LIABILITY FOR CRIMINAL ACTS OF THIRD PARTIES: Targets, Liability Theories and Defenses

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I. THE EVOLUTION OF THE LAW: LIABILITY FOR CRIMINAL ACTS

A. Before 1960 – limited exposure: Prior to 1960, appellate court decisions affirming a civil judgment in favor of a crime victim against a defendant who did not perpetrate the crime are few and far between. Courts typically held that the defendant either owed no duty to protect the victim from criminal attack or that the criminal act severed any proximate cause link between the alleged negligence of the defendant and the injury. In general, courts considered criminal attacks to be events that people and institutions had no reason to anticipate and, as such, declined to find liability in this area.

- Example of early “no duty” case: Altepeter v. Virgil State Bank, 345 Ill.App. 585 (1952), involved a plaintiff who brought an action against a bank for injuries he received when a robber shot and wounded him. The plaintiff was a customer in the bank transacting business at the time. The appellate court affirmed dismissal of the Complaint, holding that the bank owed no duty to protect the customer from the criminal attack. In so holding, the court emphasized, “As a general principle, the proprietor of a store is not liable for injuries caused by third persons acting independently of him. As stated by some authorities, an independent act by a third person causing injury to a customer is something which a proprietor is not generally bound to anticipate, especially where the independent act is a willful one.”

- Example of “no proximate cause” case: In Weihert v. Piccione, 273 Wis. 78 (1956), a restaurant owner was not liable for failing to provide the necessary protection in his restaurant to the plaintiffs, who were patrons in the eatery, from an assault and battery upon them by another customer. The court held that “the failure to have provided ‘guards’ or ‘bouncers’ in the establishment did not constitute causal negligence, for reason that had such been provided, it cannot be assumed that they would have prevented the assault which occurred instantly and without warning.”

- Restatement of Torts § 314 entitled “Duty To Act For Protection Of Others”: “The actor’s realization that action on his part is necessary for another’s aid or protection does not of itself impose upon him a duty to take such action.” [emphasis added]

B. After 1960 – The evolution of liability for criminal attacks: After 1960, crime victims began pursuing causes of action against a variety of defendants who did not actually commit the crime. Plaintiffs attempted to overcome the “duty” hurdle by focusing on relationships. Specifically, plaintiffs focused on the relationship between the defendant and the criminal or the relationship between the plaintiff and the defendant at the time of the crime. Based upon those relationships, plaintiffs argued that the defendant owed a duty to warn them about, or protect them from, the injury-causing crime. At first, courts were reluctant to expand liability in this area. The relationships that did give rise to a duty were relatively narrow and strictly construed by the courts.
However, when the 1970s gave way to the 1980s, courts began to “loosen the reins.” Plaintiffs were more successful in jumping through the “duty” and “proximate cause” hoops. The willingness of some courts to expand, or liberally construe, the “relationship” criteria led to a dramatic increase in litigation arising out of the criminal acts of third parties.

C. **1990s and beyond: The age of terrorism:** The expansion of liability opportunities in connection with criminal acts attacks came on the heels of a series of mass casualty crimes beginning in the 1990s. Columbine, the 1993 World Trade Center bombing, the Oklahoma City bombing, the Branch Davidian incident in Waco, the Virginia Tech and Northern Illinois shootings and, of course, 9/11 are probably the most infamous, but they are hardly alone. The newspapers and 24-hour news cycles seem to inundate us with stories of violence in the workplace, shopping malls, schools, hospitals and homes. There no longer seems to be any sanctuary. After 9/11, just about anything is foreseeable; and therein lies the problem. Courts now have to grapple with the implications of imposing liability on private and public entities for catastrophic criminal acts. Faced with the potential consequences of “passing the cost” of such crimes onto individuals and entities who did not perpetrate the crime, courts and legislatures seem to be taking a “second look” at the area of law that addresses liability for criminal acts.

Before we examine how the courts have handled some of the more notorious criminal acts in recent times, let us first examine the theories of liability that are potentially available to crime victims seeking compensation from individuals and entities other than the criminal.
DID DEFENDANT AND PLAINTIFF HAVE A SPECIAL RELATIONSHIP AT THE TIME OF THE CRIME?

**YES**

Was the Defendant a **common carrier** and the Plaintiff a **passenger**?

**NO**

Was the Defendant an **innkeeper** and the Plaintiff a **guest**?

**NO**

**YES**

**YES**

Was the Defendant a **business invitor** and the Plaintiff an **invitee**?

**NO**

**NO**

**YES**

Was the Defendant a **custodian** of the criminal and Plaintiff a **protectee**?

**NO**

**NO**

**YES**

Was the Defendant a **landlord** and the Plaintiff a **tenant**?

**NO**

**NO**

**YES**

Was the Defendant a **school** and the Plaintiff a **student**?

**NO**

**NO**

**YES**

Was the Defendant an **employer** and the Plaintiff an **employee**?

**NO**

**NO DUTY** unless voluntary assumption or “special circumstances” applies.

DUTY ESTABLISHED
II. “SPECIAL RELATIONSHIP” BETWEEN PLAINTIFF AND DEFENDANT

The most common factual scenario giving rise to litigation stemming from the criminal acts of third parties involves a defendant who has no relationship to the criminal, but does have some relationship with the crime victim at the time of the crime. The courts have adopted certain relationships between crime victim and defendant as being adequate to impose a duty on the defendant to protect the victim from a criminal attack of a third person. In recent years, the courts seem inclined to expand the list of recognized relationships. This section will first outline the various plaintiff–defendant relationships that typically qualify as a basis to impose liability on the defendant for the criminal acts of a third party and then outline those relationships that are under consideration or adopted by various states.

Once the plaintiff establishes the necessary relationship with the defendant, he must then prove that the crime was foreseeable to the defendant. The last part of this section will examine what constitutes a “foreseeable” criminal act in this context.

A. Defendant–plaintiff relationships that create a duty

1. Common carrier–passenger: A common carrier is under a duty to its passengers to take reasonable action (a) to protect them against unreasonable risk of physical harm, and (b) to give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others.

   **Practice point**

   • A carrier is under no duty to one who has left the vehicle and ceased to be a passenger. For example, the court in *Briggs v. Washington Metropolitan Area Transit Authority*, 481 F.3d 839 (D.C. Cir. 2007), concluded that the transit authority owed no special duty to protect decedent by virtue of a common carrier–passenger relationship, since decedent’s body was found outside the station entrance.

2. Innkeeper–guest: An innkeeper is under a duty to his guests to take reasonable action (a) to protect them against unreasonable risk of physical harm, and (b) to give them first aid after he knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others. The Supreme Court of Wisconsin in *Peters v. Holiday Inn, Inc.*, 89 Wis.2d 115 (1979) provides an excellent framework for the potential exposure of innkeepers in the context of criminal acts. In *Peters*, a former employee of a hotel stole a bell boy uniform to gain access into a guest’s room. Once in the room, the former employee robbed and assaulted the guest. The Wisconsin Supreme Court began its analysis by noting, “In the context of the hotel-guest relationship, it is foreseeable that an innkeeper’s failure to maintain
adequate security measures not only permits but may even encourage intruders to rob or assault hotel patrons. Therefore, we hold that a hotel has a duty to exercise ordinary care to provide adequate protection for its guests and their property from assaultive and other types of criminal activity.” Peters at 123.

However, the court also noted that the standard of care in providing security will vary according to the particular circumstances and location of the hotel. Peters at 123-124. Some of the factors that the court considered to determine whether the hotel exercised ordinary care in providing adequate security were:

- Industry standards regarding security measures at hotels;
- The crime rate in the particular community where the hotel is located;
- The extent of assaultive or criminal activity in the area or in similar business enterprises;
- The presence of suspicious persons; and
- The peculiar security problems posed by the hotel’s design.

**Practice Point**

- **An innkeeper is not under a duty to a guest who is injured or endangered while he is away from the premises.** However, some courts have expanded the duty owed to guests to include criminal attacks that occur just outside the hotel. For example, in *Banks v. Hyatt Corp.*, 722 F.2d 214 (5th Cir. 1984), a physician was shot and killed near the entrance to a hotel where he was a registered guest. The wife and children sued the hotel. Noting that the operator had knowledge of previous assaults that had taken place near its premises, the court declined to limit the duty owed to guests to situations in which the harm suffered by the guest occurred within the hotel itself. Instead, the court held that the hotel operator could be held liable for the assault that had taken place just outside its doorway.

3. **Business invitor—invitee:** A possessor of land who holds it open to the public is under a duty to members of the public who enter in response to its invitation to take reasonable action (a) to protect them against unreasonable risk of physical harm, and (b) to give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others. The Wisconsin Supreme Court has held that the proprietor of a business is subject to liability for bodily harm to invitees caused by the criminal acts of a third
party “if the proprietor by the exercise of reasonable care could have
discovered that such acts were being done or were about to be done, and
could have protected the members of the public by controlling the conduct
of the third persons, or by giving a warning adequate to enable them to

**Practice Point**

- Courts are reluctant to impose liability on a business if the crime
  occurs off of the premises of the business owner, although a
  potential exception exists if the crime occurs in close proximity to
  the business. For example, in *Novak v. Capital Management and*
  *Development Corp.*, 452 F.3d 902 (D.C. Cir. 2006), patrons of a dance
  club were attacked in an alley outside the club by a group of thugs
  shortly after leaving. They sued the club for negligence. The Court of
  Appeals reversed summary judgment for the club, holding that a
  reasonable jury could find that the club put the alley to a substantial
  special use, thereby giving rise to a duty of care. The alley was only a
  few steps from the only exit to the club and was the most common
  path for departing customers.

4. **Voluntary custodian—protectee:** One who is required by law to take or
   who voluntarily takes the custody of another under circumstances
   such as to deprive the other of his normal opportunities for protection
   is under a similar duty to the other. Courts have used the “custodian—
   protectee” relationship to create a duty in a variety of contexts. The
   common thread is that the defendant takes control of the plaintiff and the
   defendant knows the plaintiff is not in a position to protect himself or
   herself from the criminal acts of third persons. Many courts have invoked
   the “custodian relationship” in the context of children and their adult
   caregivers to impose a duty to prevent harms caused by the intentional or
   criminal conduct of third parties. Examples include the operator of a
   preschool or daycare center owing a duty to the children in attendance.

   Courts have also used the “custodian-protectee” relationship to find that a
   hospital owed a duty to its patients to protect them from criminal acts. For
   example, in *Hall v. St. Vincent Hospital*, 187 Wis.2d 292 (1994), a
   criminal escaped from jail and authorities suspected that he would try to
   visit his girlfriend who was hospitalized at the time. Police informed the
   hospital of their suspicions and distributed a photo of the convict to
   security supervisors at the hospital instructing them to call the authorities
   immediately if he showed up. As it turns out, the supervisors did not
   disseminate the photo to all of the security personnel. When the convict
   arrived, an unsuspecting guard escorted him to the girlfriend’s hospital
   room where plaintiff was also a patient. The convict proceeded to assault
   the girlfriend while threatening to kill plaintiff if she made any noise.
   When the police arrived, the convicted threw plaintiff—who recently had
   back surgery—out of the room. The Wisconsin Appellate Court in *Hall*
held that, “The hospital had a duty to exercise reasonable care to protect Hall from Gupe’s criminal acts. The hospital knew that its patients were in no condition to defend themselves and were unable to lock doors against intruders. A hospital, like a hotel or theater, is required to provide reasonable security for its invitees.”

B. Relationships that may qualify

The comments to Restatement (Second) of Torts § 314A (1965) emphasize that the special relationships listed in that section are not considered exclusive. Courts in some jurisdictions have expanded the list of “special relationships” between plaintiff and defendant that potentially create a duty to protect plaintiff from the criminal attacks of a third person. Furthermore, drafts of the Restatement (Third) of Torts add to the list of recognized “special relationships” in this context. The following will set forth the “special relationships” that some courts currently recognize and that are likely to receive added recognition in the near future.

1. Landlord-tenant: Several jurisdictions have held that the landlord-tenant relationship imposes an affirmative duty on a landlord to take reasonable steps to warn or otherwise protect a tenant from foreseeable unreasonable risks of physical harm posed by another tenant or some other third party. See Speaker v. Cates Co., 879 S.W.2d 811 (Tenn. 1994); Fazzolari v. Portland School Dist. No. 1J, 734 P.2d 1326 (Ore. 1987). Some courts recognize a duty imposed upon landlords to protect tenants from criminal attacks on the leased premises as merely a logical extension of the recognized “special relationship” between innkeeper and guest. Tenney v. Atlantic Associates, 594 N.W.2d 11 (Iowa 1999). The draft for the Restatement (Third) of Torts includes landlord-tenant as a “special relationship.”

Practice Point

• Some courts have held that an employee of a tenant is considered a “tenant” for the purposes of establishing a “special relationship.” For example, in Ann M. v. Pacific Plaza Shopping Center, 863 P.2d 207 (Cal. 1993), an employee of a tenant at a strip mall sued the landlord after she was criminally attacked on the premises of the tenant. The plaintiff claimed that the landlord failed to take reasonable steps with respect to the safeguarding the common areas, thereby causing the attack. The court concluded that it was appropriate to apply the rules specifying the duty of a landowner to its tenants and patrons. Even though the plaintiff was not the “tenant” (her employer was), the court noted that “in the commercial context where the tenant generally is not a natural person and must, therefore, act through its employees, it cannot be seriously asserted that a tort duty that a
landlord owes to protect the personal safety of its tenant should not extend to its tenant’s employees.” *Ann M.* at 213.

2. **School–pupil**: A majority of jurisdictions hold that schools share a “special relationship” with students entrusted to their care, which imposes upon them certain duties of reasonable supervision for the protection of students from criminal acts. Courts often consider the relationship between school and pupil as an offshoot of the custodian relationship recognized in the Restatement (Second) of Torts § 314A (*i.e.* “One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection . . .”). For example, *Marquay v. Eno*, 662 A.2d 272 (N.H. 1995), held that “a child while in school is deprived of the protection of his parents or guardian. Therefore, the actor who takes custody . . . of a child is properly required to give him the protection which the custody or the manner in which it is taken has deprived him.” The draft for the Restatement (Third) of Torts includes school–pupil as a “special relationship.”

**PRACTICE POINT**

- **Some courts hesitate to extend “special relationship” status to the university–student relationship.** For example, in *Freeman v. Busch*, 349 F.3d 582 (8th Cir. 2003), a female college student attended a party at dorm room, became inebriated, passed out, and was sexually assaulted. She sued the college, but the district court granted summary judgment in favor of the defendant. In affirming the ruling, the determined that no special relationship existed between the RA and the plaintiff that would impose legal duty on the RA to act for the plaintiff’s protection.

3. **Employer–employee**: The courts are *split* regarding whether the employer–employee relationship constitutes a “special relationship” in the context of imposing a duty on employers to protect employees from criminal attacks. (*See Midgette v. Wal-Mart Stores, Inc.*, 317 F.Supp.2d 550 (E.D.Pa. 2005), applying Pennsylvania law to refuse the recognition of the employer–employee relationship as a “special relationship”; *but see A.H. v. Rockingham Publishing Co.*, 255 Va. 216, 495 S.E.2d 482 (1998), in which the Virginia Supreme Court held that a special relationship existed as a matter of law between an employer and his employees.) Restatement (Third) of Torts § 40 (Proposed Final Draft 2005) includes the employer–employee relationship on the list of special relationships, *but only* where the employee is in *imminent danger* or injured and thereby helpless.
PRACTICE POINTS

• Civil lawsuits brought by an employee against his employer are infrequent, even in the criminal acts context, because of applicable workers’ compensation statutes. The employee typically files for workers’ compensation benefits in connection with an injury at work, even if that injury was due to a criminal attack. The “exclusive remedy” provision of most workers’ compensation statutes would then prevent the employee from suing the employer in a civil action.

• Even if a particular jurisdiction did not recognize the employer-employee relationship as being a “special relationship,” an employer could still have liability to its employees for a criminal attack pursuant to an agency theory.

C. Foreseeability of criminal act

Assuming the plaintiff establishes a “special relationship” between the defendant and crime victim, the focus then shifts to the issue of foreseeability. Specifically, courts will not impose a duty on a defendant to warn a plaintiff about, or to protect him from, a criminal act unless that criminal act is reasonably foreseeable to the defendant. While this standard is necessarily nebulous, a survey of the law reveals four considerations that typically determine whether the crime giving rise to the litigation was reasonably foreseeable to the defendant: (1) the geographic and temporal proximity of any prior criminal activity to the subject crime; (2) the similarity of the prior criminal activity to the crime in question; (3) the amount of prior similar criminal activity; (4) the defendant’s knowledge of threatening behavior or altercations before the subject crime. The following will analyze these four factors.

1. Geographic and temporal proximity of prior crime: Generally, courts are more apt to find a crime “reasonably foreseeable” to a particular defendant if prior criminal activity has occurred on the premises of the defendant and within relatively close proximity to the crime at issue. However, no “hard and fast” rules exist to determine whether a particular geographic or temporal relationship between the defendant and prior criminal activity satisfies the “reasonably foreseeable” standard.

For example, some courts have held that the prior criminal activity must have actually occurred on the same premises to be relevant. Rivers v. Hagner Management Corp., 959 A.2d 110 (Md.App. 2008). However, most courts allow evidence of prior criminal activity within an area “‘sufficiently proximate’ to the subject location.” See Novikova v. Greenbriar Owners Corp., 694 N.Y.S.2d 445 (1999). The definition of “sufficiently proximate” can include anything from the parking lot immediately adjacent to the defendant’s premises to neighboring property. The judge typically has the discretion to set the geographic boundaries of the prior crime evidence that he will consider in determining “reasonable
foreseeability.” In *Peters v. Holiday Inn, Inc.*, 89 Wis.2d 115 (1979), the Wisconsin Supreme Court held that the crime rate in the particular community where a hotel was located was a relevant consideration to determine whether—and to what extent—that hotel owed a duty to prevent criminal activity.

Similarly, the judge typically has the discretion to *set temporal limitations* on prior criminal acts being considered for the purpose of establishing reasonable foreseeability. No consistent timeframe exists. Courts have allowed evidence of prior crimes going as far back as 10 years to establish “reasonable foreseeability.” Other courts have limited the admissibility of prior criminal activity to one year before the incident in question. Generally speaking, the *closer* in time the prior crime is to the subject crime, the *more likely* it will support a “foreseeability” argument.

2. **Amount of crime:** The *greater the frequency* of criminal activity, the *more likely* the court will find that the subject crime was reasonably foreseeable. For example, in *Foster v. Winston-Salem Joint Venture*, 281 S.E.2d 36 (N.C. 1981), the court held that the thirty-one criminal incidents reported as occurring on the shopping mall premises within the year preceding the assault created a jury question as to whether the defendants had knowledge that the subject crime was likely to occur. In *Butler v. Acme Markets, Inc.*, 445 A.2d 1141 (N.J. 1982), a customer sued the defendant store owner for personal injuries sustained in a criminal attack in the store’s parking lot. Seven prior muggings the preceding year were enough to establish “reasonable foreseeability.”

In *Weihert v. Piccione*, 273 Wis. 78 (1956), the Wisconsin Supreme Court found that two visits by the police at a restaurant over a six year period “militates against any suggestion that the establishment was often frequented by careless or criminal persons, a condition, which if it had existed, would have required extraordinary precaution for the benefit of others in the place.” Once again, no specific number of prior crimes constitutes “reasonable foreseeability” in all jurisdictions.

3. **Similarity of crime:** In order for prior criminal activity to establish a reasonable foreseeability with respect to a specific crime, most courts demand that the prior crimes and the subject crime be an “apples to apples” comparison. In other words, prior criminal assaults on the defendant’s property make another assault “reasonably foreseeable.” In contrast, several incidents of property vandalism in the defendant’s parking lot do *not* make a homicide at that same location foreseeable.

Most courts require a “substantial similarity” between the prior criminal activity and the particular crime in question. However, “substantially similar” does *not* mean identical. As one court pointed out:

> Although criminal conduct is difficult to compartmentalize, some lines can be drawn. For instance, we have held that reports of vandalism, theft, and neighborhood disturbances are
not enough to make a stabbing death foreseeable. Similarly, although the repeated occurrences of theft, vandalism, and simple assaults at the [defendant’s premises] signal that future property crimes are possible, they do not suggest the likelihood of murder.


4. **Pre-crime threatening behavior:** If employees of the defendant have knowledge of the eventual perpetrator making verbal threats and/or becoming involved in altercation before the subject crime, most courts will find that the subject crime was foreseeable to the particular defendant—even if the defendant did not have a history of crime on its premises. Knowledge of threatening behavior or altercations before a crime are especially relevant in “bar fight” cases. The plaintiff—who typically is on the receiving end of a fight—will claim that the defendant had warning signs that put it on notice of the eventual assault, thereby giving rise to a duty (i.e. remove the eventual perpetrator from the establishment, have a bouncer defuse the situation, etc.).

For example, in *Kolstad v. White Birch Inn, LLC*, 314 Wis.2d 508 (2008), a fight broke out at an Inn that was hosting a wedding reception, in addition to remaining open to the general public. A customer, who was injured in the fight, sued the Inn for failing to provide security. The court granted summary judgment in favor of the Inn because the fight was not foreseeable. Employees of the Inn were not aware of two verbal altercations that had occurred prior to the fight. The Inn never had any altercations requiring a police response before the subject fight. Thus, the court concluded, “The Inn had no reason to believe a wedding reception would result in a bar brawl. Once informed of the fight, the bartender took reasonable steps to stop it by calling 911 and informing the participants the police were called.”

Additionally, the Supreme Court of Wisconsin in *Radloff v. National Food Stores, Inc.*, 20 Wis.2d 224 (1963) discussed the foreseeability issue in the context of a shoplifting case. In *Radloff*, two employees of a grocery store approached a man suspected of shoplifting just outside the grocer. They asked the suspect to walk with them to the back of the store for questioning. While the employees escorting the suspect, he suddenly broke free and ran toward the exit knocking down a customer in the process. The customer sued and prevailed at trial. The Wisconsin Supreme Court reversed the judgment holding, “[A]s a matter of law the defendant did not know and by the exercise of reasonable care could not have discovered that the violent acts done by the shoplifter were being done or were about to be done so as to give rise to a duty on the part of the defendant to protect its customers from the shoplifter’s acts.” *Radloff* at 237. In so holding, the court emphasized that, “None of the evidence establishes that the proprietor knew or by the exercise of reasonable care could have discovered that the shoplifter was going to attempt to break loose and to rush out of the store, bumping into customers that might be in the way.” *Radloff* at 236.
III. FULFILLING THE DUTY TO WARN AND PROTECT

A. What is the duty owed? If a plaintiff can establish that a defendant owed a duty in the context of criminal acts, then courts typically define that duty as using reasonable care under the circumstances to reduce, eliminate or warn about the opportunity for criminal attack.

Granted, that standard is rather vague and open-ended. A survey of the law, however, reveals a rather practical principle in applying this standard: the greater the likelihood of crime and/or the greater the magnitude of the harm that could occur because of the crime, the more steps a particular defendant must take in order to satisfy its duty of reasonable care. The Tennessee Supreme Court analyzed the duty owed to crime victims as follows:

“In determining the duty that exists, the foreseeability of harm and the gravity of harm must be balanced against the commensurate burden imposed on the business to protect against that harm. In cases in which there is a high degree of foreseeability of harm and the probable harm is great, the burden imposed upon defendant may be substantial. Alternatively, in cases in which a lesser degree of foreseeability is present or the potential harm is slight, less onerous burdens may be imposed. By way of illustration, using surveillance cameras, posting signs, installing improved lighting or fencing, or removing or trimming shrubbery might, in some instances, be cost effective and yet greatly reduce the risk to customers. [Citation omitted.] In short, “the degree of foreseeability needed to establish a duty decreases in proportion to the magnitude of the foreseeable harm” and the burden upon defendant to engage in alternative conduct. [Citation omitted.] “As the gravity of the possible harm increases, the apparent likelihood of its occurrence need be correspondingly less to generate a duty of precaution.” The degree of foreseeability needed to establish a duty of reasonable care is, therefore, determined by considering both the magnitude of the burden to defendant in complying with the duty and magnitude of the foreseeable harm.


B. How does a defendant satisfy its duty of reasonable care?

In criminal acts cases that involve a “special relationship” between the defendant and the plaintiff, analysis of the “breach” element typically focuses on the steps taken by the defendant to protect the plaintiff from, or warn the plaintiff about, the possibility of criminal activity. Issues frequently explored in these cases to determine breach include:
a. The adequacy of **door and window locks**;

b. The adequacy of the **lighting** conditions;

c. The existence of video **surveillance**;

d. The presence of a **security guard**;

e. The existence of an **intercom system**;

f. The measure taken to adequately **screen** visitors or **eject** unruly visitors; and

g. The existence of **placards or signs** warning about criminal activity.

The Wisconsin Supreme Court, in analyzing the potential liability of a hotel for criminal acts of third persons committed on the premises, observed:

“A hotel’s liability depends upon the danger to be apprehended and the presence or absence of security measures designed to meet the danger. The particular circumstances may require one or more of the following safety measures: a security force, closed circuit television surveillance, dead bolt and chain locks on the individual rooms as well as security doors on hotel entrance ways removed from the lobby area.” *Peters v. Holiday Inns, Inc.*, 89 Wis.2d 115, 124 (1979)

The breach issue in this context is often the subject of **expert testimony**. That reality can make life difficult for defendants because, in this day and age, an expert for the plaintiff can almost always point out, with the clarity of hindsight, a security measure or gadget that “would have prevented or deterred” the particular crime, had the defendant “only spent the few extra dollars to implement it.” Experts and, unfortunately, jurors often forget that the standard is one of **reasonableness** based upon a totality of the circumstances. Again, the **less foreseeable** the crime, the **less security** an defendant has to provide to satisfy its duty of care.

**IV. LACK OF PROXIMATE CAUSE**

Even if defendant owed a **duty** of reasonable care to plaintiff in connection to the criminal act of a third party, and even if the defendant **breached** that duty, the defendant can still escape liability if its breach did **not proximately cause** the injuries to the plaintiff. The **general rule** is that the intervening or superseding criminal acts of another **preclude** liability of the initial negligent actor when the injury is caused by the criminal acts. Most courts, including Wisconsin (*Tobias v. County of Racine*, 179 Wis.2d 155 (1993), have adopted Restatement (Second) of Torts § 448 (1965), or similar language, to analyze the proximate cause issue in
cases involving criminal attacks. Section 448 states:

The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor’s negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor [defendant] at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.

Stated more simply, the crime must have been reasonably foreseeable at the time the defendant acted negligently in order for the plaintiff to establish the necessary proximate cause link between the negligent conduct of the defendant and the injury-causing crime. Foreseeability exists if the defendant, as a person of ordinary intelligence, should have anticipated the dangers his negligent act created for others. The facts must show more than conduct that creates an opportunity to commit crime. Rather, the facts must show that the defendant committed negligent acts and that he knew or should have known that, because of his acts, the crime (or one like it) might occur. An excellent illustration of this principle is the Wisconsin Supreme Court case of Weihert v. Piccione, 273 Wis. 78 (1956). In that case, a patron at a diner assaulted another customer who was sitting at an adjacent table. The confrontation rapidly unfolded and without much warning. The trial court held that, “[T]he plaintiff . . . was taken entirely by surprise over the incident which happened so suddenly that no one had time to do anything about it.” The Wisconsin Supreme Court agreed and affirmed judgment in favor of the diner. The key in all the cases is whether the intervening criminal act was a reasonably foreseeable event at the time of the alleged breach.

A survey of the cases reveals the following additional points relating to the proximate cause determination:

A. The same criteria used to determine whether a crime was foreseeable in the “special relationship between defendant and criminal” analysis are often used to determine foreseeability in the proximate cause context. For example, a shopping mall customer brought a negligence action against the property manager and a security company for personal injuries that customer received when he was shot by third party in the parking lot during a carjacking. The court held that the prior property crimes in the mall’s parking lot were insufficient to create a factual issue as to whether the defendants could reasonably anticipate that a carjacking and shooting resulting in personal injury might occur. Baker v. Simon Property Group, 614 S.E.2d 793 (Ga.App. 2005).
B. **The more random, sudden and catastrophic the criminal violence, the more likely that a court would find that criminal act unforeseeable, thereby severing any proximate cause link.** The case of *Tobias v. County of Racine*, 179 Wis.2d 155 (1993) provides an excellent illustration of this principle. In *Tobias*, an unknown assailant shot and killed the daughter of the plaintiff in a drive-by shooting. The daughter was a troubled youth who was under the care of the human services department of the County of Racine. She had repeatedly runaway from home. In the days leading up to the shooting, the mother-plaintiff had requested that the caseworker issue of *capias* order to facilitate the arrest of her daughter so that she would be removed from the apartment where she was staying, which was located in a bad area of town. The caseworker never had the *capias* order issued and the mother sued as a result. The jury found in favor of plaintiff, but the appellate court reversed that judgment. In reversing the judgment, the *Tobias* court held as a matter of law that the assailant’s act of shooting the daughter constituted a *superseding cause* of her death, thereby precluding liability against the County of Racine. The court explained that, “The doctrine of superseding cause is another way of saying that the injury is too remote from the negligence to impose liability.” The court acknowledged that while the County’s negligent failure to issue a *capias* may have created a situation which afforded an opportunity to a third person to commit a crime, the County could not have foreseen that a third person would commit a crime against the daughter because of the opportunity created by the county’s negligence. *Tobias* at 163. The court concluded:

“[T]he drive-by shooting that took Diana Jo’s life could have happened at any time. It was a random shooting by an unknown assailant—Diana Jo was not the specific target. The shooting could have occurred on any given day at any given time, even if Diana Jo were not running at the time.” *Tobias* at 163.