimes is not required under this test.[62]

---

51. WEISSENBERGER & MCFARLAND, *supra* note 2, § 11.2, at 330 (citing Michael J. Bazyler, *The Duty to Provide Adequate Protection: Landowners' Liability for Failure to Protect Patrons from Criminal Attack*, 21 ARIZ. L. REV. 727, 736 (1979)).

52. WEISSENBERGER & MCFARLAND, *supra* note 2, § 11.2, at 330.

53. Meadows v. Friedman R.R. Salvage Warehouse, 655 S.W.2d 718, 721 (Mo. Ct. App. 1983).

54. Faheen v. City Parking Corp., 734 S.W.2d 270, 272 (Mo. Ct. App. 1987).

55. Corrigan & VanRonzelen, *supra* note 47, at 360.

56. *See infra* notes 57-86.

57. *See supra* note 41 and accompanying text.

58. Taylor & Taylor, *supra* note 40, at 101.

59. Corrigan & VanRonzelen, *supra* note 47, at 360.

60. Taylor & Taylor, *supra* note 40, at 101.

61. Taylor & Taylor, *supra* note 40, at 101.

62. Taylor & Taylor, *supra* note 40, at 101.

Liability under this theory may be found only if there is sufficient time in which the owner could have acted to mitigate the threat.[63] Courts have found that the display of firearms or weapons, language that is loud or threatening, or any other physical acts that are threatening in nature indicate a person is behaving in a threatening manner.[64]

In Missouri, plaintiffs may recover under this theory, but they are not limited to it.[65] Some states, however, have limited the duty of a business owner to the "known third person" theory.[66] This approach is essentially the one adopted by Section 344 of the *Restatement (Second) of Torts*.[67] Few states, however, maintain it as the sole remedy for recovery against a business owner.[68]

2. Prior Violent Crimes

The most common theory of recovery against a business owner for criminal acts by a third person is the "prior violent crimes" exception.[69] Under this

---

63. Faheen v. City Parking Corp., 734 S.W.2d 270, 273 (Mo. Ct. App. 1987).

64. Clayborn v. Midwest Petroleum Co., 819 S.W.2d 742, 746 (Mo. Ct. App. 1991).

65. *See* Brown v. Van Noy, 879 S.W.2d 667, 670, 672 (Mo. Ct. App. 1994) (The plaintiff was injured when a man struck him in the face while he was at the defendant's bar. The bar owner knew the man who assaulted the plaintiff and knew the man had a history of fighting. The court held that there was enough evidence to submit the case to the jury, stating that, "[w]hen a tavern owner permits a person to remain in his tavern, knowing him to manifest vicious tendencies likely to inflict injury upon others, the tavern owner has a duty to act to protect his patrons."); *see also* Nappier v. Kincade, 666 S.W.2d 858, 861-62 (Mo. Ct. App. 1984) (The court provided a very good description of the "known third person" rule.).

66. *See, e.g.*, Henley v. Pizitz Realty Corp., 456 So. 2d 272, 277 (Ala. 1984) (The plaintiff's abduction from a parking garage and subsequent rape was not the result of the defendant's negligent failure to provide security, despite prior instances of serious crime on the premises, because no evidence suggested that the defendant knew or had reason to know of imminent bodily harm to the plaintiff.); Shipes v. Piggly Wiggly St. Andrews, Inc., 238 S.E.2d 167, 169 (S.C. 1977) (The defendant store was not liable for an assault on the plaintiff in the parking lot because employees had no knowledge the attack was occurring or was about to occur.); Burns v. Johnson, 458 S.E.2d 448, 450 (Va. 1995) (The gas station was not liable for the abduction and rape of the customer, who left her car at the pump for more than one hour just after a drunk male customer tried to gain entry to the locked store by uttering a lewd suggestion to the female attendant because the evidence "utterly" failed to show that the attendant knew a criminal assault was about to occur.).

67. *See supra* note 41 and accompanying text.

68. *See* Minson, *supra* note 10, at 619 & n.48.

69. Corrigan & VanRonzelen, *supra* note 47, at 360.

theory, third-party crimes against invitees are foreseeable only if the plaintiff can establish that the defendant knew or should have known of prior similar crimes on to the premises.[70] Missouri courts have adopted the "prior violent crimes" theory, noting that three elements must be proved.[71] First, the necessary relationship must exist between the plaintiff and the defendant, which encourages the plaintiff to come onto the premises (*i.e.*, invitor-invitee or landlord-tenant).[72] Second, "there must be prior specific incidents of violent crimes on the premises that are sufficiently numerous and recent to put a defendant on notice, either actual or constructive, that there is a likelihood third persons will endanger the safety of defendant's invitees."[73] Third, the incident that caused the injury must be "sufficiently similar in type to the prior specific incidents occurring on the premises that a reasonable person would take precautions to protect his or her invitees against that type of activity."[74]

In Missouri, the "prior violent crimes" theory is narrowly defined. For example, a plaintiff simply cannot allege that the defendant's location is in a "high-crime" area or has been the target of excessive criminal conduct.[75] The plaintiff must prove a sufficient amount of like criminal conduct such that the landowner is put on notice that a repeat incident might occur.[76] Accordingly, in *Brown v. National Supermarkets, Inc.*,[77] the Missouri Court of Appeals for the Eastern District of Missouri found that evidence of sixteen robberies involving a firearm, seven incidents of strong-arm robberies, and 136 other reported crimes were sufficient to establish "special facts and circumstances" under the "prior violent crimes" theory, making an assault and battery with a gun foreseeable.[78] On the other hand, in *Brown v. Schnuck Markets, Inc.*,[79] the Missouri Court of Appeals for the Eastern District of Missouri found for the defendant store owner because the plaintiff, who was assaulted in a parking lot, failed to produce evidence of prior similar incidents of violent crimes on the premises that were "'sufficiently numerous and recent to put a defendant on notice' that parking lot assault was foreseeable."[80]

---

70. Minson, *supra* note 10, at 619.

71. Faheen v. City Parking Corp., 734 S.W.2d 270, 273-74 (Mo. Ct. App. 1987).

72. *Id.* at 272.

73. *Id.*

74. *Id.* at 274; *see also* Groce v. Kan. City Spirit, Inc., 925 S.W.2d 880, 885 (Mo. Ct. App. 1996).

75. *Groce*, 925 S.W.2d at 885.

76. *Id.*

77. 679 S.W.2d 307 (Mo. Ct. App. 1984).

78. *Id.* at 308-09.

79. 973 S.W.2d 530 (Mo. Ct. App. 1998).

80. *Id.* at 533 (The only prior crimes introduced were a non-violent purse snatching and one robbery.).

In addition, not all incidents of prior criminal activity are relevant. The nature of the criminal act resulting in the injury and those criminal acts that occurred in the past must share "common elements."[81] For example, if the incident that caused injury occurred outside of a business establishment (*i.e.*, the parking lot), then it is necessary to exclude prior incidents that occurred inside the business.[82] Furthermore, prior incidents occurring near a business, but not on the actual premises, are excluded.[83]

The "prior similar incidents" theory has been administered in a variety of ways. Some jurisdictions, such as Missouri, impose the narrow view that the defendant's knowledge must derive from prior criminal attacks of the same or a substantially similar type previously committed on the defendant's premises.[84] Other jurisdictions adopt the broader view that the duty may arise from the defendant's knowledge of prior criminal acts committed in the general area of the defendant's premises, which suggest the possibility of violence in the future.[85] Regardless of the interpretation of this test, many of these jurisdictions, including Missouri, have experienced difficulties in administering the test consistently.[86]

---

81. Keesee v. Freeman, 772 S.W.2d 663, 669 (Mo. Ct. App. 1989).

82. *See* Bowman v. McDonald's Corp., 916 S.W.2d 270, 278, 281 (Mo. Ct. App. 1995); Pickle v. Denny's Rest., Inc., 763 S.W.2d 678, 681-82 (Mo. Ct. App. 1988).

83. Faheen v. City Parking Corp., 734 S.W.2d 270, 273 (Mo. Ct. App. 1987).

84. *See* Mills v. Jack Eckerd Corp., 482 S.E.2d 449, 450 (Ga. Ct. App. 1997) (narrowly interpreting the "prior similar incidents" rule by affirming that no liability existed when the shopper was injured by a fleeing shoplifter because the plaintiff failed to present any evidence of prior incidents in which a patron was injured by a fleeing thief); Lauersdorf v. Supermarket Gen. Corp., 657 N.Y.S.2d 732, 733 (App. Div. 1997) (finding property crimes gave no notice that the rape of the plaintiff was foreseeable).

85. *See* Sturbridge Partners, Ltd. v. Walker, 482 S.E.2d 339, 341 (Ga. 1997) (holding that a landlord's knowledge of several prior burglaries might be enough to prove that the rape of a tenant was foreseeable); Marshall v. David's Food Store, 515 N.E.2d 134, 136 (Ill. App. Ct. 1987) (holding that fourteen instances of prior criminal activity within two blocks of the parking lot where the plaintiff was raped showed sufficient evidence of the crime's foreseeability), *appeal denied*, 522 N.E.2d 1246 (Ill. 1988); Murrow v. Daniels, 364 S.E.2d 392, 398 (N.C. 1988) (making it a jury question whether the rape and robbery of a motel guest was foreseeable when the evidence showed that the motel was located in a high-crime area where similar incidents had occurred); Polk v. Rhinestone Wrangler, 774 S.W.2d 799, 801 (Tex. App. 1989) (holding that evidence that fights broke out at the bar sixty percent of the time and that patrons had drawn guns on two or three occasions created a duty on the part of the bar owner to protect patrons from assault by other patrons).

86. Minson, *supra* note 10, at 620.

C. Totality of the Circumstances

Several jurisdictions have adopted a more expansive theory known as the "totality of the circumstances" approach.[87] At least in part as a reaction to the shortcomings of the "prior similar incidents" approach, the "totality of the circumstances" approach allows a factfinder greater latitude in determining when criminal acts of third persons are sufficiently foreseeable.[88] Under this test, the ordinary rules of negligence apply, meaning that foreseeability is a question of fact and turns on all of the evidence, not just prior crimes similar to the one that injured the plaintiff.[89] Thus, violent incidents that occur near the premises might be sufficient to put the defendant on notice that the crime could occur on his or her property.[90] In addition, a business also might foresee criminal attacks in a poorly lit parking garage, even though none have occurred there before.[91]

Under this approach, a plaintiff may introduce evidence of foreseeability that normally would not be allowed in a "prior similar incidents" jurisdiction.[92] This evidence may include the architectural design of the landowner's premises;[93] any security measures the landowner has taken, such as cameras or

---

87. *See* Isaacs v. Huntington Mem'l Hosp., 695 P.2d 653, 659-60 (Cal. 1985) (holding that foreseeability should not be determined by the "rigid application of a mechanical 'prior similars' rule" but, rather, by the totality of the circumstances, which included the location of the property in a high-crime area, criminal assaults on or near the premises, and poor lighting in the parking lot where the assault occurred); *cf.* Ann M. v. Pac. Plaza Shopping Ctr., 863 P.2d 207, 213-15 (Cal. 1993) (revisiting the "totality of the circumstances" rule and announcing new factors); Seibert v. Vic Regnier Builders, Inc., 856 P.2d 1332, 1339-40 (Kan. 1993) (adopting the "totality of circumstances" approach when the plaintiff was shot in an underground parking garage and no evidence was offered of prior similar crimes in the parking garage); Clohesy v. Food Circus Supermarkets, Inc., 694 A.2d 1017, 1027 (N.J. 1997) (rejecting the "prior similar incidents" rule in favor of the "totality of circumstances" rule); Reitz v. May Co. Dep't Stores, 583 N.E.2d 1071, 1074 (Ohio Ct. App. 1990) (adopting the "totality of circumstances" test, which allowed consideration of evidence of prior nonviolent crimes when the plaintiff was stabbed in a parking lot); Torres v. U.S. Nat'l Bank, 670 P.2d 230, 235-36 (Or. Ct. App. 1983) (describing the "totality of circumstances" test without labeling it).

88. Minson, *supra* note 10, at 619-20.

89. *See generally* Minson, *supra* note 10.

90. *See Isaacs*, 695 P.2d at 659-61; *cf. Ann M.*, 863 P.2d at 213-15 (concluding that prior similar incidents of violent crime compliments the "high degree of foreseeability" requirement).

91. *See* Small v. McKennan Hosp., 437 N.W.2d 194, 201 (S.D. 1989).

92. Minson, *supra* note 10, at 620.

93. *See* Clohesy v. Food Circus Supermarkets, Inc., 694 A.2d 1017, 1019 (N.J. 1997) (reversing the trial court's grant of the defendant's motion for summary judgment

guards;[94] lighting;[95] the character of the business;[96] the character of neighborhood businesses;[97] and all prior crimes, violent and nonviolent, on or near the premises.[98] As a result, courts that use the "totality of the circumstances" test significantly expand the range of circumstances that could constitute sufficient notice to a landowner of the need to take measures to protect his or her patrons.[99]

Under the "totality of the circumstances" approach, evidence of prior similar crimes is still an important factor in determining foreseeability. As the California Supreme Court noted, "the requisite degree of foreseeability rarely, if ever, can be proven in the absence of prior similar incidents of violent crime on the landowner's premises."[100] The Kansas Supreme Court, however, adopted the approach stating that it "[was a] better reasoned basis [than the 'prior similar incidents' rule] for determining foreseeability."[101] The Missouri Supreme Court has acknowledged that "[t]he touchstone for the creation of a duty is foreseeability."[102] However, Missouri has not adopted the "totality of the circumstances" approach.[103]

---

and citing evidence, including that the store permitted parking in an area impossible to observe from inside the store, as sufficient to present the jury the question of the store's negligence).

94. *See Isaacs*, 695 P.2d at 662 (noting evidence of an insufficient number of guards and cameras).

95. *See* Seibert v. Vic Regnier Builders, Inc., 856 P.2d 1332, 1340 (Kan. 1993) (remanding to determine what role insufficient lighting played in a shooting).

96. *See Isaacs*, 695 P.2d at 661 (noting hospital emergency rooms, surrounding areas, and nearby parking lots had high potential for violent acts).

97. *See Clohesy*, 694 A.2d at 1021 (noting evidence that a neighboring gas station and liquor store, which were gathering places for loiterers, should have alerted the grocery store to the need for parking lot security).

98. *See id.* (noting evidence of all prior crimes on or near the store's premises for the preceding two-and-one-half years, including shoplifting and driving while intoxicated, and noting the increasing number of offenses).

99. Minson, *supra* note 10, at 620.

100. Ann M. v. Pac. Plaza Shopping Ctr., 863 P.2d 207, 215 (Cal. 1993).

101. Seibert v. Vic Regnier Builders, Inc., 856 P.2d 1332, 1340 (Kan. 1993).

102. Madden v. C & K Barbecue Carryout, Inc., 758 S.W.2d 59, 62 (Mo. 1988).

103. Corrigan & VanRonzelen, *supra* note 47, at 361. A compelling case can be made that the Missouri Supreme Court at least suggested use of the "totality of the circumstances" test in *Virginia D. v. Madesco Investment Corp.*, 648 S.W.2d 881, 887 (Mo. 1983). "If *Virginia D.* was ambiguous in its suggestion that Missouri should adopt a totality of the circumstances approach, no Missouri case after *Virginia D.* specifically refutes the merit of the doctrine." Taylor & Taylor, *supra* note 40, at 102.

IV. INSTANT DECISION

In *Hudson*, the Missouri Court of Appeals for the Eastern District of Missouri held that an invitee could not recover in a negligence action against a premises owner for criminal acts of an unknown third person absent sufficiently numerous or similar prior crimes of the type inflicted on the invitee.[104] The court began by reciting the general rule that there is no duty to protect a business invitee from criminal acts of unknown third persons.[105] Next, the court noted that a duty may be imposed by common law if there is a "special relationship" or if "special facts and circumstances" exist.[106] After briefly discussing the "special relationship" exception, the court noted that, because Hudson did not allege that a "special relationship" existed between him and Riverport and BMW, the issue would not be addressed.[107]

The court next discussed the "special facts and circumstances" exception, which was the basis of Hudson's claim.[108] The court began by noting that the "special facts and circumstances" exception can apply in two situations.[109] First, "when a person, who is known to be violent, or behaves in such a manner as to indicate danger, is on the premises and a sufficient time exists to prevent the injury" (*i.e.*, the "known third person" theory).[110] The second situation occurs "when a relationship exists between the plaintiff and the defendant that encourages the plaintiff to enter the premises" (*i.e.*, the "prior violent crimes" theory).[111]

The court stated that, in the second situation, the plaintiff must show "prior specific incidents of violent crimes have occurred on the premises that are sufficiently numerous and recent to put a defendant on notice, either actual or constructive, that there is a likelihood third persons will endanger the safety of defendant's invitee."[112] Furthermore, the court noted that the plaintiff also must show that the situation surrounding the injury is "sufficiently similar in type to the prior specific incidents occurring on the premises that a reasonable person

---

104. Hudson v. Riverport Performance Arts Ctr., 37 S.W.3d 261, 265 (Mo. Ct. App. 2000).

105. *Id.* at 264.

106. *Id.*

107. *Id.* at 265.

108. *Id.*

109. *Id.* at 264.

110. *Id.*

111. *Id.*

112. *Id.*

would take precautions to protect his or her invitees against that type of activity."[113]

Having recited the law, the court stated that Hudson failed to produce sufficient evidence to bring the case within the "known third person" theory of the "special facts and circumstances" exception. First, the court stated that Hudson failed to show that Riverport or BMW had any knowledge that the "long-haired" gentleman who assaulted Hudson was violent or, prior to the incident, acted in a manner indicating danger.[114] The court noted that, in fact, Hudson indicated just the opposite in his deposition.[115] In his deposition, Hudson stated that "not only was there not sufficient time to put Riverport and BMW on notice of the 'long-haired' gentleman's violent propensities, but there was insufficient time for the security personnel standing twenty feet away to prevent the attack."[116] The court then concluded that, because of these facts, Hudson failed to establish that this case falls within the "known third person" theory of the "special facts and circumstances" exception.[117]

Next, the court addressed the "prior violent crimes" theory of the "special facts and circumstances" exception. Hudson argued that, as a ticket holder, he was encouraged to come to the amphitheater, and that Riverport and BMW were put on notice by sufficiently similar and numerous prior acts of violence.[118] The court acknowledged Hudson's introduction of fifty-five police reports between

---

113. *Id.* at 265.

114. *Id.*

115. *Id.* In his deposition, Hudson testified that:

> two or three minutes before the assault, he and the "long-haired" gentleman had exchanged some words. The long-haired gentleman then walked away, and Mr. Hudson "just assumed it was over." Further, Mr. Hudson testified he was not even sure if anyone in his group noticed this exchange, and personally, he did not feel the need to inform the security personnel. When the "long-haired" gentleman approached Mr. Hudson the second time, Mr. Hudson testified "just a few seconds" had lapsed between the time he approached Mr. Hudson and struck him.

Id.

116. *Id.*

117. *Id.*

118. *Id.*

1992 and 1996.[119] The court, however, distinguished these prior incidents.[120] The court reasoned that:

> [a]fter excluding all of the incidents that occurred outside of [the] Amphitheater, there is evidence that thirty-eight assaults occurred at Riverport within a five-year span. . . . Out of these assaults, most appeared to be fistfights, elbowing, pushing, kicking, and pulling hair; none of these assaults involved a bottle or other similar object.[121]

The court then stated that "[t]hese assaults [were] not sufficiently similar in nature to the incident in this case or numerous to put Riverport or BMW on notice."[122] Therefore, the court concluded that Hudson "failed altogether to establish this case falls within the 'special facts and circumstances' exception."[123] As a result, the court held that Hudson could not recover in a negligence action against Riverport and BMW because the prior assaults failed to reach the standard of "sufficiently numerous or similar."[124]

V. COMMENT

In *Hudson*, the Missouri Court of Appeals for the Eastern District of Missouri cut off a potential legal disaster for the owners of theaters, sports teams, stadiums, restaurants, and other public places by ruling that a patron who was assaulted by an unknown third person could not recover from the premises owner for lack of security. In so doing, the court upheld the traditional approach for determining foreseeability, the "prior violent crimes" analysis of the "special facts and circumstances" exception to the general rule of no liability.[125]

---

119. *Id.*

120. *Id.* According to the court:

> Out of fifty-five police reports, fifty-two of them were documented assaults. Only fourteen of the assaults actually occurred on the lawn area, the same location appellants were located; twenty-four occurred in other areas inside the premises of Riverport; and, fourteen occurred in the parking lot. Of the fifty-two assaults, only one involved a glass bottle, and it occurred in the parking lot.

Id.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

However, the court failed to discuss the alternative theory that several states recently have adopted, the "totality of the circumstances" approach.[126]

The ruling in *Hudson* is in line with Missouri precedent. The "prior violent crimes" analysis of the "special facts and circumstances" exception has been applied by the Missouri Supreme Court since *Madden*.[127] However, while Missouri courts have yet to adopt the "totality of the circumstances" approach, they have not rejected it explicitly.[128] While the plaintiffs in *Hudson* did not attempt to argue for a change in Missouri law, such an argument has merit and plausibly could be considered in future cases.

Under the "totality of the circumstances" approach, the facts in *Hudson* might have produced a different result. First, in using the "prior violent crimes" analysis, the court excluded several assaults that occurred outside of Riverport Amphitheater, including an assault involving a glass bottle that occurred in the parking lot.[129] Under the "totality of the circumstances" approach, these incidents would be considered in determining if the assault on Hudson was foreseeable. Furthermore, using the "prior violent crimes" approach, the court distinguished assaults involving the use of fists, elbows, and hair pulling from assaults by bottle throwing.[130] In a "totality of the circumstances" jurisdiction, this distinction is not dispositive. Rather, the number of assaults, regardless of the type, occurring on or near the premises would be considered in determining foreseeability.

A proponent of the "prior violent crimes" approach may argue that, in practice, these two competing approaches will yield the same result. For example, when arguing under the "prior violent crimes" approach, a court will look at all prior crimes offered into evidence and "weed out" those that do not fit under the exception. Using the evidence that fits, the court then will determine if there is enough to establish foreseeability. Under the "totality of the circumstances" approach, if prior crimes are the only evidence offered, as in *Hudson*, a court likely will give less weight to those crimes that ordinarily would be outside the "prior violent crimes" exception. If a court gives less weight to the crimes that are not as "similar or numerous," the end result could be the same.

The "prior violent crimes" approach limits a court's analysis to those specific prior crimes that fit the exception.[131] Under the "totality of the

126. For a discussion of the "totality of the circumstances" test, see *supra* notes 87-103 and accompanying text.

127. *See supra* notes 45-46 and accompanying text.

128. *See supra* note 103 and accompanying text.

129. *See supra* notes 120-21 and accompanying text.

130. *See supra* notes 120-22 and accompanying text.

131. For a discussion of the "prior similar incidents" rule, see *supra* notes 69-86 and accompanying text.

circumstances" approach, a plaintiff may introduce evidence of all prior crimes, violent and nonviolent, on or near the premises.[132] More importantly, a plaintiff also may introduce a wide variety of other evidence that might be helpful in determining foreseeability but would be excluded under the "prior violent crimes" approach.[133]

Essentially, the "totality of the circumstances" approach expands the scope of a premises owner's duty. Courts that use this approach broaden the range of circumstances that could constitute sufficient notice to alert an owner of the need to take precautions to protect his or her invitees.[134] The practical result is that more cases will reach the jury under the "totality of the circumstances" approach than do under the current Missouri-adopted "prior violent crimes" approach.

Whether this result is preferable to the result reached under the "prior violent crimes" approach is open to debate. One commentator has suggested that the "totality of the circumstances" approach is "pro-plaintiff" and that it marks the "culmination of the transition from a strict to a broad interpretation of foreseeability."[135] Likewise, courts have criticized the approach for providing a broad standard for imposing liability and for coming close to imposing strict liability on business owners for any criminal attacks suffered by patrons while on the premises.[136] It is argued that such a rule would violate the widely-held view that business owners are not the insurers of their customers' safety.[137]

Arguments against the "prior violent crimes" approach, however, are also numerous. Commentators have criticized the "prior violent crimes" approach because it gives the premises owner at least one "free" injury.[138] Essentially, the first crime never will subject the premises owner to liability because, by definition, there are no prior violent crimes to establish foreseeability.

---

132. For a discussion of the "totality of the circumstances" test, see *supra* notes 87-103 and accompanying text.

133. For a discussion of the "totality of the circumstances" test, see *supra* notes 87-103 and accompanying text.

134. For a discussion of the "totality of the circumstances" test, see *supra* notes 87-103 and accompanying text.

135. Donna Lee Welch, Ann M. v. Pacific Plaza Shopping Center*: The California Supreme Court Retreats from Its 'Totality of the Circumstances' Approach to Premises Liability*, 28 GA. L. REV. 1053, 1061-62 (1994).

136. McClung v. Delta Square Ltd. P'ship, 937 S.W.2d 891, 900 (Tenn. 1996) (noting with approval criticism toward the "totality of circumstances" test because it "effectively impos[es] an unqualified duty to protect customers in areas experiencing any significant level of criminal activity").

137. *See* RESTATEMENT (SECOND) OF TORTS § 344 cmt. f (1965) (providing that "the possessor is not the insurer of the visitor's safety").

138. Minson, *supra* note 10, at 619.

In addition, commentators also have argued that the "prior violent crimes" approach removes too many cases from the jury and that it generates "arbitrary decisions about what kinds of prior crimes are sufficiently similar to establish foreseeability."[139] These arbitrary decisions inevitably result in an inconsistent application of the law.

Economic considerations are at the forefront of this debate. For example, in 1995, the average jury award in negligent security actions involving rape was $1.8 million.[140] With more than four-thousand rapes reported in parking garages and lots in 1995, it is clear that this theory of liability subjects business owners to excessive liability.[141] Under the "prior violent crimes" approach, this vast liability is potentially cut off.[142] A likely result is lower costs for business owners due, in part, to lower insurance premiums. Ideally, these lower costs will be passed on to consumers, who will benefit through lower prices. Meanwhile, the injured party is left with no recovery. Under the "totality of the circumstances" approach, business owners are vulnerable to large, unpredictable jury verdicts.[143] While the injured party may prefer this result, the consumer likely will be stuck with the tab.

The decision in *Hudson* does nothing to change existing law in Missouri. However, by maintaining the "prior violent crimes" approach as law, Missouri courts continue their policy of siding with business owners in negligent security actions.

VI. CONCLUSION

In *Hudson*, the court upheld the traditional standard for dealing with a business owner's liability for the criminal acts of unknown third persons inflicted upon his or her patrons. In so doing, the court maintained a policy of siding with business owners in negligent security actions. However, an argument for a change in Missouri law that is more consumer friendly is, by no means, dead and has merit. Whether Missouri courts will acknowledge and eventually accept this argument is for future jurists to decide.

MATTHEW J. LANDWEHR

---

139. Minson, *supra* note 10, at 619.

140. KAMINSKY, *supra* note 43, at 4.

141. KAMINSKY, *supra* note 43, at 4.

142. For a discussion of the "prior similar incidents" rule, see *supra* notes 69-86 and accompanying text.

143. For a discussion of the "totality of the circumstances" test, see *supra* notes 87-103 and accompanying text.