Premises Liability After the KFC Case: Potential Liability of a Commercial Establishment to a Customer Injured by a Provocation of an Armed Robber

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Premises Liability After the KFC Case: Potential Liability of a Commercial Establishment to a Customer Injured by Provocation of an Armed Robber

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I. Introduction

Every seventeen seconds a violent crime occurred in the United States in 1994. One robbery occurred every fifty-one seconds, totaling 618,817 robberies in 1994; 237.7 robberies per 100,000 people. Losses attributed to robberies during 1994 were approximately $496 million. The average amount taken during the robbery of a convenience store was $387; for a bank, $3,551. Monetary loss represents only one type of damage inflicted during the course of a robbery. Many victims suffer serious personal injury at the hands of the robber. Robbery resulted in 2,072 murders in 1994; slightly over ten percent of all murders occurred during an armed robbery. The perpetrator of a robbery is usually young and the most likely weapon to be used during a robbery is a firearm.

On August 14, 1993, Kathy Brown was a patron of Kentucky Fried Chicken in Redondo Beach, California. An armed robber took her wallet, held a gun to her back, and demanded that the KFC cashier give the robber all the money. The clerk responded that she did not have the key to the register and would have to go to the back of the restaurant for the key. The robber pushed the gun harder into Brown's back and told the cashier to open the register or the robber would shoot Brown. Brown screamed at the cashier to give the robber the money, at which time the cashier handed over the money and the robber left. Brown sued Kentucky Fried Chicken because KFC's delay in turning over the money allegedly caused Brown damage and increased the risk of grave injury to Brown.

At first blush, a Kentucky Fried Chicken restaurant might appear to be an unlikely target for an armed robbery. However, customers of fast-food restaurants typically pay with cash and, according to law enforcement authorities, any business dealing predominately in cash transactions is a likely site for a robbery. One representative of law enforcement opined that the most likely site for an armed robbery is a convenience store. However, she noted that a customer is not likely to be hurt in the robbery of a convenience store because the customer is usually in and out of the establishment quickly. In her opinion, the second most likely place for an armed robbery to occur was a fast-food restaurant. Further, she opined that a customer is more likely to become a victim in a fast-food restaurant than a convenience store robbery.

1. Crime in the United States, 1994, Uniform Crime Reports for the United States, Federal Bureau of Investigation (1995) [hereinafter UCR, 1994]. Robbery is defined as the "forcible or attempted taking or obtaining of anything of value from the care, custody, or control of a person or persons by force or threat of force or violence and/or by putting the victim in fear." Id. at 26.

2. Id. at 26.

3. Id. at 27.

4. Id.

5. Id. at 28 & 21. These were 23,076 murders in the United States in 1994.

6. Firearm were used in 42 percent of all robberies in 1994. "Thirty-three percent of all robbery offenses in 1994 were under 25 years of age." Juvenile arrests for robbery rose 52 percent during the five-year period of 1989-1994. Id. at 29.

7. Kentucky Fried Chicken of Calif., Inc. v. Brown, 40 Cal.App.4th 708, 802-03, 47 Cal.App.2d 2199 (Cal. App. 2nd Dist., Div. 3, 1993). California allows recovery of damages for emotional distress if the plaintiff is a "direct victim" of defendant's negligence and the emotional distress is foreseeable. No physical harm is required for recovery of emotional distress damages. Mejia v. Kaiser Foundation Hosp., 27 Cal.3d 866, 617 Cal. Rptr. 851, 616 P.2d 913 (1980). The only damage suffered by the plaintiff in Brown appears to be increased emotional damage caused by the clerk's delay in turning over the money to the armed robber. The plaintiff would have suffered some distress by having the robber put a gun to her back for the first instance, as her recovery would be for increased emotional distress only.
Typically, there is a higher volume of trade in a fast-food restaurant, i.e., there are more people inside the establishment at any given period of time, and each customer spends more time in the fast-food restaurant than a convenience store. Accordingly, there is more opportunity for involvement during a robbery.

The Federal Bureau of Investigation provides statistics on violent crimes each year. The locations of robberies are categorized by street or highway, commercial house, gas or service station, convenience store, residence, bank, and miscellaneous. A commercial house includes a place of business other than a service station, convenience store, or bank. Thus, a commercial house includes supermarkets, taverns, restaurants, hotels, motels, department stores, and fast-food restaurants. There is no individual category for fast-food restaurants as there is for convenience stores, service stations, and banks. Thus, there is no way to really compare the frequency of robberies that occur at a fast-food restaurant with those that occur at a convenience store. The “miscellaneous” category includes robberies that occur in places such as waterways, schools, subways, trains, churches, and libraries. The most likely place for an armed robbery to occur in 1994 was on a street or highway. However, the second most likely place was in a “commercial house.” A “commercial house” includes fast-food restaurants. A “commercial house” was a more likely site of an armed robbery than a service station, convenience store, or bank.

Street, gas station, convenience store, and bank robbery all declined during the period of 1990 through 1994. However, robbery of the “commercial house” increased.

Robbery of a commercial establishment presents a volatile situation in which injury or death could result to either an employee of the business or a customer unfortunate enough to be present during the robbery. The California Court of Appeals recently held in *Kentucky Fried Chicken of California, Inc. v. Brown* 8 that a business establishment owes a legal duty to “behave reasonably during an armed robbery in order to avoid unreasonably increasing the risk” of harm to a customer. Therefore, Kathy Brown could sue Kentucky Fried Chicken for injuries sustained during the armed robbery and it was a question of fact whether KFC acted reasonably during the robbery. Previously, most courts had concluded that a business did not owe a duty to a customer to use reasonable care during the course of an armed robbery. However, a few courts agree with California and impose a legal duty whereby the business could be liable if employees reacted unreasonably during the robbery and the unreasonable actions could be found to have provoked the robber into injuring the customer.

Unbelievably, the duty to use reasonable care during a robbery seems to require the business to comply with all criminal demands and take no affirmative action that might provoke the robber. A breach of this duty would mean that the business would face potential civil liability for injuries inflicted on customers at the hands of the armed robber.

This article addresses whether courts should expand the concept of the duty of care owed by a business to an invitee to include the duty to not provoke an armed robber, or to comply with the demands of an armed robber, to avoid unreasonably increasing the potential risk of harm to the customer. The duty argument springs from the general duty of the landowner to provide a reasonably safe environment for an invitee, including the duty to prevent injuries at the hands of a third party if the conduct of the third party is foreseeable.

II. Traditional Duties of Businessmen Toward Entrants

Typically, an owner’s liability in negligence for harm occurring upon the premises varies with the status of the entrant complaining of an injury. Whether an entrant is an invitee, licensee or trespasser determines the amount of care an owner will be required to exercise to protect that entrant.

A trespasser is one who intentionally invades the property of another without consent or any privilege to intrude. As a general rule, a landowner owes no duty to an unknown trespasser except to refrain from willfully or wantonly injuring him. The landowner does have a duty

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8. Telephone Interview with Tula Chadwick, Administration Specialist, Planning and Development, Oklahoma City Police Department (April 3, 1996). Mr. Chadwick has been with the OCPO for twenty years and has been a crime analyst and involved in major crime activity.


11. Id.

12. UCR 1994, supra note 1, at 27. Fifty-five percent of all robberies occurred on streets or highways in 1994; twelve percent occurred in a “commercial house.” Id.

13. Id. Two percent of robberies occurred at service stations; five percent at convenience stores; and one percent at banks. Id. (Continued in next column)

14. Id. (Continued from previous column)

Eleven percent were at residences and thirteen percent fell into the miscellaneous category. Id.

15. Street robbery declined 9% from 1990–1994; gas station robbery declined 30%; convenience store robbery declined 24%; and bank robbery declined 9%. Id. at 50.

16. Commercial house robberies increased 14% from 1990 to 1995. The only other category to show an increase was residential robbery with a 9% increase in the five-year period. Id. at 50.

17. Id. at 40. App. 4th 708. 47 Calif. Rptr. 2d 36 (2nd Div., Div. 3, 1995).

18. Id. at 40. App. 4th 708. at 807.

19. Id. at 809.

to warn of known, but concealed, dangers once the landowner discovers the presence of the trespasser. The landowner may also owe a duty to the known trespasser not to injure the trespasser through negligence in the active operations on the land.

A licensee, or social guest, is one rightfully upon the premises of another but the owner receives no "beneficial" interest from the visit, other than the intangible advantage of social intercourse. A social guest takes the premises as he finds them and the host has no duty to make the premises better or safer than when hospitality was extended. The possessor of land owes to the bare licensee merely the duty to exercise reasonable care to disclose to him dangerous defects which are known to the landowner and are unlikely to be discovered by the licensee. The landowner also must use reasonable care in the active operations of the land to avoid injury to the licensee. However, there is no duty to inspect the premises or to affirmatively make the premises safe for the reception of such a visitor.

Historically, an invitee was generally a business visitor, i.e., one rightfully upon another's premises for purposes that provided the owner some beneficial interest. "Beneficial" meant business or commercial significance. Therefore, a mutual business or commercial interest had to exist between the invitor and invitee or the invitor had to receive a benefit from the invitee in order for an entrant to be classified accordingly. Modern courts have expanded the concept of invitee. An invitee can either be a business visitor, "a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealing with the possessor of the land," or a public invitee. A public invitee is a "person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public." The protection afforded the invitee does not hinge solely on an economic benefit to the possessor of land; rather, protection is also afforded if the land is held open to the public.

An owner of land owes the highest duty to the invitee. The relationship of invitor/invitee gives rise to the owners' duty to use reasonable care to prevent injury by keeping the premises in reasonably safe condition. This duty includes the duty of reasonable inspection to discover and correct dangerous conditions. Although the owner has no legal duty to alter the premises to eliminate known and obvious dangers, an owner breaches his duty to an invitee by not warning him of latent or concealed perils known to the owner but not to the invitee.

The duty to use reasonable care to protect the invitee is justified on two grounds. The "economic benefit theory" justifies the affirmative duties to make the premises safe on the grounds that it is the price the landowner has to pay for the economic benefit the landowner derives or is expected to receive from the invitee. The alternative theory is that the landowner gives an "implied representation" that reasonable care has been used to make the premises safe when the landowner encourages people to enter his land "to further a purpose of his own." Premises held open to the public carry the implied assurance of safety that the land has been "prepared for their reception"; hence, the creation of the category of public invitee.

Some courts criticized the traditional common law categories of invitee, licensee and trespasser as a method for determining the extent of duty owed by a possessor of land. As stated by the California Supreme Court in the landmark decision of *Rowland v. Christian*:

A man's life or limb does not become less worthy of protection by the law nor a loss less worthy of compensation under the law because he has come upon the land of another without permission or with permission but without a business purpose. Reasonable people do not ordinarily vary their conduct depending upon such matters, and to focus upon the status of the injured party as a trespasser, licensee, or invitee in order to determine the question whether the landowner has a duty of care is, contrary to our modern social mores and humanitarian values. The common law rules obscure rather than illuminate the proper considerations which should govern determination of the question of duty.

The courts that abolish the common law categories impose a single duty upon the owner or occupier of land: a duty to use reasonable care in light of all the circumstances. A plaintiff's status as an invitee, licensee, or trespasser may have some bearing on the question of liability.
because the status may reflect upon the foreseeability of injury and upon the precautions a reasonable person might take. The status is simply not determinative on the issue of the scope of the duty to the entrant. However, courts tend to retain the "no-duty" rule toward a trespasser even if they have merged the common law categories of invitee and licensee. Furthermore, most courts have declined to abolish the common law categories because the common law approach provides predictability, stability, and workable solutions for cases dealing with premises liability. Courts recently addressing the issue have, in fact, unanimously reaffirmed commitment to the common law classifications. The so-called trend to adopt a general duty toward all entrants to use reasonable care and abolish the invitee/licensee/trespasser classification appears to have ended.

But in any event a business owes a general duty of reasonable care towards patrons of its establishment. This duty encompasses the duty to protect against foreseeable risks of harm. Foreseeable risks of harm can include injury caused by criminal activity. Thus, a business establishment may have a duty to protect its patrons from injuries caused by foreseeable criminal attacks.

III. Duty to Protect Against Foreseeable Criminal Attacks

Traditionally, an owner of land owed no duty to protect its entrants from criminal assaults of a third party. Criminal misbehavior was considered unforeseeable and the conduct of the criminal was perceived as a sufficient intervening cause to relieve the landowner of liability. The criminal action was considered the proximate cause of the injury, not inaction or a failure to protect on the part of the possessor.

Courts carved out exceptions to the no-duty rule whenever a "special relationship" existed between the plaintiff and defendant to justify a duty to protect the plaintiff from criminal activity. Special relationships evolved from the element of control; the defendant controlled the circumstances and the plaintiff was generally unable to protect himself due to the control exercised by the defendant. For example, a landlord owes a duty to protect its tenants from foreseeable criminal attacks occurring in the common areas because the landlord, not the tenant, controls this portion of the premises. Generally, the relationship of an owner of land and an entrant is not considered sufficiently special to justify an affirmative duty to protect against criminal attack.

However, a business owes an invitee a duty to use reasonable care to protect the invitee from conditions on the premises that pose an unreasonable risk of harm to the invitee. Criminal attacks can pose an unreasonable risk of harm to an invitee if the criminal misconduct is foreseeable. Today, criminal activity is, in a broad sense, always foreseeable. We all know that a crime could possibly occur at any place or at any time. The location and precise time is, of course, unpredictable. In order to impose a duty on a business to protect a customer from criminal attacks, the criminal activity must be foreseeable as to that premises, i.e. anticipated at that particular business. The misconduct must be more likely to occur at the particular business in question as compared to other locations. It must be demonstrated that a person on the premises is likely to be injured, including a patron, because the criminal attack is specifically foreseeable. The particularized knowledge that the specific question in a microphone is a more likely target for criminal activity than crime occurring randomly in society may create a duty to protect customers from the unreasonable risks of harm that may occur during a criminal attack.

45. (Continued from previous column)

46. (Continued from previous column)

47. (Continued from previous column)

48. (Continued from previous column)

49. Goldberg v. Horning Authority of Newtown, 36 N.J. 578, 186 A.2d 201, 293 (1962). It would be folly to impose liability for mere possibilities..."[W]e must reach the question of liability for attacks which are foreseeable but in such a sense that they are unpredictable and probable." Kline v. 150 Massachusetts Avenue Apartment Corp., 439 F.2d 477, 483 (D.C. Cir. 1970).

Support for this position can be found in the Restatement (Second) of Torts, which imposes a duty upon a commercial or public establishment to protect against intentional harmful acts of third parties if the establishment knows "the acts are being done or are likely to be done."51 Almost all jurisdictions recently deciding the issue have followed the position of the Restatement and impose a duty to protect entrants from foreseeable criminal attacks.52 One exception appears to be Oklahoma. In Davis v. Allied Supermarkets, Inc., 53 Oklahoma held in 1976 that a business in a high-crime dis- trict had no duty to protect a patron from her assailant even though the assault occurred in the business' inadequately lit parking lot. The proximate cause of the patron's injuries was considered the criminal act.54 In 1986, the Oklahoma Supreme Court imposed a duty upon landlords to protect tenants from risks created by foreseeable criminal attacks, and specifically "disapproved" of the holding in Davis.55 In 1993, however, Oklahoma held that the term "disapproved" did not overrule Davis, but only indicated that the no-duty rule was not absolute and that there could be a duty to protect against criminal attack in "exceptional circumstances."56 Currently, it is unclear whether Oklahoma would now rule with the majority of courts and impose a duty on a business to protect an invitee from foreseeable criminal acts when presented with an appropriate case; i.e., whether it would be an "exceptional circumstance" to depart from the no-duty rule.57

The obligation of an owner to protect against criminal activity is explained further in comments to the Restatement, as follows:

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 the 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 person. If the place or character of his business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection.58

Under the traditional interpretation of the Restatement, the defendant would be entitled to an invitee's criminal activity with resulting liability for failure to use reasonable care can arise in four ways: (1) the character of the business, by its nature, is likely to attract certain crimes; therefore, it is generally foreseeable that a patron could be subjected to an unreasonable risk of harm; (2) prior similar incidents at the particular business or the totality of the circumstances illustrate foreseeability of criminal attack and the possessor of land failed to take measures to prevent or discourage the criminal attack upon an invitee; (3) the business failed to use reasonable care to assist a

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50. (Continued from previous page)


52. See, e.g., Tussi Bell, Inc. v. Larson, 744 P.2d 42 (Colo. 1987).


54. Restatement (Second) of Torts § 444 (1965) (emphasis added).

55. The exceptional circumstances that mandated a departure from the no-duty rule was where "an inviter has knowledge that an invitee is in imminent danger, the inviter must act reasonably to prevent injury." Id. at 128. In Jury v. Myerson, the invitee was being harassed in the inviter's parking lot. The inviter refused to call the police and the invitee was attacked. The assault lasted five minutes. The inviter had a duty because of the exceptional circumstances of the invitee being in imminent danger. Id. at 280. The eminent danger rule is not as expansive as saying that it is not to prevent foreseeable criminal misconduct which might injure a patron. For a discussion of the theory that a business should generally owe no duty to protect premises from criminal activity except in certain circumstances, see generally Sharp, Police the Crimes of Others? Landowner Liability for Crimes on the Premises, 29 Stan. L. Rev. 11 (1977).

56. Restatement (Second) of Torts § 444 cmt. e (1965).

57. Id.

58. Restatement (Second) of Torts § 444 cmt. e (1965).

59. Id.
customer once the business knew a criminal attack against the patron was in progress; and (4) a business undertook to provide security and an invitee is injured due to negligence in implementing the security measures. The adoption of the above duties does not, however, mandate the expansion of the concept of duty to include an obligation to use reasonable care during an armed robbery or a duty not to take any affirmative action which might provoke an armed robber.

A. Risky Business

Under the Restatement, a business may owe a duty to a patron to prevent injuries inflicted by a criminal attack if the "character" of his business makes a criminal attack reasonably to be anticipated. For example, the owner of a busy tavern, given the "character" of a business serving alcohol, might reasonably anticipate bar fights and have a duty to hire a bouncer. Or, the nature of a convenience store is such that the owner could reasonably anticipate robberies and thus have a duty to mount hidden security cameras to provide a valid deterrent. However, this author knows of no appellate court decision which has held that all convenience stores must install security cameras or all bars must hire bouncers using as the sole determining factor the "character" of the business. After all, a small corner bar with limited clientele might not be a likely place for a fight to break out and a convenience store in a small quiet town might not need hidden security cameras. A judicial ruling mandating specific security measures for all

engaged in a certain vocation based solely on the type of business involved would appear to be pernicious judicial legislation. Courts are reluctant to apply what has been referred to as the "tempting target rule," which would impose a duty to protect patrons from intentional misconduct without a showing that the misconduct was predictable at the particular location. In determining whether a business has a duty to protect patrons from criminal attack, courts prefer to examine the foreseeability that the criminal activity will likely occur based on the facts of each individual case. However, courts could easily use the fact that the nature of a certain business was particularly attractive to crime as one consideration in determining liability.

It has been suggested that the "tempting target rule" should apply to assaults in bars or taverns where intoxication is expected. Likewise, a hotel or motel could owe a higher duty to a guest because the hotel or motel has control over the common areas, locks, and lighting. The nature of the business is analogous to the relationships of landlord/tenant or common carrier/passenger. Thus, a duty to protect could be implicit in the relationship.

A shopping mall could be classified as a "risky business" because of the "unique problems regarding security."

65. See, e.g., Handlin v. Marchesi Food Store, 310 So.2d 33 (La. App. 2d Cir. 1975); Bollow v. Southland Corp., 482 So.2d 1290 (La. App. 2d Cir. 1980).
68. Yarbough v. Terry, 705 S.W.2d 191 (Tex. Ct. App. 1985) (right not foreseeable in a neighborhood bar with no history of violence). The provision of lighting and reasonable security in the parking lots of shopping malls could easily be required by courts without a showing of prior similar incidents of crime in a particular mall. Recently, one business argued likely to fall into the category of a "risky business" is a night depository or an automated teller machine (ATM):

Since these banking mechanisms are meant to be used at night, they constitute an invitation to lawless elements, and hence a duty to take reasonable steps to protect customers arguably should arise even in the absence of prior hold-ups. Due care might require the removal of obstructions which might hide from police or passers-by a view of the machines or depositories. It might also call for adequate lighting, monitoring by cameras, the location of machines inside locked bank entryways, and warnings to customers.

On the other hand, the social benefit provided by these devices is such that no liability should attach in situations where the injury could not have been prevented by the utilization of some specific, reasonable safety measure or measures.

Scholarly attention to ATMs has been significant, although reported case law

66. Id.
68. Id.; see also David W. Robertson, Negligence Liability for Crimes and Intentional Torts Committed by Others, 87 Tul. L. Rev. 135, 186 (1992).
69. "An insurer does not owe its guests against the risk of injury or property loss resulting from criminal acts. The insurer's protection vis-a-vis its guests is similar to that of a common carrier toward its passengers. Thus, a grant is extended to a high degree of care and protection. The insurer has a duty to take reasonable precautions against criminals." David W. Robertson, Negligence Liability for Crimes and Intentional Torts Committed by Others, 87 Tul. L. Rev. 135, 167-170 (1992), quoting Krause v. J.A. Osuna Meat Bros., 410 So.2d 1045, 1053 (Fla. 1982). See generally Annots., Liability of Hotel or Motel Owner for Injury to Guest Resulting from Prinnt Assault by Third Party, 31 A.L.R. 3d 999 (1979).
70. PARKER, supra note 46, at 362-363.
71. See, e.g., Jarvis v. L ООО, 1134 Ill. 141 (1981) ( "As the means of merchandising has changed to shopping centers and malls with attendants present, the common law concerning the business property owner's liability to his customers for personal injury by criminal attacks on business customers in the parking lot has also been subjected to drastic change."); see generally Marquie A. Green, Annotation, Liabilities of Owner or Operator of Shopping Centers or Business Houses Hundred Years, for Injury to Patron or Person from Criminal Attack by Third Party, 31 A.L.R. 3d 550 (1975); James L. Idam, Annotation, Parking Facility Proprietor's Liability for Criminal Attack on Patron, 40 A.L.R. 4th 1257 (1986); Oness L. Landis, Annotation, Liability of Owner or Operator of Shopping Centers or Business Houses Hundred Years, for Injury to Patron or Person from Criminal Attack by Third Party, 31 A.L.R. 3d 999 (1979).
72. PARKER, supra note 46, at 362-363.
is scarce.73 Most courts have declined to impose a duty upon a bank to protect its patrons from an armed robbery while using an ATM.74 In the near future, however, ATMs could prove to be a "tempting target" for litigation as well as for robbers.76

Imposition of liability upon a business for criminal attacks because the essential character of that business attracts certain crimes does not support an extension of liability by mandating a standard of behavior while a armed robbery is in progress. Reasonable security precautions taken before the criminal misconduct would prevent legal liability if a court considered the business to be a risky one. However, it is completely different to say that an agent of the business did not use reasonable care during an armed robbery because of the way the agent reacted to a life-threatening situation. Arguably, requiring a business to adopt reasonable measures before a likely criminal incident in order to deter the activity establishes a meaningful standard that businesses could conform to avoid legal liability.

As stated previously, however, most courts have not classified certain businesses by their nature as being "risky businesses" or "tempting targets." Courts generally refrain from saying that a commercial establishment has a duty to protect a patron from a criminal attack unless prior similar incidents at the particular business or the totality of the circumstances indicate that criminal misconduct is likely to occur thereby creating an unreasonable risk of harm to the customer.

B. Similar Incidents or Totality of the Circumstances

Public opinion polls show that citizens are very fearful of the crime problem and nearly half report that they would be afraid to walk alone at night in some portion of their neighborhood. A common response to the fear is simply to stay at home.77 But a common response when an injury results is to sue the owner of the premises where the attack occurred.

 Victims of violence usually find that their assailants—the murderers, rapists, muggers, drunk drivers, etc., who were the most obvious and immediate sources of the harm—are "judgment proof," i.e., uninsured and impecunious. Thus, there is a high incidence of litigation seeking to hold others—persons and institutions whose negligence arguably set the stage for the injuries in some way—responsible for the harm caused by such persons.78

As a result, litigation attempting to impose premises liability for injuries caused by criminal attack is rapidly increasing.79 The typical case requires: (1) proof of a duty to prevent a foreseeable criminal attack and accordingly a duty to protect the patron from an unreasonable risk; (2) proof of a breach of that duty by a failure to provide any reasonable, specific safety measure; (3) proof that a specific safety measure had been used would have prevented the injuries to the patron at the hands of the third party; and (4) proof of the damages caused by the failure to utilize or maintain safety precautions.80 Most of the reported cases deal with the first element of proof, whether a duty was owed to prevent the criminal attack. The duty hinges on whether the attack was probable or likely at the location; i.e., whether it was foreseeable. Although there is some scholarly support for "an unqualified duty-to-prove rule that would require all business invitees to take reasonable steps under the circumstances to prevent the occurrence of crime on the premises,"81 courts generally hold that there is only a duty to prevent criminal misconduct where it can be foreseen that the activity will likely occur on the premises. The duty will usually only apply to invitees, not licensees or trespassers.82

To establish that criminal activity that might injure a patron is foreseeable, the business need not foresee "precisely when or how an incident will occur."83 Rather, evidence is needed that the misconduct would be likely to occur in the future so that a "reasonably thoughtful person would take account of it in guiding practical conduct"84 to avoid an unreasonable risk of harm to a customer. Businesses that "do not attract or provide

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73. (Continued from previous page)

74. ATM Crime, supra note 73; Attacks on ATM Patron, supra note 73, at 1010.

75. See collection of authority in ATM Crime, supra note 73, at n.18.

76. In Florida, a $1 million verdict was rendered in favor of a customer blinded in one eye in an armed robbery of a night depository. Attacks on ATM Patron, supra note 73, at 1025.

77. Michael J. Velecky, Business Inviter's Duty to Protect Invitees from Criminal Acts, 134 U. Pa. L. Rev. 883, 885 (1986). ("If all the involved parties, the cost of crime reduction is cheap.") While the patrons hold just one expensive option, staying home, the landlord holds many options, ranging from relocalization of better lighting, fences, or good service, to even varying hours of operation. All of these options should be less expensive and more effective in deterring crime than the patron's sole choice of staying home.


80. Mark A. Cohen, Experts Advisory on Premises Liability Clause, Don't Ignore Criminal Link, Lawyers' J. Mass. Lawyers Weekly (Feb. 1, 1993), Seventy-five percent of premises liability cases where recovery is sought for injuries caused by a criminal attacks involve rape.

81. Id.


83. See Hethering v. 1061 Fourth Avenue Associates, 136 N.J. 527, 529 (1994) ("The duty was owed to a passerby because he was not an invitee at the time of the criminal attack.") See also Cascioli v. Colino, 238 N.J. Super. 477, 483 (1989) ("...the court was faced with a license because the negligence alleged was the active negligence of a security guard in the performance of his duties. However, the dissent argued that there was no duty to protect licensees from foreseeable criminal acts of third parties. There was only such a duty owed to invitees.")

84. Id.
a climate for crime are under no duty to guard against criminal acts of third parties unless they know or have reason to know that acts are occurring or are about to occur there which pose an imminent probability of harm to an invitee.83 As a result, more than occasional robberies in the area is needed to establish foreseeability of a robbery at a particular business.84 The mere fact that an establishment has been the victim of an armed robbery before does not mean that subsequent armed robberies are foreseeable.85

The test for foreseeability is whether a person of ordinary intelligence and prudence should anticipate the danger to others created by his negligent act.86 However, varied interpretations of the concept of foreseeability have been provided by the courts.

The "narrow view of foreseeability mandates that similar crimes must have occurred, many times on the same premises.87 "The risk reasonably to be perceived defines the duty to be obeyed."88 For example, prior burglaries at night at a business does not mean that the business will foresee an armed robbery during working hours.89 Or, foreseeability of an armed robbery in the drive-through lane of a Kentucky Fried Chicken was not found to exist from the fact that a prior robbery in the lobby of the same establishment had occurred several months previously.90

The narrow view of foreseeability is reflected in the "prior similar incident rule" which provides that a business would only have a duty to guard against

"crimes which were of the same type as its prior crimes on the premises.91 Reduced to its essence, the "prior similar incidents" requirement translates into the belief that failure to adequately infer foreseeability will fail for failing to control the dog.92 That license which is refused to a dog's owner should be withheld from a building's owner and the owner's agents as well.93 Recently, the solid trend of courts has been to reject the "prior similar incident rule" in favor of a broad interpretation of foreseeability.94 The requirement that prior crimes of the exact type must occur at a business before a business might anticipate criminal activity that might endanger a patron flies in the face of the traditional tort doctrine which requires that only a general risk of harm need be foreseen, not the precise manner of occurrence or specific injury.95 Furthermore, the "prior similar incident rule" encourages "arbitrary distinctions with respect to the similarity of prior incidents."96 The trend to apply a broader view of foreseeability is reflected by courts rejecting the "prior similar incident rule" in favor of the "totality of the circumstances rule."97

93. See, e.g., Oregon v. Spence Co., Inc., 477 So.2d 295 (Ala., 1985) (evidence that a convenience store had been robbed five times in two years was not sufficient evidence to establish that Spence Co. had knowledge that the criminal activity was happening at the store with the plaintiff). Judge Price, in a concurring opinion, stated that the plaintiff was entitled to perform "an act of self-defense" with the weapon of the store. Id. at 295. For the precise form of an arrest's "arrest" and the matter of "criminal activity which could endanger an invitee in the store."

94. Judge McGahey, 771 S.W.2d 247 (1987) (subject to the rule of the prior similar incident rule, a "complaint must be filed or a resident has the right to file a complaint under the rule.")

95. Sharp v. W.H. Moore, Inc., 118 Inda 797, 798 (1980) ("There is no "no free rides" rule in Illinois.")

96. Id. at 798.

97. Id. at 798.

98. Judge McGahey, 771 S.W.2d 247 (1987) (subject to the rule of the prior similar incident rule, a "complaint must be filed or a resident has the right to file a complaint under the rule.")

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108. Judge McGahey, 771 S.W.2d 247 (1987) (subject to the rule of the prior similar incident rule, a "complaint must be filed or a resident has the right to file a complaint under the rule.")

109. Judge McGahey, 771 S.W.2d 247 (1987) (subject to the rule of the prior similar incident rule, a "complaint must be filed or a resident has the right to file a complaint under the rule.")

110. Judge McGahey, 771 S.W.2d 247 (1987) (subject to the rule of the prior similar incident rule, a "complaint must be filed or a resident has the right to file a complaint under the rule.")

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117. Judge McGahey, 771 S.W.2d 247 (1987) (subject to the rule of the prior similar incident rule, a "complaint must be filed or a resident has the right to file a complaint under the rule.")

118. Judge McGahey, 771 S.W.2d 247 (1987) (subject to the rule of the prior similar incident rule, a "complaint must be filed or a resident has the right to file a complaint under the rule.")

119. Judge McGahey, 771 S.W.2d 247 (1987) (subject to the rule of the prior similar incident rule, a "complaint must be filed or a resident has the right to file a complaint under the rule.")

120. Judge McGahey, 771 S.W.2d 247 (1987) (subject to the rule of the prior similar incident rule, a "complaint must be filed or a resident has the right to file a complaint under the rule.")

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Under the "totality of the circumstances" approach, foreseeability can be established not only by prior crimes, but by other circumstances as well. Thus, unlike the prior similar incidents rule, even if a business has never experienced any crime in the past, criminal attacks on customers might still be deemed foreseeable by such things as the level of crime in the neighborhood as a whole, or other factors specific to the given case, such as inadequate lighting or architectural designs that are inviting to criminal activity. With evidence of prior similar crimes on the premises might remain the most probative evidence regarding foreseeability, a prior similar crime is only one factor to determine the "totality of the circumstances." Evidence that the premises was in a high-crime area and whether the owner was aware of the criminal activity is also relevant. Obviously, a business is more likely to owe a duty to prevent and to protect patrons from criminal attacks if a court adopts a broad view of foreseeable or looks to the "totality of the circumstances." However, occasional robberies in a large area over an extended period of time will probably not be sufficient proof of foreseeability even under a broad interpretation of that concept.

Even if a business has a duty to prevent criminal activity because it is foreseeable, the duty is still one of "reasonable care under the circumstances to reduce or eliminate the opportunity for criminal attack." Typically, plaintiffs introduce expert testimony regarding specific security measures that could have been taken by the defendant that might have prevented the criminal actions of third parties and the security measures that other similar businesses utilize.

A major goal is to inhibit illegal acts through a controlled physical environment. Direct controls include those that reduce environmental opportunities for crime, such as security hardware, street lighting, surveillance, and building design. The environment can be designed so that the individual considering a criminal act thinks that there is a good chance that he will be seen and recognized.

The general economic principle behind such physical planning for crime prevention is to make criminal behavior high-risk behavior. If the risk of being apprehended is large, many potential attackers or intruders will not commit the crime.

Therefore, reasonable care would mean in most case planning the physical environment of a business to deter crime. However, at least one court has held that it was a question of fact for the jury to determine whether a business should be required to hire a security guard to comply with its duty to use reasonable care.

In Taco Bell, Inc. v. Lannon, Taco Bell was located in a high-crime area and had been the victim of ten armed robberies in three years, one two nights before the robbery in question. Plaintiff entered Taco Bell, fled when he realized an armed robbery was in progress and was shot in his hand as he attempted to flee. The Colorado Supreme Court held that the robbery was foreseeable and that Taco Bell had a duty to protect patrons from unreasonable risks of harm from an armed robbery. The court held that it was a jury question whether Taco Bell "breached its duty by failing to provide one or more armed security guards."
The court did not believe this duty would place an "onerous burden" upon Taco Bell because customers could pay a few cents more for food for added protection.

Various public policy arguments have been raised against extension of the duty to use reasonable care to include hiring of armed security guards. "The creation of private police forces contravenes public policy by shifting the government's law enforcement duty to the private sector. Private security guards frequently do not have the same level of training or expertise as police officers. Yet, unlike the government...business proprietors..."

99. (Continued from previous page)

100. 114 F.D. 18 (E.D. Mich. 1960); Aschenbrenner v. Wachovia Bank & Trust Co., 378 U.S. 305 (1964) (jury question created with evidence of several burglaries on the premises as to whether criminal theft of plaintiff was foreseeable); Bank v. Hoyer Corp., 32 F.3d 1214 (10th Cir. 1994) (criminal activity on the premises foreseeable due to eleven robberies in the surrounding area); generally see Barry and Stoffel, The Duty to Provide Protection From Criminal Acts Occurring Off the Premises: The Winning-Down of the "Duty to Act in Similis Incidenti" Rule, 19 Hofstra L. Rev. 171 (1991) (Comment, A Landlord's Duty to Guard Against Criminal Attack: Foreseeability and the Prior Similarity Doctrine Rule, 48 Ohio St. L.J. 247 (1987)).


103. Id.

104. See, e.g., Bianco v. Huntington Montclair Hospital, 36 Cal. 3d 312, 603 P.2d 163 (1980) (plaintiff doctor was shot in a parking lot in which there was no prior record of violent crimes. However, the fact that there was evidence that the lot was a high crime area, that assailants and thieves had occurred in the vicinity, and there was inadequate lighting created an issue of fact whether the attack on plaintiff was foreseeable); Row v. State Bank of Lombard, 125 Ill. 2d 203, 533 N.W.2d 120, 126 Ill. Dec. 519 (1993) (question of fact was created as to whether the presence of one person and the shadowing of the (Continued from next column)

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plaintiff were foreseeable based on evidence of 17 prior incidents of criminal activity within 5 years. The prior criminal acts were more thefts and burglaries.).


106. PREGERER LAMBERT, supra note 45, at 301.

107. Id. at 302, see also Mark A. Cohen, Expertise Advised for Prevention Liability Claims: Don't Ignore Costly Link, Lawyers' Expo, May (May 1993).


109. One court has listed the following reasons for an event to be deemed criminal activity, as follows: "Making sure the [owners] is well acquainted, recycling highly visible outside events, keeping small amounts of cash in the registers, posting signs notifying potential robbers of the small amount of cash kept on the premises, turning employees out of buildings dealing with progressive robbers; and locking non-public entrances during nighttime hours." Taco Bell v. Lannon, 744 F.2d 43 (Colo. 1987).

110. Id. at 34-44. The jury awarded the plaintiff $40,000 in damages, id. at 44.

111. Id. at 40.
who employ security guards risk civil liability for the negligent acts of these armed servants.”114 Private security forces might actually increase the risk of harm to customers if it would increase the likelihood that gunfire might be exchanged. Furthermore, the economic burden might drive businesses out of high-crime areas altogether.115 Currently, it is unclear whether reasonable care might dictate employment of security guards in some cases or whether public policy arguments will prevent extension of the duty to include armed guards.

Imposition of a duty of care when crime is foreseeable does not mandate that an independent duty should be created not to provoke a robber or a duty to comply with criminal demands when a robbery is in progress. The duty to comply with criminal demands has been argued in cases where the criminal activity was not alleged foreseeable.116 Therefore, there was no duty to prevent the crime nor protect the customer because the robbery or crime was not foreseeable. The only duty allegedly breached was a failure to react with reasonable care to the robber with the reaction provoking the robber into shooting. Absent foreseeability of criminal activity, a duty that all clerks would have to respond in an appropriate manner during a robbery would be placing an impossible burden on businesses. A duty not to provoke a robber or comply with all criminal demands also does not flow logically from the requirement that a business may have a duty to assist a patron when the patron is subjected to an imminent or ongoing criminal attack.

C. Imminent Attack on a Patron

A business generally owes a duty to protect a patron from assaults of a third party when “he knows or has reason to know that the acts of the third person are occurring, or are about to occur;”117 i.e., the attack on a patron is “imminent.”118 Typically in these cases, the business or its employees are not threatened. In other words, the criminal activity is directed only toward the customer and not the business. An agent of the business realizes the danger to the invitee and does not take reasonable steps to prevent or stop the attack upon the invitee. Reasonable measures usually mandate calling the police to intervene. Failure to call the police in a timely fashion allows the attack to occur or proceed. If the clerk had reacted in a timely fashion, the patron would not have suffered the attack or would have sustained fewer injuries. Cases typically impose a duty to protect a patron from an imminent attack even if they refrain from creating a broad duty to prevent foreseeable criminal activity.119

[The possessor cannot stand idly by while a business visitor is assaulted. It has a duty to take reasonable steps to stop the assault provided it is shown that it, or its agents, were aware that the risk occurred and had time to take whatever steps were reasonable in the circumstances. Only if, and to the extent that, such reasonable steps could have avoided the injury can the possessor be held liable. Then only does the breach of duty lead proximately to the injury.120

The “imminent danger rule” is illustrated by the case of Hardin v. Munchies Food Store.121 The plaintiff stopped at Munchies, a convenience store, with a male companion. Plaintiff remained in the truck while her friend entered the store to purchase cigarettes. A large man, Oliver King, walked over to the truck and began to make “sexual, crude and offensive” remarks to the plaintiff.122 The male friend returned and the two men were exchanging words when King pulled a heavy pipe out of his pocket and struck the male companion on the head.123 King then inflicted a savage beating on plaintiff’s friend that lasted for approximately 20 minutes.124 Employees of Munchies witnessed the attack and repeatedly refused to call the police. When the police were finally summoned, they arrived within three minutes.125 Plaintiff developed displacement of her jaw, “cheerleader syndrome,” from her prolonged screams for help.126 The court held that the defendant had both the knowledge that injurious conduct was about to occur and the ability to prevent the harm that occurred to the plaintiff.127 Thus, Munchies could be found liable for the plaintiff’s injuries.128


116. See, e.g., Kelly v. March Co., 484 F.2d 162 (10th Cir. 1973);


122. Id. at 35.

123. Id. at 36.

124. Id. at 36.

125. Id. at 37.

126. Id. at 37.

127. Id. at 37.

128. Id. at 35. The jury awarded the plaintiff $55,440.05. Id. at 37.
Another example is found in Ballew v. Southland Corporation.\(^{120}\) Ballew came to a 7-11 store at 10:00 p.m. on a chilly February night. A large man, Mitchell, dressed only in yellow gym shorts, was standing inside the store. Mitchell had been in and out of the store for fifteen to thirty minutes asking customers for money. Ballew waited until she thought Mitchell had left before she entered the store. Mitchell reappeared and told the clerk that Ballew would buy him a coke. Mitchell got a coke, went outside and propped his foot up on Ballew's car while he drank the coke. Ballew told the clerk she was afraid of Mitchell. When Mitchell reentered the 7-11, the clerk told Mitchell to leave. Mitchell grabbed Ballew by the hair and throat, dragged her outside, and forcibly raped her behind the 7-11.\(^{121}\) The court upheld a jury verdict in favor of Ballew for $40,000\(^{122}\) stating that a jury could have reasonably concluded that the clerk should have realized that a potentially dangerous situation was developing because of "Mitchell's bizarre dress, suspicious actions and erratic behavior."\(^{123}\) The business need not have foreseen precisely what criminal behavior Mitchell intended; it was only necessary to have foreseen that Mitchell was a potentially dangerous person.\(^{124}\) Store policy required summoning the police whenever a suspicious person loitered around the premises.\(^{125}\) "The failure of defendant's employee to act by timely notifying the police and locking down the premises was clearly a substantial factor in bringing about the plaintiff's harm."\(^{126}\)

Time is a key factor in determining liability. There must be time to prevent the attack on a patron by a third party or, at least, an opportunity to prevent further injuries.\(^{127}\) Spontaneous attacks that end quickly do not result in liability because there is nothing that the business could do to prevent the assault.\(^{128}\)

Furthermore, the measure of liability is still a failure to use reasonable care under the circumstances. Reasonable care in most cases means calling the police in a timely fashion,\(^{129}\) locking down the premises,\(^{130}\) or perhaps warning a patron of potential trouble.\(^{131}\) Courts generally do not suggest that clerks have the duty to physically intervene and jeopardize their own personal safety. It would not be reasonable to require the clerk from Munchies to have physically restrained King during his savage attack. Reasonable care only dictates quickly summoning the authorities. However, a security guard might have the obligation to take physical action to rescue a patron from an assault that was in progress because the security guard has ostensible training to intervene and subdue.\(^{132}\)

A duty to assist a patron in imminent danger is totally different than a duty to use reasonable care during an armed robbery, when such a duty necessitates compliance with all criminal demands to avoid provocation. Certainly, any patron in an establishment is in imminent danger during an armed robbery. Yet, so are all the employees. The conduct of an employee exercising a lawful privilege of self defense by ducking behind a counter for protection or running to escape could provoke an armed robber into gunfire. There is clearly a difference between responding to a life-threatening situation when it is your life that is being threatened versus when someone else is threatened and you are reacting from a position of safety. In the latter instance, there is more room for deliberate thought and more opportunity to comply with a duty to use reasonable care to avoid unreasonable risks of harm to a patron.\(^{133}\)

D. Negligent Undertaking of Security Measures

A business can be responsible for a patron's injuries if negligence in the implementation of security measures voluntarily undertaken by the business. Even if criminal activity is not foreseeable based on prior similar incidents or the totality of the circumstances, commercial establishments that adopt certain security measures to protect their customers must exercise reasonable care in carrying out those security measures or face potential exposure to liability.\(^{134}\) This duty com-
ports with traditional tort doctrine asembodied within the Restatement (Second) of Torts, section 324A, which provides:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

(a) his failure to exercise such care increases the risk of such harm, or

(b) he has undertaken to perform a duty owed by the other to the third person, or

(c) the harm is suffered because of the other's reliance upon the undertaking.143

The most egregious examples are cases where a victim is assaulted in the presence of a security guard and the security guard watches the attack and does not try to subdue the attacker144 or quite literally runs in the opposite direction.145 Other cases show more subtle allegations of negligence, such as an allegation that the plaintiff was injured in an attempt to help an inept security guard in the guard's attempt to catch a thief.146 Or, an allegation that an intruder gained entrance due to a security service's negligence in failing to lock a door.147

A submission case to a jury is likely if a security measure fails to prevent criminal activity and injuries to a patron result. At times, it would appear that a case can go to the jury with very little proof of fault or showing of causation between the failed security precaution and the customer's injuries. In Harris v. Pizza Hut of Louisiana, Inc.,148 the Pizza Hut in New Orleans had been robbed twenty times, seven times in the three months prior to the robbery that was the subject of this litigation.149 Pizza Hut hired Officer Walker, an off-duty New Orleans police officer, as a security guard. Officer Walker arrived at the Pizza Hut, prepared himself a salad, and sat down at a table to eat and converse with Dwayne Thomas, a patron of Pizza Hut.150 Officer Walker's presence in the Pizza Hut was obscured by a partition. Two armed robbers entered the restaurant and one pointed a shotgun at Officer Walker and said "Don't move pig."151 Dwayne Thomas dived to the floor and Officer Walker moved, evidently slightly, to the right. The robber fired the shotgun and the blast killed one patron and injured another, the plaintiffs. Officer Walker was also injured by the blast, but returned fire and killed one robber and wounded another; a third robber escaped.152 Plaintiffs sued and their experts testified at trial that a security guard is a deterrent to crime by visible presence. Officer Walker should have positioned himself so he would have been visible to people outside the Pizza Hut. The experts further testified that a security guard should never eat on duty and all experts agreed that "an officer with a shotgun pointed at him should not move, his only option being to follow the instructions of the man with the shotgun."153 The jury awarded plaintiffs substantial damages against Pizza Hut.154

The Louisiana Supreme Court upheld the jury verdict because a jury could have reasonably concluded that the lack of visibility of the security guard and the "guard moving in the face of the shotgun" were negligent acts. Causation was established because "but for Walker's lack of visibility, the robbers would not have entered the Pizza Hut, and, but for Walker moving when ordered not to do so by the robber, the shotgun probably would not have been fired and the harm would not have resulted."155 One could easily question the decision that there was sufficient proof whereby reasonable minds could differ on either the issue of a failure to use reasonable care or the issue of causation. As stated by the dissent:

[T]he majority concludes that a security guard, who moves no matter how slight, after a shotgun is placed in his face and warned not to move by an armed robber, is a cause-in-fact of all parties injured when the gunman intentionally fires his weapon at him. This rule would require the guard to remain motionless during the perpetration of an

142. (Continued from previous page)


144. Sharp v. W.H. Moore, Inc., 118 Mo. 297, 700 S.W.2d 90 (1985) (plaintiff raped when smallest gained access to the building through an unlocked door and the security guards were negligent for not checking the door); accord Rowe v. Stuck Hub, Inc., 135 Ill. 3d 290, 531 N.E.2d 1358 (1985) (security guard at a parking lot was negligent for not checking the door); accord Wolfe v. Stuck Hub, Inc., 135 Ill. 3d 290, 531 N.E.2d 1358 (1985) (security guard at a parking lot was negligent for not checking the door); accord Wolfe v. Stuck Hub, Inc., 135 Ill. 3d 290, 531 N.E.2d 1358 (1985) (security guard at a parking lot was negligent for not checking the door).

145. See, e.g., Morgan v. Scotland Associates, 881 F.2d 295 (8th Cir. 1989) (security guards were at a feed court at a small by a gang, and the security personnel stood by and took no action to deter or prevent the attack); O'Connell v. Coffin, 920 N.E.2d 728 (1995) (security guard provided no aid when plaintiff was stabbed in presence of the security guard).

146. Wiles v. Grace Petroleum Corp., 671 P.2d 562 (Okla. 1983) (security guard told the woman to protect herself when plaintiff was shot); O'Connell v. Coffin, 100 N.W. 3d 788 (1995) (security guard ran from building when the plaintiff was injured).

147. 435 So.2d 1364 (La. 1984), rev'd, 445 So.2d 735 (La. 1984).

148. Id. at 1366.

149. Id. at 1368.

150. Id. at 1366.

151. Id. at 1368. Officer Walker testified at trial, as follows: "At that time I just knew that he was going to blow my head off my shoulders. He was definitely going to kill me. I definitely felt I was going to die in that time." Id. at 1368.
armed robbery and would find him negligent if he either acts in his own interest of self-preservation or in consequence of his duty to prevent the robbery.

This guard was in fact later given a written commendation and a medal of merit for the manner in which he performed during the robbery. Furthermore, the sole legal cause of the injuries to the plaintiff was not the fault of the guard. That cause was the intentional conduct of the gunmen.126

Perhaps, the real reason for liability is not any action or inaction on the part of Officer Walker. The real reason might be deliberate judicial policy to uphold the jury verdict and make the business pay for any injuries when armed robberies are clearly going to continue to happen based on the track record of that particular business unless the business took more drastic measures than the hiring of a single security guard. Pizza Hut had been the subject of twenty armed robberies, seven in three months, and continued to open its doors to the public and solicit business despite the known risk of injury. In this case, another armed robbery was not just foreseeable, it was very predictable. Perhaps, the court was simply holding that under these circumstances the business will have to bear the cost of any injuries inflicted in armed robberies if the commercial establishment wants to continue in business without greater efforts at deterrence.157

At least, the allegation of a failure to use reasonable care during an armed robbery was against a trained security guard in Harris v. Pizza Hut. An allegation that a security guard was negligent in the face of an armed robbery is totally distinct from such an allegation when dealing with other employees of a business. Theoretically, a security guard has training and experience on how to react when confronted with a life-threatening situation. A duty to use reasonable care when confronted with an armed robbery demands only that the security guard use reasonable care in the performance of his or her occupation. A completely different situation is presented when a clerk of a business is confronted by an armed robber. The clerk has no special police training and is not holding himself out to the public as someone able to deal with a criminal attack. It would be totally unfair to impose a duty to use reasonable care during an armed robbery, meaning a duty to comply with all demands and not provoke the robber, when employees other than security guards are involved.

The security guard should have training to protect others even at the expense of his or her own personal safety. All employees of businesses should not be required to have this level of expertise. An unfair burden would be cast upon businesses if a requirement was imposed that all employees had to perform as if they members of a private police force.

IV. Duty to Use Reasonable Care During an Armed Robbery

The cases imposing liability for criminal attack usually focus on the fact that the attack was foreseeable (due to the totality of the circumstances, prior similar incidents or by virtue of the risky nature of a business), that the attack on the patron was imminent, or that the proprietor voluntarily assumed the duty to provide security measures and then failed to use reasonable care in implementation of the precautions. The question is whether there should also be a separate duty, independent of the above scenarios, to use reasonable care once an armed robbery is in progress. In other words, must businesses use reasonable care during the robbery even if a robbery at that particular business is not foreseeable. The following logic supports the imposition of a duty to use reasonable care:

When a criminal episode on the premises has begun to unfold and the possessor or his employees are or should be aware of it, the issue of foreseeability disappears. It would seem logical that the possessor would then owe entrants a duty of reasonable care under the circumstances.158

Once such a duty is imposed, the issue then becomes what is reasonable care under the circumstance of an armed robbery. Statistically, the best course of action during a robbery is to cooperate fully, hand over the money, and not do anything to provoke the armed robber.159 Most armed robberies do not result in death or serious injury.160 The argument follows, therefore, that reasonable care requires compliance with all criminal demands and requires refraining from conduct that might provoke a robber. Reasonable care means that businesses should train employees to turn over the money and cooperate. Any other response could provoke the robber, thereby creating an unreasonable risk of harm to patrons inside the establishment at the time of the attack.161

Policy arguments support the imposition of a duty of care. "[T]he consequence to the community of recognizing a duty is that it will protect patrons generally from the increased risk posed by misguided attempts to resist or overwhelm an armed robber."162 Action or inaction when confronting an armed robber would

126. Id. at 1573-74 (Bilotta, J., dissenting).
157. One could easily foresee the arguments by plaintiff's counsel that reasonable care could dictate disclosure to the public by a sign warning the public that the establishment had been the victim of 20 armed robberies and that the public considerate at their own risk.
158. Phantom Liability, supra note 45, at 705.
159. Telephone interview with Tala Chadwick, supra note 8. In Kentucky Fried Chicken of California v. Brown, 40 Cal. App. 4th 798, 802, 47 Cal. Rptr. 2d 67, 71 (1995), plaintiff issued a police brochure titled "Business Crime Prevention: Tips for the Small Business Owner" ("tips for small businesses that are located in areas of high crime") and then alleged that "the bank's failure to honor its obligation to provide and maintain the police brochure" was a breach of the duty of care that would have prevented the robbery.
160. Id. at 1573-74. Plaintiff in Harris v. Pizza Hut, supra note 155, alleged that the armed robbery was foreseeable due to the history of armed robberies at the Pizza Hut and the steps taken by the owner to prevent the attack. The court in Harris held that the fact that the attack was foreseeable did not impose a duty of care on the pizza chain.
161. Id. at 1573-74 (Bilotta, J., dissenting).
162. See, e.g., Kelly v. Burger Co., 483 F.3d 1302, 1304 (10th Cir. 2007), "[p]atients need not be aware of the particular criminal who is engaged in the act of robbing the restaurant but only of the general criminal activity that occurs in the restaurant"; United States v. Rios, 172 F.3d 563, 565 (9th Cir. 1999).
clearly increase the risk of harm to patrons. Furthermore, there is fear of the consequence of not imposing a duty to use reasonable care to avoid increasing a risk of harm to a customer during a robbery attempt:

[T]here cannot be said to have been any right on defendant’s part as a matter of law to take any measures he might choose to frustrate the gun- man and secure his capture without regard to the effect of such actions on the safety of others present. The social utility of such objectives was for the consideration of the jury in forming an overall judgment——The value of human life and of the interest of the individual in freedom from serious bodily injury weigh sufficiently heavily in the judicial scales to preclude a determination as a matter of law that they may be disregarded simply because the defendant’s activity serves to frustrate the successful accomplishment of a felonious act and to save his property from loss.

A fundamental principle is “when a general risk can be perceived, our system of law requires that the person whose activity produces or enhances that risk take adequate precautions to avert injury.”

The no-duty principle forecloses courts and juries from precision and forces gross, one-sided resolutions...The courts should treat risks of injury due to criminal activity in the same way as other risks and allocate the costs of such injuries through our system of fault. If a proprietor’s conduct is negligent, as measured by the standard of due care under the circumstances, the proprietor should bear the cost and responsibility of that conduct. Courts that adhere to the theory of a duty of care would not be imposing a regime of strict liability upon entrepreneurs but would be applying the general principles of negligence law to determine if the entrepreneur should be held responsible for his conduct.

A decision, stating that there is no duty owed to avoid provocation through total compliance, has been criticized as a method of avoiding the harder issues of what would and would not be considered appropriate conduct during an armed robbery. It is safe to say that no one really knows what conduct might provoke an armed robber into gunfire.

Examination of the type of conduct that has been alleged to have provoked a robber is the starting point in determining if it is appropriate to create an independent duty to use reasonable care during a robbery.

A. Conduct Provoking Armed Robbers

The conduct argued to have provoked armed robbers in reported cases cannot be reasonably interpreted as conduct deliberately chosen by employees of businesses. The cases certainly do not support a theory that the actor wished to provoke the robber. Rather, a more fair interpretation is that the conduct that allegedly provoked the robber into gunfire was an instinctual or unthinking response to a life-threatening situation. Confrontation with an armed robber can evoke many emotional responses including “fear, tension, impatience, frustration, anger, and confusion” as well as the normal inclination of self-defense and defense of one’s property. A controlled response that would avoid all possibility of provocation is probably not practicable.

Any conduct other than absolute compliance can be argued after the fact to be conduct that provoked a robber. For example, the slight movement of the security guard in _Harris v. Pizza Hut of Louisiana, Inc._{168} allegedly caused the robber to discharge his shotgun. However, it would take courage that most people lack to not, at least, flinch when a shotgun is pointed in one’s face. Unless an employee remained motionless during a robbery, almost any movement could be argued in retrospect as the provocation. However, remaining stationary could then be likewise argued as provocation because the actor is not complying if they freeze. Delay tactics have been successfully argued as the cause of a robber’s gunfire. In _Genovay v. Fox_,{171} the proprietor’s fumbling with the combination of a safe was later argued to be a deliberate attempt at a delay tactic to frustrate the robbery attempt. The conduct alleged in _Kentucky Fried Chicken of California v. Brown_ was perceived as a delay tactic; the clerk told the robber when asked for the money that she would have to go to the back of the restaurant to get the key to the cash register. However, this conduct could just as easily have been an instinctual response in self-defense—an attempt to get away from a criminal with a gun and summon help. Probably, the clerk at Kentucky Fried Chicken was rightfully more concerned with her personal safety than with the loss of her employer’s money at that particular moment.

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165. Lawrence F. Williams, Proprietor’s Liability to Passengers Injured in Robberies, 47 Tenn. L. Rev. 743, 784 (1980) (hereinafter “Everybody Freeze.”)

166. 166. Id. at 782; see generally Robert C. Bishop, Annotation, Liability of Stockholders for Death of an Injury to Customer in Course of Robbery, 72 A.L.R. 3d 1299 (1976); Joseph T. Biscolato, Annotation, Liability of Bank for Injuries Sustained by Customer in Course of Bank Robbery, 98 A.L.R. 3d 711 (1973).

167. Robert R. Marlin, Jr., Comment, Reasonable Care and Independent Criminal Conduct on the Premises—Breed v. Brown Currency Exchange, Inc., Your Money or His Life, 7 Osborn L. Rev. 138, 146 (1973). The courts have generally agreed that a business has no duty to warn of the potential of an armed robber. See, e.g., Sklar v. Alpha Beta-Ave Marks, Inc., 40 Cal. App. 2d 671, 675 (1955); or the duty to warn of the possibility of an armed robber while the robbery is in progress. See, e.g., Taylor v. Boston & Ohio App. 261, 455 N.E. 2d 558 (1983), or that the police have staked-out the premises to catch a robber, see, e.g., Roht v. Noble Nunnery’s, Inc., 159 N.J. 379, 391 (1981); Counties v. South Texas Beverage Co., 79 S.W.2d 175 (Tex. Civ. App. 1934).

168. Telephone Interview with Tula Chadwick, supra note 8.

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170. 185 S.2d 1384 (La. 1964).


In many cases, conduct that has been argued by plaintiff's counsel to have provoked the armed robber is what could easily be described as self-defensive behavior. A clerk's response of dropping behind a counter or running for safety when confrontation with an armed robber occurs can easily cause the robber to shoot and injure a patron as a result. Although perhaps not the best course of conduct, the employee certainly is acting out of fear and self-defense without time to reflect upon the consequences of the movement taken in self-defense.

Self-defense conduct can also be seen when an employee during a robbery cries out to a patron for help and the robber then attacks the patron. A simplistic “but for” approach leads to the conclusion that the patron would not have been harmed “but for” the cry for help. However, one can seriously question whether conduct that is only a cry for help should ever be allowed to be litigation as the cause of a patron’s injuries at the hands of an armed robber. Certainly, the clerk in these cases did not intend to expose a customer to a risk of harm. Arguably, it was simply a fairly typical response to an emergency situation. One would also have to seriously question how the business was at fault and potentially burdened with civil liability when the clerk instinctively requests help. As one court has stated, “[the historic outcry, ‘Robbery. Help!’ offers no apparent springboard...for a successful dive into litigation.”

A physical struggle initiated by an employee to disarm an armed robber could easily result in the discharge of the weapon with resulting injuries to customers. Injuries to third parties are equally foreseeable when the robbers are chased or when a silent alarm is triggered to summon the police. A conclusion could be easily drawn that any attempt to disarm or engage in a physical struggle is exposing a customer to an unreasonable risk of physical injury, thereby violating a duty to use reasonable care during a criminal attack. Yet, such a conclusion flies in the face of the traditional privileges of self-defense and defense of property.

Hostile manner toward the armed robber, including disobeying orders, obscene gestures, and name-calling, has also been argued as provocation and a failure of the business to use reasonable care to protect customers during a robbery. The danger of suggesting that there is a duty to refrain from hostile conduct during an armed robbery is that such a duty could easily be transmuted into the absurd proposition that there is an affirmative duty to be polite. If a business can be potentially liable for a customer’s injuries at the hands of an armed robber solely because it is contended that a clerk’s hostility provoked the robber, then the only way to avoid liability is to assure all employees are polite to the robber. The most graphic illustration of allegedly hostile manner and verbal provocation is seen in Bennett v. Baker. Mr. Baker owned the Brown Fox Tavern and Robert and Pat Bennett were patrons. A robber entered and demanded money or he would shoot. Mr. Baker responded: “Piss on you, go ahead and shoot me, you are not getting my money.” The robber shot Baker four times, killing him. The robber also injured Robert Bennett and killed another patron. The court held that Baker had no duty to accede to criminal demands and had the right to choose “the path of verbal rather than physical resistance.”

The argument could easily be made that Baker exposed his patrons to an unreasonable risk of harm when he told the armed robber “[P]iss on you, go ahead and shoot.” Hindsight clearly shows that the statement was regrettable. However, Baker was not attempting suicide. The comment could be explained as an excited utterance, a statement made out of fear or anger without reflection on the possible consequences. The court stated that Baker choose the path of verbal resistance. Choice connotes deliberate decision-making which in this type of case might not be correct. Profanity might blurt out as a result of the fright or anger that occurs when one is a victim of a criminal attack. Arguably, involuntary behavior in response to a life-threatening situation should not be the cornerstone for potential legal liability. For example, the involuntary response of fainting might provoke a robber; yet, few would suggest that fainting should be liability-producing conduct.

Examination of the conduct of agents that has been alleged as sufficient provocation to impose liability on the business where the armed robbery occurred reveals that imposition of a duty of care to avoid provocation would be allowing cases to go to the jury where hindsight says that a patron would not have been injured otherwise. The loss of the truly unfortunate occurrence would be shifted onto the shoulders of the business. The stronger policy arguments support the theory that there should not be an independent duty established requiring businesses not to provoke, or a duty to use reasonable care during a robbery, unless
exceptional circumstances can be established.

B. Policy Arguments Against Creation of a Duty to Comply

Policy arguments have always existed against the imposition of any liability upon businesses for damages to invitees inflicted by virtue of criminal activity. The traditional arguments could have equal applicability to the issue of whether there is an affirmative duty to comply with criminal demands. First, protection of the public is a duty allocated to the government and it is unfair to supplant that duty onto the shoulders of businesses, especially in situations where the police have been unable to provide adequate protection. The imposition of such a duty could “encourage the spread of private security forces” which might increase the risk of the exchange of gunfire and heighten, not lessen, the potential risk of harm to the public.

The second argument is that it is not fair to cast the cost of crime prevention onto a business’ overhead when it would be difficult to know how to comply with the legal standard. Any duty to protect against criminal attack is, by definition, a vague standard. It is feared that businesses could confront “virtually limitless liability.” Furthermore, the imposition of liability upon a commercial establishment is not likely to have any meaningful affect upon the incidence of street crime. The imposition of a duty upon a business in a high-crime area could also lead to a very undesirable result. “The imposition of a duty in such cases might hasten the departure of business enterprises from inner-city neighborhoods and hence run counter to a policy of improving the quality of life in urban ghettos.”

Causation arguments have also been raised as a traditional obstacle to liability. Businesses should be able to plan their affairs under the assumption that others will obey the law. Clearly, the immediate cause of any injury to a customer at the hands of an intruder is the intentional criminal conduct of a third party. A business has no control over the conduct of that third party. The area in which the premises are located is one where criminal assaults often occur and defendant has done nothing to increase the risk to any measurable degree, then it is very difficult to see how the business-defendant has even caused-in-fact the customer’s injuries. “But for” the negligence of the defendant, the criminal attack upon a patron might still have occurred if the locale is a high-crime area. The argument for a causation analysis seems even stronger when a case deals with the issue of whether the conduct of an employee provoked an armed robber, because the outcome of any armed robbery is unpredictable. It is, at best, speculative to suggest that acquaintances would have avoided all injury. Even if the agent had complied with all the demands of the criminal, the robber could have been provoked by something or someone else. In many cases, for example, the conduct of another customer or the plaintiff is argued as the provocation and a sufficient intervening cause to relieve the business from any liability for prior negligent behavior.

Furthermore, one would have to question whether the “reasonable robber,” if such a creature exists, would be easily provoked into gunfire. Exchange of gunfire would greatly increase the risk of the crime to the robber because a citizen’s death could lead to a felony murder conviction, possibly carrying the death penalty. It would appear that most robbers would want to avoid the discharge of a weapon unless necessary to protect themselves or prevent incarceration. It is probably safe to say that master criminals don’t rob Taco Bells or Pizza Huts. Yet, their goal in most cases would seem to

184. PLAIN LANGUAGE, supra note 46, at 299. The provision argued is that “private businesses have long satisfied a need for security services which the police are unable to provide. If they can perform the task more efficiently, three areas little reason why they not be encouraged to do so.” Id. at 300.
185. PLAIN LANGUAGE, supra note 46, at 299-300. This argument does not necessarily support the rejection of duty in use reasonable care during an armed robbery because it is based on the unsound assumption that “reasonable security measures will always create new risks.” Id. at 301.
186. Id. The opposite point of view is that it is inappropriate that the cost of crime prevention be placed upon commercial establishments where citizens occur. The business is in the best position to reduce the risk at the lowest cost and thus distribute the costs throughout. Id. at 309. Furthermore, “the increase in sales and profits, merchants have created shopping malls, which inherently attract criminal elements. Because merchants’ goals for profits inevitably have increased the incidence of crimes in shopping areas, merchants arguably should have borne the burden of protecting their patrons.” Id. quoting Dale Allen Bradford, Jere Law—Merchants’ Duty to Protect Its Customers From Third Party Criminal Acts—Root v. Winn-Dixie Inst. Joint Venture., 18 West Florris. L. Rev. 114, 123 (1983).
187. Henchclis, 802 P.2d at 1370.
188. Id.
189. Id. at 1370.
190. PLAIN LANGUAGE, supra note 46, at 300.
191. Henchclis, 802 P.2d at 1370.
192. PLAIN LANGUAGE, supra note 46, at 300.
194. See, e.g., Fortner v. Foodmaker, Inc., 82 Cal. App. 3d 396, 237 Cal. Rptr. 74 (1988) (clerk at a Jack-in-the-box yielded the plaintiff to “Stop him.” Plaintiff thought the youthful armed robber was a shoplifter and chased him. The unarmed victim shot the plaintiff in the head as the victim ran away from the restaurant. The court found the plaintiff’s conduct was unforeseeable. A later case, United Food & Fuel, Inc., 759 P.2d 1370 (Colo. Ct. App. 1985) (issue of whether plaintiff was constructively negligent when he ran once he saw the armed robber was in progress was at issue for the jury. The negligence was alleged to have provoked the robbers); Rogers v. 3M Co., 576 N.W.2d 64 (Iowa Ct. App. 1997) (the claim of negligence being heard by 3M under the coverage of the policy was non-existent, but finding that there was no coverage since the policy did not cover armed robbery).
195. Plaintiff’s own action is striking to obtain relief from armed robbers was constitutionally negligeant thereby predicating recovery.” A reasonable man does not fight with two armed robbers, R. W. Williams v. Cunningham Drug Stores, Inc., 148 Mass. App. 25, 179 N.W.2d 540 (Mich. Ct. App. 1957). Further, since the defendant was not provoking the incident, the defendant’s own action was in fact “unreasonable.” Id. at 305. The police are in a reasonable position to infer that the defendant was not provoking the incident. Id. at 305. The police are in a reasonable position to infer that the defendant was not provoking the incident. Id. at 305. The police are in a reasonable position to infer that the defendant was not provoking the incident. Id. at 305. (a) (1995) (issue of whether plaintiff was constructively negligent when he ran once he saw the armed robber was in progress was at issue for the jury. The negligence was alleged to have provoked the robbers); Rogers v. 3M Co., 576 N.W.2d 64 (Iowa Ct. App. 1997) (the claim of negligence being heard by 3M under the coverage of the policy was non-existent, but finding that there was no coverage since the policy did not cover armed robbery.)
be the same: get the money fast and get away without trouble. If a robber can be provoked as easily as suggested in some of the cases, then the robber could find a reason to be provoked from other sources as well.

The one action that could easily provoke even the "reasonable robber" is a physical attack on the robber initiated out of self-defense or in an attempt to capture the offender. However, a further policy argument is that the privilege of self-defense and defense of property should counterbalance any duty requiring a business to comply with all criminal demands during an armed robbery. Acts of self-defense and defense of property have historically been in accordance with public policy and have social value. It is argued that businesses should have no absolute duty to accede to criminal demands because they are confronted with a choice of two evils. Proprietors of businesses can either yield their rights and privileges of defense of self and property, or they can assert their rights and privileges by resisting the perpetrator of the crime.196

There is, and must continue to be, a great public interest in the prevention of crime and in the speedy apprehension of criminals. To that end the victim of a crime, as vicious as an armed robbery, during the course of such criminal act, is excused, justified and to be held privileged from ordinary resistance which might otherwise cause actionable damage. He should be chargeable with no greater legal duty to use care for the protection of others than he, in the emergency, has seen fit to use to protect himself. 197

It is felt that a duty to accede flies in the face of public policy to deter, not facilitate, crime because few businesses would resist crime if they were burdened with potential civil liability.198 The perception is that the only person who might benefit from such a rule is the criminal. The creation of a duty to comply and a duty not to provoke would "put another weapon at the disposal of the criminal."199

If a duty is imposed...to comply with such a demand the same would only inure to the benefit of the criminal without affording the desired degree of assurance that compliance with the demand will reduce the risk to the invitee. In fact, the consequence of such a holding may well be to encourage the use of hostages for such purposes, thereby generally increasing the risk to invitees upon business premises. If a duty to comply exists, the occupier of the premises would have little choice in determining whether to comply with the criminal demand and surrender the money or to refuse the demand and be held liable in a civil action for damages brought by or on behalf of the hostage. The existence of this dilemma and knowledge of it by those who are disposed to commit such crimes will only grant to them additional leverage to enforce their criminal demands. The only persons who will clearly benefit from the imposition of such a duty are the criminals....[T]he result may appear to be harsh and unjust, but, for the protection of future business invitees, we cannot afford to extend to the criminal another weapon in his arsenal.200

The counter-argument is that criminals rarely stay abreast of developments in tort law. Recognition of a legal duty to behave reasonably during an armed robbery to avoid unreasonably increasing the risk of harm to customers would not lead to an increase in the taking of hostages.201 A duty to comply and not provoke will "protect patrons generally from the increased risk posed by misguided attempts to resist or overwhelm an armed robber."202 Furthermore, the privileges of self-defense and defense of property have never been absolute privileges. Conduct arising out of those privileges is gauged by the standard of reasonableness in determining whether the actor is liable to an innocent third party injured as a result of the defensive behavior.203 The Restatement provides that a person exercising a privilege is liable for injuries to innocent bystanders only if "the actor realizes or should realize that his act creates an unreasonable risk of causing such harm."204 However, case-law in the area is scant.205 It is argued that a business should not have a right to take any and all measures to frustrate an armed robber without regard to the risk such action will be imposing on customers. The value of human life outweighs the value society might place on frustration of crimes and protection of property.206

Once again, however, defensive behavior might be more of an instinctual response to a life-threatening emergency than a deliberate decision to attempt heroics. Whether or not a person engages in defensive behavior could easily be the result of how the actor perceives survival at that particular moment in time. When confronted with an armed robber, one person may feel that he will survive if he does everything the robber demands; an-
other individual may instead react that he had better do something or the robber will take his life. Arguably, either course of conduct is not unreasonable given the emergency circumstance.

Further justification for not imposing a duty to accede to criminal demands can be found in the emergency doctrine from traditional tort law. The emergency doctrine is founded on the principle that in an emergency situation an "actor cannot reasonably be held to the same accuracy of judgment or conduct as one who has had full opportunity to reflect, even though it later appears that the actor made the wrong decision, one which no reasonable person could possibly have made after due deliberation."207 The emergency must be sudden or unexpected calling for immediate action.208 The actor has no time to think; "he cannot weigh alternative courses of action, and must make a speedy decision, based very largely upon impulse or guess."209 Accordingly, an actor should not be held liable for an honest error in judgment, even if a different approach to a situation might have been better had the actor had the time to deliberate.210 Certainly, in the excitement and confusion of an armed robbery, neither victim nor spectator can be expected to react as calmly as observers of a chess match.211 Imposing a duty to use reasonable care while an armed robbery is in progress "presupposes rational thought during a time which normally produces the antithesis."212 A person will likely react to an armed robbery out of instinct213 with no time to make an accurate forecast of the consequences of any action.214

However, the emergency doctrine can also be used as support for the creation of a duty and submission of cases to the jury for resolution. The standard of care to determine if conduct is negligent is whether the conduct complained of was what the reasonable person would have done when acting in the same or similar circumstances. One of the circumstances considered in attempts to ascertain whether conduct is reasonable is whether the actor was acting in an emergency. Furthermore, the emergency doctrine is not an absolute grant of immunity; an individual must still act as the reasonable person would have acted when confronted with a similar emergency.215 The argument follows that the jury is in the best position to determine whether a response to an armed robbery was or was not reasonable with, of course, due consideration given to the emergency circumstance. Thus, the emergency doctrine would allow recovery where it was appropriate and, at the same time, would also provide businesses the needed protection against unlimited or unjust liability.216

At times the judgment of the common man—voiced through the jury or other trier of fact—on what the prudent man should have done will be to deny to the individual concerned a legal justification for his perfectly human instinctive response. At other times what is actually usual may be equated with that which is legally prudent....What better way is there to judge of this?217

The imposition of a duty to use reasonable care during an armed robbery would mean that all cases would go to the jury with appropriate instructions regarding the emergency doctrine. The danger is that the standard of care to be utilized could be perceived as already established. Information from the police department will be introduced as well as internal store policies that could well instruct employees of businesses to comply with the robber's request, turn over the money, and do nothing to excite or startle the armed robber.218 Such information could easily be perceived as the reasonable course of conduct to the jury and any other reaction could be perceived as unreasonable even with a cautionary instruction regarding the emergency doctrine. For example, courts have easily concluded that a plaintiff's alleged conduct in response to an armed robbery was unreasonable to preclude recovery as a matter of law.219 If courts can fall into the trap of knowing what reasonable conduct is during an armed robbery, a lay jury could certainly as well. Again, the danger is that we know what a reasonable person should do during a robbery—

207. Proctor & Kedros, supra note 36, at 196, "Everyday Force," supra note 165, at 722. For delightful accounts of application of the emergency doctrine, see, e.g., Luskey v. Great Dane Ins. Co., 385 F.2d 674 (5th Cir. 1967) (the driver of an automobile collided with a parked vehicle. The emergency driver encountered was a ramp. The court affirmed the jury verdict of no liability for the passenger's injuries.); Conley v. Peerless Transportation Corp., 196 Fed. 2d 358 (3d Cir. 1952) (an armed robber jumped into the defendant's taxi to escape. The driver of the taxi jumped out of the taxi while it was still in motion. The car then struck a pedestrian on the sidewalk. Motion to dismiss complaint was granted based on the emergency doctrine.); Proctor & Kedros, supra note 36, at 196.


212. Null v. Marion, 347 P.2d 523, 525, 32 A.2d 18, 19 (1948). In null, a lader is in response to a hold-up dropped behind a counter. The robber fired three shots immediately thereafter wounding the plaintiff. In commenting on the actor's behavior, the Supreme Court of Pennsylvania stated, as follows: "The exigency could not have been greater, and he cannot be held to perfect judgment under the circumstances. The notion applicable here is that negligence may not be imputed where one, because of the extremity of time in which to form judgment as an emergency not created by his negligence, fails to act in the most judicious manner....As an honest exercise of judgment is all that is required of him even if he could have done better but had no time to deliberate." id.


215. "Everyday Force," supra note 165, at 772-73. "Slothing," "flee" is a reasonable behavior when there is in fact a fire, in most circumstances, to the reasonably prudent being to do, while the same act done to avoid a single piece of paper burning in a trash can in the theater vestibule may not be. (Continued from previous column)

(Continued from previous column)

jury will decide into which category this case will fall?" Holm v. Church's Fried Chicken, Inc., 81 N.C. App. 427, 432-433, 344 S.E.2d 349, 353 (1986).

217. Luskey v. Great Dane Ins. Co., 385 F.2d 674 (5th Cir. 1967). The emergency doctrine is founded on the case in which a ramp was a trap. The defendant electrician had a legal obligation to warn the employees of the trap. The driver struck a parked car as a result. The jury verdict for the defendant was affirmed.

218. See supra note 159.

219. See supra note 194.
One may argue the social advantages of shifting or equalizing the burden of victims of crime, but aside from the question of propriety in this litigation, it does not seem that shifting the financial loss caused by crime from one innocent victim to another innocent victim is proper.

C. A Proposed Solution

The solution proposed in this article is that courts should adhere to the rule that there is no duty to use reasonable care while an armed robbery is in progress unless exceptional circumstances exist. Generally, liability should not be imposed on commercial establishments based on the argument that an employee’s reaction to an armed robber provoked the robber causing the criminal to attack a customer. Courts should continue to treat the issue as one of what duty is owed because duty is a question of law to be determined by the court, not the jury.

Accordingly, courts should retain proper control and act as a screening device to prevent most such cases from reaching the jury’s discretion. Furthermore, duty is simply a way of expressing the sum total of policy considerations that lead the law to say that this particular plaintiff is entitled to or not entitled to recover from the defendant under the facts of a particular case.

The stronger policy arguments support the no-duty rule as a reflection of how society perceives the propriety of such litigation.

However, society has a very strong interest in avoiding injuries to customers during an armed robbery of a business. Businesses need to be encouraged to instruct employees to take the safest course of action if a robbery occurs—to comply with the requests of the criminal and not provoke by action or inaction. The law would certainly not want to discourage cooperation because failure to cooperate could increase the likelihood of injury. Therefore, the no-duty rule would need to be tempered in exceptional circumstances so that liability could be invoked when appropriate. The first exception to the no-duty rule would be if a business had a deliberate policy to protect their property without regard to customer safety and instructed their employees not to cooperate in the event of an armed robbery. Certainly, the law could not afford a deliberate business decision to jeopardize the lives of innocent patrons to protect profits.

Another example of an exceptional circumstance might be if a skilled employee was involved, such as a security guard, with sufficient expertise to be able to comply with a standard of reasonable care in the face of an armed robber. Furthermore, a business might have a duty to provide more training to employees on how to respond to a life-threatening situation if the likelihood of an armed robbery is so high that it becomes not just foreseeable, but a probability. Courts might want to impose a duty to use reasonable care during an armed robbery if

220. The author was a victim of a strong-arm robbery. The author would have predicted the reaction would have been one mainly of flight. Instead, the author faced her robber in the eyes and called him a son of a bitch (among the last several calls anyone to her face), yelled at him, and chose the robber. All those responses have been judged as unreasonable conduct and provocation in attempts to impose liability onto the shoulders of businesses. Such conduct is judged as creating an unreasonable risk of harm to others. However, it is more of a punitive reaction and is incapable of determinate before the fact whether fear or anger will make the victim first.

221. Kramer v. Service, Inc. v. Wilkins, 184 Misc. 443, 186 N.Y.S. 525 (1939). The phrase post hoc ergo propter hoc means that if one event follows another at time, the latter event is caused by the earlier one. This doctrine has been rejected as an unlaudable one for determining cause-in-fact.


225. See e.g., Horst v. Sillen, 665 2d 1285 (Okla. 1983).


armed robberies were a constant risk of doing business at a particular establishment. The frequency of criminal attacks could easily create an exceptional circumstance and the creation of a duty of care. Another exception to the no-duty rule could be found if time intervened during the course of an armed robbery and the threat of personal safety to the employee is removed. Detached reflection would seem to demand the clerk’s use of reasonable care considering the emergency circumstance. 229 Certainly, the use of reasonable care by employees during a criminal episode on the premises should also be demanded when the crime does not involve the potential loss of life or serious injury that exists with an armed robbery. The strong policy reasons that support the no-duty rule would seem to disappear when other crimes, such as shoplifting, occur at a business. For example, businesses should not expose patrons to unreasonable risks of harm when apprehending shoplifters. 230

The question becomes whether an exception to the no-duty rule should be created and whether there should be the imposition of potential liability upon a business when the conduct of an agent appears so rash a response to an armed robbery that the conduct approaches a reckless disregard for the safety of others present during the criminal episode. For example, the comment of the owner of the establishment when a robber demanded his money, “[P]iss on you, go ahead and shoot me, you are not getting my money,” 231 could easily be argued as exhibiting a reckless disregard for the customers inside the establishment. However, if liability is imposed for “piss on you,” then other statements could easily follow. 232 After all, a statement by a clerk to a robber that the clerk would pray for the robber might provoke a different criminal to cause injury. If liability is imposed for mere words, however unfortunate they appear to be after the fact, then liability could also be argued for the initiation of a physical struggle in the exercise of the lawful privilege of self-defense or defense of property. After all, “verbal resistance...under most plumes of rationality would not involve the same degree of danger as would physical actions.” 233 Caution would have to be exercised if any exception for rash behavior was created or the exception would literally swallow up the rule and businesses would again face potential liability for an employee’s slight delay in complying with a criminal’s demand to turn over the money, such as in the case of Kentucky Fried Chicken of California, Inc. v. Brown. 234 The creation of such an exception could easily lead courts down the slippery slope of ever-expansive legal liability.

The no-duty rule with carefully drawn exceptions finds support from an analogous no-duty rule. Generally, there is no affirmative duty to rescue another in peril even if the actor could do so without subjecting the actor to a risk of harm. Although morally the right thing to do is to assist someone in peril if the goal can be accomplished without serious inconveni-

cence, the no-duty rule has survived because of practical difficulties in applying any other rule. 235 “[T]hus far the difficulties of setting any standards of unselfish service to fellow men, and of making any workable rule[s]...has limited any tendency...of setting up a rule of universal application.” 236 Instead, the law has carved out exceptions. 237 There should likewise be no separate duty to comply with criminal requests and no duty not to provoke an armed robber because of compelling policy considerations and the practical difficulties of applying any other rule. Exceptions can be created where casting liability onto the shoulders of the business where the crime occurs is clearly appropriate.

V. Conclusion

There should not be a duty imposed to use reasonable care during an armed robbery, meaning a duty to comply with all criminal demands and a duty not to engage in action or inaction which might provoke an armed robber. This rule may seem harsh, but no other rule is workable. Fairness dictates that the business that was the unlucky target of an armed robbery should not have to bear the burden of the cost of any injuries inflicted at the hands of the criminal absent some other legal grounds of liability. Causation is such cases is speculative because provocation could still have occurred absent the conduct of the agent of the commercial establishment. The immediate cause of any injury remains the deliberate discharge of the weapon. Imposition of a duty would mean that the business and its employees would have to forfeit the traditional privileges of defense of property and self. Furthermore, the imposition of liability could cause

232. One author suggests that “verbal abuse is simply a preconceived provocation unreasonably producing increased risks to customers” without the strong intenets that raise the privilege of self-defense in defense of property are exercised. Everybody Else’s, supra note 165, at 759.
236. DARIUS & KENNEDY, supra note 26, at 376.
businesses to depart from inner-city neighborhoods that have a high incidence of crime frustrating efforts at stabilizing such areas. The spread of private police forces could increase with a resultant increase in potential exchange of gunfire. The public could be exposed to a greater, not lesser, risk of injury. The fundamental difficulty with holding that a duty of care exists to exercise reasonable care during an armed robbery is that conduct in response to a life-threatening emergency is likely to be an instinctive or primitive reaction to the situation, not conduct deliberately chosen after weighing all potential consequences and risks that might possibly be created by the conduct. Any other holding would make it impossible to know where to draw the line between permissible legal liability and non-liability. Movement, cries for help, delay, profanity, hostile or uncooperative behavior, and self-defensive conduct have all been conduct that has allegedly provoked an armed robber. Once a duty is invoked, that duty will lead to a slippery slope of liability.

However, liability could still be imposed if the court decides to impose a duty due to the exceptional circumstances of a given case. Exceptions could be crafted when the policy reasons supporting the no-duty rule no longer support denying relief, such as when: (1) a commercial establishment adopts a deliberate business policy not to cooperate during an armed robbery and thereby protects business property at the expense of the personal safety of patrons; (2) a skilled employee, one who has training and experience with armed robberies, reacts unreasonably under the contemplated circumstance; (3) robberies of certain businesses become so probable that the establishment has an affirmative duty to train employees how to respond to a life-threatening situation; and (4) the intervention of time and the circumstances provide an employee the opportunity for rational thought. Caution should prevent an exception to the no-duty rule for conduct of an employee that appears to be rash when confronting an armed robber. Such an exception could swallow up the rule because the only way to draw the line between permissible versus impermissible behavior would be to submit all cases to the jury to determine whether the conduct was rash or reasonable.

Clearly, the no-duty rule should be restricted to in-progress armed robberies and should have no applicability to crimes where an employee is not exposed to the risk of serious injury or death. For example, an employee should have to exercise reasonable care and not expose customers to unreasonable risks of harm when apprehending a shoplifter or petty criminal. Furthermore, liability could always be pursued under traditional law where liability is imposed for injuries to patrons caused by foreseeable criminal attacks. The suggested no-duty rule would not preclude liability if the criminal attack on the premises was foreseeable, based on prior similar incidents or the totality of the circumstances including the risky nature of the business. Liability could also be imposed if an attack on a patron was "imminent" and the business failed to use reasonable care to prevent the attack or summon the authorities to protect the patron. Negligence in the implementation of established security measures could also be grounds for relief. Holding that there is no independent duty to use reasonable care during an armed robbery, where the happening of the robbery itself is not foreseeable, will simply help to confine tort liability to a manageable degree, within traditional parameters, and prevent businesses from having to absorb and assume more of the burden of crime prevention.

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Consumer Credit Class Actions in Louisiana

by David S. Willenzik*

After years of quiet inactivity, Louisiana suddenly has found itself in the midst of a rash of consumer credit class actions. At least count, a local Baton Rouge attorney, with the assistance of out-of-state plaintiffs' counsel, has filed seven Truth in Lending class actions in Baton Rouge federal court. These cases involve a questionable practice by Louisiana auto dealers of aggregating motor vehicle fees and charges and disclosing the total as a single amount under the heading "license fees." The later filed cases additionally allege improper disclosure of Louisiana personal property ad valorem taxes that the State imposes on auto dealers and that dealers pass through to purchasing consumers as an additional cost of the vehicle. These later filed cases further include RICO and state fraud claims.

An additional consumer credit class action involving forced placed insurance issues has been filed in state court here in New Orleans. This case alleges violation of the Louisiana Motor Vehicle Sales Finance Act (LASFA). The defendant class includes all banks, finance companies and other lenders purchasing or originating automobile consumer credit contracts in Louisiana where forced placed insurance was purchased or obtained through Progressive National Insurance Company, which was also named as a defendant.

Another class action is pending before the United States District Court for the Western District of Louisiana in Shreveport asserting anti-trust price fixing by the Louisiana Automobile Dealers Association (LADA) and every automobile dealer in the State of Louisiana who engaged in the practice of charging retail purchasers for personal property ad valorem taxes that the state imposes on the dealer. This class action has already been certified by consent of the LADA and the law firm that represents the defendant class of dealers. Banks and finance companies purchasing retail installment contracts from such dealers have not yet been named as additional defendants.

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