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Violence in the Workplace: Reevaluating the Employer's Role

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COMMENTS

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Diana Havner was an overnight clerk at an unsecured Texas convenience store. While on routine patrol in the early morning hours, a police officer discovered Diana's car out front, the store unlocked, an empty cash register and Havner missing. Four days later, her badly mutilated body, still cloaked in her employer's smock, was found naked from the waist down with her skull crushed.[1]

In Washington, D.C., an armed robber entered a bank, went directly to Zonya Grillo Durham, the teller nearest the front door, leaned over the counter and shot her in the head. A few years earlier the bank had removed all protective glass from the tellers' counters as part of an overall architectural plan to make the inside look more historical. In response to employee requests to have it replaced, the bank refused stating it was too expensive and was not effective in preventing robberies.[2]

Jason Bercaw's Illinois employer allowed him to deliver a pizza alone to a man named "Mr. Jones" calling from a pay phone in an unsafe area. The employer's franchisor provided materials outlining safety procedures to protect delivery persons such as Jason, but his employer failed to train him in this regard. While attempting to deliver the pizza, Jason was strangled and killed.[3]

Cherlyn Peavler was working in her employer's plant in Indiana when her boyfriend entered the plant and shot her to death. At the time of the shooting there were no security guards at the plant and the boyfriend did not have to report to anyone before

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1. Havner v. E-Z Mart Stores, Inc., 825 S.W.2d 456, 456-57 (Tex. 1992).
2. Grillo *ex rel.* Durham v. National Bank of Wash., 540 A.2d 743, 744-46 (D.C. 1988).
3. Bercaw v. Domino's Pizza, Inc., 630 N.E.2d 166, 167-68 (Ill. App. Ct. 1994).

entering. Having escorted her boyfriend out on a previous occasion, Cherlyn's employer was well aware of the danger he posed.[4]

INTRODUCTION

Homicide is the second-most common manner of workplace death in the United States.[5] It is the leading manner in which women are fatally injured at work.[6] According to recent statistics, each day criminal attacks in the workplace account for the death of three people and serious injury of sixty-one others.[7] While tragic

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4. Peavler v. Mitchell & Scott Mach. Co., 638 N.E.2d 879, 880 (Ind. Ct. App. 1994).

5. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, No. 94-384, NATIONAL CENSUS OF FATAL OCCUPATIONAL INJURIES, 1993, 1 (1994) [hereinafter CENSUS]; *see also* Guy Toscano & Janice Windau, *The Changing Character of Fatal Work Injuries*, MONTHLY LAB. REV., Oct. 1994, at 17 [hereinafter *Changing Character*]; Janice Windau & Guy Toscano, *Workplace Homicides in 1992, in* FATAL WORKPLACE INJURIES IN 1992: A COLLECTION OF DATA AND ANALYSIS 11, 11 (BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, Apr. 1994). Homicide is the leading cause of work-related death in Alabama, Connecticut, Maryland, Michigan, South Carolina, and the District of Columbia. *See Vehicle Crashes Top Other Workplace Hazards; Homicides Emerge as Major Occupational Threat*, 23 O.S.H. Rep. (BNA) No. 27, at 805 (Dec. 1, 1993); *Homicides Surpass Motor Vehicle Crashes as Cause of Workplace Fatalities in Texas*, 22 O.S.H. Rep. (BNA) No. 48, at 2139 (May 18, 1993); *see also Homicide Major Cause of On-the-Job Death, Federal-State Study Finds for New York Area*, 23 O.S.H. Rep. (BNA) No. 30, at 876 (Dec. 22, 1993). One in six violent crimes occurs in the workplace. *See Justice Report on Workplace Violence Confirms Trend Already Noted by SHRM*, PR NEWSWIRE, July 22, 1994, at 0722DC030.

Criminologists call the workplace homicide trend the fastest growing form of murder in America. Robert H. Elliott & Deborah T. Jarrett, *Violence in the Workplace: The Role of Human Resource Management*, 23 PUB. PERSONNEL MGMT. 287 (1994). *But see* Richard Blow, *Stamped Out*, NEW REPUBLIC, Jan. 10-17, 1994, at 11; Jan H. Schut, *Killers Among Us; Violence in the Workplace*, INSTITUTIONAL INVESTOR, Aug. 1994, at 125. While recognition of the problem of workplace homicide has increased, figures on workplace homicide are not truly reflective of the problem because "existing studies have been conducted very differently, and many are either quite recent or outdated." *Id.*

6. CENSUS, supra note 5, at 1; BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR No. 94-10, VIOLENCE IN THE WORKPLACE COMES UNDER CLOSER SCRUTINY (1994) [hereinafter SCRUTINY]; Janice Windau & Guy Toscano, *Workplace Homicides in 1992, in* FATAL WORKPLACE INJURIES IN 1992: A COLLECTION OF DATA AND ANALYSIS 11, 11 (BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, Apr. 1994). Homicide was the cause of death of approximately 41% of the women killed on the job in the last decade. *Decline in Workplace Deaths Reported; Role of Homicide, Motor Vehicles Detailed*, 22 O.S.H. Rep. (BNA) No. 47, at 2020 (Apr. 28, 1993) [hereinafter *Decline*].

7. *See* SCRUTINY, *supra* note 6 (based on 1,063 work related homicides per year). The statistic reflecting serious injury of sixty-one workers per day was calculated by including only those workers who were required to take off one or more workdays due to the injury, but on average, five days were required for the worker to recuperate. *Id.* Forty-six percent of these victims were hit, kicked or beaten, and 23% were raped or threatened. *More than 22,000 Violent Non-Fatal Attacks Reported in the Workplace, BLS Report Says*, 24 O.S.H. Rep. (BNA) No. 15, at 907 (Sept. 7, 1994). Non-fatal workplace violence affects one of four workers each year. *See* Bill D. Hager, *Defusing Workplace Violence: Mission Possible*, 15

mass murders committed by disgruntled workers or jealous spouses immediately come to mind,[8] statistics reveal these types of events only account for fourteen percent of the criminal attacks upon workers.[9] An overwhelming majority of criminal attacks, seventy-five percent, arise during the course of armed robberies and other miscellaneous crimes.[10] Workers in retail trades, such as convenience stores and eating establishments, are particularly susceptible since these businesses are generally open all night and often have few employees.[11]

Because of the alarming nature of these statistics, pressure is mounting for employers to take an active role in protecting their workers.[12] While employers incurred costs of $4.2 billion in lost

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SAN DIEGO BUS. J., Oct. 24, 1994, at 23; *Problems Predictable, Employers Can Act to Reduce Hazards on the Job, OSHA Official Says*, 24 O.S.H. Rep. (BNA) No. 1, at 16 (June 1, 1994). "The total number of incidents in which workers are attacked but not killed on-the-job may be anywhere from tens of thousands of incidents to several million, depending upon how such attacks are defined and recorded . . . ." *Regional, Area OSHA Offices Need Guidance to Address Work-Related Assaults, AFSCME Says*, 24 O.S.H. Rep. (BNA) No. 24, at 1276 (Nov. 9, 1994) [hereinafter *Regional Offices*]. Data analyzed from a National Crime Victimization Survey for 1987-1992 showed each year one million individuals are victims of violent crime at work. *One Million Workers Affected Each Year, New Justice Department Study Reports*, 24 O.S.H. Rep. (BNA) No. 9, at 387 (July 27, 1994); *see also* Alex Heard, *Working Stiffs: Keep Your Job, Keep Your Life*, NEW REPUBLIC, Aug. 22, 1994, at 11.

8. *See Robberies Far Outstrip Other Causes of Work-Related Homicides, Article Says*, 23 O.S.H. Rep. (BNA) No. 37, at 1222 (Feb. 16, 1994) [hereinafter *Robberies*]; *see also* Matthew Hall, *Grudges Make Workplace Murders Soar*, BUS. FIRST OF COLUMBUS, July 4, 1994, at 25; Robert D. Ramsey, *Violence on the Job: How Safe is Your Workplace?*, SUPERVISION, Aug. 1994, at 6.

9. CENSUS, *supra* note 5, at 3; *see also Changing Character, supra* note 5 (roughly 1 of 7 victims of workplace homicide was killed by a co-worker); *Majority of Violent Workplace Attacks Caused by Customers, Clients, Report Says*, 23 O.S.H. Rep. (BNA) No. 21, at 616 (Oct. 20, 1993); *OSHA Work of Compliance Directive is Nearing Completion, Official Says*, 12 Employee Rel. Wkly. (BNA) 957 (Aug. 29, 1994) [hereinafter *Compliance Directive*] (workplace homicides primarily committed by members of the public, not co-workers); *Regional, supra* note 7 (misconception that workplace violence is largely a result of workers attacking co-workers); Ira A. Lipman, *Violence at Work*, BUS. PERSPECTIVES, June 22, 1994, at 14 (externally-generated crime is more prevalent).

10. CENSUS, *supra* note 5, at 1, 3; *see also* SCRUTINY, *supra* note 6; *Changing Character, supra* note 5, at 17; *Robberies, supra* note 8; Lipman, *supra* note 9, at 15.

11. CENSUS, *supra* note 5, at 1, 3; *see also* SCRUTINY, *supra* note 6; *Compliance Directive, supra* note 9; *Improved Lighting, Worker Training Urged to Protect Workers from Workplace Homicide*, 23 O.S.H. Rep. (BNA) No. 22, at 645 (Oct. 27, 1993) [hereinafter *Improved Lighting*]; *Decline, supra* note 6; Orin M. Kurland, *Workplace Violence*, 40 RISK MGMT., June 1993, at 76.

12. *See* Louis P. DiLorenzo & Darren J. Carroll, *The Growing Menace: Violence in the Workplace*, 67 N.Y. ST. B.J., Jan. 1995, at 24 (employers under increasing pressure to formulate and implement responses to workplace violence); *see also OSHA Should Hold Employers Accountable for Taking 'Reasonable Measures,' Labor Says*, 23 O.S.H. Rep. (BNA) No. 34, at 1008 (Jan. 26, 1994); *Improved Lighting, supra* note 11; Lipman, *supra* note 9, at

work and legal expenses alone last year due to workplace violence,[13] the reality is that many employers refuse to acknowledge a problem exists and will not respond until a tragedy has occurred in their workplace.[14] The Occupational Safety and Health Administration (OSHA) and various state legislatures are beginning to acknowledge this reality and are starting to outline their role in prompting employers to prevent violence in the workplace.[15] Even more notable in the crusade to make workplaces safer is the role of employees and their families who are victims of workplace violence. An increasing number of them are bringing civil lawsuits against their employers claiming the employers provided inadequate security to guard against criminal attacks at work.[16] These employee lawsuits directly challenge state workers' compensation

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15 (the time has come for business to protect the security of its personnel); Shari Caudron, *Fight Crime, Sell Products*, INDUSTRY WK., Nov. 7, 1994, at 49, 52 (Americans believe corporate America should play a role in stemming the tide of violence); Mark Braverman & Susan R. Braverman, *Seeking Solutions to Violence on the Job; The United States of Violence*, USA TODAY, May 1994, at 29, 30 (companies are in best position to make a difference in the security and quality of life of their workers); *Ramsey*, *supra* note 8 (companies should begin to pay attention to issues of employee safety).

13. Jenny C. McCune, *The Age of Rage; Workplace Violence*, SMALL BUS. REP., March 1994, at 35 [hereinafter *Age of Rage*]; *see also* Jenny C. McCune, *Companies Grapple With Workplace Violence*, MGMT. REV., Mar. 1994, at 52, 53-54. The average award in a security negligence case is $1 million. Alfred G. Haggerty, *Employers Need to Address Workplace Violence*, NAT'L UNDERWRITER PROP. & CASUALTY-RISK & BENEFITS MGMT., Sept. 27, 1993, at 68. Costs of crime in the workplace are also threatening the economic viability of the nation's small businesses. *Crime-Associated Costs Squeezing Small Businesses, House Panel Told*, 24 O.S.H. Rep. (BNA) No. 9, at 391 (July 27, 1994).

Other costs of workplace violence include security costs, building repair and cleanup, business interruption with customers, loss of productivity, lost work time, turnover of employees, increased workers' compensation claims and increased insurance premium rates. S. ANTHONY BARON, VIOLENCE IN THE WORKPLACE, A PREVENTION & MANAGEMENT GUIDE FOR BUSINESSES 68-69 (1993); *see also Age of Rage*, *supra*, at 35.

14. *Group Urges Proactive Steps to Reduce Workplace Violence*, 23 O.S.H. Rep. (BNA) No. 15, at 382 (Sept. 8, 1993); *see also* Tracey Rosenthal, *Despite Increasing Attacks at Workplaces, Most Companies are not Implementing Safety Measures, Experts Say*, BUS. FIRST OF BUFF. July 25, 1994, at 15; Robert H. Elliott & Deborah T. Jarrett, *Violence in the Workplace: The Role of Human Resource Management*, PUB. PERSONNEL MGMT., June 22, 1994, at 287; *Age of Rage*, *supra* note 13, at 36 ("[C]orporate denial is the biggest problem."). *But see* Dale D. Buss, *Combating Crime; Small Businesses Take Safety Precautions*, NATION'S BUS., Mar. 1994, at 16, 18 (examples of proactive approaches taken by some businesses to prevent violence in their workplaces).

15. *See infra* parts I, II; *see also OSHA Looking Into Growing Problem, Agency Staffer Tells Seminar Attendees*, 24 O.S.H. Rep. (BNA) No. 18, at 973 (Sept. 28, 1994).

16. *See* Pamela R. Johnson & Julie Indvik, *Workplace Violence: An Issue of the Nineties*, 23 PUB. PERSONNEL MGMT. 515 (1994); *see also* Nancy Chambers et al., *The Best and Worst Jobs for Women*, WORKING WOMAN, July 1994, at 38, 46; Robert H. Bernstein, *Companies Tackle Workplace Violence*, N.J. L.J., Apr. 25, 1994, at 10; Lipman, *supra* note 9, at 16.

schemes which ordinarily provide an exclusive statutory remedy for work-related injuries and operate to preclude civil lawsuits against employers.[17]

Workplace violence is justifiably beginning to capture attention from the administrative, legislative and judicial bodies of the nation.[18] Inevitably, employers will have to play some role in protecting their workers from the criminal acts of third parties. How this role should come about is the focus of this Article. The Article first examines the response of OSHA and various state legislatures to the growing problem of workplace violence and comments on their effectiveness in prompting employers to provide safe working environments. In addition, theories holding an employer liable in tort or breach of contract for failure to provide a safe workplace to its employees are analyzed. Since workers' compensation statutes currently operate to preclude such suits, the Article will discuss how the courts should play a role in removing workplace violence cases from the grip of workers' compensation exclusivity provisions and how the rationale used to hold landlords liable for criminal attacks upon tenants should be extended to the employer/employee relationship. The Article also discusses whether employers will be prompted to take action to protect employees from violence in the workplace if the courts and legislatures allow these incidents to remain solely within the purview of workers' compensation. This Article also analyzes the complex nature of modern commercial relationships including situations where businesses lease property from landowners and control of the premises is negotiated in the lease.[19] Is it equitable to allow an employee of a business tenant who becomes a victim of workplace violence to recover in tort against the landowner and only recover under workers' compensation against the employer?

Ultimately, the Article concludes that the best way to prompt employers to take an active role in preventing criminal attacks upon its employees would be a combination of state legislation and an altered workers' compensation scheme that would allow a court to award damages in a tort suit against negligent employers to vic-

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17. *See generally infra* part III.

18. *See Strategy to Prevent Occupational Homicide Needs Coordination, Collaboration, NIOSH Says*, 22 O.S.H. Rep. (BNA) No. 24, at 1198 (Nov. 11, 1992) (workplace homicide is a public health problem of significant proportion); *see also* Braverman & Braverman, *supra* note 12, at 29 (workplace violence is an "epidemic" affecting the American workforce).

19. "Many parties may become legally entangled when work place violence occurs. These include the property owner, management company, outside security contractor and tenant." Phillip M. Perry, *Assault in the Work Place: How to Cut Your Legal Risk*, EDITOR & PUBLISHER Mar. 26, 1994, at 18.

tims of workplace violence.

I. OSHA's Response to Workplace Violence

Congress enacted the Occupational Safety and Health Act of 1970 to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions . . . ."[20] The Act places primary responsibility for protecting workers on the shoulders of employers who are charged with both a specific duty to comply with health and safety standards set forth in the Act[21] as well as a general duty to provide a safe workplace for all employees.[22] The requirement to provide a safe workplace is commonly referred to as the "general duty clause," and was enacted by Congress to cover employment hazards not specifically addressed by a promulgated safety standard set forth in the Act.[23]

Since the Act currently does not contain a specific standard addressing workplace violence, agency inspectors are encouraged to make use of the general duty clause to cite workplaces where there is a reasonable expectation that violence may occur.[24] Due in part to increasing pressure from unions and recent federal research on workplace violence,[25] OSHA plans to issue a compliance directive to assist agency inspectors in enforcing the general duty clause against employers.[26] The directive will include items such as a business' exterior lighting and training for employees on how to respond to violent incidents in the workplace.[27] OSHA also plans to issue guidelines to target violence in the night retail and health

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20. 29 U.S.C. § 651 (1985).

21. *Id.* § 654 (a)(2).

22. *Id.* § 654 (a)(1). The general duty clause states that an employer "shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." *Id.*

23. *See* Mark A. Rothstein, Occupational Safety & Health Law § 141 (3d ed. 1990); *see also Group Home, Transport Firm Settle Citations; Agree to Measures to Improve Workers' Safety*, 23 O.S.H. Rep. (BNA) No. 45, at 1566 (Apr. 13, 1994).

24. *See Dear Outlines Strategy to Address Issue; Special Assistant Named to Spearhead Effort*, 23 O.S.H. Rep. (BNA) No. 33, at 980, 981 (Jan. 19, 1994) [hereinafter *Dear Outlines Strategy*]; *see also OSHA Considering Developing Guidelines With Input From Interested Parties, Group Told*, 24 O.S.H. Rep. (BNA) No. 23, at 1193, 1194 (Nov. 2, 1994).

25. *Dear Outlines Strategy*, *supra* note 24, at 981; *see also Labor Union Calls on OSHA to Convene Working Group to Tackle "Horrid Scourge,"* 23 O.S.H. Rep. (BNA) No. 21, 625 (Oct. 20, 1993); *OSHA Should Hold Employers Accountable for Taking "Reasonable Measures," Labor Says*, 23 O.S.H. Rep. (BNA) No. 34, at 1008 (Jan. 26, 1994).

26. *Compliance Directive*, *supra* note 9, at 957.

27. *OSHA Looking Into Growing Problem, Agency Staffer Tells Seminar Attendees*, 24 O.S.H. Rep. (BNA) No. 24, at 973 (Sept. 28, 1994); *see also Compliance Directive*, *supra* note 9, at 957.

care sectors.[28] While details are not available at this point, OSHA notes these guidelines will not carry any enforcement power. [29]

While OSHA's measures are encouraging, the issuance of the guidelines and compliance directive could be the extent of OSHA's action to ensure employers provide working environments free of violence. Already, agency officials acknowledge their inability to respond,[30] the unlikelihood of a promulgated standard,[31] and the limitations of staff and budget to address the issue.[32] Instead, OSHA appears resigned to tackle the problem by levying "stiff fines" for violations of the general duty clause and working closely with employers and employees to ensure workplaces are safe.[33]

Without a promulgated standard, the effectiveness of citing an employer under the general duty clause to ensure worker safety is minimal. OSHA primarily deals with work-related violence on a complaint and referral basis, leading to few citations.[34] In addition, preliminary citations issued to employers who violate the general duty clause because of workplace violence hazards indicate that penalties are limited, ranging only from $750 to $5000.[35] While employers may report violent deaths in the workplace to OSHA, an agency official notes that such incidents "will not typically gener-

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28. *OSHA Says Guidelines Will Target Night Retail and Health Care Sectors*, 24 O.S.H. Rep. (BNA) No. 34, at 1729 (Jan. 25, 1995).

29. *Id.*

30. *See Workplace Violence Rule Not Likely, OSHA Official Tells State Legislatures*, 23 O.S.H. Rep. (BNA) No. 49, at 1747 (May 11, 1994) (OSHA is still "not sure how to respond" and has "little advice to offer states trying to stem violence in the workplace"); *see also Guidelines May Be Focus of OSHA Plan to Fight Violence, Senior Official Says*, 24 O.S.H. Rep. (BNA) No. 26, at 1396 (Nov. 23, 1994) (combatting workplace violence is not an "easy issue" for OSHA).

31. *See* Gregg LaBar, *Grand Plans; The Occupational Safety & Health Administration's Major Programs for 1995*, OCCUPATIONAL HAZARDS, Dec. 1994, at 32, 33 (OSHA will use guidelines and local emphasis programs to deal with workplace violence); *see also Workplace Violence Rule Not Likely, OSHA Official Tells State Legislatures*, 23 O.S.H. Rep. (BNA) No. 49, at 1747 (May 11, 1994) (OSHA has "no intention or desire to promulgate a standard" to address workplace violence).

32. *Job-Related Violence Falls Within OSHA Jurisdiction, Agency Official Says*, 24 O.S.H. Rep. (BNA) No. 21, at 1055 (Oct. 19, 1994). OSHA officials also note the new political climate it is facing and is therefore handling workplace violence issues slowly. *OSHA Says Guidelines Will Target Night Retail and Health Care Sectors*, 24 O.S.H. Rep. (BNA) No. 34, at 1729 (Jan. 25, 1995).

33. *Workplace Violence Rule Not Likely, OSHA Official Tells State Legislatures*, 23 O.S.H. Rep. (BNA) No. 49, at 1747 (May 11, 1994).

34. *OSHA Looking Into Growing Problem, Agency Staffer Tells Seminar Attendees*, 24 O.S.H. Rep. (BNA) No. 51, at 973 (Sept. 28, 1994).

35. *Employer Liability, OSHA Criminal Acts, Workplace Violence Discussed at ABA Meeting*, 24 O.S.H. Rep. (BNA) No. 12, at 624 (Aug. 17, 1994); *Psychiatric Hospital in Chicago Cited by OSHA for Workplace Violence*, 23 O.S.H. Rep. (BNA) No. 22, at 646 (Oct. 27, 1993).

ate an OSHA inspection."[36] Additionally, many employers feel that if they report workplace violence incidents to the police then they have met their obligation to provide a safe workplace.[37] In light of OSHA's reluctance to promulgate a standard, the unlikelihood of inspection[38] and the imposition of minimal fines for a violation, it is unlikely employers will take OSHA seriously enough to assume an active role in protecting employees from violence in the workplace.[39]

II. STATE LEGISLATIVE RESPONSE TO WORKPLACE VIOLENCE

Fear of crime is an increasing concern of the public[40] and violence in the streets and homes is beginning to spill over into the workplace.[41] "It [even] makes us think twice before making a latenight stop at an empty 7-Eleven."[42] In response to the public's concern, states are beginning to take action to protect workers from violent attacks. In 1993, for example, Florida became the first state to mandate crime prevention measures for convenience stores.[43] This mandate arose following the success of a city ordinance in Gainesville, Florida, which reduced the number of convenience store robberies by eighty percent over a six year period from 1986 to 1992.[44] The city ordinance requires two clerks on duty between 8:00 p.m. and 4:00 a.m., parking lots with ample lighting, safes that employees cannot open, a limit of $50 in the cash register and an unobstructed view into the store.[45] The success of the ordinance has prompted more than 260 communities

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36. *OSHA Says Guidelines Will Target Night Retail and Health Care Sectors*, 24 O.S.H. Rep. (BNA) No. 34, at 1729 (Jan. 25, 1995).

37. *Compliance Directive, supra* note 9, at 957.

38. OSHA has a mere 2000 inspectors to seek out potential problems in six million workplaces. *See* Thomas J. Sheeran, *OSHA Inspection Helped Arcade Company's Plant Cut Workplace Injuries*, BUFF. NEWS, Feb. 18, 1995, at B9.

39. In fact, criminal prosecutions against companies whose employees are injured on the job are on the rise. This is due in part to OSHA's increasing unresponsiveness in regulating workplace safety. Therefore, prosecutors feel they must take on the responsibility themselves. Deborah A. Ballam, *Intentional Torts in the Workplace: Expanding Employee Remedies*, 25 AM. BUS. L.J. 63, 63 (1987).

40. *See* Caudron, *supra* note 12, at 49; Buss, *supra* note 14, at 16.

41. *Social Factors That Can Fuel Violence Include Stress, Family Troubles, Seminar Told*, 23 O.S.H. Rep. (BNA) No. 24, at 750, 750 (Nov. 10, 1993); Ramsey, *supra* note 12, at 6; Thomas Dunkel, *Newest Danger Zone: Your Office*, WORKING WOMAN, Aug. 1994, at 38, 40; Hager, *supra* note 7, at 23.

42. Caudron, *supra* note 12, at 49.

43. *See* Dunkel, *supra* note 41, at 70; Convenience Business Security Act, 46 FLA. STAT. ANN. § 812.1701-175 (West 1994).

44. *See* Buss, *supra* note 14, at 19.

45. *Id.*

nationwide to request copies of the law for conducting their own studies.[46]

California is especially sensitive to workplace violence, as homicide became the leading cause of job-related deaths for its workers in 1993.[47] Workplace violence killed more workers in California than any other state, including those with large urban populations such as New York and Florida.[48] California's Occupational Safety and Health Agency (Cal-OSHA) released new workplace security guidelines effective August 15, 1994, which underscore the need for employer involvement to ensure the safety of its employees.[49] Responding to a 31.7% rise in fatal workplace assaults from the previous year, Cal-OSHA felt the need to use their "statutory discretion" to "issue any orders necessary to eliminate the causes and prevent reoccurrences of . . . occupational accidents . . . ."[50] Unsatisfied with the issuance of the guidelines, the California State Employees Association is pressing for a bill from the legislature to force Cal-OSHA to promulgate a standard on workplace violence.[51] The Association is also requesting legislation that would levy stiff fines on government agencies who violate safety and health regulations, and legislation that would repeal a state statute that exempts governmental entities from civil penalties.[52]

In 1994, California passed two bills seeking to protect state and private sector employees. First, the Workplace Violence Safety Act allows employers to obtain temporary restraining orders and injunctions to protect employees from individuals who are harassing or stalking them.[53] The second measure requires the establishment of an interagency task force to develop recommendations for improving security in office buildings where state employees come

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46. *Id.*

47. *Workplace Violence: Facing the Facts*, O.S.H. Daily (BNA) (Nov. 29, 1994).

48. *California, New York, Texas Lead States in Total Assault-Related Workplace Fatalities*, 23 O.S.H. Rep. (BNA) No. 31, at 910 (Jan. 5, 1994).

49. *Legislative Agenda; AB 2788, SB 469, SB 1448, SB 1648; Tort Reform; Cal/OSHA Workplace Guidelines*, S. CAL. BUS., Nov. 1994, at 5 [hereinafter *Legislative Agenda*]. Interestingly, OSHA will base its workplace violence guidelines partly upon Cal-OSHA's workplace violence guidelines. *OSHA Says Guidelines Will Target Night Retail and Health Care Sectors*, 24 O.S.H. Rep. (BNA) No. 34, at 1729 (Jan. 25, 1995); *see also NACOSH Group Suggests Steps OSHA, NIOSH Can Follow to Combat Job-Related Incidents*, 24 O.S.H. Rep. (BNA) No. 28, at 1510 (Dec. 7, 1994).

50. *Legislative Agenda, supra* note 49.

51. *State Failed to Provide Safe Workplace Following Fatal Shooting, Workers Complain*, 23 O.S.H. Rep. (BNA) No. 32, at 951 (Jan. 12, 1994).

52. *Id.*

53. *California Governor Signs Two Bills Seeking to Enhance Security on the Job*, 24 O.S.H. Rep. (BNA) No. 20, at 1031 (Oct. 12, 1994).

into contact with the public.[54] Also in 1994, a state employee association prompted California's Tax Board to pledge $6.4 million for security measures at field offices statewide and improved policies regarding job-related violence.[55] The Board's action took place following a contract grievance for failure to provide a workplace free of recognized hazards associated with assault on the job; the recognized hazards being "potentially-dangerous taxpayers."[56]

New York also suffers from a high rate of workplace homicide. Nearly fifty percent of all workers fatally injured at work in the New York metropolitan area are victims of homicide.[57] "The biggest threat to life on the job in New York City is murder."[58] Recognizing a threat to its taxi drivers, New York City requires barriers between drivers and passengers in taxicabs.[59] The Governor of New York responded to the growing rate of workplace violence by awarding $5.88 million in grants to spur occupational safety and health training statewide, some of which will be used to address violence on the job.[60] The Long Island Occupational Safety and Health Administration also organized a local outreach effort to educate local businesses on workplace violence, including identification of hazards and how to correct them before enforcement actions occur.[61] Similar to California, New York's Civil Service Employees Association is taking action to protect its front-line public employees by urging the State Labor Department to issue a workplace security standard.[62]

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54. *Id.*

55. *California Agency to Spend $6.4 Million for Workplace Security After Shooting Death*, 23 O.S.H. Rep. (BNA) No. 50, at 1800 (May 18, 1994).

56. *See California Tax Board Responds to Demands by State Employee Group for Work Site Security*, 24 O.S.H. Rep. (BNA) No. 12, at 620 (Aug. 17, 1994). A key official of the American Federation of State, County and Municipal Employees indicated that organized labor should use safer workplace conditions as a political issue in 1996. The Republicans' political agenda could put front-line public employees at risk. "When welfare is cut off and the orphanages start up, they [the people affected] aren't going to be throwing rocks at Newt Gingrich; they're going to be throwing rocks — or worse — at us." *Labor Should Use Safe Workplace Issues for Political Purposes, Group Told; 1996 Eyed*, 24 O.S.H. Rep. (BNA) No. 28, at 1515 (Dec. 7, 1994).

57. *See* Buss, *supra* note 14, at 17.

58. *Homicide Major Cause of On-the-Job Death, Federal-State Study Finds for New York Area*, 23 O.S.H. Rep. (BNA) No. 30, at 876 (Dec. 22, 1993).

59. *Problems Predictable, Employers Can Act to Reduce Hazards on the Job, OSHA Official Says*, 24 O.S.H. Rep. (BNA) No. 1, at 16 (June 1, 1994).

60. *Cuomo Awards $5.88 Million for New York Job Safety, Health*, (Bus. Publishers) 24 Occupational Health & Safety Letter No. 19 (Oct. 19, 1994).

61. *Outreach Project to be Established by Long Island OSHA to Educate Businesses*, 24 O.S.H. Rep. (BNA) No. 16, at 935 (Sept. 14, 1994).

62. *Public Workers Union Sees More Violence in Workplace, Urges Standard on Security*, 22 O.S.H. Rep. (BNA) No. 32, at 1402 (Jan. 13, 1993).

As evidenced by the recent activity of OSHA and a handful of concerned states, workplace violence is no longer just a criminal justice issue.[63] While the nation is only beginning to consider legislation to prompt employers to protect workers, the trend is likely to continue if crime remains a compelling issue confronting the electorate. Recently, Congress received a request from the House Small Business Committee for funds to conduct more specific studies on business-related crime and violence.[64] Private groups are also beginning to exert influence on legislatures to address workplace violence. For example, the National Association of Convenience Stores plans to collect twenty-five million signatures on petitions to demand the enactment of truth-in-sentencing laws to ensure criminals complete their prison terms to protect not only the public in general, but convenience store workers in particular.[65] The Association will use the signatures to prompt crime legislation at the state level when state legislatures reconvene in early 1995.[66]

While the impact of OSHA's regulation on workplace violence is yet to be seen, the success of Gainesville's ordinance is noteworthy[67] and signals that state legislation can be a viable method to encourage employers to take an affirmative role in protecting their employees from random violence occurring in the workplace. As one California assemblywoman stated, "corporate feet need to be held to the fire . . . . We certainly don't allow other kinds of workers' safety issues to be handled through volunteerism . . . ."[68]

III. JUDICIAL RESPONSE TO WORKPLACE VIOLENCE

As the workplace becomes more violent, an increasing number of victims and their families are bringing contract and negligence lawsuits against employers for breach of a duty to protect employees from the criminal acts of third parties.[69] Participation in workers' compensation schemes currently shields most employers from

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63. *See Job-Related Violence Falls Within OSHA Jurisdiction, Agency Official Says*, 24 O.S.H. Rep. (BNA) No. 21, at 1055 (Oct. 19, 1994).

64. *House Small Business Committee Requests Funds for More Research on Business Crime*, 24 O.S.H. Rep. (BNA) No. 12, at 607 (Aug. 17, 1994).

65. *Convenience Store Industry Kicks Off Petition Drive for Stiffer Sentencing*, 24 O.S.H. Rep. (BNA) No. 16, at 934 (Sept. 14, 1994) [hereinafter *Convenience Store*]. The convenience store industry is particularly active in pursuing safe workplaces for its employees. *See Removing Robbery Risk Could Shield Workers From Violence on the Job*, Occupational Health & Safety Letter (Bus. Publishers) (Aug. 22, 1994); Buss, *supra* note 14.

66. *Convenience Store*, *supra* note 65.

67. The success of Gainsville's ordinance has already been referred to in cases involving workplace violence. *See, e.g.*, Havner v. E-Z Mart Stores, 825 S.W.2d 456 (Tex. 1992).

68. Dunkel, *supra* note 41, at 70.

69. *See* Lipman, *supra* note 9, at 16.

liability in these civil suits because of the exclusive statutory remedy provided for employees injured in the workplace.[70] In the early twentieth century, civil suits brought by injured workers against employers were removed from the tort system by workers' compensation laws.[71] Under workers' compensation, employees relinquish their common-law rights in return for timely, scheduled payments for work-related injuries set forth in the compensation statutes.[72] This trade-off, or bargain, between the employer and the employee was ideal when it was first instituted because the prevailing tort system at the time made it difficult for employees to recover against employers and workers' compensation provided a quick, guaranteed recovery.[73]

Today, workers question the equity of this bargain in a society where the modern tort system fosters improved prospects for recovery and significantly higher monetary recoveries.[74] Even though the workers' compensation system provides a guaranteed recovery, it frequently serves as an inadequate remedy for certain workplace injuries, especially those incurred as a result of violence in the workplace.[75] Rather than providing full tort compensation for all

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70. *See, e.g.*, Stapleton v. Ashland Oil, Inc., 774 F.2d 622 (4th Cir. 1985); Grillo *ex rel.* Durham v. National Bank of Washington, 540 A.2d 743 (D.C. 1988); General Motors Acceptance Corp. v. David, 632 So. 2d 123 (Fla. Dist. Ct. App. 1994); Bercaw v. Domino's Pizza, Inc., 630 N.E.2d 166 (Ill. App. Ct. 1994); *contra* Peavler v. Mitchell & Scott Mach. Co., 638 N.E.2d 879 (Ind. Ct. App. 1994). *See also* DiLorenzo & Carroll, *supra* note 12, at 29; HENRY H. PERRITT, JR., WORKPLACE TORTS: RIGHTS & LIABILITIES § 1.28 (1991).

71. *See* Note, *Exceptions to the Exclusive Remedy Requirement of Workers' Compensation Statutes*, 96 HARV. L. REV. 1641, 1641 (1983) [hereinafter *Exceptions to Workers' Compensation*].

72. *Id.*; Paul C. Weiler, *Workers' Compensation & Product Liability: The Interaction of a Tort & a Non-Tort Regime*, 50 OHIO ST. L.J. 825, 826-27 (1989).

73. *See Exceptions to Workers' Compensation, supra* note 71, at 1641; Weiler, *supra* note 72, at 826-27.

74. *See Exceptions to Workers' Compensation, supra* note 71, at 1644-45 (easier for employees to recover under tort system today); CHARLES A. SULLIVAN ET AL., CASES & MATERIALS ON EMPLOYMENT LAW 1272 (1993) (one commentator cited a U.S. Chamber of Commerce Study that reported for a loss of a hand, workers' compensation coverage ranged from $8,675 to $102,510, but tort recovery for the same loss ranged from $150,000 to $425,000).

The average cost of a workplace injury covered under workers' compensation is $11,318. The average cost for a claim involving a shooting is $29,232. *Study Reveals Increase in Claims Involving Intentional Violent Acts*, 24 O.S.H. Rep. (BNA) No. 21, at 1057 (Oct. 19, 1994). In contrast, jury awards for inadequate security cost on average $1.2 million. Settlements out of court reach $600,000. Perry, *supra* note 19, at 18.

75. Injuries suffered by employees who are victims of violent attacks in the workplace are many times emotional in nature. For example, rape can subject a victim to long-term emotional, as well as physical damage. "Rape is a life-altering trauma. . . . It doesn't just happen one night and go away the next day or the next week. Victims deal with this on a daily basis for years and years afterward." Jill Agostino, *Why Do They Feel Sorry For the*

economic and noneconomic losses, the typical compensation scheme only provides medical and rehabilitation costs and approximately two-thirds of net wages.[76] Disability payments are available, but only if the employee is physically impaired or if a loss of earning capacity occurs.[77] Damages for pain and suffering are uncompensated under the statute and recovery for a worker's spouse or children is excluded.[78] For these reasons, employees are attempting to elude the exclusivity provisions of the statutes to obtain additional damages in civil suits against employers for injuries in the workplace.[79]

While most courts are reluctant to undermine the traditional workers' compensation bargain,[80] if victims of workplace violence continue to test the courts, it is possible the judicial system will consider establishing exceptions to the exclusive remedy limitation for these incidents.[81] Judicially created doctrinal exceptions to the exclusivity provisions of workers' compensation statutes are not unheard of. In fact, several courts have already carved out exceptions to the exclusivity requirement using a dual capacity doctrine, intentional tort exceptions, suits by third parties against employers for contribution and indemnity, and suits against parent and sibling corporations of the employers.[82] These judicial exceptions seek to address the inequities that exist because of the juxtaposition of workers' compensations schemes and the tort system.[83]

Culprit Instead of the Victim in Rape? BUFF NEWS, Feb. 12, 1995, at F-9. Death benefits are also extremely limited under workers' compensation. NICHOLAS A. ASHFORD & CHARLES C. CALDART, TECHNOLOGY, LAW & THE WORKING ENVIRONMENT 229 (photo. reprint 1995) (1991). Most states provide 400 to 500 weeks of the average weekly wage for a death in the workplace. RICHARD A. EPSTEIN, CASES & MATERIALS ON TORTS 936 (5th ed. 1990). Workers' compensation does not provide for emotional distress or pain and suffering. *See* 1 ARTHUR LARSON, THE LAW OF WORKMEN'S COMPENSATION § 2.40 (1990). In contrast, under the common law goal of full compensation, a tort recovery is not limited. Therefore, a victim who brings a cause of action in tort can recover substantial damages for emotional distress and pain and suffering. *See* EPSTEIN, *supra*, at 935; PERRITT, JR., *supra* note 70, § 2.33.

76. *Exceptions to Workers' Compensation, supra* note 71, at 1642.

77. *See* Weiler, *supra* note 72, at 826; EPSTEIN, *supra* note 75, at 935.

78. *See* LARSON, *supra* note 75, § 2.40; SULLIVAN ET. AL., *supra* note 74, at 1272.

79. Ballam, *supra* note 39, at 64.

80. *Exceptions to Workers' Compensation, supra* note 71, at 1654.

81. *Id.* at 1648; *see, e.g.*, Peavler v. Mitchell & Scott Mach. Co., 638 N.E.2d 879 (Ind. Ct. App. 1994). Courts are already questioning the employers' role in protecting workers from potentially violent co-workers. *See Employer Liability Seen Growing for Potential Hazards Posed by Employees*, 23 O.S.H. Rep. (BNA) No. 38, at 1287 (Feb. 23, 1994) (courts may start to look at who is responsible; this inquiry is based on trends for the employer and landlord to address safety problems).

82. *Exceptions to Workers' Compensation, supra* note 71, at 1648.

83. *Id.* at 1660-61.

> [T]he creation of the four exceptions . . . contributes to the achievement of compensation and efficiency goals. Each exception identifies a class of cases in which the exclusive remedy rule ought not to bar additional tort damages. . . . [T]he exceptions reap the efficiency advantages of imposing a greater share of accident costs on employers.[84]

For example, absent a judicial exception to entertain indemnity suits against employers, a third party whom an injured employee can recover against in full, whose responsibility may have been minimal compared with that of the employer, would be liable for the full amount of damages. As a result, the employer would escape all liability.[85]

The existence of judicial exceptions to the exclusive remedy of workers' compensation also demonstrates an attempt by the courts to correct the divergent recoveries available to employees under the two systems.[86] Notably, the extension of the strict product liability doctrine beyond consumer products to workplace products, which allowed workers to sue third-party manufacturers for injuries suffered in the workplace from defective machinery, resolved the inequity of a tort recovery available to a consumer and a limited workers' compensation recovery to an employee for an injury received from the same tool.[87]

Since judicially created exceptions are aimed at specific inequities, one inequity courts might consider in workplace violence situations is the fact that a business patron injured during a store robbery is afforded a tort claim against the business,[88] yet an employee injured in the same robbery would be limited to workers' compensation coverage. In addition, many injuries suffered by employees subject to violent attacks in the workplace are emotional, not physical, therefore affording little, if any, recompense under workers' compensation. For example, a rape, which causes extensive emotional damage, but may not cause any lasting physical injury, would be compensated significantly less under a workers' compensation scheme than an assault where an employee is beaten and sustains physical injuries even though both acts are equally heinous. Not only would a judicial exception created for workplace violence situations alleviate these inequities, increase the amount of compensation available, and transfer the true cost of the injury

84. *Id.* at 1652.

85. *Id.* at 1651.

86. *Id.* at 1652.

87. *Id.*

88. Perry, *supra* note 19, at 18 (workers' compensation does not shield employers when violent crime occurring in the workplace injures clients or independent contractors); *see, e.g.*, Cohen v. Southland Corp., 203 Cal. Rptr. 572 (Ct. App. 1984).

to the employer,[89] but such an exception would draw attention to the need for legislative action.[90]

While courts tend to defer to the workers' compensation "bargain" originally set forth by the legislature,[91] "courts can legitimately interpret the exclusive remedy rule in light of modern circumstances and goals."[92] As one federal court of appeals judge stated when confronted with a negligence action against an employer for a 2:00 a.m. robbery and rape of one of its clerks, "[p]rinciples of law pushed to their extremes frequently find themselves at war with one another. Their mutual accommodation, so that they may live, if in tension, nevertheless, at peace with one another, becomes the responsibility of the courts."[93] It is not appropriate for a court to strictly adhere to statutory language and legislative purpose when it is clear that the legislature was not confronting the issue of violence in the workplace, a recent development in modern society.[94]

> It is wrong to view the compensation system as a static bargain impervious to societal change. . . . [W]orkers would be bound by the strictures of the compensation system until legislatures roused themselves sufficiently to enact reform. . . . [T]he bargain must be recalibrated to reflect the changes in the realities of the tort system and the workplace that have made the . . . trade off unacceptable. Courts . . . applying workers' compensation statutes can accomplish . . . this adjustment by . . . not merely assuming tort reme-

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89. The payment of workers' compensation to employees injured by workplace violence does not fall upon the employer. Instead, it falls on the public because compensation premiums are considered a business operation expense and therefore employers incorporate premiums into product prices, which are paid for by consumers. *See* Ballam, *supra* note 39, at 77, 90-91; ASHFORD & CALDART, *supra* note 75, at 228. If employers are responsible for paying typical tort damages, which are viewed at common law as the true measure of full compensation to the victim, it will be difficult to pass these costs on to the consumer because it would require charging higher prices than competitors. Not only would this force the employer to bear the true costs of doing business, but paying tort damages would also serve as an incentive to protect employees. Ballam, *supra* note 39, at 90; *cf.* ASHFORD & CALDART, *supra* note 75, at 9 (workers' compensation has made the cost of accidents more predictable, therefore employers lost their economic incentive to avoid accidents); ASHFORD & CALDART, *supra* note 75, at 234-35 (workers' compensation and tort system should be modified so employers bear the 'external' costs of doing business).

90. *Exceptions to Workers' Compensation*, *supra* note 71, at 1653. Legislatures do respond to judicial opinions which request legislative action. *See Exceptions to Workers' Compensation*, *supra* note 71, at 1659; *see, e.g.*, Pamela B. v. Hayden, 31 Cal. Rptr. 147, 161 (Ct. App. 1994) (stating the legislature should take on the daunting task of imposing rational limits on landlord liability for criminal acts of third parties).

91. *Exceptions to Workers' Compensation*, *supra* note 71, at 1661; *see, e.g.*, Grillo *ex rel.* Durham v. National Bank of Washington, 540 A.2d 743, 754 (D.C. 1988).

92. *Exceptions to Workers' Compensation*, *supra* note 71, at 1654-55.

93. Stapleton v. Ashland Oil, Inc., 774 F.2d 622, 622 (4th Cir. 1985).

94. *See Exceptions to Workers' Compensation*, *supra* note 71, at 1656-57.

dies are precluded.[95]

IV. VICTIMS' RIGHTS LITIGATION AND THE *KLINE* DECISION

"Society's need to deter crime is spurring a new trend in tort liability. . . . '[V]ictims' rights litigation' is establishing legal duties" that were nonexistent thirty-five years ago.[96] Liability is imposed under a theory that a crime was committed against a particular victim as a result of the breach of a third party's duty to protect.[97] Victims are now enjoying significant success in suits against these third parties despite the intervening acts of criminals.[98] Accompanying the success of these suits is the fact that courts are paying less attention to victim compensation provided under insurance contracts, restitution and state-funded compensation programs.[99] This trend suggests that courts are increasingly finding justifications in the law to hold third parties liable when violent attacks are involved, regardless of whether victims obtain compensation elsewhere.

Some employers feel they have no duty to protect their employees from the criminal acts of third parties, including the payment of workers' compensation. In *Jesse v. Savings Products*,[100] the employer and its insurance company appealed an award of workers' compensation benefits for chronic post-traumatic stress syndrome suffered by a convenience store clerk who was raped by a customer while working alone during a late night shift.[101] First, the employer argued that there was no employment-related motive on the part of the assailant because he took no money or other property from the store.[102] The assailant succeeded only in committing a rape, which alone suggested a personal motive.[103] Second, the employer argued that the plaintiff received no significant physical injury and that any mental disability incurred by the clerk was

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95. *Id.*

96. *See* Gregory A. Crouse, *Negligence Liability for the Criminal Acts of Another*, 15 J. MARSHALL L. REV. 459, 459-60 (1982). "Victims' rights litigation" is a term adopted by modern commentators that refers to cases where a victim brings a civil suit against a criminal or negligent third party whose act allegedly caused an injury. *Id.* at 459 n.4.

97. *Id.* at 461.

98. *Id.* at 462.

99. *Id.*

100. 772 S.W.2d 425 (Tenn. 1989).

101. *Id.* at 426.

102. *Id.*

103. *Id.* at 427. However, the employer overlooked the fact that the police arrived during the attack and were able to apprehend the assailant. *Id.* at 426.

a result of past problems in her life, not a result of the rape.[104]

Similarly, twenty-five years ago landlords also argued that they had no duty to protect their tenants from the criminal attacks of third parties.[105] However, successful victims' rights litigation succeeded in imposing liability on some landlords for violent attacks on their tenants.[106] In 1970, the traditional immunity afforded landlords, although different in nature from the immunity provided employers through workers' compensation, was eliminated with a decision from the District of Columbia Circuit in *Kline v. 1500 Massachusetts Avenue Apartment Corp.*[107]

A. *The* Kline *Decision: The Downfall of Traditional Immunity Afforded Landlords for Criminal Attacks upon Tenants*

In the past, as a general rule, a landlord had no duty to protect tenants from third party criminal attacks.[108] Courts recognized this rule in landlord-tenant law because of their reluctance to intrude on the landlord-tenant relationship, the intervening act of the criminal, the difficulty of determining foreseeability of criminal acts, the vagueness of a standard the landlord would have to meet, economic consequences of the imposition of a duty and the responsibility of law enforcement officials in the public sector to provide protection.[109] However, beginning in 1970 with the landmark *Kline* case, courts started to recognize the realities of modern day urban apartment living and were forced to reevaluate landlords' responsibilities with respect to the safety of tenants from third party criminal acts.[110]

In *Kline*, the court held a landlord liable for injuries suffered when a criminal assaulted and robbed a tenant in a common hallway of an apartment building.[111] Liability in tort founded upon a breach of a duty to protect the tenant existed for two reasons. First, the landlord had an implied obligation, arising from the contractual relationship with the tenant, to provide "those protective

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104. *Id.* at 426.

105. *See* James L. Weiss, Comment, *Landlord Liability - Obligation to Maintain Adequate Security - A Comparative Study*, 59 TUL. L. REV. 701, 701 (1985).

106. *See* Crouse, *supra* note 96, at 461.

107. 439 F.2d 477 (D.C. Cir. 1970); *see also* Weiss, *supra* note 105, at 704; Crouse, *supra* note 96, at 469.

108. *See* Crouse, *supra* note 96, at 469; *see also* B.A. Glesner, *Landlords as Cops: Tort, Nuisance & Forfeiture Standards Imposing Liability on Landlords for Crime on the Premises*, 42 CASE W. RES. L. REV. 679, 685 (1992).

109. *Kline*, 439 F.2d at 481.

110. Irma W. Merrill, Note, *Landlord Liability for Crimes Committed by Third Parties Against Tenants on the Premises*, 38 VAND. L. REV. 431, 434 (1985).

111. *Kline*, 439 F.2d at 478.

measures which are within his reasonable capacity."[112] Second, a criminal attack upon the tenant was foreseeable because of the landlord's knowledge of repeated criminal activities on the premises.[113] The court also emphasized the landlord's control over the common areas[114] of the building and his superior economic position which made him better equipped to guard against the risk of harm.[115] The court noted that the landlord's control exceeded even that of the police, who could not patrol entryways and garages of apartment buildings, and also the control of tenants, who were unable to secure common areas.[116] While the landlord is not an "insurer of his tenant's safety," he has "obligations to aid in law enforcement and to minimize opportunities for crime."[117]

In the aftermath of *Kline*, many courts have begun to hold landlords who fail to provide adequate security liable for criminal attacks on their tenants,[118] a liability that landlords did not envision would materialize. Many employers today feel as landlords did twenty-five years ago. Yet, the judiciary or legislature could revive the reasoning set forth in *Kline* to justify an imposition of a duty upon an employer to protect its employees from the criminal acts of third parties. To establish liability against landlords, injured tenants advance several theories, some of which could be equally viable in the employment context. For example, victims of workplace violence can bring contract and tort actions against employers based on breach of an express or implied contract, a voluntary assumption to provide security, or ordinary negligence.

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112. *Id.* at 485. The standard of care to be met in *Kline* included the degree of security that existed when the lease was signed. *Id.* at 486. The notion first set forth in *Kline* that a landlord has an implied contractual obligation to maintain the security that existed at the lease's inception was never implemented in any court, but instead the implied obligation took the form of an implied warranty of habitability. *See* Weiss, *supra* note 105, at 705. Using a theory of an implied warranty of habitability to find liability for criminal attacks of third parties is argued as imposing a strict liability standard upon a landlord. *See* Merrill, *supra* note 110, at 446.

113. *Kline*, 439 F.2d at 483. The landlord in *Kline* had actual and constructive notice that the building was experiencing a "rising wave of crime. . . . [Therefore] the landlord here 'was aware of conditions which created a likelihood' . . . that further criminal attacks upon tenants would occur." *Id.*

114. *Id.* at 481.

115. *See id.*

116. *Id.* at 480, 484.

117. *Id.* at 484.

118. Weiss, *supra* note 105, at 701.

V. Legal Theories to Utilize in a Civil Suit Against an Employer to Impose Liability for Crimes in the Workplace

A. *Breach of Express or Implied Contract*

The existence of an express or implied contractual duty to protect an individual from a criminal attack is much easier to apply in the landlord context than it is in the employment context. Most landlords enter into leases with their tenants, the lease being the contract giving rise to the express or implied duty.[119] Existence of a contract in the employment context is much more difficult to establish. Many people in the workforce today are "at-will" employees with no written employment contracts.[120] However, cases such as *Woolley v. Hoffmann-La Roche, Inc.*[121] and *Foley v. Interactive Data Corp.*,[122] indicate that contractual obligations can arise between an employer and employee absent a formal written contract. As a result of these holdings, employers' express statements, handbooks and manuals can create enforceable implied-in-fact employment contracts.

The New Jersey Supreme Court in *Woolley* concluded:

> [W]hen an employer of a substantial number of employees circulates a manual that, when fairly read, provides that certain benefits are an incident of the employment . . . the judiciary, instead of "grudgingly" conceding the enforceability of those provisions . . . should construe them in accordance with the reasonable expectations of the employees . . . .[123]
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> . . . The manual is an offer that seeks the formation of a unilateral contract — the employees' bargained-for action needed to make the offer binding being their continued work when they have no obligation to continue.[124]

In *Foley*, the California Supreme Court held that the company's own conduct and personnel policies could give rise to an enforceable oral contract with its employees.[125] While recognizing a threat to the traditional "at-will" relationship of the parties,[126] the court

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119. *See* Glesner, *supra* note 108, at 698; *see also Kline*, 439 F.2d at 485; Flood v. Wisconsin Real Estate Inv. Trust, 503 F. Supp. 1157, 1160 (D. Kan. 1980).

120. Sullivan et al., *supra* note 74, at 8 n.13.

121. 491 A.2d 1257 (N.J. 1985) (holding that implicit contract limited employer's ability to fire an employee for other than cause despite the fact that the employment was terminable at will).

122. 765 P.2d 373 (Cal. 1988) (holding that statute of frauds did not bar an action for breach of an oral or implied contract that could be performed within one year).

123. *Woolley*, 491 A.2d at 1264.

124. *Id.* at 1267.

125. *Foley*, 765 P.2d at 387-88.

126. *See id.* at 387.

found "no sound reason to exempt the employment relationship from the ordinary rules of contract interpretation which permit proof of implied terms."[127] The statute of frauds did not negate the oral agreement because contract performance was possible within one year.[128] For instance, the employee could quit or be terminated during this one year period.

If a contract exists expressing an employer's intention to provide a "safe" working environment, an employee/victim of workplace violence could bring an action against an employer not only for breach of contract, but also for breach of the covenant of good faith and fair dealing implied in most contracts.[129] Under such a theory, in order for employees to function on the job and perform their bargained for exchange, it is the employer's duty to provide a safe workplace for the employees. Some courts today recognize an urban apartment lease as an exchange of rent for a "well known package of goods and services," which *includes* reasonable security protection as part of that expected package.[130] The same can be said about the employer/employee bargain. The employee exchanges services in return for a package which includes wages and a reasonably safe place to work.[131]

One victim attempted to bring a tort claim against an employer in *Williams v. Munford, Inc.*.[132] The plaintiff in this case was an eighteen-year-old convenience store clerk raped by a criminal in the course of a store robbery at 4:00 a.m.[133] The store was located in a high crime area of Mississippi and had a history of frequent robberies during which other clerks were injured.[134] Despite the prior incidents, the employer did not implement security measures.[135] The clerk had no key to lock the doors and was not permitted to keep a weapon.[136] In addition to a negligence claim, the plaintiff advanced the theory that her employer breached a

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127. *Id.*

128. *Id.* at 383 ("It has been repeatedly held that, if an agreement . . . may be completely performed within one year . . . it is not within the statute of frauds.") (citations omitted).

129. RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981). Section 205 states that every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement. *Id.*

130. Merrill, *supra* note 110, at 448 (emphasis added) (citations omitted).

131. Even though crime rates continue to rise, employees still expect their workplaces to be safe. Paul Holley, *For Employers, Answers to Workplace Violence Prove Elusive*, BUS. J. MILWAUKEE, Oct. 1, 1994, at 1.

132. 683 F.2d 938 (5th Cir. 1982).

133. *Id.* at 938.

134. *Id.*

135. *Id.*

136. *Id.*

contractual duty to provide her with a safe workplace.[137] This breach, in light of the employer's knowledge of prior incidents and failure to implement any security measures, constituted an action so callous and reckless as to amount to an intentional tort, thus escaping the exclusivity of a workers' compensation remedy.[138] The Fifth Circuit concluded that Mississippi courts have labeled this type of action as an "endrun" around the workers' compensation system and have held them to be contrary to the "spirit and philosophy of the Workmen's Compensation Act."[139]

In another case seven years later, *Tabor v. Munford, Inc.*,[140] a nineteen-year-old clerk working alone in a Michigan convenience store was murdered during a nighttime criminal attack.[141] Her estate claimed the employer breached its contract to provide safe working conditions to the decedent.[142] The court dismissed the claim stating that the plaintiffs attached a breach of contract label to what was essentially a negligence claim.[143] Relying on an earlier Michigan Supreme Court decision, *Beauchamp v. Dow Chemical Co.*,[144] the court held the "all-inclusive character of the exclusiveness principle [of workers' compensation] results in barring actions for covered injuries even though the plaintiff casts his action in the form of a breach of some kind of contract."[145]

Even if breach of contract claims could escape workers' compensation exclusivity provisions, prevailing under a breach of contract theory would not be very effective in encouraging employers to take an active role in protecting their employees because liability would be limited to the facts of each case. Employer liability for breach of a contractual promise to protect would depend on the existence of an employment contract, including any written and oral exchanges between the employer and employee, the degree of security existing in other similar establishments, and the types of security existing at the time the employment contract came into existence. Not only would these cases require additional resources such as time and attorney fees, but the limitation on damages in contract actions would leave employers merely paying for items that a workers' compensation scheme requires them to pay. Dam-

137. *Id.* at 940.

138. *See id.*

139. *Id.* (quoting Brown v. Estess, 374 So. 2d 241, 242-43 (Miss. 1979)).

140. No. G86-132 CA5, 1989 U.S. Dist. LEXIS 10785 (W.D. Mich. Feb. 17, 1989).

141. *Id.* at *1.

142. *Id.* at *4.

143. *Id.* at *6.

144. 398 N.W.2d 882 (Mich. 1986) (citations omitted), *superseded by statute*, MICH. COMP. LAWS. § 418.131 (1987).

145. *Id.* at 894.

ages allowed in contract actions, including breach of the implied duty of good faith and fair dealing,[146] are limited to economic losses such as property or personal injury.[147] Contract remedies do not include punitive damages and compensation for pain and suffering.[148] In addition, employers will still have control over the decision to implement security measures based on what, if any, oral or written statements they make to employees. While advocates of a free market system would argue that employees can bargain for security, the current job market is not conducive to individual employee demands that security provisions be incorporated into working relationships.[149] Employers are relatively free to refuse such demands without suffering harm because they can easily replace employees facing workplace violence, who very often are low-wage, semi-skilled workers.[150] In addition, relatively quick employee turnover rates and isolated working conditions do not facilitate powerful, organized movements that could prompt employers to provide safer working environments.

B. *Voluntary Assumption of a Duty to Protect*

Under a voluntary assumption theory, an employer's duty to protect employees from the criminal acts of third parties arises from the employer's express or implied promise to provide security.[151] The issue under this theory is not whether a duty to protect on the part of an employer exists, but whether the employer actually assumed the duty.[152] If an employer is found to have assumed a duty to protect, he is bound to exercise that duty with reasonable care. If he does not, liability can be imposed if harm results. Section 324A of the *Restatement (Second) of Torts* declares:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if (a) his failure to exercise reasonable care increases the risk of such harm, or (b) he has undertaken to perform a duty owed by the other

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146. *See* PERRITT, *supra* note 70, § 1.18; *see, e.g.*, Foley v. Interactive Data Corp., 765 P.2d 373, 374 (Cal. 1988).

147. *See* Glesner, *supra* note 108, at 698 n.88.

148. *See id.*

149. *See generally* ASHFORD & CALDART, *supra* note 75, at 226-31 (arguing that many workers are willing to tolerate a high level of workplace risk rather than jeopardize job security).

150. *See id.* at 243.

151. *See* Glesner, *supra* note 108, at 695.

152. *See id.* at 696.

to the third person, or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.[153]

Assumption of a duty to protect exists where employers contract to provide security, or where they actually implement security measures. In *Vaughn v. Granite City Steel Division of National Steel Corp.*,[154] for example, the Illinois appellate court found an employer's duty to protect existed based on a voluntary contractual undertaking to protect the employee while he was on the premises.[155] In *Vaughn,* the decedent/employee was a victim of a latenight homicide in his employer's parking lot shortly before he was to begin work.[156] A jury returned a $415,000 verdict against the employer after the employee's estate brought an action under the state's wrongful death statute,[157] which required a finding of a duty on the part of the employer to protect the decedent.[158] Appealing the judgment of the trial court, the employer argued that its motion for a judgment notwithstanding the verdict should be granted because the company owed no "legally cognizable duty" to the decedent.[159] However, the appellate court declared that the duty issue was "decided without difficulty" because of the employer's voluntary undertaking.[160]

The court in *Vaughn* turned to a company-issued manual entitled "Standard Operating Procedures, Plant Protection Department" to determine that the employer did indeed assume the duty to protect the decedent.[161] Statements in the manual such as, "[t]o maintain the peace and protect all employeees and their property while they are on the Company's premises," made it clear the employer intended to protect its employees.[162] Other statements reflected a duty to keep strangers off the premises and provide a security force to perform its duties: "[t]o deny access to all persons not specifically authorized or properly invited," and "[t]o provide a readily available, trained, and responsive force to function in emergencies."[163]

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153. RESTATEMENT (SECOND) OF TORTS § 324A (1965).

154. 576 N.E.2d 874 (Ill. App. Ct. 1991).

155. *Id.* at 878.

156. *Id.* at 876.

157. *Id.*

158. *Id.* at 877.

159. *Id.* at 878.

160. *Id.* Vaughn's estate urged that a duty existed based on a special employer/employee relationship, the foreseeability of the criminal act and the company's voluntary contractual undertaking to protect the decedent. *Id.* at 877.

161. *Id.* at 879.

162. *Id.* at 879-80.

163. *Id.* at 879.

Martin v. McDonald's Corp.[164] is another case where a court utilized a voluntary assumption theory to create a duty on the part of a defendant to protect employees. In *Martin,* a six-woman teenage crew was working to clean up and close a McDonald's restaurant in Illinois when an armed robber appeared in the back of the restaurant.[165] While forcing the crew into the refrigerator, the robber shot and killed one teen and assaulted two others.[166] The trial court awarded $1,003,445 in damages for the wrongful death of the girl the robber killed and $125,000 for negligent infliction of emotional distress to each of the girls the robber assaulted.[167] McDonald's appealed the damage awards stating they owed no duty to protect the victims because it was merely the licensor of the business.[168] The appellate court rejected the argument and found that the corporation owed a duty of care and protection because it had voluntarily assumed the duty to protect employees of its licensees.[169] The Illinois appellate court justified its use of the voluntary assumption theory to impose liability because the state supreme court had used the same theory to impose liability in two Illinois landlord-tenant cases.[170]

The *Martin* court found that McDonald's had assumed an increased responsibilty for care and protection of its franchisors' employees because it had created a separate corporate branch to deal with security problems and had prepared a "bible" for store security operations.[171] The corporation also had a regional security manager who checked on restaurant security problems, contacted individual restaurant managers regarding security policies, and was obligated to "follow-up" to ensure problems were handled and that security procedures were followed.[172] While the restaurant manager where the attack occurred was never given the security procedures manual, the regional security manager from McDonald's did inform the manager regarding proper closing procedures, which included instructions not to use the back door after dark.[173] Realizing the importance of prohibiting entry after dark through the rear of the restaurant, the regional security manager also ordered a security window and new alarm system for the back door prior to the

164. 572 N.E.2d 1073 (Ill. App. Ct. 1991).
165. *Id.* at 1076.
166. *Id.*
167. *Id.* at 1075-76.
168. *Id.* at 1076.
169. *Id.* at 1078.
170. *Id.* at 1076.
171. *Id.* at 1077.
172. *Id.*
173. *Id.*

attack.[174]

Since the court found the corporation had assumed this duty, the corporation was responsible for performing it with due care and competence.[175] The court held that the corporation did not perform its duty with due care because the regional security manager never followed-up to ensure the crew's proper implementation of security procedures.[176] Furthermore, testimony revealed that most of the employees were not informed with regard to the use of the back door after dark and that employees had moved the dumpster close to the back door to facilitate the disposal of garbage.[177]

McDonald's requested that they be "afforded the protection given in section 5(a) of the Illinois Workers' Compensation Act," which would limit the employees to the exclusive remedy provided for under the Act.[178] The *Martin* court agreed with the jury's determination that the individual restaurant manager/licensee was an agent of the corporation/licensor. Therefore the store manager's negligence for not communicating safety procedures to his employees was attributable to the corporation.[179] Despite the fact that restaurant manager was an agent of the corporation, and the corporation was responsible for his negligent act, this did not make McDonald's the restaurant manager's employer.[180] Therefore, the court found the workers' compensation could not be utilized to protect McDonald's from the civil suit brought by the franchisee's employees.[181]

The theory of a voluntary assumption of a duty to protect is an important one in modern society because employers often lease their property from a commercial landlord.[182] Depending on the terms of the lease, the commercial lessor and/or employer/lessee, could be liable for the same violent act against an employee of the employer/lessee. For example, in *Rowe v. State Bank of Lombard*,[183] a masked intruder gained access to a commercial office park and accosted two female employees working from midnight to

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174. *Id.*
175. *Id.* at 1078.
176. *Id.*
177. *Id.*
178. *Id.* at 1080.
179. *Id.*
180. *Id.*
181. *Id.*
182. Many parties become entangled in a negligent security lawsuit when a business owner leases property from a commercial landlord. *See* Perry, *supra* note 19, at 18; Johnson & Indvik, *supra* note 16, at 518.
183. 531 N.E.2d 1358 (Ill. 1988).

8:00 a.m., seriously injuring one and killing the other.[184] The plaintiffs initially brought separate actions for personal injury and negligence under wrongful death and probate statutes, but the actions were consolidated by the trial court.[185] The actions were against, *inter alia,* the employer/tenant, the park owner/lessor, and the lessor's managing agent.[186] The trial court denied the employer's motion for summary judgment, but granted summary judgment to the lessor and the lessor's agent.[187] The appellate court affirmed the grant of summary judgment to the lessor and agent, but the Illinois Supreme Court reversed, stating there was a triable issue of fact as to whether the lessor and agent owed a duty to the business tenant's employees.[188]

In reversing the grant of summary judgment to the lessor and agent, the Illinois Supreme Court discussed voluntary undertaking, making three statements of particular importance. First, in the lease, the lessor specifically disclaimed responsibility for protecting tenants from criminal acts on the premises, therefore negating any intent to assume a duty to protect.[189] Second, while the landlord agreed to provide illumination in common areas, such action is "commonplace" and cannot be reasonably regarded as an assumption of a duty to deter criminal attacks.[190] Third, a mere investigation by the lessor's agent in response to a call that an intruder was on the premises cannot create a duty to protect.[191]

Imposing a voluntary duty upon employers to protect employees under an assumption theory could be very productive in the employment context if employees were given oral assurances, or found written statements in company handbooks that demonstrated that an employer intended to provide a safe workplace. However, utilizing the theory to prompt employers to implement security measures for the protection of their employees would not be recommended. It is uncertain what actions or statements on the part of an employer would be fairly viewed as a true assumption of a duty to protect the employee. As seen from *Rowe,* lights and doorlocks are common incidents to maintaining property and do not rise to an assumption of any duty. Would an assumption occur then only if the employer provided security measures that are

184. Rowe v. State Bank of Lombard, 505 N.E.2d 1380, 1382 (Ill. App. Ct. 1987), *aff'd in part, rev'd in part,* 531 N.E.2d 1358 (Ill. 1988).

185. *Id.* at 1381-82.

186. *Id.* at 1382.

187. *Id.* at 1383.

188. Rowe v. State Bank of Lombard, 531 N.E.2d 1358, 1370 (Ill. 1988).

189. *Id.* at 1365.

190. *Id.*

191. *Id.* at 1365-66.

unique or extraordinary, such as a security system or guards?[192] Because it is unclear when a voluntary assumption begins, fear of liability could deter an employer from implementing any security measures at all. While an employer has an incentive to install security measures to protect business property, therefore protecting its investment, the incentive is minimized when the security measures act to expose an employer to potential civil liability for injuries to its employees.[193]

C. *Negligence*

Courts are generally reluctant to hold an individual responsible for the intentional criminal acts of third parties.[194] However, the doctrine of ordinary negligence has played a major role in imposing liability upon landlords for criminal attacks on their tenants.[195] The elements of a negligence action include the existence of a duty, a breach of that duty and damages proximately resulting from the breach.[196] Negligent conduct can be an affirmative act that creates an unreasonable risk of harm to another or a failure to act which is negligent only if there is a duty to act.[197] When a court is asked to consider whether a duty exists on the part of an individual to protect another from foreseeable criminal activity, the nature of criminal acts in modern society becomes particularly troublesome.

> [T]he law ordinarily does not require the prudent person to expect the criminal activity of others.
>
> Since duty is essentially a recognition of an obligation imposed as a response to human experience, a conflict has arisen due to the significant increase in crime .... [M]odern living has revealed that there are situations where criminal activity can be predicted with a significant degree of probability. Simultaneously, ... occurrence of crime is still so unpredictable ....[198]

The unpredictable nature of crime makes it generally reasonable for an individual to risk the possibility of a criminal act without

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192. One commentator notes a voluntary duty requiring a landlord to provide adequate security to prevent attacks upon tenants would be "vague, inefficient, inequitable, and counterproductive." Rex A. Sharp, *Paying for the Crimes of Others? Landowner Liability for Crimes on the Premises*, 29 S. TEX. L. REV. 11, 50 (1987).

193. Glesner, *supra* note 108, at 699.

194. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 33, at 201 (5th ed. 1984).

195. *See* Glesner, *supra* note 108, at 702.

196. KEETON ET AL., *supra* note 194, § 30, at 164-65.

197. RESTATEMENT (SECOND) OF TORTS § 284 (1965).

198. Crouse, *supra* note 96, at 465.

taking preventative measures because the continual burden of those measures outweigh the apparent risk.[199] In addition, a duty to protect is seen as an exception to the general rule that a person has no duty to protect another from criminal acts.[200] A person's general duty to protect all individuals from crime would be unrealistic, not only because of the cost,[201] Therefore, courts turn to special relationships,[203] special circumstances,[204] such as when an individual exposes another to an unreasonable risk of crime, or statutes[205] to find an exception to the general rule.

While victims of workplace violence are attempting to create exceptions to the rule that an employer has no duty to protect them from random workplace violence, it is already recognized that "[i]n the employment context, the major hurdle typically is in finding the existence of any duty at all."[206]

1. *Duty Created by Special Relationship.* An employer could have a duty to protect employees from criminal attacks based on the recognition of a "special relationship" between the employer and employee. A special relationship is recognized by a court when an individual has a special responsibility to protect the victim or if the individual creates a temptation for criminal acts that requires him to protect against foreseeable criminal activity.[207] The *Restatement Second of Torts* states that special relationships exist, giving rise to a duty to protect between common carriers and passengers, innkeepers and guests, possessors of land and the invited public, and jailers and inmates.[208] The duty is created in these relationships based on the superior control of one of the parties to perceive and protect the other from the risk of a criminal attack.[209]

Until recently, a special relationship giving rise to a duty on the part of a landlord to protect his tenants never received much credence from the courts,[210] even though *Kline* enunciated that the modern landlord/tenant relationship is analogous to that of the

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199. KEETON ET AL., *supra* note 194, § 33, at 203.

200. Crouse, *supra* note 96, at 465.

201. *Id.*.

202. *Id.* at 467 (declaring the difficulties of imposing a duty when fifty people might fail to rescue one).

203. *See infra* part VI.C.1.

204. *See infra* part VI.C.2.

205. *See infra* part VI.C.3.

206. PERRITT, *supra* note 70, § 2.22, at 46.

207. KEETON ET AL., *supra* note 194, § 33, at 202.

208. RESTATEMENT (SECOND) OF TORTS §§ 302B cmt. e, 314(a), 315, 320 (1965).

209. *Id.* § 320; *see* Crouse, *supra* note 96, at 468.

210. *See* Glesner, *supra* note 108, at 703 (citations omitted).

traditional innkeeper/guest.[211] However, an increasing number of jurisdictions are moving toward a recognition of this analogy and subsequent imposition of a duty existing in the law through a special landlord/tenant relationship.[212] If a special relationship can be found between a landlord and a tenant giving rise to a duty to protect, a special relationship can also be justified between an employer and employee.

In *Lillie v. Thompson*,[213] the Supreme Court recognized that a special relationship could exist between an employer and an employee giving rise to a duty of care.[214] In *Lillie*, the employer required a twenty-two year old operator to work alone, overnight in an isolated, small building located in a railroad yard.[215] The railroad yard had inadequate lighting, no guard service, and the building had no windows that would allow the woman to see who was knocking on the door.[216] Her job entailed the collection and dissemination of messages to passing train operators who stopped by the building.[217] One night she opened the door, assuming the visitor to be a train operator, and was subsequently beaten and permanently injured by a man bearing a tire iron.[218] The petitioner alleged, "[the employer] was aware of conditions which created a likelihood that a young woman performing the duties required of [her] would suffer just such an injury as was in fact inflicted upon her."[219] The employer had a duty to make reasonable provisions to prevent the danger it was aware of, regardless of whether the danger was from criminal misconduct, and a breach of that duty would constitute negligence.[220]

The notion of a special relationship existing between an employer and employee has been rejected in the state of Alabama. In *Parham v. Taylor*,[221] an armed robber entered a liquor store shortly after 10:00 p.m. and shot the store clerk.[222] The employee attempted to recover against her employer based on negligence in failing to provide a safe workplace, workers' compensation cover-

211. Kline v. 1500 Mass. Ave. Apartment Corp., 439 F.2d 477, 485 (D.C. Cir. 1970).

212. Glesner, *supra* note 108, at 703.

213. 332 U.S. 459 (1947).

214. *Id.*; *see also* Sharp, *supra* note 192, at 27 n.62; *Kline*, 439 F.2d at 483; *contra* Parham v. Taylor, 402 So. 2d 884, 886 (Ala. 1981).

215. *Lillie*, 332 U.S. at 460.

216. *Id.* at 461.

217. *Id.*

218. *Id.*

219. *Id.* at 461-62.

220. *Id.* at 462.

221. 402 So. 2d 884 (Ala. 1981).

222. *Id.* at 885.

age and breach of an employment contract.[223] The trial judge granted summary judgment to the employer on all three counts.[224] The employee appealed the negligence claim and the Alabama Supreme Court affirmed, concluding that the employer was not liable as a matter of law.[225] The court felt that employers should not be saddled with civil liability to employees for criminal attacks of third parties except in the "most extraordinary and highly unusual circumstances."[226]

> In spite of police protection afforded by the state it is a fact of life that citizens are sometimes assaulted, beaten, robbed, raped or murdered at home, at work or on the streets. This is a problem which confronts all citizens equally and for which there is often no civil remedy.[227]

While the court went on to distinguish bank tellers and all-night attendants as occupations which entail a substantial risk of exposure to criminal acts, it stated that liability should not attach unless the employer "greatly and unreasonably increased [the] risk without taking reasonable precautions for the safety of the employee. . . . [I]t is clear that the defenses of contributory negligence and assumption of risk are available when appropriate."[228]

2. *Duty Created by Special Circumstances: The Role of Foreseeability.* Even if a special relationship is not found to exist between an employer and employee, thereby negating a duty to protect as a matter of law, the court can employ policy justifications in order to justify the imposition of a duty.[229] As Dean Prosser stated, "it should be recognized that 'duty' is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection."[230] Therefore, courts look to special circumstances to create a duty to protect, such as foreseeability of harm to the plaintiff, certainty of the plaintiff's injury, closeness of the connection between the defendant's conduct and the injury suffered by the plaintiff, moral blame, policy of preventing future injury, burden on the defendant, consequences to the community of imposing the duty, and the availability, cost, and existence of in-

223. *Id.*
224. *Id.* at 885-86.
225. *Id.* at 887.
226. *Id.* at 886.
227. *Id.* (quoting Thoni Oil Magic Benzol Gas Stations, Inc. v. Johnson, 488 S.W.2d 355, 357 (Ky. 1972)).
228. *Id.* at 886-87.
229. *See* Crouse, *supra* note 96, at 470-71; *see also* Sharp, *supra* note 192, at 21.
230. KEETON ET AL., *supra* note 194, § 53, at 358.

surance to cover the risk.[231]

Foreseeability of crime appears to be the primary consideration[232] with regard to the question of duty in workplace violence cases, and its consideration is both crucial[233] and controversial.[234] The existence of a legal duty of care is a question of law to be determined only by the court,[235] while foreseeability is ordinarily a question of fact for the jury, and is decided as a question of law only if there is no room for a reasonable difference of opinion.[236] Since foreseeability is a factor the court considers when deciding if a duty exists under a special circumstances approach, the role foreseeability plays for the court and the jury must be distinguished. Foreseeability in a duty context is limited to an evaluation of "whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed on the negligent party."[237] Essentially, the court measures a duty by the scope of the risk that the negligent conduct foreseeably entails.[238] "Thus, the court determines whether the risk of harm was reasonably foreseeable, charting out the areas of liability and excluding the remote and unexpected."[239] This role is contrasted with the "fact-specific foreseeability questions bearing on negligence (breach of duty) and proximate causation posed to the jury or trier of fact."[240] Under the jury's proximate cause inquiry, a determination is made of whether the particular harm was foreseeable, i.e., likely enough to follow from the defendant's negligence to justify holding him responsible.

Since the existence of a duty as a matter of law is essential to any negligence action, what the court considers as evidence of foreseeability of a particular type of harm to the victim is crucial. In cases involving violent attacks, courts use a prior similar incidents rule or a totality of the circumstances test to evaluate the evidence of foreseeability.[241] Under a prior similar incidents rule the court

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231. Ann M. v. Pacific Plaza Shopping Ctr., 863 P.2d 207, 212 n.5 (Cal. 1993).

232. *See, e.g.*, Cohen v. Southland Corp., 203 Cal. Rptr. 572, 576 (Ct. App. 1984); Gomez v. Ticor, 193 Cal. Rptr. 600, 603 (Ct. App. 1983); Graham v. M & J Corp., 424 A.2d 103, 105 (D.C. 1980).

233. *See, e.g., Ann M.*, 863 P.2d at 214; Isaacs v. Huntington Memorial Hosp., 695 P.2d 653, 657 (Cal. 1985); Lopez v. McDonald's, 238 Cal. Rptr. 436, 443 n.6 (Ct. App. 1987).

234. *See* Sharp, *supra* note 192, at 23.

235. KEETON ET AL., *supra* note 194, § 37, at 236.

236. Bigbee v. Pacific Tel. & Tel. Co., 665 P.2d 947, 950 (Cal. 1983) (citations omitted).

237. *Lopez*, 238 Cal. Rptr. at 443 (quoting Ballard v. Uribe, 715 P.2d 624, 629 n.6 (Cal. 1986)).

238. *Id.* (citations omitted).

239. *Id.* at 444 (citations omitted).

240. *Id.* at 443 (citations omitted).

241. *See* Sharp, *supra* note 192, at 64.

considers the proximity, time, number and types (i.e., burglary, rape) of prior violent incidents and then determines if the particular harm befalling the plaintiff was foreseeable in light of these prior acts.[242] Under a totality of the circumstances test, the court is allowed to consider not only past criminal acts, but also the nature of the business, the condition of the premises and the surrounding neighborhood.[243] Many courts have turned to a totality of the circumstances test[244] for several reasons, outlined most clearly in the California Supreme Court decision of *Isaacs v. Huntington Memorial Hospital.*[245]

In *Isaacs,* a doctor was shot in the chest by an assailant in a hospital parking lot after he left the hospital around 10:00 p.m.[246] Dr. Isaacs and his wife alleged that the hospital failed to provide adequate security measures to protect him against the criminal acts of third parties on the premises.[247] At trial, evidence was presented showing that the hospital was located in a high crime area, several threats to individual safety had occurred in the emergency room area across from the parking lot, and thefts had occurred in the surrounding area.[248] Additional testimony revealed that emergency room facilities and their surrounding areas are inherently dangerous, and that parking lots by their very nature give rise to a special temptation and opportunity for criminal conduct.[249] The trial court granted the hospital its motion for a nonsuit claiming, *inter alia,* the plaintiffs failed to produce evidence of prior similar incidents and the reasonable foreseeability of the shooting.[250] The Isaacs appealed, and the California Supreme Court reversed, stating the trial court erred as a matter of law in determining that the doctor's assault was not foreseeable.[251] Rejecting a recent line of court of appeals cases requiring proof of prior similar incidents before a duty could be imposed upon landowners to anticipate criminal activities of third parties, the court

242. *Id.* at 65-68.

243. *Id.* at 64-65; *see, e.g.,* Isaacs v. Huntington Memorial Hosp., 695 P.2d 653, 661 (Cal. 1985); Doe v. Dominion Bank of Washington, N.A., 963 F.2d 1552, 1560 (D.C. Cir. 1992) (the District of Columbia uses a combination of factors analysis, which is similar to a totality of the circumstances test).

244. *See* Sharp, *supra* note 192, at 64.

245. 695 P.2d 653 (Cal. 1985).

246. *Id.* at 655.

247. *Id.*

248. *Id.*

249. *Id.* at 661-62.

250. *Id.* at 657.

251. *Id.* at 662.

instead adopted a totality of the circumstances test.[252]

Supporting its conclusion, the court noted four fatal flaws in the rigid prior incidents rule. First, application of the rule was contrary to public policy because it meant a landowner would get one 'free' assault before being held liable and would discourage the implementation of preventative measures.[253] Second, the court noted the arbitrariness of the rule. How similar did the incidents have to be?[254] "[H]ow close in time do the prior incidents have to be? How near in location must they be?"[255] The courts could not apply this type of rule consistently in ruling on foreseeability.[256] Third, it was not appropriate to conclude that because a prior incident was not similar enough in nature, foreseeability should be precluded[257] (i.e., burglary versus murder). Finally, the prior similar incidents rule improperly removed the question of foreseeability from the jury's consideration.[258] "Foreseeability of harm should ordinarily be determined by a jury. That determination calls for the consideration of what is reasonable in light of all the circumstances."[259]

The *Isaacs* court viewed the totality of the circumstances, including the high crime area, the dangerous nature of the emergency room and parking lot, and other prior incidents of crime and concluded that the foreseeability of the assault in the parking lot should have been submitted to the jury.[260] The court also considered that the foreseeability of the attack was increased because the parking lot created a temptation and opportunity for criminal activity.[261] Referring to a similar case, *Gomez v. Ticor*,[262] the court noted that "[t]he deserted, labyrinthine nature of [parking complexes], especially at night, makes them likely places for robbers and rapists to lie in wait."[263] Foreseeability "is not to be measured by what is more probable than not, but includes whatever is likely enough in the setting of modern life that a reasonably thoughtful person would take account of it in guiding practical conduct."[264]

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252. *Id.* at 658, 661; *see also* Ann M. v. Pacific Plaza Shopping Ctr., 863 P.2d 207, 214 (Cal. 1993).

253. *Isaacs*, 695 P.2d at 658.

254. *Id.* at 659.

255. *Id.*

256. *Id.* at 658-59.

257. *Id.* at 659.

258. *Id.*

259. *Id.* at 665.

260. *Id.* at 661-62.

261. *Id.* at 662 (citations omitted).

262. 193 Cal. Rptr. 600 (Ct. App. 1983).

263. *Isaacs*, 695 P.2d at 660 (quoting *Gomez*, 193 Cal. Rptr. at 604).

264. *Gomez*, 193 Cal. Rptr. at 604 (quoting Bigbee v. Pacific Tel. & Tel. Co., 665 P.2d 947, 952 (Cal. 1983)).

Since parking complexes are a modern concept,[265] the evaluation of the foreseeability of such a crime in one of these structures is left to a jury.[266] A court should not impose its own judgment upon a situation where reasonable minds could differ.[267]

Although California courts concede that the question of duty is decided by the court and not the jury,[268] including foreseeability as part of the determination of duty under a totality of the circumstances test makes it less likely a court will conclude as a matter of law that no duty exists. The California Supreme Court has held that foreseeability should not be removed from the jury and can only be decided as a question of law when under the undisputed facts there is no room for a reasonable difference of opinion.[269] When a totality of the circumstances test is employed, more factors are considered in determining foreseeability of crime. Therefore it is more likely that reasonable minds could differ on the issue. Logically then, when a totality of the circumstances test is used by a court, summary judgments are more readily precluded. The court usually cannot find as a matter of law that the defendant owed no duty to protect the plaintiff when foreseeability is involved in the question of duty.[270]

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265. *Id.* Convenience stores are also modern fixtures, therefore requiring a jury to determine if a criminal act occurring in one is foreseeable. Cohen v. Southland Corp., 203 Cal. Rptr. 572, 578 (Ct. App. 1984).

266. *Gomez*, 193 Cal. Rptr. at 604.

267. *Isaacs*, 695 P.2d at 662 (citations omitted).

268. *See* Ann M. v. Pacific Plaza Shopping Ctr., 863 P.2d 207, 212 (Cal. 1993) (citations omitted).

269. *Isaacs*, 695 P.2d at 659 (citations omitted).

270. The implication of the totality of the circumstances test involving third party criminal attacks has caused appelate courts to overrule lower court decisions when finding they erred in concluding as a matter of law that the plaintiff's assault was not foreseeable, and therefore did not give rise to a legal duty. *See, e.g.*, Small v. McKennan Hosp., 403 N.W.2d 410 (S.D. 1987) (jury should decide if abduction, rape and murder of a woman in a dimly lit parking garage in an unsafe neighborhood was foreseeable); Graham v. M & J Corp., 424 A.2d 103 (D.C. 1980) (high crime neighborhood, malfunctioning outer door latch and previous burglary attempt must be considered in foreseeability of fire set in building hallway); Cohen v. Southland Corp., 203 Cal. Rptr. 572 (Ct. App. 1984) (previous store robberies and other frequent nighttime robberies of area stores should have been considered as to foreseeability of injury to customer shot during armed robbery of convenience store); Gomez v. Ticor, 193 Cal. Rptr. 600 (Ct. App. 1983) (need to consider high crime character of neighborhood and instances of theft and vandalism to determine if robbery and murder of victim in parking lot was foreseeable); Kwaitkowski v. Superior Trading Co., 176 Cal. Rptr. 494 (Ct. App. 1981) (need to consider faulty front door lock, easy access to building by strangers, neighborhood, and prior assault and robbery to determine foreseeability of the attack assault, battery, rape and robbery of woman in dimly lit lobby of an apartment building).

The totality of the circumstances test has been effective in precluding summary judgments. It almost appears that duty becomes a question of fact reserved for a jury. In *Ann*

The California Supreme Court recently revisited the totality of the circumstances test set forth by *Isaacs* in *Ann M. v. Pacific Plaza Shopping Center*.[271] In this case, the employee of a business tenant was raped at approximately 8:00 a.m. when she was working alone in a photo processing store located in a secluded area of a shopping center.[272] The store was equipped with a drop gate to prevent customers from getting behind the counter, but it was broken at the time of the incident. A man entering the store got behind the counter, threatened her with a knife, raped her, robbed the store and fled.[273] Prior to this incident, various tenants and employees had voiced complaints about transients who loitered in the common areas of the shopping center.[274] As a result of loitering directly outside the photo store, which employees found threatening, the plaintiff's employer granted permission to the clerk working overnight to bring her dog to work for protection.[275] In response to the complaints, a merchants' association hired a security company to drive by three or four times a day, but foot patrols were not utilized, as was recommended by a security consultant.[276]

After the rape, the victimized employee filed a complaint for damages alleging, *inter alia*, that her employer, the shopping center owner, and the shopping center's management company were negligent in failing to provide adequate security to protect her from an unreasonable risk of harm.[277] The claim against the employer was dismissed because of the exclusivity provision of the workers' compensation statute.[278] The shopping center filed a cross-complaint for indemnity against the employer, but the court eventually dismissed the employer without prejudice.[279] Therefore, only the issue of landowner liability was before the court, not the issue of employer/tenant liability for the attack on the liability.[280]

In discussing whether the shopping center had a duty as a

M. v. Pacific Plaza Shopping Ctr., the California Supreme Court rejected the totality of the circumstances rule adopted by the court in *Isaacs*, which led to this conclusion. "[B]road language used in *Isaacs* has tended to confuse duty analysis generally in that the opinion can be read to hold that foreseeability in the context of determining a duty is normally a question of fact reserved for the jury . . . . Any such reading of *Isaacs* is in error." *Ann M.*, 863 P.2d at 207, 215.

271. 863 P.2d 207 (Cal. 1993).
272. *Id.* at 209-10.
273. *Id.* at 210.
274. *Id.*
275. *Id.*
276. *Id.*
277. *Id.* at 210-11.
278. *Id.* at 210 n.4.
279. *Id.*
280. *Id.*

matter of law to protect the business tenant's employee, the court stated that while the injured employee was not the tenant, in a commercial context where a tenant is usually not a natural person, a duty to protect extends to employees of the tenants who act on behalf of the business.[281] Therefore, the lack of a direct landlord/tenant relationship could not preclude the existence of a duty of care for landlords in California to take reasonable steps to secure the common areas.[282] In addition, the fact that the rape occurred inside the tenant's premises was not dispositive because the claim stated it was the shopping center's failure to adequately maintain the common areas that caused her injury, and because the plaza had exclusive control of the common areas under the lease.[283]

Revisiting the totality of the circumstances test enunciated in *Isaacs* to evaluate the duty, the court felt the need to refine the test.

> Unfortunately, random, violent crime is endemic in today's society. It is difficult, if not impossible, to envision any locale open to the public where the occurrence of violent crime seems improbable. Upon further reflection and in light of the increase in violent crime, refinement of the rule enunciated in *Isaacs* . . . is required.[284]

The court stated that the scope of the duty is determined by balancing the foreseeability of the criminal acts against the burden of the duty to be imposed.[285] In cases where the burden of preventing future harm is great, a high degree of probability of harm would be required.[286] Where there are strong policy reasons to prevent the harm, or the harm can be prevented by simple means, a lesser degree of probability would be required.[287] In *Ann M.*, the court concluded that for the scope of a landowner's duty to include hiring security guards, there would have to be a high degree of foreseeability, including prior similar incidents, because of the significant monetary and social costs of imposing the duty.[288] "To hold otherwise would be to impose an unfair burden upon landlords and, in effect, would force landlords to become the insurers of public safety . . . ."[289]

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281. *Id.* at 212-13.
282. *Id.* at 213.
283. *Id.*; *but see, e.g.*, Williams v. Detroit, 339 N.W.2d 215 (Mich. Ct. App. 1983) (would not extend landlord duty to incidents within the boundaries of leased premises).
284. *Ann M.*, 863 P.2d at 215.
285. *Id.*
286. *Id.*
287. *Id.*
288. *Id.*
289. *Id.* at 215-16.

The *Ann M.* court, however, did not consider whether the scope of a landlord's duty of care would include providing security guards in certain types of commercial property that are inherently dangerous, like all-night convenience stores or parking garages, in the absence of any prior similar incidents.[290] This consideration could be determinative of the existence of a duty because next to foreseeability, the second most important factor under the totality of the circumstances test is whether the "premises attracts or promotes crime."[291] Upset with the majority's decision in *Ann M.*, the dissent criticized the court for "resurrect[ing] an improper [prior similar incidents] test discarded by this court eight years ago" and stated that liability issues and any burden on landowners are factual matters for a jury to decide, not the court by summary judgment.[292]

The District of Columbia Circuit also decided a case, *Doe v. Dominion Bank of Washington, N.A.*,[293] where the employee of a business tenant brought a negligence suit against the commercial landlord claiming it had a duty of care to protect her from the criminal conduct of third parties.[294] In *Doe*, a secretary working for a business tenant of the commercial landlord was raped during the workday in an unlocked office on a vacant floor of the building.[295] She was in an elevator heading to the lobby when it stopped on a vacant floor, and a man entered the elevator.[296] The man proceeded to choke her and drag her down a hallway through unlocked doors into a dark vacant office where she was raped and robbed.[297] Many of the building's floors were vacant in anticipation of its sale and the owner had failed to secure the vacant floors which remained accessible by elevator or stairwell.[298] During the month prior to the attack on the plaintiff, many tenants allerted the landlord regarding threats to their safety, including thefts, drugs, restroom sexual activity and the presence of intruders.[299] The landlord's management company strongly urged the landlord to take immediate security measures in response to the complaints.[300]

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290. *Id.* at 216 n.8.
291. *See* Sharp, *supra* note 192, at 68.
292. *Ann M.*, 863 P.2d at 218.
293. 963 F.2d 1552 (D.C. Cir. 1992).
294. *Id.* at 1553.
295. *Id.*
296. *Id.* at 1555.
297. *Id.*
298. *Id.*
299. *Id.* at 1555-56.
300. *Id.* at 1557.

The District of Columbia Circuit noted that in Washington, D.C., residential landlords have a duty of care to protect those on the premises from foreseeable criminal activity occurring in common areas within their control. Because the court could find no distinction between commercial and residential landlords, the court found commercial landlords are held to the same duty of care as residential landlords to protect their tenants.[301] To determine whether a duty existed in this case on the part of the landlord to protect the plaintiff, the court was compelled to apply a "combination of factors" analysis, which included foreseeability of crime and the condition of the premises.[302] While the district court stated the plaintiff's case was "fatally flawed" by the lack of evidence of crimes against persons occurring in or around the building, the circuit court rejected this reasoning.[303] In fact, it found the district court's insistence on evidence of crimes against persons, versus property, "at odds with D.C.'s multi-factored, anti-talismanic approach to foreseeability."[304] Therefore, in light of the building's deficient security, unsecured vacant floors, prior incidents of theft, drug use and sexual activity, and tenant complaints of intruders, the court found the evidence created an issue on which reasonable people could differ, thereby precluding judgment as a matter of law.[305]

Similarly, the Illinois Supreme Court in *Rowe v. State Bank of Lombard*[306] concluded that the distinction between crimes against property and crimes against the person was not relevant when determining if the attack on two women working overnight in the office park was within the scope of foreseeable risk,[307] therefore giving rise to a duty on the part of the park owner and manager to protect the business tenants' employees. The park owner and manager failed to adequately control the distribution and return of master keys, and the purpose of having secure locks was to prevent unauthorized entry by intruders.[308] Although most of the prior criminal activity in the office park involved crimes against property interests, the court acknowledged that these types of crimes "also involve[ ] a high risk of personal injury or death if the intruder is confronted."[309] Therefore, since the office park manager was aware

301. *Id.* at 1559-60.
302. *Id.* at 1562.
303. *Id.* at 1561.
304. *Id.*
305. *Id.* at 1562.
306. 531 N.E.2d 1358 (Ill. 1988).
307. *Id.* at 1369.
308. *Id.*
309. *Id.*

that employees of its tenants would be working late at night, and that they would be vulnerable to attack if an intruder was interrupted, the fact that "no violent crimes had been committed at the office park [did] not render the criminal [activity] unforeseeable as a matter of law."[310]

The *Rowe* court, combining its foreseeability analysis with other factors, including the likelihood of injury, the burden to guard against the injury and the consequences of imposing the burden on the owner, concluded that there was a triable issue of fact as to whether the imposition of a duty was justified.[311] Providing adequate security measures would have been relatively inexpensive because the locks could have been "rekeyed" at a cost of about $2,500 and the tenants could have been notified of the possible danger.[312] This was not an unreasonable burden for the park owner and manager to assume.[313] Therefore, the Illinois Supreme Court held that the appellate court erred in granting summary judgment to the park owner and manager.[314] While the *Rowe* court included the cost of prevention in its analysis,[315] the cost element of providing protection to the plaintiff was never considered.[316]

When a court uses a totality of the circumstances test, the role of foreseeability in the duty analysis appears to preclude the issuance of summary judgments.[317] In *Lopez v. McDonald's*,[318] however, the California Court of Appeals held that the defendant owed no duty, as a matter of law, to the victims of a criminal assault even though the court used a totality of the circumstances test to evaluate foreseeability. In *Lopez*, a man entered a McDonald's restaurant in camouflage pants, armed with a semi-automatic rifle and began indiscriminately slaughtering customers and employees behind a glass-enclosed structure.[319] Before he was killed by a sharp shooter, he succeeded in killing twenty-one people and injuring eleven others.[320] Despite the restaurant's location in a high

310. *Id.*

311. *Id.* at 1369-70.

312. *Id.* at 1370.

313. *Id.*

314. *Id.*

315. *Id.*

316. Doe v. Dominion Bank of Washington, N.A., 963 F.2d 1552, 1564 (D.C. Cir. 1992) (Williams, J., concurring).

317. *See* case cited *supra* note 270. *But see, e.g.*, Lopez v. McDonald's, 238 Cal. Rptr. 436 (Ct. App. 1987); Gregorian v. National Convenience Stores, Inc., 220 Cal. Rptr. 302 (Ct. App. 1985).

318. *Lopez*, 238 Cal. Rptr. at 436.

319. *Id.* at 438.

320. *Id.*

crime area, the rise of gang activity, armed robberies on the premises, violent criminal assaults in the vicinity, and employee requests for a private security force, the restaurant declined a $5.75 per hour uniformed security service for economic reasons.[321] Other businesses in the vicinity had security ranging from armed guards to closed circuit television systems to roving security patrols.[322] The court concluded that McDonald's owed no duty as a matter of law to the victims of the massacre:

> [T]he likelihood of this unprecendented murderous assault was so remote and unexpected that, as a matter of law, the general character of McDonald's nonfeasance did not facilitate its happening. . . . [The] deranged and motiveless attack . . . is so unlikely to occur within the setting of modern life that a reasonably prudent business enterprise would not consider its occurrence in attempting to satisfy its general obligation to protect [employees] . . . from reasonably foreseeable criminal conduct.
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> . . . .
>
> . . . [N]ot only was [his] crime not theft-related, but the narrow focus on slaughter and [his] obvious suicidal motive are unrelated to the area's general crime rate as a matter of law.[323]

In addition to foreseeability, the court applied other factors to conclude a duty did not exist as a matter of law. The court noted the difficulty of proving a causal nexus because (1) additional security measures would not likely deter this type of criminal activity, (2) the lack of moral blame within the context of this type of harm, and (3) the burden on the defendant to protect against heavily armed, suicidal murderers was substantial, even though the policy of preventing future harm was great.[324] The court also stated that a fast food restaurant did not create an "especial temptation and opportunity" for this type of criminal conduct.[325] However, this fact appears insignificant because in *Gregorian v. National Convenience Store*,[326] another California court noted that although an all-night convenience store can expect its establishment to be the target of armed robberies, a gang attack on the store resulting in the plaintiff's injuries was the result of an "extraordinary malicious criminal act" that the store owner could not have anticipated.[327] Therefore, even though the owner conducted a business that may have attracted criminal activity, it owed no duty

321. *Id.* at 438-39.
322. *Id.* at 440.
323. *Id.* at 445.
324. *Id.* at 446-47.
325. *Id.* at 446.
326. 220 Cal. Rptr. 302 (Ct. App. 1985).
327. *Id.* at 305-06.

as a matter of law to protect the injured plaintiff.[328]

If courts use foreseeability as the sole or primary factor in creating a duty for an individual to protect another from criminal attacks, then employers and commercial landowners will not know when a duty arises to protect employees from criminal attack. Not only is the concept of foreseeability difficult to define and subject to varying court interpretations,[329] but in modern society criminal activity is an everyday occurrence and is often foreseeable. In many instances the question of duty is actually passed on to the jury, especially when a totality of the circumstances approach is taken to evaluate foreseeability, because a court cannot conclude as a matter of law that a particular injury was not foreseeable.[330] The court's foreseeability analysis to determine whether a duty exists then becomes confused and intertwined with the jury's factual foreseeability analysis to find proximate cause.

Since it is firmly established that the existence of a duty is a matter of law to be determined by a court, foreseeability should be measured carefully by a court before a negligence suit is allowed to proceed based on a duty owed to the victim. However, foreseeability is often disregarded by courts and becomes only a question of fact for the jury because foreseeability of crime in modern society is an issue upon which reasonable minds could differ.[331] Foreseeability as a duty determinant then becomes a game of chance for the employer and/or landowner since it will be determined on a case-by-case basis by a jury, leading to inconsistencies in the creation of duties to protect.

3. *Duty by Statute.* In some instances of landlord liability for criminal acts against tenants, the courts turn to statutes or ordinances, instead of special relationships or circumstances, to determine that a duty to protect exists.[332] In these instances, it is a state legislature that determines whether a duty exists to protect others. Courts, therefore, generally feel comfortable using a violation of a statute as a basis for a negligence action.[333] Examples of statutes that provide for a landlord to maintain a safe premise include housing codes and the Uniform Residential Landlord Tenant Act.[334] While courts feel comfortable using statutory duties as a

328. *Id.*
329. *See* KEETON ET AL., *supra* note 194, § 43, at 297; Crouse, *supra* note 96, at 471.
330. *See* case cited *supra* note 270.
331. *See* Sharp, *supra* note 192, at 62.
332. *See* Glesner, *supra* note 108, at 702.
333. Glesner, *supra* note 108, at 699-700; Sharp, *supra* note 192, at 29.
334. Glesner, *supra* note 108, at 700.

basis of a negligence action, many cases in landlord/tenant law indicate that provisions relating to healthy and safe premises only refer to such things as structural defects and unsanitary conditions, not safety from the criminal acts of third parties.[335]

However, Florida, which does not generally impose a duty to protect upon landlords, found in *Paterson v. Deeb*[336] that a landlord duty arose from the express language of a state statute which required leased property to be secured with locks and common areas to be kept in a safe condition.[337] In *Paterson*, the apartment building in which a tenant was raped had defective locks.[338] The court also noted the use of the statute eliminated the foreseeability requirement when deciding whether a duty to protect existed. The court, citing *Isaacs*, was "not willing to . . . sacrifice the first victim's right to safety upon the altar of foreseeability by slavishly adhering to the now-discredited notion that at least one criminal assault must have occurred."[339]

Establishing a duty by statute in the employment context could be done today, even without specific state statutes addressing workplaces prone to violence, if courts acknowledge a statutory duty to protect employees under OSHA's general duty clause.[340] The importance of the obligation created under the Act's general duty clause cannot be overstated.[341] Congress was clear in its intention that because employers control the conditions of employment, it is their responsibility to protect workers.[342]

> It is firmly established that a private cause of action may not be based solely on OSHA. . . .
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> . . . It is much more common for the plaintiff or defendant to seek to introduce applicable OSHA standards to prove the duty owed to the plaintiff by the defendant. As a general proposition, an administrative regulation may be admitted into evidence to prove the standard of conduct of a reasonable person.[343]

If a statutory duty under OSHA is acknowledged, the court would then have to determine if noncompliance with an OSHA requirement was negligence per se, some evidence of negligence or not ad-

335. *Id.*
336. 472 So.2d 1210 (Fla. Dist. Ct. App. 1985).
337. *Id.* at 1218-19.
338. *Id.* at 1217.
339. *Id.* at 1218-19.
340. 29 U.S.C. § 654 (a)(1) (1985).
341. ASHFORD & CALDART, *supra* note 75, at 179.
342. *Id.* at 88.
343. ROTHSTEIN, *supra* note 23, § 513, at 500-01.

missible at all.[344] Courts would probably take noncompliance with a comprehensive workplace violence standard promulgated by OSHA more seriously than they would a compliance directive. OSHA standards are supported by extensive research and a guarded administrative procedure which ensures input from the electorate,[345] and therefore are truly reflective of the expectations of society and the law of an employer's role in preventing workplace violence.

Even though OSHA could be recognized as giving rise to an employer's statutory duty in a negligence suit to provide workplaces free from violence, workers' compensation remains a consideration. While some plaintiffs have alleged that an employer's failure to comply with OSHA requirements destroys the immunity provided by workers' compensation, this reasoning has not been upheld.[346] Section 4(b)(4) of the Act provides that "[n]othing in this Act shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any manner the common law or statutory rights, duties, or liabilities of employers and employees . . . ."[347] However, and more importantly, noncompliance with OSHA requirements can be used to establish willful or intentional misconduct, therefore allowing escape from the exclusivity of workers' compensation.[348] Employers are bound to OSHA requirements for workplace safety[349] and OSHA's administrative response could be the key for courts to find an exception to the exclusivity provision of workers' compensation. If a directive, or more significantly, a standard, is put forth requiring employers to institute certain security measures specifically to prevent criminal attacks on employees, an employer's disregard of the requirements could be interpreted as an intentional tort, therefore escaping the exclusivity of workers' compensation.[350]

Having a duty based on a statute, ordinance or regulation would be ideal because courts feel comfortable applying such a duty. Employers and landowners would be more aware that such a duty existed and therefore be more likely to comply with the duty. A comprehensive statute or regulation could also outline the standard of care to be applied when performing a duty to protect. In

344. *Id.* § 513, at 502-04.

345. *See* ASHFORD & CALDART, *supra* note 75, at 60, 91.

346. ROTHSTEIN, *supra* note 23, § 501, at 479 (citations omitted).

347. 29 U.S.C. § 653 (1985).

348. ROTHSTEIN, *supra* note 23, §§ 501, 505, at 480, 483-85.

349. *See* ASHFORD & CALDART, *supra* note 75, at 58.

350. *See* PERRITT, *supra* note 70, at 27 (workers' compensation generally will not preempt intentional tort cause of action).

fact, one commentator notes that statutory duty cases in landlord/tenant law may be indicative of a "growing trend of legislative direction in the security of leased premises."[351] Lawmakers looking at how to approach the difficult and evolving area of law involving liability for workplace violence should heed any trend coming from courts, who have been grappling for twenty-five years with the issue of landlord liability for criminal attacks upon tenants.

While only a few states today actually have statutes addressing businesses prone to workplace violence,[352] other states considering the promulgation of statutes or regulations designed to prevent violence in the workplace could provide specific, predictable requirements tailored to a particular community or type of business and could provide for a "first line of defense" against criminal attacks in the workplace. Their existence would also eliminate the unpredictable nature and controversial role of foreseeability of crime in determining whether a duty to protect actually exists.

VI. Causation in Workplace Violence Cases

Allowing a negligence suit to proceed against an employer based on a duty to take reasonable precautions to guard employees from the foreseeable criminal attacks of third parties would not necessarily make the employer an insurer of employee safety because causation must still be proved. Causation requires some reasonable connection between the defendant's act or omission and the plaintiff's injury.[353] The connection is ordinarily referred to by courts as "proximate cause" or "legal cause."[354] As Prosser and Keeton note on the issue of proximate cause, "[t]here is perhaps nothing in the entire field of law which has called forth more disagreement, or upon which the opinions are in such a welter of confusion."[355] Proximate cause functions to limit a defendant's liability to those acts or omissions which are so closely connected with the resulting injury that the imposition of liability is justified.[356] If proximate cause was not a factor in negligence suits, liability would exist for all wrongful acts.[357]

Causation consists of two elements, namely, cause in fact and proximate cause.[358] Cause in fact is a particularly difficult concept

351. Glesner, *supra* note 108, at 702.
352. *See infra* part II.
353. Keeton et al., *supra* note 194, § 41, at 263.
354. *Id.*
355. *Id.*
356. *Id.* at 264.
357. *Id.*
358. *Id.* §§ 41-45.

because the traditional test for determining if it exists is to have the fact finder compare the fact of the injury with what would have occurred if hypothetical, contrary-to-fact conditions had existed.[359] For example, if an employer did not have a security system at the time a clerk was killed by an intruder, would the same assault have occurred even if the employer had a functioning security system? An act or omission is not viewed as a cause in fact if the particular injury would have occurred without it.[360] In the example, if the intruder would have succeeded in killing the clerk, even if a security system existed, then the absence of the security system would not be a cause in fact of the injury. The problem in workplace violence cases is that in many instances the precise circumstances surrounding the attack are unknown, and are therefore only speculative.[361] Because it is often the case that more than one cause can act together to bring about an injury, if it can be said that the defendant's act was a substantial factor, i.e. more probable than not, in bringing the injury about, cause in fact exists.[362] Whether an act is a substantial factor in bringing about the injury is usually a question for the jury unless the issue is so clear that reasonable minds could not differ.[363] In negligence actions, the plaintiff usually bears the burden of proof to submit evidence that shows the defendant's conduct more likely than not was a cause in fact of the injury.[364] If the issue of cause in fact remains one of pure speculation or conjecture, the court must direct a verdict for the defendant.[365] However, circumstantial evidence, common knowledge or expert testimony can provide a basis for inferring cause in fact.[366] A unique problem arises in workplace violence

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359. Id. § 41, at 265.

360. *Id.* § 41, at 266; *see e.g.*, Lopez v. McDonald's, 238 Cal. Rptr. 436, 450 (Ct. App. 1987) (security could not have prevented the attack).

361. *See, e.g.*, E-Z Mart Stores, Inc. v. Havner, 832 S.W.2d 368, 370 (Tx. Ct. App. 1992); Vaughn v. Granite City Steel Div. of Nat'l Steel Corp., 576 N.E.2d 874, 887 (Ill. App. Ct. 1991) (Harrison, J., dissenting).

362. KEETON ET AL., *supra* note 194, § 41, at 266-67.

363. *Id.* § 41, at 267.

364. *Id.* § 41, at 269.

365. *Id.*

366. *Id.* § 41, at 270.

> If as a matter of ordinary experience a particular act or omission might be expected, under the circumstances, to produce a particular result, and that result in fact has followed, the conclusion may be permissible that the causal relation exists. . . . [I]t is an everday experience that unlighted stairs create a danger that someone will fall. . . . [W]hen a fat person tumbles down the steps, it is a reasonable conclusion that it is more likely than not that the fall would not have occurred but for the bad lighting . . . . Such questions are peculiarly for the jury. . . .

Id.

cases when considering the probative value of expert witness testimony, especially involving unsolved employee homicides. Expert testimony can only be considered when an inference to be made is not a matter of common knowledge.[367] "It is an easy matter to know whether a stairway is defective and what repairs will put it in order . . . but how can one know what measures will protect against the thug, the narcotic addict, the degenerate, the psychopath and the psychotic?"[368]

Compounding the unknown deterrent issue in unsolved homicide cases is the unknown identity of the perpetrator of the crime, so even if an expert could testify as to what deters certain types of criminals, it would be based purely on speculation that that type of criminal committed the crime in question. Therefore, it can be argued that expert testimony serves no purpose in these cases because any inferences made are only matters of common knowledge surrounding the facts of the case.

If the defendant's act or omission is found to be the cause in fact of the plaintiff's injury, the court must determine whether the defendant's act was the legal cause of the plaintiff's injury.[369] "Unlike cause in fact, proximate cause is not a factual determination. Rather, it involves a determination of legal policy . . . ."[370] Courts usually refer to economic, moral and practical considerations to determine if the defendant's act is the proximate cause of the plaintiff's injury.[371] Sometimes the proximate cause inquiry is put forth as an issue of whether the defendant is under any duty to the plaintiff, or whether the scope of the duty includes protection against the plaintiff's particular injury.[372]

Courts advance two contrasting theories to analyze proximate cause. First, a defendant is liable only for injuries that occur within the scope of the foreseeable risks.[373] Second, a defendant is liable only for injuries that are a direct result of her actions.[374] The use of flexible notions such as "foreseeability" of injury and "direct" result require the judge or jury to evaluate the evidence.[375] Although the proximate cause inquiry is referred to as fact finding,

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367. *Id.* § 41, at 269.

368. Lopez v. McDonald's, 238 Cal. Rptr. 436, 450 (Ct. App. 1987) (quoting Noble v. Los Angeles Dodgers, Inc., 214 Cal. Rptr 395, 399 (Ct. App. 1985)).

369. KEETON ET AL., *supra* note 194, § 41, at 272-73.

370. Weiss, *supra* note 105, at 720.

371. *Id.* at 720-21.

372. KEETON ET AL., *supra* note 194, § 42, at 273.

373. *Id.*

374. *Id.* California courts reject this theory. *See* Pamela B. v. Hayden, 31 Cal. Rptr. 2d 147, 150 n.3 (Ct. App. 1994).

375. KEETON ET AL., *supra* note 194, § 42, at 274.

the conclusion is reached based on an evaluation of the facts, which can lead to drastically different results.[376]

A. *Evidence of Causation*

A recent case in Texas, *Havner v. E-Z Mart Stores*,[377] serves as an example of the problems encountered when plaintiffs attempt to prove that an employer's failure to provide adequate security to its employee was the cause of an employee's death when circumstances surrounding the death are unknown. In *Havner*, E-Z Mart conceded the issues of negligence and foreseeability, but argued that its failure to provide adequate security devices was not the cause of the employee's death.[378]

The undisputed evidence in the *Havner* case showed that:

> [Diana] Havner was working alone at the E-Z Mart on the 11:00 p.m. to 7:00 a.m. shift. At approximately 4:47 that morning, a police officer found the store open, but there was no clerk on the premises. Two hundred and thirty dollars were missing from the cash register. Five days later, Havner's badly mutilated body was found face up with the legs spread apart, and her pants had been removed. Her skull was crushed to the point that her eyeballs and eyesockets could not be found and one of her ears was missing.[379]

In an effort to prove that E-Z Mart caused Diana's death, the Havners introduced evidence that E-Z Mart significantly reduced security measures when it purchased the store from its previous owner.[380] The testimony of four expert witnesses was also introduced.[381]

Initially, the jury found that E-Z Mart's negligence proxi-

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376. *Id.*

377. 797 S.W.2d 116 (Tex. Ct. App. 1990), *rev'd*, 825 S.W.2d 456 (Tex.), *remanded*, 832 S.W.2d 368 (Tex. Ct. App. 1992).

378. Havner v. E-Z Mart Stores, Inc., 825 S.W.2d 456, 459 (Tex.), *remanded*, 832 S.W.2d 368 (Tex. Ct. App. 1992).

379. 797 S.W.2d at 116.

380. 825 S.W.2d at 459. E-Z Mart reduced security by placing a countertop over the safe rendering it inoperable as a cash control mechanism, removing two existing silent panic alarm buttons, obstructing the windows and failing to provide security and robbery training. *Id.* E-Z Mart removed two existing silent panic alarm buttons that were directly connected to police headquarters at a cost of $8.00 per month, one under the cash register and one that was the form of a necklace to be worn around a cashier's neck. *Id.* In addition, E-Z Mart maintained a one-way telephone in the cashier area which allowed only management to make incoming calls. Any outgoing calls had to be made from a payphone outside the store. 797 S.W.2d at 122.

381. 825 S.W.2d at 459-60. The expert witnesses testified that E-Z Mart's security system was deficient, Diana was most likely abducted from the store and then raped and murdered, the police could have arrived at the store within one minute, and that Diana would be alive today if E-Z Mart had a security system in the store. *Id.*

mately caused Diana's death and awarded damages to her two daughters, her parents and her estate.[382] On appeal, the appellate court reversed, finding the evidence legally and factually insufficient to establish that E-Z Mart's negligence caused Diana's death.[383] The appellate court noted the difficulty in determining whether there was evidence from which reasonable minds could infer that E-Z Mart's conduct was the cause in fact of Diana's death.

> As significant as the evidence in this record is, *equally significant is the absence of certain evidence.* This case presents many unknowns. We do not know who the assailant was, whether he, she or they were armed, whether Diana Havner was ordered from the premises, taken by ruse, or otherwise; and we do not know if she was actually abducted. There is far too little known about the causes or motivations behind the criminal acts . . . to conclude that there is any evidence that any conduct by E-Z Mart caused the harm to Diana Havner.[384]

Hearing the case on a writ of error, the Supreme Court of Texas reversed and found that some evidence did exist to support the jury's finding that E-Z Mart's inadequate security was one cause of Diana's death.[385] The supreme court stated that the court of appeals should not have substituted its judgment in place of the

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382. 797 S.W.2d at 117.

383. *Id.* at 120. The appellate court was unable to conclude that E-Z Mart's conduct was a substantial factor in bringing about Diana's death and "but for" which her death would not have occurred. " '[I]t would be just a guess as to what subjective effect' E-Z Mart's conduct may have had upon the criminal actor." *Id.* (citations omitted). The Havners presented no evidence of probative value to support the cause in fact element of proximate cause. The opinions given by the expert witnesses, stating that Diana would still be alive today if a security system existed and that police would most likely have arrived before the abduction, were dismissed as nothing more than "guess, speculation and conjecture." *Id.* at 119. The court also negated the value of a better phone system for protection by noting that Diana was unable to use a gun that was found in her purse at the store. *Id.* at 120.

384. *Id.* at 119 (emphasis added).

385. 825 S.W.2d at 456. The Texas Supreme Court's evaluation of the evidence was at odds with that of the appellate court. Rejecting the notion that the experts' testimony was "speculation" of "lay witnesses," the court stated the four witnesses were qualified as experts at trial. *Id.* at 460 n.4. The first expert, who taught security for seven years and authored four books and over 100 articles on the subject, testified that E-Z Mart's security was deficient. Two other witnesses, both law enforcement officials who had inspected the crime scene and were actively involved in the investigation, had personal knowledge and expertise to assist the fact-finders, as required by Texas' rules of evidence. Their testimony included the opinion that Diana was taken by force from the store, and that she would be alive today if adequate security was provided. The fourth witness, an alarm company manager and former police officer, testified the police would have had adequate time to respond and that Diana would be alive if an alarm system was present. *Id.* at 459-60. The supreme court concluded that the testimony of each of the four experts constituted some evidence that inadequate security caused Diana's death. *Id.* at 460 n.4.

jury's judgment unless the court's theory was the *only inference* that could be drawn from the evidence.[386] The question before the court was "whether there is any evidence from which *reasonable minds could draw an inference* that the failure to provide a safe place to work was a cause in fact of Havner's death."[387] Noting that this evidence did exist, the court opined that to accept a contrary view would

> make redress impossible for the family of a victim killed in an unwitnessed occurrence regardless of the strength of the circumstantial evidence [and] remove any legal incentive for businesses to take adequate security measures to protect employees. It would [further] deny determined law enforcement officials the partnership with the private sector needed to oppose lawlessness.[388]

After the Texas Supreme Court concluded that the evidence was legally sufficient, the case was remanded back to the appellate court to review whether the evidence was sufficient to support the jury's causation finding.[389] The appellate court again discounted the expert witness testimony[390] and found the evidence factually insufficient.[391] As a result, the decision was reversed and remanded

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386. *Id.* at 461 (emphasis added).

387. *Id.* at 459 (emphasis added).

388. *Id.* at 461.

389. *Id.* at 462.

390. E-Z Mart Stores, Inc., v. Havner, 832 S.W.2d 368, 372-73 (Tex. Ct. App. 1992). In the court's opinion, the well-published security witness could not be treated as an expert because his testimony regarding E-Z Mart's deficient security was not relevant to proximate cause, only to the question of negligence. *Id.* at 373 n.10. While he was well qualified as a security expert, he expressed no opinion on causation. *Id.* at 373. Also, one of the law enforcement officials who did testify to causation could not be an expert witness "[u]nless it can be said that any police officer with a high school diploma and thirteen years of police work experience is per se an expert." *Id.* at 372 n.6. Even if he was an expert witness, his opinion that E-Z Mart caused Diana's death was of little weight because it was mere conjecture. *Id.* at 372 n.7. The second law enforcement official who responded to a question on causation stated that he believed the police would have arrived before Diana was taken out of the store. The court declared this statement, taken in context, only indicated that Diana may have been killed and/or raped *in the store* instead of being taken from the premises and raped and killed. *Id.* at 372 n.6. (emphasis added). Therefore, the existence of the alarm would not have precluded the attack.

The only opinion the court considered as evidence was that of the alarm company manager. After testifying about various alarm systems, he concluded that the police would have had an opportunity to arrive at E-Z Mart before the assailant[s] were able to steal the money and take Diana out of the store. *Id.* at 373. Overall, given that no direct evidence was offered to show causation, the court could only rely on opinions, which had little weight. *Id.* at 374. "The specialized knowledge of the experts is simply of no assistance to the trier of fact. . . . The jury is equally capable of engaging in the same speculation. . . . [T]he experts' opinions are not helpful, but superfluous." *Id.* at 374 n.14 (citations omitted).

391. *Id.* at 374.

for a new trial.[392] The dissent adamantly declared that the court failed to apply proper standards concerning inferences,[393] expert witnesses[394] and consideration of all the evidence.[395] In addition, the dissent echoed the supreme court's position, stating that when possible conflicting inferences can be made, it is the responsibility of the jury to decide, not whether the reviewing court agrees with the jury's decision.[396]

In another employer liability case discussing causation, the Appellate Court of Illinois in *Vaughn v. Granite City Steel Division of National Steel Corp.*[397] declared that to prove cause in fact the evidence must be sufficient to afford the jury a reasonable basis to conclude that the employer's negligence was "more likely than not" the cause of the employee's death.[398] While it was possible the decedent had a violent encounter with a co-worker in the employer's parking lot, and that no amount of security could have prevented the attack, the evidence in the case indicated a homicide had occurred instead of a self-inflicted wound and experts on both sides agreed that additional measures could have been taken to minimize the risk to the defendant.[399] The circumstantial evidence included, *inter alia*, that the decedent's body was located near his car in the employer parking lot shortly before his shift was to begin, he was shot twice at close range, there were incidents of crime against property in the parking lot, testimony of a friend and co-worker that no one would want to kill the decedent, and expert testimony that the parking lot security was deficient.[400] "Where presentation of direct evidence is impossible, courts are reluctant to conclude that verdicts based upon circumstantial evidence cannot be upheld even though a contrary verdict could have been reached upon the same circumstantial evidence."[401]

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392. *Id.*

393. *Id.* at 375-76.

394. *Id.* at 376-78.

395. *Id.* at 378-79.

396. *Id.* at 375. Based on the strong circumstantial evidence in this case, "can we say it would be illogical for a jury to draw an inference from these circumstances that a robbery, abduction and murder had occurred? Clear reasoning says we cannot . . . ." *Id.* Proximate cause can be established by circumstantial evidence and the test is one of probability. "The majority does not seek probability and does not mention probability, but instead wonders who the perpetrator was and what his motivations might have been. These unknowns do not thwart the ability of the jury to make a probable inference from the known facts." *Id.* at 376.

397. 576 N.E.2d 874 (Ill. App. Ct. 1991).

398. *Id.* at 880.

399. *Id.* at 881.

400. *Id.* at 876, 881.

401. *Id.* at 880 (citations omitted).

The dissent in *Vaughn* voiced concerns reflective of the Texas appellate court's viewpoint in *Havner*. First, the dissent declared that under Illinois law, the court used an improper measure for cause in fact and should have required the plaintiffs to prove with reasonable certainty that the employer's inadequate security measures caused or contributed to the specific circumstances that led to the death of the employee.[402] Second, because of the absence of evidence surrounding the murder of the decedent to ascertain the identity of the perpetrator or the motivations underlying his actions, the dissent claimed that it was purely speculative that the employer's inadequate security measures were linked to the employee's death.[403] Holding the employer responsible in this case for negligent performance of his duty to protect was "tantamount to holding that [the employer] must be an insurer of the safety of everyone lawfully on its premises."[404]

The Illinois appellate court again considered the value of circumstantial evidence in *Martin v. McDonald's Corp.*[405] The court found a "great deal of circumstantial evidence" from which the jury could conclude that McDonald's failure to secure the back door was the proximate cause of the plaintiffs' injuries.[406] The evidence included an employee's testimony that, while she could not see the intruder coming through the back door, the intruder approached her from the rear of the store.[407] In addition, the intruder testified that even though he was under the influence of drugs, he remembered being attracted to the light above the back door.[408] While there was conflicting evidence whether the back door latch functioned properly, there was proof the door had been opened twice after closing.[409]

> While it is true that there is no direct evidence that [the intruder] entered the store through the rear door, there is more than ample circumstantial evidence on which the jury could conclude that [he] did indeed gain entry . . . through the rear door and that the failure of McDonald's security procedures facilitated that entry and were thus the proximate cause of injury to the plaintiffs.[410]

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402. *Id.* at 885-86 (citations omitted).

403. *Id.* at 886. "[I]f the decedent's killer were one of his co-workers, the killer would have been authorized to be in the area, and no amount of fencing or additional access control may have prevented his confrontation with the decedent." *Id.*

404. *Id.* at 887.

405. 572 N.E.2d 1073 (Ill. App. Ct. 1991).

406. *Id.* at 1079.

407. *Id.*

408. *Id.*

409. *Id.*

410. *Id.*

B. *Intervening Actors*

The proximate cause analysis is difficult to understand and becomes even more complex when other acts or actors are added to the equation. When the acts of two parties combine to contribute to the plaintiff's injury, then both are the proximate cause of the injury.[411] When intervening forces are involved, the force must be evaluated to determine if it is a normal or an independent response.[412] If the intervening act is a normal response to the defendant's negligent act, the chain of causation is not broken and the defendant is liable.[413] In contrast, if the intervening act is an independent response to the defendant's negligent act, the chain of causation might be broken therefore precluding liability.[414] Usually, foreseeability is used to determine whether the chain of causation is broken.[415] If the risk of injury by the independent intervening act is foreseeable, the defendant is liable.[416] In contrast, if the intervening act is highly unusual, the act is unforeseeable and is deemed a "superseding cause" that will preclude liability.[417] However, there is no "bright line" rule for defining intervening acts as normal or highly unusual to determine whether they are foreseeable or not. "On a clear day some courts can foresee forever, at least when they are looking for negligence. Others are myopic."[418]

"One's tortious conduct and others' criminal acts are strange bedfellows."[419] Older cases generally considered intervening criminal acts as unforeseeable and therefore treated such acts as a superseding cause, thus relieving a defendant of any liability for failure to protect a plaintiff from the criminal act.[420] The modern view is reflected in sections 448 and 449 of the *Restatement (Second) of Torts*. Under section 448, a criminal act can be a superseding cause of harm *unless the criminal act was foreseeable.*[421] Section 449

411. Pamela B. v. Hayden, 31 Cal. Rptr. 2d 147, 151 (Ct. App.), *superseded by*, 880 P.2d 112 (Cal. 1994). This case is analyzed for discussion purposes only. The case is not citable as authority because it was superseded.

412. *Id.*

413. *Id.*

414. *Id.*

415. *Id.* at 151-53.

416. *Id.* at 151.

417. *Id.*

418. *Id.* at 151-52 (citations omitted).

419. E-Z Mart Stores, Inc., v. Havner, No. 06-89-09797-CV, 1990 Tex. App. LEXIS 1537, at *4 (Tex. Ct. App. 1990).

420. *Pamela B.*, 31 Cal. Rptr. 2d at 152.

421. Small v. McKennan Hosp., 437 N.W.2d 194, 202 (S.D. 1989) (emphasis added). Section 448 of the Restatement states:

declares:

> If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby.[422]

Thus, if the defendant can foresee the risk of a criminal attack, he cannot escape liability by declaring the criminal attack was a superseding cause of the injury.[423] Therefore, in jurisdictions where foreseeability is a duty determinant, and the court subsequently rules that a duty exists to protect the defendant based on foreseeability, then the issue of causation disappears. Causation is no longer an issue because the court, by declaring the duty exists, admits that the criminal act was foreseeable, therefore no act can be a superseding cause.[424] However, in California, where foreseeability is a duty determinant, a court recently declared that even though the defendant owed a duty as a matter of law to the plaintiff, this did not mean the defendant automatically, as a matter of law, was the cause of the injury.[425] Causation is a question of fact for the jury and even though the criminal act was foreseeable, the jury still needs to determine if the defendant's act or omission was a substantial factor in causing the injury.[426]

While causation remains a jury question, adoption of the modern view set forth in the *Restatement (Second) of Torts* in a jurisdiction that uses foreseeability as a duty determinant eliminates a court's ability to use proximate cause as a means to limit liability because it cannot conclude, as a matter of law, that a criminal act was an independent superseding force which breaks the chain of causation. A California appellate court in *Pamela B. v. Hayden*,[427] acknowledged the predicament of being unable to judicially limit liability.[428] In *Pamela B.*, a tenant was raped in an underground

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> 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 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.

RESTATEMENT (SECOND) OF TORTS § 448 (1965).

422. RESTATEMENT (SECOND) OF TORTS § 449 (1965).

423. *Small*, 437 N.W.2d at 202.

424. *Pamela B.*, 31 Cal. Rptr. 2d at 153.

425. *Id.*

426. *Id.* at 154.

427. 31 Cal. Rptr. 2d 147 (Ct. App. 1994).

428. *Id.* at 158.

parking garage of her apartment building. After affirming the $1.2 million dollar damage award against the landlord to the plaintiff, the court opined,

> These cases raise problems far beyond the legal issues resolved by traditional rules of negligence. It is nonsense to suggest that [the] [d]efendant's failure to change some light bulbs and fix some locks was the cause of [the plaintiff's] injuries. . . .
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> . . . .
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> . . . [T]he merely negligent actor [ought not to be required] to make monetary amends to all persons who may have suffered [at the hands of a violent criminal who perchance committed his crime on the defendant's property]. Experience has shown that there are clear judicial days on which a [jury] can foresee forever and thus determine [causation,] but none on which that foresight alone provides a socially and judicially acceptable limit on recovery of damages for that injury.[429]

This statement emphasizes the California court's concern in *Ann M.* with abandonment of the prior similar incidents rule.[430] Foreseeability, as a substantial factor in a duty determination, is crucial when combined with section 449 of the *Restatement (Second) of Torts* because it could eliminate the court's ability as a matter of law to limit liability. Since California courts use a totality of the circumstances test in evaluating foreseeability, there is a greater chance foreseeability will be found or at least passed on to a jury, therefore negating the courts' only mechanism to limit the possibility of unlimited liability.[431]

A federal court of appeals judge in *Doe v. Dominion Bank of Washington, N.A.*,[432] voiced a similar concern when confronted with the District of Columbia's "combination of factors"[433] analysis to evaluate foreseeability, which essentially eliminated the court's consideration of duty and subsequent ability to preclude liability as a matter of law.

> Until the District of Columbia Court of Appeals says otherwise, it seems reasonable to see the foreseeability requirement as a vestige of the blanket rule against liability for the criminal acts of third parties. Though framed as an issue relating to 'duty,' it seems, so far as landlord liability for criminal

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429. *Id.* at 158-59 (paraphrasing a comment in Thing v. LaChusa, 717 P.2d 814 (Cal. 1989)).

430. Ann M. v. Pacific Plaza Shopping Ctr., 863 P.2d 207, 214 (Cal. 1993).

431. California courts question the outcome of cases that combine the use of foreseeability of a criminal attack as a duty to protect determinant and § 449 of the Restatement, but other courts do not. *See, e.g.*, Small v. McKennan Hosp., 437 N.W.2d 194 (S.D. 1989); Rowe v. State Bank of Lombard, 531 N.E.2d 1358 (Ill. 1988).

432. 963 F.2d 1552 (D.C. Cir. 1992).

433. *Id.* at 1562 (quoting Columbia v. Doe, 524 A.2d 30, 33 (D.C. 1987)).

> acts in areas under his control is concerned, to perform no analytical work, but merges with the proximate cause analysis. In other contexts, of course, the duty requirement presumably continues to bar liability for the criminal acts of third parties.[434]

CONCLUSION

Workplace violence is a serious problem that needs to be addressed. Lawmakers have recognized that the criminal justice system can no longer be the sole caretaker of citizens' safety. As this Article reflects, landowners and landlords are already involved in the effort to assist the police force, but their role has not come about voluntarily. This role arose because the courts, sometimes with the assistance of the legislature, created a common-law duty to protect tenants, patrons and employees of business tenants from foreseeable criminal activity. For the same reasons a landowner is expected to take reasonable precautions to guard against foreseeable criminal activity, an employer should be expected to take similar measures to protect employees.

Combining a commercial landowner's duty to protect employees of business tenants with the increasingly complex nature of modern business relationships, commercial landowners often bear the full cost of workplace violence through a business tenant employee's access to the tort system. This is especially inequitable if it is the nature of the employer's business that attracts the crime. If a commercial landowner is found negligent, the landlord can protect itself by obtaining indemnification from a business tenant/employer. However, if the court finds that it is the employer who actually controls security of the premises through the lease, it is the employee who then becomes the bearer of the true cost of the injury because he is limited to workers' compensation coverage from the employer.

The only way an employer could be forced to absorb the true cost of an injury would be a situation where an employee could recover in tort against a commercial landowner who was indemnified by the employer. But in many of these cases the success of recovery against the landowner would be determined by the lease terms between the landowner and the employer. The employee's ability to recover the true cost of the injury, then, is decided by the bargain between the commercial landowner and the employer. The employee's access to the tort system is further limited if his employer owns the property from which the business is conducted.

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434. *Id.* at 1564 (Williams, J., concurring).

In cases of workplace violence, where injuries are emotionally damaging to the victim, workers' compensation is wholly inadequate as a remedy. Therefore, an injured employee or his family is forced to bear the true cost of the injury which is attributable to the employer's business, unless he can access the tort system through a suit against a commercial landowner. Even then, complete recovery is not guaranteed depending on the bargain between the employer and the landowner regarding premises security and indemnification. In addition to the inadequate recovery afforded through workers' compensation, an employer's payment of workers' compensation premiums does not serve as an adequate incentive to implement security measures. In reality, workers' compensation premiums are borne by the consumer. Therefore, not only are employers not bearing the true costs of operating their business, but the compensation premiums do not serve as a deterrent that would prompt an employer to take reasonable security precautions to protect workers.

In light of the inadequate recovery available to victims of workplace violence, the possibility of a landowner or employee absorbing the true cost of workplace injuries and the lack of an incentive for employers to implement security measures, workplace violence cases should be removed from the exclusivity of workers' compensation. In light of modern developments, these situations are not part of the "bargain" envisioned between employer and employee almost a century ago. In addition, commercial landowners are being negatively affected by this bargain because employees are seeking recovery from them in the tort system as a result of inadequacies in workers' compensation coverage. Employers should bear the true costs of injuries arising from the nature of their businesses. Allowing tort recovery not only would force them to bear this cost, but would also adequately compensate the victim and prompt employers to take an active role in protecting its employees.

Because of the serious nature of workplace violence injuries, courts should acknowledge that an affirmative duty exists for an employer to take reasonable measures to protect employees arising from a statute or through a special relationship. Voluntary undertaking could discourage the implementation of security measures and foreseeability is too unpredictable, therefore leading employers to take chances on being held liable. Comprehensive legislation, preferably from the states which can tailor guidelines to specific communities, would be ideal because courts feel comfortable extending statutory duties and the statutes could provide a measurable standard of care. The creation of a duty to protect employees at risk would not make an employer an insurer of his employee's

safety, because the tort system only imposes liability when an employer acts negligently. If the employer takes reasonable precautions to prevent foreseeable injuries to its employees then in most cases he will not be held liable. Further, if an employer is held liable, he is only bearing the true cost of doing business by paying for injuries that the business brought about. Employers also have the ability to insure against such losses. While the tort system occasionally fails and is viewed as unpredictable, it undoubtably serves as an incentive for an employer to protect employees from physically and emotionally dehabilitating injuries, or even death.