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Patients as Victims—Hospital Liability for Third-Party Crime

N. Jean Schendel

PATIENTS AS VICTIMS—HOSPITAL LIABILITY FOR THIRD-PARTY CRIME

Our whole society seems to be going toward violence, and hospitals are no exception.[1]

I. INTRODUCTION

Patients who enter hospitals for healthcare do not expect to be victims of violent crime. Nevertheless, when an Alabama woman, suffering from pain, entered Huntsville Hospital for kidney stone treatment, she became the victim of a sexual assault.[2] A male intruder entered her hospital room at approximately 6:00 a.m., a time well outside the hospital's posted visiting hours.[3] The intruder found the helpless patient lying in her hospital bed, heavily sedated from a pain medication injection.[4] The man sexually assaulted her, and the four security guards on duty did nothing.[5] The victim brought a lawsuit against the hospital and won on appeal.[6]

The public's and the hospital administrators' perception that hospitals are safe havens for ailing patients[7] may no longer be valid.[8] Although healthcare

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1. AMERICAN HEALTH CONSULTANTS, *Fight Security Problems with Tough RM Agenda*, HOSP. RISK MGMT., May 1989, at 57.

2. Facts taken from Young v. Huntsville Hosp., 595 So. 2d 1386, 1387 (Ala. 1992). *See also infra* notes 253-69 and accompanying text.

3. *Id.* The actual posted visiting hours were contested, but the plaintiff contended that the visiting hours were from 10:00 a.m. until 8:30 p.m.

4. *Id.* at 1390. *See also infra* notes 253-69 and accompanying text.

5. *Id.* at 1387.

6. *Id.*

7. Hospitals were not always seen as safe places, and hospitals originated as charitable institutions that primarily provided shelter for the poor. IRVING J. LEWIS & CECIL G. SHEPS, THE SICK CITADEL 54 (1983). By 1920, the public no longer perceived hospitals as only refuges for the urban poor. CHARLES E. ROSENBERG, THE CARE OF STRANGERS 341 (1987). Instead, hospitals were viewed as "awesome citadels of science and bureaucratic order." PAUL STARR, THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE 145 (1982). The advent of aseptic techniques and disease-related knowledge made hospitals more acceptable to the upper and middle classes. *Id.* at 145. Religious and ethnic hospitals evolved primarily to alleviate discrimination among various groups. *Id.* Religious communities recognized that "[e]ntering a hospital necessarily involved encounters with strangers at times of weakness and vulnerability, but the encounters might be less threatening if the hospital authorities were of the same faith or, even better, of the same ethnic background." *Id.* at 173-74.

As hospitals moved toward the center of the health care system, the sick entered hospitals for help in regaining health, rather than for comfort care and help in dying. LEWIS & SHEPS, *supra*, at 54. "Indeed, the sick le[ft] their homes and enter[ed] hospitals because of the superior treatment there promised them." University of Louisville v. Hammock, 106 S.W. 219, 220 (Ky. Ct. App.

industry leaders consider the problem of crime to be exclusively outside the hospital setting,[9] the reality is that violent crimes, such as physical assault,[10] sexual assault,[11] rape,[12] and murder,[13] sometimes occur on hospital premises.[14] Estimates suggest that one out of two hospitals has been involved

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1907) (describing a patient who was injured by another patient suffering from delirium tremens).

8. James Vardalis, *A Haven or a Horror: The Emerging Problem of Violent Crimes at Health Care Facilities*, HEALTH CARE BOTTOM LINE, Aug. 1989, at 3 [hereinafter *Haven or Horror]; see also* James J. Vardalis, *Hospital Administrators as Defendants in Security Lawsuits*, J. HEALTHCARE PROTECTION MGMT., Fall 1988 at 18 [hereinafter *Hospital Administrators*] (stating that recent crime data reveals that the issue of crime in the health care setting is quickly emerging as one of major concern for health care administrators).

9. Skip Estrella, *Diagnosing Crime Trends*, J. HEALTHCARE PROTECTION MGMT., Summer 1991, at 32 (citing GEORGE P. MORSE & ROBERT F. MORSE, PROTECTING THE HEALTH CARE FACILITY (1974) (stating that "$1,000 in crime losses per bed per year is a conservative estimate.")); *see also* AMERICAN HEALTH CONSULTANTS, *supra* note 1, at 58 (stating that the Joint Commission on the Accreditation of Healthcare Organizations "maintains that most hospitals do not face serious security problems"); *Recent Cases:* Sorrell v. St. James Hosp., No. L-047213086 (N.J. Super., filed June 23, 1988), 32 ATLA L. REP. 157 (May 1989) (reporting of a settlement between a patient-victim and a hospital). The patient claimed that the hospital negligently allowed a vagrant to rape her in her room after he accosted other patients and raped an elderly patient in the hospital bed next to the patient-victim's. The hospital claimed that it had not breached its security because "patient rape was an unavoidable problem in urban hospitals." *Id. But see* Russell L. Colling, *Trends in Hospital Security*, HOSP. SECURITY & SAFETY MGMT., Jan. 1993 at 13 (describing new Joint Committee of Accreditation of Healthcare Organizations standards that go into effect in 1993). *See infra* note 24.

10. *See, e.g.*, Roettger v. United Hosp., 380 N.W.2d 856 (Minn. Ct. App. 1986) (female patient physically assaulted by a male intruder in hospital); *Gunman Shoots Three in LA Hospital*, THE FORT WAYNE NEWS-SENTINEL (Fort Wayne, Ind.), February 9, 1993, at H4 [hereinafter *Gunman*] (gunman who burst into city emergency room with three guns, demanding pain medication, and shot three emergency room physicians after holding two women hostage for several hours).

11. *See, e.g.*, Young v. Huntsville Hosp., 595 So. 2d 1386 (Ala. 1992) (female patient sexually assaulted in hospital by male intruder).

12. *See, e.g.*, Copithorne v. Framinghan Union Hosp., 520 N.E.2d 139 (Mass. 1988) (describing a visiting physician who raped a hospital patient); Freeman v. St. Clare's Hosp. & Health Ctr., 548 N.Y.S.2d 686 (N.Y. App. Div. 1989) (emergency room patient who was in multiple restraints and was raped by another patient).

13. Rhines v. Herzel, 392 A.2d 298 (Pa. 1978) (mental hospital patient killed another patient and buried body on hospital grounds); Small v. McKennan Hosp., 403 N.W.2d 410 (S.D. 1987) (hospital employee who was visiting a hospital and was murdered in the parking garage); *Indictment Charges Nurse Gave Fatal Drug Injection*, MOD. HEALTHCARE, Jan. 22, 1988, at 12 (nurse indicted for allegedly killing hospital patients with drug injections); *Nurse Sentenced to Nine Years for Murder Attempt, Forgery*, MOD. HEALTHCARE, Aug. 12, 1988, at 67 (nurse convicted of attempting to kill AIDS patient with drug overdose).

14. Many other crimes occur on hospital premises, but it is beyond the scope of this Note to fully discuss them all. Some examples include: infant kidnappings, bomb threats, thefts, robberies, hostage taking, and other terrorist acts. Anthony L. Best, *Preventing Violence in Hospitals*, J. HEALTHCARE PROTECTION MGMT., Spring 1990, at 76 (stating that violence in hospitals can take the form of infant kidnappings, bomb threats, assaults, robberies, rapes, and murders); *see also Crime in Hospitals, 1988, 1989—The Latest IAHSS Surveys*, J. HEALTHCARE PROTECTION MGMT., Summer 1991, at 1, 2 [hereinafter *Crime in Hospitals*] (indicating that hospitals reported such crimes

in a security-based lawsuit as of 1992.[15] As one author states, "[t]he frontlines of healthcare . . . have, in some cases, become battlegrounds."[16] As a result of such violent crimes, security-related lawsuits against hospitals are rapidly increasing.[17]

Today's hospitals function as businesses,[18] and traditionally, courts have been reluctant to hold business owners liable for third-party criminal acts that

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as arson, sexual assault, armed robberies, bomb threats, thefts, suicides, and kidnappings); *Haven or Horror, supra* note 8, at 3 (describing health care facilities that reported rapes, robberies, and assaults on the premises); Bruce K. Smock, *IAHS Survey of Infant Abductions: 1983-1989*, J. HEALTHCARE PROTECTION MGMT., Fall 1989, at 40, 48 (containing a survey of infant kidnappings in healthcare facilities); AMERICAN HEALTH CONSULTANTS, *In the News: Baby Theft, "Angel of Death" Could Hit You, Too*, HOSP. RISK MGMT., Oct. 1987, at 125, 129 (stating that hospitals could face infant kidnappings and patients murdered by health care workers).

15. Russell L. Colling, *Hospital Security: Is the Patient at Risk?*, J. HEALTHCARE PROTECTION MGMT., Summer 1991, at 37.

16. Terry L. Selby, *Nurses Face Growing Risk of Violence & Abuse*, AM. NURSE, Apr. 1992, at 3. For a recent dramatic example that demonstrates that the frontlines of healthcare have become battlegrounds, see *Gunman, supra* note 10, at H4 (describing a man who burst into a busy inner-city emergency room with three guns, demanded pain medication, and then shot three emergency room physicians after holding two women hostage for several hours); *see also Three Wounded as Patient Opens Fire*, THE FORT WAYNE JOURNAL-GAZETTE (Fort Wayne, Ind.), July 11, 1993, at 11A (describing a male patient who used a handgun to shoot two security guards and a visitor in a Michigan City, Indiana emergency room). Although some hospitals claim that violent incidents are infrequent and occur because of the explosive reactions of only a small percentage of patients or their families and friends, these violent incidents "make the emergency room appear . . . like a battlefield." Saralie Faivelson, *Weapons in the Wards: Violence Nationwide at Times Turns ERs Into Combat Zones*, MED. WORLD NEWS, Mar. 1993 at 60.

17. *Crime in Hospitals, supra* note 14, at 2. This represents a twenty-nine percent increase in security-related lawsuits since 1987. *Id.* Responding hospitals reported a total of forty-nine incidents. *Id.* Fewer hospitals responded in 1989 (315) than in 1988 (340). *Id.* A direct result of increasing crime is that courts and juries are more willing to hold hospitals responsible for violence on the premises. Janine Fiesta, *Criminal Liability for the Nurse*, NURSING MGMT., Apr. 1992, at 17.

18. Darling v. Charleston Community Memorial Hosp., 211 N.E.2d 253 (Ill. 1965) (recognizing hospitals as businesses), *cert. denied*, 383 U.S. 946 (1966); James J. McCabe & Eric W. Springer, *Emerging Issues in Hospital Law*, FOR THE DEFENSE, June 1992, at 2 (stating that hospitals function as businesses as well as houses of healing); Victoria L. Nelson, *Legal Aspects of Hospital Security*, 3 J. HEALTHCARE PROTECTION MGMT., 1978, at 61 (stating that hospitals must act as businesses to protect patients); *see also* ROSENBERG, *supra* note 7, at 347 (1987) ("[T]he hospital never assumed the guise of rational and rationalized economic actor . . . . It was never managed as a factory or department store. The hospital continued into the twentieth century to be clothed with the public interest . . . ."); David G. Spackman, *Healthcare in the 90's*, 32 BOSTON BAR J., Nov./Dec. 1988, at 8 (recognizing that hospitals represent big business). Although private hospitals may have charitable goals, their central purpose is institutional survival. *Id. But see* Arthur F. Southwick, *The Hospital's New Responsibility*, 17 CLEVELAND-MARSHALL L. REV. 146 (1968) ("A hospital does not . . . consist of two organizations—business and medical. Rather, it is a single organization.").

occur on the business premises.[19] Nevertheless, modern courts are modifying common law doctrines of premises liability to allow a crime victim the status of a civil litigant in actions against premises owners, including business owners.[20] Courts are increasingly faced with the "crime-victim-as-civil-litigant," and they have reacted in varied ways.[21] As courts move away from common law doctrines of premises liability, some courts impose liability on the premises owner, while other courts refuse to impose liability, recognizing the rule of no duty to protect from crimes.[22]

As courts modify common law premises liability doctrines, some hospitals are being held liable for injuries their patients suffer at the hands of third

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19. *See, e.g.*, Nappier v. Kincade, 666 S.W.2d 858, 860 (Mo. Ct. App. 1984) (holding that, generally, business owners owe no duty to protect others from third-party criminal attacks); *see also* Michael J. Yelnosky, Comment, *Business Inviters' Duty to Protect Invitees from Criminal Acts*, 134 U. PA. L. REV. 883 (1986).

20. Linda S. Calvert Hanson & Charles W. Thomas, *Third Party Tort Remedies for Crime Victims—Searching for the "Deep Pocket" and a Risk Free Society*, 18 STETSON L. REV. 1 (1988). Third-party tort remedies are of judicial, not legislative, origin. *Id.* at 32-33. *See infra* part IV and accompanying notes.

21. Yelnosky, *supra* note 19, at 883 (stating that some courts are responding to the move to eliminate the no-duty rule, while others continue to apply the traditional rule of no-duty for the premises owner to protect others from criminal acts); *see also infra* part V and accompanying notes.

22. Yelnosky, *supra* note 19. The third-party victims' rights arena is volatile and raises some difficult questions. First, is it fair to impose responsibility on a third party for a plaintiff's injuries, which were due to a criminal's actions? Second, if a third party's actions occasioned a reasonably foreseeable risk of criminal activity, should the victim be left without a remedy at law? Frank Carrington, *Victims' Rights: A New Tort?*, TRIAL, June 1978, at 41 [hereinafter Carrington, *A New Tort?*].

The courts are divided as to these inquiries. Some courts have held premises owners liable for failing to adequately secure the premises. *See, e.g.*, Garzilli v. Howard Johnson's Motor Lodges, Inc., 419 F. Supp 1210 (E.D.N.Y. 1976) (awarding singer Connie Francis $2.5 million for motel's failure to provide adequate security to prevent intruder from entering her room and raping her); Isaacs v. Huntington Memorial Hosp., 695 P.2d 653 (Cal. 1985) (holding a hospital negligent in its failure to provide adequate security to prevent physical assault on doctor in parking lot); Neering v. Illinois Cent. R.R., 50 N.E.2d 497 (Ill. 1943) (holding a railroad liable for rape and assault of female passenger because it had notice that hobos and tramps were loitering on the premises). Other courts, employing the theory that the premises owner should not be made an insurer against criminal activity, have held that the premises owner owed no duty to the victim. Carrington, *A New Tort?*, *supra*, at 41. *See, e.g.*, Moye v. A.G. Gaston Motels, Inc., 499 So. 2d 1368 (Ala. 1986) (holding that a premises owner owed no duty of protection absent a special relationship); Cornpropst v. Sloan, 528 S.W.2d 188 (Tenn. 1975) (holding that shopping mall merchants owed no duty to shopper to guard against third-party criminal acts); Wright v. Webb, 362 S.E.2d 919 (Va. 1987) (holding that motel owners owed no duty of protection to female theater patron to protect her from assault in adjacent parking lot). Nevertheless, even conservative courts are changing direction in premises liability cases and are joining the trend in the law to impose liability. Virginia Cope, *Third-Party Liability*, TRIAL, Oct. 1988, at 85 (citing K.S.R. v. Novak & Sons, 406 N.W.2d 636 (Neb. 1987); Lay v. Dworman, 732 P.2d 455 (Okla. 1987)).

parties.[23] However, because courts have not developed a consistent standard on which to base liability,[24] hospitals are uncertain as to what steps they must take to protect patients from the violent criminal acts of persons not employed by the hospital.[25] Hospitals are also uncertain as to how to protect themselves from liability for unforeseeable third-party criminal acts.[26]

Increasing violence is costing hospitals money. Combatting the rise in violence entails new expenditures for security, employee training, and insurance. Hospitals are frequently unable to insure against liability caused by the violent

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23. *See infra* notes 44-67 and accompanying text. This note deals only with patient victimization. Hospital employees also suffer criminal victimization at the hands of third parties. *See, e.g.*, Johns v. Department of Health & Rehab. Serv., 485 So. 2d 857 (Fla. Dist. Ct. App. 1986) (describing a hospital employee that was injured by a patient in the hospital lobby); Miller v. Johns Hopkins Hosp., 469 A.2d 466 (Md. Ct. Spec. App. 1984) (claiming that a hospital employee was denied workers' compensation benefits for injuries she received from sexual assault while en route to work). Patients are injured by not only unrelated third parties, but also family members. *See infra* notes 53-67 and accompanying text.

24. *See infra* part V and accompanying notes. In addition to the courts' failures to develop a consistent standard, courts are "finding new ways to hold hospitals accountable for crimes actually committed by others." Jack S. Dawson & James A. Scimeca, *Hospital Crimes: Expecting the Unexpected*, HEALTHSPAN, Nov. 1990, at 3. Accrediting agencies have also failed to provide hospitals with specific standards on which to rely. *See, e.g.*, The Health Care Financing Agency's Form HCFA-1537 (4-89), STANDARD: BUILDINGS, Code A227(a), at 30 (1989), the measurement used by the Indiana State Board of Health to evaluate hospital safety and security. The standard provides: "The condition of the physical plant and the overall hospital environment must be developed and maintained in such a manner that the safety and well-being of patients are assured." The Joint Commission of Accreditation of Healthcare Organizations (JCAHO) also evaluates hospital security, and its standard PL.1 provides: "There is a safety management program that is designed to provide a physical environment free of hazards and to manage staff activities to reduce the risk of human injury." A sub-heading under PL.1, PL.1.2 requires that the safety management program be based on "organizational experience, applicable law and regulation, and accepted practice." 1 JOINT COMMISSION OF ACCREDITATION OF HEALTHCARE ORGANIZATIONS, ACCREDITATION MANUAL FOR HOSPITALS: STANDARDS 129 (1993). Although JCAHO inspects hospitals regularly for accreditation purposes, its standards provide hospitals with no more guidance than have recent court decisions.

25. *See infra* part VI. This note will consider injuries caused by third parties who are not hospital employees, but rather actors from outside the hospital. For examples of cases dealing with patients injured by hospital employees, see, e.g., Rachals v. State, 361 S.E.2d 671 (Ga. Ct. App. 1987) (finding a nurse guilty but mentally ill in charge of aggravated assault with intent to murder patient when she administered potassium chloride to a critically ill patient); State v. Simon, 157 A.2d 508 (N.Y. App. Div. 1990) (indicting a nurse for second degree manslaughter for choking patient); State v. Raines, 344 S.E.2d 138 (N.C. Ct. App. 1986) (convicting a nurse of engaging in sexual acts with patient).

26. Courts have expanded the situations where hospitals can be held liable for a third party's criminal acts. Dawson & Scimeca, *supra* note 24, at 3; *see also* Marilyn M. Pesto, *The Special Problems of the Hospital as Defendant*, 15 ALI-ABA COURSE MATERIALS J., 1990, at 43 ("In the past few years, hospital liability has expanded . . . to almost total responsibility for every occurrence in the hospital.").

acts of third parties because the risk is unforeseeable.[27] The increased financial burden may cause already weakened hospitals in neighborhoods that most need healthcare to fail.[28] To alleviate the financial uncertainty of defending lawsuits that stem from third-party crimes, state legislatures must give hospitals guidance as to the duty they owe their patients by way of a statute regulating hospital security.[29] Such a statute would help a hospital by clarifying the extent of its duty to protect its patients from third-party crime and establishing a consistent standard to which it can conform.

This Note will discuss and analyze the emerging trend of imposing liability upon hospitals for patients harmed by third-party criminal acts. Section II of this Note discusses the extent of the patient victimization problem.[30] An examination of the emerging tort of third-party liability for hospitals and its effects follows in Section III.[31] In Section IV, the evolution of premises owner liability is discussed, tracing the basis on which hospital premises liability rests.[32] Section V analyzes court responses to the issue of patient victimization and various tests that courts have used to deal with this matter.[33] Section VI examines the effect of imposing liability on hospitals.[34] Finally, Section VII offers a model statute that regulates hospital security as a solution to the problem of the uncertain liability hospitals face, resulting from the inconsistent standards that courts have used to remedy patient victimization.[35]

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27. *See infra* notes 236-53 and accompanying text.

28. *See infra* notes 277-79 and accompanying text.

29. *See infra* notes 306, 313 and accompanying text. One author, suggesting that legislatures enact uniform security legislation to insure minimum safety standards for tenants, stated: "However, crime levels vary widely according to locale . . . . Therefore, the language of the statute should clearly specify not only the required security devices, but also inform landlords that they are required to implement whatever additional security measures they deem reasonably necessary to deter criminal activity." Arthur E. Petersen, *The Landlord's Liability for Criminal Injuries—The Duty to Protect*, 24 TULSA L.J. 280 (1988). The same theory applies to patients in hospitals: legislatures should provide minimum uniform safety standards for hospitals to follow. Some courts contend that the question of extending hospital liability to include a duty to protect patients from third-party criminal acts is a policy question that is better left to the legislature, rather than the courts. *See, e.g.*, G.L. v. Kaiser Foundation Hosp., 746 P.2d 731 (Or. Ct. App. 1987) (find that hospital was liable for protection of patient who was sexually assaulted by hospital employee, under the theory of premises liability, even if hospital was not liable for negligent hiring).

30. *See infra* notes 36-73 and accompanying text.

31. *See infra* notes 74-97 and accompanying text.

32. *See infra* notes 98-197 and accompanying text.

33. *See infra* notes 198-270 and accompanying text.

34. *See infra* notes 271-313 and accompanying text.

35. *See infra* notes 314-35 and accompanying text.

II. NATURE AND EXTENT OF PATIENT VICTIMIZATION PROBLEM

Estimates suggest that more than four million Americans are victims of crime each year.[36] One government survey has predicted that a child who is twelve years old today has an eighty-three percent chance of being a violent-crime victim during the child's lifetime.[37] More than thirty-five million citizens are likely to experience victimization in a given year.[38] The United States Department of Justice reported that in 1991, one violent crime occurred every seventeen seconds, one forcible rape occurred every five minutes, and one aggravated assault occurred every twenty-nine seconds.[39] Crime touches every aspect of our society,[40] and at least one governmental agency has recognized that violence is both a criminal justice and a health problem.[41] The healthcare system is deluged with victims of violence.[42] Violence is costly in human terms because our sense of security is threatened, and also in terms of health-care dollars, because crime victims seek help within the health care system.[43]

The frightening statistics above do not exempt hospital patients, who are also at risk of crime victimization.[44] A 1988-89 survey revealed that non-sexual assaults in hospitals increased in 1989.[45] Inner-city hospitals are

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36. The prevalence of crime in our society increases the possibility that a given person will be the victim of a violent crime. Jane L. Uva, *Urban Violence: A Health Care Issue*, J. AM. MED. ASS'N, Jan. 5, 1990, at 135. Some of the factors that affect the crime rate and types of crimes committed in different geographical areas include: population density and the degree of urbanization, composition of the population variables, stability of the area's population, economic conditions, cultural characteristics, climate, and variations in how the area's law enforcement agencies, judicial system, and citizens treat crime. U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES 1991, at v (1992).

37. Hanson & Thomas, *supra* note 20, at 4 (citing BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE PUB. NO. NCJ—104274, LIFETIME LIKELIHOOD OF VICTIMIZATION (B.J.S. TECHNICAL REPORT) (1987)).

38. *Id.*

39. U.S. DEP'T OF JUSTICE, *supra* note 36, at 4 (1992).

40. *Id.* at v (1988). According to the report, crime is a serious concern, not only for law enforcement agencies, but also for society at large.

41. Jacquelyn Campbell, *Violence Demands Nursing Solutions: Editorial*, AM. NURSE, Apr. 1992, at 4 (citing *Health People 2000*) (describing an entire section of ways to decrease violence, describing violence as a health problem as set forth by the Department of Health and Human Services).

42. *Id.*

43. *Id.*

44. Colling, *supra* note 15, at 38. Hospital patients are victims of crimes that run from petty thefts at one end of the continuum to more violent crimes causing death at the other.

45. *Crime in Hospitals*, *supra* note 14, at 2. For the 1988 survey, 340 hospitals responded, but only 315 hospitals responded to the 1989 survey.

particularly affected by this increase.[46] Another survey reported that, of 170 United States teaching hospitals, forty-three percent reported a physical attack one or more times a month, while eighteen percent reported one or more displays of threatening weapons during the same time period.[47] Yet another survey among California hospitals indicated that twenty-five percent reported both attempted and actual violent acts on the premises.[48] These numbers indicate a disturbing trend of increasing violence in all types of healthcare facilities, from inner-city hospitals to urban community hospitals.[49]

Because of their unique characteristics, hospitals are particularly vulnerable to criminal activity. During a hospital's twenty-four hour service, it sustains constant traffic and activity.[50] Criminals can easily avoid detection in hospitals because of this activity, the number of people, and also the confusion and distraction the hospital can cause to patients and visitors.[51] Patients and visitors may be under great stress and, therefore, distracted and less vigilant about their personal safety.[52] Such stress, combined with other factors, may also cause visitors and patients themselves to demonstrate violent behavior.[53]

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46. *Id.* at 3. More notable than the correlation between hospital location and increased crime rate is that all hospitals in the survey, regardless of location, experienced similar crime patterns. For example, inner-city hospitals reported that 11.1% experienced incidents of sexual assaults, while 8.7% of urban hospitals and 10.5% of rural hospitals experienced incidents of sexual assaults. *Id.* Another author claims that the nation's inner-city hospitals that provide services to the poor "are especially vulnerable to violence," Faivelson, *supra* note 16, at 60.

47. Gregg A. Pane, *Preventing & Controlling Violence in Emergency Departments*, W.J. MED., Sept. 1991, at 285-86. The Medical College of Georgia at Augusta reported that "more than thirty percent of our patients and visitors come into the facility armed with offensive weapons and that a much higher percentage have ready access to weapons in their vehicles." R. Bruce Morgan, *Health Facility Crime to Worsen During 1990's*, HEALTH FACILITIES MGMT., June 1989, at 26, 30; *see also Gunman*, *supra* note 10 (describing that police recovered two handguns, a knife, and a sawed-off rifle from gunman after he stormed an L.A. emergency room and shot three doctors); Faivelson, *supra* note 16, at 60 (noting that administrators at Detroit's Henry Ford Hospital changed its security system at the request of staff members, who reported that two to three percent of patients and visitors carry "unauthorized metallic objects," and that patients' weapons often drop onto the floor when patients are lying on stretchers).

48. Mary Downey, *The Bellevue Murder: Could It Happen in Your Hospital?*, J. HEALTHCARE PROTECTION MGMT., Fall 1989, at 30, 33.

49. *See* Morgan, *supra* note 47, at 28. One author asserted that the trend in increasing violence "may keep hospital administrators awake at night . . . ." Fiesta, *supra* note 17, at 17.

50. Fiesta, *supra* note 17, at 17; *see also Haven or Horror*, *supra* note 8, at 3 (stating that health care facilities often unintentionally contribute to attracting criminal activity by merely providing their services).

51. Fiesta, *supra* note 17, at 17.

52. *Id.*

53. *See, e.g.*, Doctors Hosp. v. Kovats, 494 P.2d 389 (Ariz. Ct. App. 1972) (patient injured when another patient struck him with a chair); Univ. of Louisville v. Hammock, 106 S.W. 219 (Ky. Ct. App. 1907) (patient injured when another patient suffering from delirium tremens assaulted her); Burns v. Forsyth County Hosp., 344 S.E.2d 839 (N.C. Ct. App. 1986) (patient injured by patient-

In addition, hospitals are, by definition, places where helpless and incapacitated patients are located, and most patients are readily accessible to visitors.[54]

To avoid negative publicity, hospitals sometimes cloak incidents of crime by either non-reporting or by using confidential reporting mechanisms.[55] Because hospitals are reluctant to disclose the full extent of crime, statistics about criminal acts committed on hospital premises are often misleading.[56] Confidentiality protection statutes[57] prevent victims from discovering internal hospital incident reports of physical or sexual assaults[58] and thereby mask the actual numbers of violent criminal attacks that occur within hospitals.[59] Some hospitals fail to report criminal activities to law enforcement officials or to file

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roommate, who threw chair); Clinton v. City of New York, 528 N.Y.S.2d 108 (N.Y. App. Div. 1988) (patient injured by roommate who stabbed her with suture scissors).

Visitors also can be a source of violence and pose a security threat to hospital occupants. Best, *supra* note 14, at 79. One study of emergency department violence reported that police received two calls a day for patient or visitor violent behavior toward staff. Pane, *supra* note 47, at 286. In addition, long waits that patients and visitors experience in many emergency rooms often exacerbate violent tendencies. Angela Brantley, *Rising Violence in ERs Cause Hospitals to Redesign Security*, MOD. HEALTHCARE, Oct. 5, 1992, at 44; *see also Hospitals Not Immune as Violence Increasingly Invades ERs*, HOSPITAL PATIENT RELATIONS REPORT, Sept. 1992, at 1 (citing long waits as one reason stress is high in emergency rooms, "Delays of eight hours or more for care only inflame tempers . . . .").

54. *See infra* notes 61-67 and accompanying text. Russell Colling compared hotel guests to hospital patients in terms of accessibility. Hotels are reluctant to give information about their guests' location; hospitals, in contrast, readily give patient room numbers to anyone making an inquiry. Hotel guests are protected by a locked door, while hospital patients have no locks on their room doors. Most hotel guests are not helpless from incapacitating illness or medication, while many hospital patients are immobile from illness or injury, or sedated from the effects of medication. Colling, *supra* note 15, at 38-39.

55. *See, e.g.*, Deborah Pinkney, *Nurses' Danger: Attacks on Job—Violence Grows in Hospitals*, CHICAGO SUN-TIMES, Sept. 20, 1992, at 1, 30 ("[H]ospitals are wary of bad publicity and so are secretive about the extent of crime within their facilities . . . ."). *See also* Copithorne v. Framingham Union Hosp., 520 N.E.2d 139 (Mass. 1987) (stating that a hospital reported two prior rapes of patients by physician through confidential intra-hospital memorandum).

56. Pinkney, *supra* note 55, at 1; Smock, *supra* note 14, at 40, 41 (stating that no agency can provide complete statistics about infant abductions from healthcare facilities, not even the FBI). *Id.* One nurse-researcher noted that "violence is increasing in hospitals and is still vastly under-reported." Selby, *supra* note 16, at 3 (quoting Marilyn Lewis Lanza).

57. Confidentiality protection statutes prevent hospitals from releasing internal reporting documents, such as incident reports and peer review records; *see, e.g.*, IND. CODE § 34-4-12.6-4 (1992) (peer review records are privileged communications).

58. *See, e.g.*, Copithorne v. Framingham Union Hosp., 520 N.E.2d 139 (Mass. 1987) (victim raped by visiting physician had no warning about physician's prior sexual assaults of two in-patients, even though hospital had knowledge by confidential incident reports); Kline v. Children's Hosp., 577 N.Y.S.2d 563 (N.Y. App. Div. 1991) (sexually assaulted patient denied discovery of documents relating to incident because of court's broad interpretation of statute).

59. Pre-trial settlement measures and an inability to determine the number of third-party tort cases filed also make it difficult to accurately determine the full extent of patient victimization cases. Hanson & Thomas, *supra* note 20, at 2.

official reports of incidents.[60] Non-reporting and confidential report documents skew the picture of hospital crime, but if one extrapolates crime in the general population to the hospital patient-population, this presents a different picture than the available numbers indicate.

Not all third-party crime injuries result from assaults by strangers. In many instances, a patient suffers injury at the hands of a family member or an acquaintance.[61] Such domestic violence includes spouse abuse,[62] child abuse,[63] and elder abuse.[64] Victims of domestic abuse frequently seek medical care in hospital emergency departments, and the victims are often followed there by the abusers.[65] Even after patients are transferred from the emergency department to an in-patient room, they remain at risk of further

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60. Pinkney, *supra* note 55, at 30. The author further notes that hospitals also resist reporting violence against employees. Other hospitals list violence against employees as a workers' compensation claim, rather than a criminal law problem; *see, e.g.*, Johns v. State Dep't of Health and Rehabilitative Services, 485 So. 2d 857 (Fla. Dist. Ct. App. 1986) (holding that employee who was assaulted in hospital lobby after arriving at work 30 minutes early was given workers' compensation benefits as exclusive remedy because the court found that arriving early was within the scope of her employment); *but see* Miller v. Johns Hopkins Hosp., 469 A.2d 466 (Md. Ct. Spec. App. 1984) (denying a hospital employee workers' compensation remedy when she was sexually assaulted after she parked on a city street adjacent to hospital, even though hospital provided a shuttle van because of crime rate in area).

61. As one author noted, "Domestic disputes rank as the top area of concern for generating violent situations." Best, *supra* note 14, at 77.

62. *Domestic Violence: Facts & Where to Call for Help*, AM. NURSE, Apr. 1992, at 9 [hereinafter *Domestic Violence*] (stating that nearly two million women were battered last year, according to the statistics from the U.S. Department of Health & Human Services); Linda L. Meierhoffer, *Nurses Battle Family Violence: Breaking the Cycle of Violence Takes Time & Caring*, AM. NURSE, Apr. 1992, at 1 (reporting from healthcare and law enforcement agencies that "a woman is battered every fifteen seconds"); Laurie J. Morrison, *The Battering Syndrome: A Poor Record of Detection in the Emergency Department*, J. EMERGENCY MED., June 1988, at 521, 523 (stating that 50% of injuries that women report to emergency rooms are caused by abuse); Uva, *supra* note 36, at 135 ("[V]iolence also includes domestic sexual abuse.").

63. *Domestic Violence*, *supra* note 62, at 9 (noting that two to four million children were abused and neglected in 1991); Uva, *supra* note 36, at 135 (stating that violence includes the physical abuse of children).

64. *Domestic Violence*, *supra* note 62, at 9 (stating that 700,000 to 1,300,000 cases of elder abuse occur annually); Uva, *supra* note 36, at 130 (stating that violence includes the abuse of the elderly).

65. AMERICAN HEALTH CONSULTANTS, *supra* note 1, at 59. Jewell Ray, Director of Security at Regional Medical Center in Memphis, notes that "[i]n any hospital across the country, the E[mergency] R[oom] is the most dangerous place." *Id.* Louis Gasbarro, president of the International Association of Healthcare Security and Safety, notes that "[v]iolence in the E[mergency] R[oom] is a spillover of violence in society." Faivelson, *supra* note 16, at 61. Gasbarro suggests that, in order to deal with hospital violence, we must confront issues such as gun control, homelessness, and domestic violence. *Id.*

injury from their abusers.[66] Hospital personnel often inadvertently assist the abuser in finding the patient's whereabouts by freely providing patient room numbers.[67]

When a patient suffers injuries inflicted by a third-party criminal, the hospital is vulnerable to third-party tort actions because it makes a more attractive defendant than the actual criminal.[68] The hospital represents a "deep pocket"[69] for compensating victims for injuries inflicted by the criminal.[70] The third-party criminal is often judgment-proof, and therefore the hospital becomes the target of the lawsuit.[71] The defense bar and some insurance organizations have resisted the move to third-party liability, calling the move "another attempt by plaintiffs' attorneys to find 'deep pockets' to compensate victims."[72]

Hospital patients are susceptible to victimization at the hands of third parties. The increasing crime rate in American society is mirrored by the increasing incidence of crime within hospitals.[73] As more hospital patients become victims of third-party crime, hospitals can expect more third-party tort lawsuits to be filed against them. An analysis of what a third-party tort lawsuit entails will be helpful in understanding the problems hospitals face.

III. THE EMERGING THIRD-PARTY TORT SUIT AND ITS EFFECTS

Traditional common law tort principles allow the criminal victim to sue the assailant directly under the intentional tort theories of assault, battery, false

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66. AMERICAN HEALTH CONSULTANTS, *supra* note 1, at 59. The author further explains, "We've had families come in after a family fight. One person is treated, and the other one comes in; and the confrontation starts all over again." *Id.*

67. Colling, *supra* note 15, at 38. In most hospitals, admitting and nursing staff freely give information about a patient's room location and status and provide visitor passes upon request. Hospitals also provide maps for ease in locating the various departments on the premises.

68. *See infra* notes 74-86 and accompanying text.

69. "Deep pocket" is defined as a person or corporation that has the money or other resources to pay a claim or judgment if one is made. BLACK'S LAW DICTIONARY 415 (6th ed. 1990).

70. Hanson & Thomas, *supra* note 20, at 29.

71. Frank Carrington, *Victims' Rights Litigation: A Wave of the Future?*, 11 U. RICH. L. REV. 447, 449 (1977) [hereinafter Carrington, *Victims' Rights Litigation*]. Generally, the hospital will not be judgment-proof and will therefore be able to pay any judgment levied against it. *Id.*

72. Cope, *supra* note 22, at 86. According to Cope, plaintiffs' attorneys view it as their duty to their clients to find a responsible party who can provide compensation for the victim's injuries. Unfortunately, because the criminal can rarely provide adequate compensation, the victim must seek recovery elsewhere. *Id.*

73. *See supra* notes 7-17, 36-67 and accompanying text.

imprisonment, and intentional infliction of emotional distress.[74] Nevertheless, most criminals are judgment-proof:[75] the criminal is unable to pay a judgment levied against him or her.[76] Thus, intentional tort remedies work only if the criminal is available for trial and has the financial resources to pay damages to the victim.[77] The criminal who is available for trial often ends up in jail, thereby unable to earn wages to pay a judgment.[78] One judge suggested that the threat of civil actions may deter criminals;[79] however, if criminals are unable to pay a judgment, they need only worry about serving a jail sentence if they are apprehended.

To remedy the problem of judgment-proof criminals, tort law developments enable crime victims to recover damages from the owner on whose premises the crime occurred.[80] In a special category of tort actions, third-party tort actions, the victim alleges that the premises owner has a duty to protect invitees from the intentional crimes of third persons.[81] This tort action's legal theory, sounding in negligence, requires the plaintiff to prove that the defendant breached a legally recognized duty, causing the plaintiff actual damage or loss.[82] Third-

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74. Carrington, *A New Tort?*, *supra* note 22, at 40. These are examples of intentional torts for which the patient-plaintiff can recover damages in a civil lawsuit against the criminal. An intent to invade the interests of another has been traditionally forbidden by the law, and a finding of intent has caused courts to impose greater responsibility on the actor. W. PAGE KEETON ET AL., PROSSER & KEETON ON TORTS, § 8, at 36-37 (5th ed. 1984) [hereinafter PROSSER & KEETON].

75. PROSSER & KEETON, *supra* note 74, at 36-37; *see also* Hanson & Thomas, *supra* note 20, at 7.

76. A judgment-proof defendant is one who is insolvent, has no sufficient property within the court's jurisdiction to satisfy a judgment, or whose wages are exempt under statutory protection. BLACK'S LAW DICTIONARY 845 (6th ed. 1990).

77. Hanson & Thomas, *supra* note 20, at 7. The situation in the majority of cases is such that the assailant/criminal is not apprehended or, if apprehended, is judgment-proof. *Id.*

78. Carrington, *Victims' Rights Litigation*, *supra* note 71, at 456. Relatively few civil actions have been filed against assailants because most criminals are indigent and therefore judgment-proof, and are often in jail following trial. *Id.*

79. *Id.* at 457 (quoting INDIANAPOLIS STAR, June 10, 1976, at 17, col. 3 (reporting on a speech made by Judge John B. Wilson, Jr. of the Marion County, Indiana, Criminal Court)).

80. Hanson & Thomas, *supra* note 20, at 1. Spurred by the victims' rights movement that gained momentum in the 1960s, courts have accepted expanded theories of liability wherein the premises owner is liable for injuries resulting from a third party's criminal acts. Cope, *supra* note 22, at 85; *see also infra* notes 299-304 and accompanying text.

81. Cope, *supra* note 22, at 85. Another type of third-party crime victim case involves the government as defendant and alleges that the government is negligent for its failure to protect or prevent crime, or for negligently handling prisoners and dangerous mental patients. Frank Carrington, *Crime Victims' Rights*, TRIAL, Jan. 1988, at 79 [hereinafter Carrington, *Crime Victims' Rights*].

82. PROSSER & KEETON, *supra* note 74, at 164-65.

party tort actions hold the premises owner, rather than the actual perpetrator,[83] liable for the victim's injuries.[84]

The third-party tort action's success depends on the victim showing that, although the criminal is the one who actually caused the harm, the premises owner's negligence afforded the criminal an opportunity to harm the victim.[85] The patient must prove, therefore, that the hospital owed a general duty of protection from crime while on the hospital's premises.[86]

As third-party tort actions flourish, writers posit various theories for the courts' move from the traditional common law doctrine.[87] One theory suggests that courts are responding to the plight of victims and the resultant victims' rights movement.[88] This responsiveness to crime victims shows the courts' tendency to be influenced by societal changes. Another theory suggests that courts are replying to increases in the nation's crime rate by imposing liability on premises owners.[89] Yet another theory is that imposing liability forces premises owners to create a safer environment.[90] One author suggests that courts are abandoning traditional negligence doctrine because of fundamental

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83. The traditional view held that in third party lawsuits, the crime victims were not the proper litigants. Carrington, *Crime Victims' Rights*, *supra* note 81, at 81. The criminal does not escape all legal liability, however, even if the premises owner is held liable to the victim, because if the criminal is convicted, he or she is sent to prison. Cope, *supra* note 22, at 85.

84. Carrington, *A New Tort?*, *supra* note 22, at 39. Third party lawsuits allow the victim to "bypass the actual perpetrator and sue the third party whose negligence has allegedly resulted in his being victimized." *Id.* at 40. *But see* Hanson & Thomas, *supra* note 20, at 5 (stating that it has "long been possible for crime victims to bring tort actions against the person who inflicted the injury and to receive compensation for such injury").

85. Carrington, *A New Tort?*, *supra* note 22, at 40. The victim essentially bypasses an action against the one who did the actual criminal harm, and sues instead the party whose negligence allegedly caused the victimization.

86. *Id.* at 41; *see also Hospital Administrators*, *supra* note 8, at 19. The basic issue driving the growth of hospital premises liability lawsuits is that health care facilities, because they invite patients and visitors onto the premises, owe these classes of people a higher duty of protection than do non-business entities. *Id.*

87. *See supra* note 19 and accompanying text.

88. Hanson & Thomas, *supra* note 20; *see also* Cope, *supra* note 22, at 86 (quoting Frank Nutter, President Alliance of American Insurers, "[The] trial bar has become more aggressive and more creative in seeking recovery for their clients, and the law and the courts have allowed this.").

89. Cathy S. Harris & Burke Gilbertson, *Business Owner Liability for Criminal Acts of Third Persons*, FOR THE DEFENSE, May 1989, at 14. The effect is that, in their attempts to solve one problem, courts have created another problem.

90. Cope, *supra* note 22, at 86. Property owners, seeing a few such successful lawsuits, will be motivated to take measures to secure their property. Also, victims' rights litigation has built into it an aspect of preventing future victimization. *Id.*

changes in social and judicial attitudes toward our liability system's goals.[91] For whatever reason, courts are expanding the area of premises liability and moving away from the common law doctrine.

Congress and some state legislatures recognize the financial consequences of victimization and have enacted victim compensation legislation.[92] Such legislation, based on the state's duty to protect its citizens, provides compensation to a citizen who has been victimized.[93] The theory upon which compensation is based is that the state failed its duty and is, therefore, liable to its citizen.[94] Victim compensation programs, although helpful, have had only limited success.[95] One reason that compensation statutes are only partially successful is that some states base their compensation on a determination of the victim's financial need.[96] Thus, if a victim's balance sheet fails to demonstrate financial hardship, the state offers no compensation. Such provisions fail to restore victims to their original status, and therefore encourage litigants to seek compensation from innocent third parties, such as hospitals. Given the origins of premises liability,[97] imposing liability on innocent third-party premises owners is an extraordinary development. An analysis of premises liability origins will help to clarify the significance of liability for third-party crime.

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91. James A. Henderson, Jr., *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L.J. 467, 483 (1976). Professor Henderson suggests that the traditional concepts of compensation are now viewed as suspect and inequitable when injured plaintiffs are denied recovery.

92. *See, e.g.*, Victims of Crime Act of 1984, 42 U.S.C. §§ 10601-10604 (Supp. IV 1986). Examples of state statutes include Ala. Code § 15-18-67 (1992), Iowa Code § 910.2 (West Supp. 1992), and Mich. Comp. Laws Ann. § 780.766 (3) (West Supp. 1992).

93. Carrington, *Victims' Rights Litigation*, *supra* note 71, at 452. Victim compensation programs provide victims compensation from the government and not the criminal, whether the criminal is apprehended or not. David L. Roland, *Progress in the Victim Reform Movement: No Longer the "Forgotten Victim,"* 17 PEPP. L. REV. 35, 43 (1989).

94. Carrington, *Victims' Rights Litigation*, *supra* note 71, at 452.

95. *Id.* (stating that although victim compensation laws are good in theory, they have extensive limitations). Another author states that "our legal system has not in the past and does not now contain effective mechanisms which permit crime victims to obtain equitable relief for harm suffered at the hands of offenders." Hanson & Thomas, *supra* note 20, at 7. David Roland notes that prior to 1984, many victim compensation programs were in poor condition because of insufficient funding and provided only limited benefits, while severely restricting candidates. Roland, *supra* note 93, at 43.

96. *See* Va. Code Ann. § 19.2-368.1 (Michie 1992).

97. *See infra* notes 98-127 and accompanying text.

IV. EVOLUTION OF PREMISES OWNER LIABILITY

A. *Traditional Rules of Landlord/Tenant Law*

The shift from land owners to land leasers[98] provided the impetus for the shift in liability from the criminal to the premises owner. The basis of the duty to protect others upon the premises springs from the common law recognition that the land owner or possessor is the best person to know about potential dangers on the land.[99] The visitor's entrant classification determined the scope of the premises owner's duty.[100] The only duty the common law imposed on the premises owner to protect an invitee against an unknown assailant was for reasonably foreseeable criminal acts.[101] Many jurisdictions abolished the traditional entrant classification scheme[102] and replaced it with a reasonable or

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98. Statistics show a trend of less owner-occupation and more renter-occupation of the land in the United States. For example, in 1890, the total farms were 4,767,179: owner-occupied farms were 3,142,746, but renter-occupied farms were only 1,624,433. U.S. DEP'T OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1957, at 395 (1961). By 1950, of a total of 5,721,022 total farms, 3,758,320 were owner occupied, and 1,962,702 were renter occupied. *Id.*

99. PROSSER & KEETON, *supra* note 74, at 386.

100. *Id.* at 393. The common law recognized three main categories of entrants on land: trespassers, licensees, and invitees. Prosser defines a trespasser as a person who enters without the possessor's consent. *Id.* The common law imposed no duty of care on the land possessor for protecting the trespasser. *Id.*

A licensee is any person who comes on the land with the possessor's consent. *Id.* at 412. The possessor owed a duty to warn the licensee of any known dangers. *Id.* However, the possessor did not have a duty to inspect the premises or to make the premises safe for a licensee. Peterson v. Balach, 199 N.W.2d 639, 641 (Minn. 1972).

Invitees are people who enter the premises to conduct business with the possessor and are owed a duty of protection against dangers the possessor knows about and also those that are discoverable with reasonable care. PROSSER & KEETON, *supra* note 74, at 419; *see also* G. Robert Friedman & Kathleen J. Worthington, *Trends in Holding Business Organizations Liable for the Criminal Acts of Third Persons on the Premises: A Texas Perspective*, 32 S. TEX. L. REV. 257, 259 (1981) (stating that duty that landowner owed is frequently determined by entrant's common law status).

101. Cornpropst v. Sloan, 528 S.W.2d 188, 191 (Tenn. 1975); *see* PROSSER & KEETON, *supra* note 74, at 428. "However, we are also aware that the duty imposed upon a possessor of land to keep his property safe for his tenants and invitees also carries with it strong social considerations which have been firmly embedded in our legal structure since the earliest days of common law." Samson v. Saginaw Professional Bldg., Inc., 224 N.W.2d 843 (Mich. 1975).

102. *See, e.g.*, Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 639 (1959) (rejecting traditional common law distinction between licensee and invitee and imposing a "duty of exercising reasonable care under the circumstances of each case" on ship owners); Rowland v. Christian, 443 P.2d 561 (Cal. 1968) (holding that a landowner should be judged by whether the landowner acted reasonably; plaintiff's status as trespasser, licensee, or invitee should not be determinative of the owner's liability); Keller v. Mols, 472 N.E.2d 161 (Ill. App. Ct. 1984) (holding that neighbor had no duty to warn child of danger of hockey without using protective equipment); Peterson v. Balach, 199 N.W.2d 639 (Minn. 1972) (holding that father had duty to warn child's 11-

ordinary person standard of care.[103]

The issue of who should be liable for a visitor's injury became more complex as landowners leased their land to tenants.[104] Initially, a lease conveyed a possessory interest in land.[105] The tenant, therefore, acquired an estate that carried with it the responsibilities of the land possessor.[106] When the lease was conveyed, the common law recognized that the landlord relinquished the land's possession and control to the tenant.[107] Additionally, the landlord had no further right to go on the land without the tenant's permission.[108] Therefore, the common law imposed no duty on the landlord to protect tenants from a third-party's criminal activities.[109] Instead, in the landlord/tenant relationship, the common law applied the doctrine of caveat lessee,[110] thereby relieving the landlord of any duty to maintain the leased

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year-old friend of dangers of carbon monoxide inhalation); Genovay v. Fox, 143 A.2d 229, 235 (N.J. Super. Ct. App. Div. 1958) (describing conventional classifications of entrants undergoing erosion in the law).

103. Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1958) (stating that reasonable care under the circumstances is the proper test for ship owners); Rowland v. Christian, 443 P.2d 561 (Cal. 1968) (holding that land occupier has duty to warn of dangerous conditions and is responsible for injuries to others caused by his lack of ordinary care); Mile High Fence Co. v. Radovich, 489 P.2d 308, 314 (Colo. 1971) (deciding that legal entrant status not sole determinant; reasonable person is proper test); *see also* Vitauts M. Gulbis, Annotation, *Modern Status of Rules Conditioning Landowner's Liability upon Status of Injured Party as Invitee, Licensee, or Trespasser*, 22 A.L.R.4th 294 (1983).

The courts have created a fictitious person to exemplify the objective standard of care by which to measure a person's conduct: "the reasonable man of ordinary prudence." PROSSER & KEETON, *supra* note 74, at 174 (citing Vaughn v. Menlove, 3 Bing. N.C. 468, 132 Eng. Rep. 490 (1837), which was probably the first case to set out the standard of "man of ordinary prudence"). The standard has been described as a reasonable person, a person of ordinary prudence, or a person of reasonable prudence. *Id.* The courts have used these descriptive phrases interchangeably to mean the same thing. *Id.* That is, the actor is held to those actions which an ideal person would do (or be supposed to do) in the same situation. *Id.*

104. *See supra* note 98 and accompanying text.

105. JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 386 (2d ed. 1988).

106. PROSSER & KEETON, *supra* note 74, at 434.

107. *Id.*

108. *Id.*

109. *See, e.g.*, Ramsay v. Morrisette, 252 A.2d 509 (D.C. 1969) (reversing a judgment for the tenant and remanding the case for further determination as to whether the landlord knew of a dangerous situation, although recognizing the common law doctrine that imposed no duty on the landlord); *see also* Gary D. Spivey, Annotation, *Landlord's Obligation to Protect Tenant Against Activities of Third Persons*, 43 A.L.R.3d 331 (1972).

110. The tenant took the premises "as is," and the landlord was under no obligation to guarantee that the premises were fit for anything. DUKEMINIER & KRIER, *supra* note 105, at 458. Caveat lessee is based upon the notion of caveat emptor, which is defined as "let the buyer beware." BLACK'S LAW DICTIONARY 222 (6th ed. 1990).

premises.[111] Under this conventional doctrine, landlords were liable for injuries to their tenants and to third parties only when they negligently breached one of the few exceptions to caveat lessee.[112] The tenant, not the landlord, was the party responsible for the upkeep and repairs of the leased property.[113]

Landlord liability has been the basis for much litigation in the past twenty years.[114] As society continued to shift from the practice of owning property to that of leasing property,[115] the landlord's duties also shifted to those duties more analogous to a common law innkeeper's, rather than a landowner's.[116]

One of the first major court decisions concerning the change in a landlord's premises liability for injuries caused by a third party's criminal act was *Goldberg v. Housing Authority of Newark.*[117] The New Jersey Supreme Court considered the issue of whether a public housing authority should provide separate police protection for its tenants. Although the jury found for the plaintiff, the *Goldberg* court held that the Housing Authority was not liable for the plaintiff's injuries because it had no duty to provide police protection for the premises.[118] The court reasoned that crime is foreseeable by everyone, virtually anywhere and at anytime.[119] The court observed that if the duty to provide police protection was based on foreseeability alone, then nearly all home

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111. Petersen, *supra* note 29, at 262. The common law did, however, recognize a few exceptions to the caveat emptor rule, including leases of furnished dwellings for short-term basis, leases of under-construction buildings, and any fraudulent misrepresentation or concealment of the property's condition. *Id.* at 262 n.6.

112. *See supra* note 110 and accompanying text. The term "caveat lessee" (let the lessee beware) was adopted to apply to property lease situations. The exceptions to caveat lessee were to disclose defects the landlord knew about, maintain common areas, make promised repairs, not make fraudulent misrepresentations about the premises, and curtail any immoral conduct on the premises. DUKEMINIER & KRIER, *supra* note 105, at 444-67, 497.

113. *See, e.g.,* Javins v. First Nat'l Realty, 428 F.2d 1071 (D.C. Cir. 1970); Goldberg v. Housing Auth., 186 A.2d 291, 296 (N.J. 1962) (deciding that no implied covenant of fitness of the premises existed); *see* Petersen, *supra* note 29, at 262.

114. *See infra* notes 117-27 and accompanying text.

115. *See supra* note 98 and accompanying text.

116. *See infra* notes 173-77 and accompanying text; *see also* Note, *Landlord's Duty to Protect Tenants from Criminal Acts of Third Parties: The View from 1500 Massachusetts Avenue*, 59 GEO. L.J. 1153, 1168 (1971) [hereinafter *Landlord's Duty*] (stating that the innkeeper, rather than the agrarian landlord at common law, more closely approximates the modern landlord, as the modern apartment landlord leases housing to multiple tenants in buildings with multiple units).

117. 186 A.2d 291 (N.J. 1962). The plaintiff was delivering milk to a tenant of the defendant's housing project. During the delivery, the plaintiff was robbed and beaten by two unknown male assailants. Although *Goldberg* dealt with the housing authority's liability for a criminal attack on a delivery person, and not a tenant, the court's analysis was based on the housing authority's duty to provide police protection for the multi-family structure. *Id.* at 291-93.

118. *Goldberg*, 186 A.2d at 296, 299.

119. *Id.* at 293 (noting that in determining if a private party is responsible for the protection of another, foreseeability is not the only inquiry).

owners and businesses would have to patrol their premises.[120]

The *Goldberg* court placed the responsibility for police protection upon the government.[121] The court recognized the common law doctrine that landlords did not imply a warranty of fitness of the premises.[122] Additionally, the court noted that the historical landlord/tenant relationship did not require the landlord to provide police protection.[123]

As society became more urban,[124] the common law emphasis that a lease conveyed only an interest in land lost some of its significance.[125] The modern apartment dweller's interest in a lease has little to do with the earth or terrain itself. Rather, the lessor is interested in a place to live that comes complete with a package of goods and services.[126] Therefore, the apartment lease of today has a different meaning to the tenant than the lease of land had to the farmer at common law.[127] As courts interpreted the landlord's liability in the modern

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120. *Id.* The court stated, "If foreseeability itself gave rise to a duty to provide 'police' protection for others, every residential curtilage, every shop, every store, every manufacturing plant would have to be patrolled by the private arms of the owner." *Id.* The court reasoned that the issue involves not only the foreseeability of a criminal act, but also the landlord's duty to take affirmative measures to prevent the act. *Id.* The court based its analysis of whether a duty exists on a question of fairness, balancing several factors: the relationship of the parties, the risk and its nature, and the public's interest in the issue. *Id.*

The fairness issue seemed to disturb the court. In addressing this issue, the court noted that "[f]airness ordinarily requires that a man be able to ascertain in advance of a jury's verdict whether the duty is his and whether he has performed it." *Id.* at 297. The court therefore found that imposing an unarticulated duty upon the Housing Authority without notice was unfair. *Id.* The *Goldberg* court noted that even with police protection, a landlord cannot prevent criminal attacks. *Id.*

121. *Id.* at 292.

122. *See supra* notes 104-13 and accompanying text.

123. Goldberg v. Housing Auth. of Newark, 186 A.2d 291, 296 (N.J. 1962). The court, in dicta, ventured that it would be a guess as to whether an unknown assailant would have been deterred by police protection. *Id.* at 297.

124. The move away from an agrarian society to one that is more industrial, causing people to live in and around cities and towns, has caused our society to become more urban. For example, in 1910, the total rural population in the United States was 49,973,000, with an urban population of only 41,999,000. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1992, at 16 (1992). By 1990, the rural population totaled only 61,656,000, and the urban population had swollen to 187,053,000. *Id.* at 27.

125. Javins v. First Nat'l Realty, 428 F.2d 1071, 1074 (D.C. Cir. 1970). In an agrarian society, an interest in land might have been reasonable. *Id.*

126. *Id.* "[A] package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance." *Id.*

127. Today's apartment tenant is uninterested in a conveyance of an interest in the land, but rather is interested in a secure place to dwell. The farmer at common law, in contrast, placed value in the land itself. *Javins*, 428 F.2d at 1074.

landlord/tenant relationship, they began to make exceptions to the traditional common law rules, thereby expanding the landlord's duties.

B. Exceptions to the Traditional Rules

Courts began to expand the landlord's liability by making exceptions to the caveat emptor rule,[128] eventually resulting in the rule's abandonment.[129] One early exception imposed liability on the landlord for the common areas of a building that were under the landlord's control.[130] As to common areas, the landlord's duty was to maintain them "in a reasonably safe condition."[131] Common areas include, for example, halls, stairs, elevators, lobbies, and other areas that are not leased to the tenants.[132]

Landlord immunity was considerably altered by the United States Court of Appeals' decision in *Kline v. 1500 Massachusetts Avenue Apartment Corporation.*[133] The court held that the landlord had a duty to minimize predictable risks to the tenant when the landlord knew of past criminal acts that occurred in common areas.[134] The court emphasized the special relationship between the landlord and the tenant,[135] analogizing it to that of innkeeper/guest.[136] Recognizing the landlord's unique capacity to provide the

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128. *See supra* note 110 and accompanying text.

129. *Javins*, 428 F.2d at 1071 (declaring an implied warranty of habitability); Peterson v. Balach, 199 N.W.2d 639, 647 (Minn. 1972).

> The duty required of a landowner . . . as to licensees and invitees is no more and no less than that of any other alleged tortfeasor, and that duty is to use reasonable care for the safety of all such persons invited upon the premises, regardless of the status of the individuals.

Id.; *see also* Petersen, *supra* note 29, at 264.

130. Goldberg v. Housing Auth. of Newark, 186 A.2d 291, 296 (N.J. 1962).

131. *Id.*

132. Samson v. Saginaw Professional Bldg., Inc., 224 N.W.2d 843, 849 (Mich. 1975).

133. 439 F.2d 477 (D.C. Cir. 1970). In *Kline*, a female apartment tenant sued her landlord for injuries inflicted by an intruder, who had assaulted her in the hallway of the landlord's building. *Id.* at 478-79.

134. *Id.* at 482. In reversing a judgment for the landlord, the court found that an individual tenant does not possess the power to take adequate security precautions in the building's common areas. *Id.*

135. *Id.* at 485.

136. *Id.* The court seemed to find it significant that at common law the only multiple dwelling houses known were inns. *Id.* at 482. In the innkeeper/guest relationship, liability is based upon "the innkeeper's supervision, care, or control of the premises, or by reason of a contract which some courts have implied from the entrustment by the guest of his personal comfort and safety to the innkeeper." *Id.*; *see also infra* notes 173-77 and accompanying text.

protection that is required,[137] the court acknowledged the special relationship between landlord and tenant.[138] The *Kline* court concluded that, in a special relationship, the party possessing control should have a duty to reasonably protect the other from reasonably anticipated third-party assaults.[139]

In addition to the landlord's duty imposed by way of the special relationship between the landlord and tenant, courts have imposed a contractual duty on landlords to provide for the tenants' reasonable safety.[140] In *Javins v. First National Realty Corporation*,[141] the court's analysis focused on the contractual nature of the modern apartment lease,[142] and found that the landlord had a legal obligation of maintenance based upon an implied warranty of habitability.[143] The *Javins* court placed the duty to repair and maintain the premises upon the landlord, the party to the contract who possessed the skill and unique capacity to perform such services.[144]

Since *Kline*, courts have continued to expand the landlord's liability to tenants.[145] Rather than enjoying immunity, modern landlords who fail to safeguard their tenants from foreseeable third-party criminal acts violate an enforceable duty of protection. By imposing liability upon landlords, courts have recognized the modern urban landlord's obligations in light of the changing nature of landlord/tenant relationships.[146]

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137. *Kline*, 439 F.2d at 484. The court noted that this unique capacity to protect exists in other special relationships, such as those between hospital/patient, carrier/passenger, businessman/patron, employer/employee, landowner/invitee, and school district/pupil. *Id.* at 482-83.

138. *Id.*

139. *Id.* at 483; *see also Landlord's Duty, supra* note 116, at 1168 ("Just as the guest submitted the security of his person and possessions to the proprietor of the inn, so does the tenant rely upon the power and responsibility of the landlord.").

140. *See, e.g.*, Javins v. First Nat'l Realty, 428 F.2d 1071 (D.C. Cir. 1970).

141. *Id.*

142. *Id.* at 1074. The majority found that "leases of urban dwelling units should be interpreted and construed like any other contract." *Id.* at 1075. The court discarded the common law notion of the lease as a conveyance in land, instead finding a lease to be an interest in a place to stay. *Id.*; *see supra* note 104-13 and accompanying text.

143. *Javins*, 428 F.2d at 1077.

144. *Id.* at 1078-79.

145. *See, e.g.*, Kwaitkowski v. Superior Trading Co., 176 Cal. Rptr. 494 (Cal. Ct. App. 1981) (holding the landlord-tenant relationship the basis for liability for failure to repair defective lock); Spar v. Obwoya, 369 A.2d 173 (D.C. 1977) (holding landlord liable for common areas, including defective front door); Samson v. Saginaw Professional Bldg., Inc., 224 N.W.2d 843 (Mich. 1975) (holding landlord liable for failure to initiate precautions to prevent harm from mental patients who used elevators).

146. *See supra* notes 98-113 and accompanying text.

C. *Modern Approaches to Landlord/Tenant Liability*

Modern courts have continued the expansion of landlord liability for third-party criminal acts that cause injury to tenants. Some courts have based liability on the special relationship between landlord and tenant,[147] and others have found that the landlord's duty is based on local statutes.[148] Whatever the basis for liability, the trend is toward tenant protectionism.

In *Samson v. Saginaw Professional Building, Inc.*[149] the Michigan Supreme Court held that an office building landlord owed a duty of protection to a tenant's employee, who suffered injuries from an attack by a mental patient in an elevator.[150] The court reasoned that the special relationship between the landlord and tenant was sufficient to require the landlord to protect its tenants.[151] Noting that common areas are under the landlord's control, the court held that the landlord is responsible for ensuring that these areas are "reasonably safe for the use of . . . tenants and invitees."[152]

The Alabama Supreme Court moved away from the special relationship as a basis for liability and found that a landlord's duty to protect the tenant from third-party criminal acts was imposed by city ordinances.[153] In *Brock v. Watts Realty Company*,[154] the court held that two city Housing Code ordinances[155]

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147. *See supra* notes 135-39 and accompanying text.

148. *See, e.g.*, Brock v. Watts Realty, 582 So. 2d 438 (Ala. 1991); *see also infra* note 155 and accompanying text.

149. 242 N.W.2d 843 (Mich. 1975).

150. *Id.*

151. *Id.* at 850.

152. *Id.* at 849. The well-reasoned dissent noted that landlords generally have no duty to protect another person even if the landlord has knowledge that such action is necessary. *Id.* at 852. Acknowledging that in special relationships one person may have a duty to protect another from the criminal attack of a third person, the dissent observed that the question of duty turns on policy considerations. *Id.* at 854. Further, whether a duty of protection is owed to another person is mostly a question of fairness. *Id.* at 852, 854 (quoting *Landlord's Duty*, *supra* note 116, at 1180).

153. Brock v. Watts Realty Co., 582 So. 2d 438 (Ala. 1991). The required standard of care for a reasonable person may be ordained by legislative enactment. Deviation from the standard of care set by statute may constitute negligence. A statute may, in a sense, impose strict liability upon a defendant because no excuse for its violation is recognized. By enactment of a statute, the legislature can reallocate the burden of injuries "upon those who can measurably control their causes, instead of upon those who are in the main helpless in that regard." St. Louis, Iron Mt., & S. Ry. v. Taylor, 210 U.S. 281, 296 (1907). Some courts refer to the imposition of such liability as "negligence per se," and the defendant can avoid liability by neither reasonable ignorance nor proper care. PROSSER & KEETON, *supra* note 74, at 220, 227; *see also* Martin v. Herzog, 126 N.E. 814 (N.Y. 1920) (holding that the unexcused violation of the safety statute constitutes contributory negligence per se).

154. 582 So. 2d 438 (Ala. 1991).

imposed a duty on the landlord to keep the individual apartment door locks in working order.[156] The court reasoned that the murder of a tenant was foreseeable, even if no prior similar incidents had occurred in the area.[157] Noting that absent foreseeability landlords and businesses are generally not held liable for third-party criminal acts, the court reasoned: "'We are not willing to give the landlord one free ride, as it were, and sacrifice the first victim's right to safety upon the altar of foreseeability . . . .'"[158] In so holding, the *Brock* court deviated from the long-held common law rule that liability should not be imposed for criminal acts that the landlord was unable to anticipate.[159] Rather than relying on the common law rule, the court looked to the ordinances' purpose: alleviating the crime problem in residential areas.[160]

Many modern courts recognize a landlord's duty to protect tenants from criminal attacks on the premises and, therefore, impose a duty to employ some type of security measures.[161] The cases indicate, however, that courts have

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155. The Birmingham Housing Code Ordinances provide:

Sec. 7-1-93 Windows, exterior doors, etc.

Every window, exterior door and basement hatchway shall be reasonably weathertight, watertight and rodentproof and shall be kept in sound working condition and good repair. Locks shall be provided on all exterior doors and all exterior openable windows.

Sec. 7-1-97 Construction, maintenance, etc., generally of facilities, etc.

Every facility, piece of equipment or utility which is required under this article shall be so constructed or installed that it will function safely and effectively and shall be maintained in satisfactory working condition.

156. *Brock*, 582 So. 2d at 441.

157. *Id.*

158. *Id.* at 440, 441 (quoting Paterson v. Deeb, 472 So. 2d 1210, 1218-19 (Fla. Dist. Ct. App. 1985)).

159. *Brock*, 582 So. 2d at 440.

160. The court noted that the two Birmingham Housing Ordinances were enacted pursuant to Ala. Code 1975, § 11-53-1, which concerns safety, sanitation, and crime in buildings housing multiple dwellings. *Id.* The court found compelling the plaintiff's argument that the ordinances were enacted only to protect tenants from crime; otherwise such laws would be unnecessary. *Id.*

161. Petersen, *supra* note 29, at 279 (stating that because a jury decides whether the security measures were adequate after a criminal attack upon a victim, this may be unfair to a landlord who has tried in good faith to prevent criminal behavior). *See, e.g.*, Rowe v. State Bank of Lombard, 531 N.E.2d 1358 (Ill. 1988) (imposing duty upon owner to take precautionary measures); Brichacek v. Hiskey, 401 N.W.2d 44 (Iowa 1987) (holding that landlord has duty to provide door locks to protect tenant); Aisner v. Lafayette Towers, 341 N.W.2d 852 (Mich. Ct. App. 1983) (reversing trial court's grant of summary judgment where it found that defendant owed no duty because apartment was not in high risk area and therefore risk was unforeseeable); Johnson v. Harris, 198 N.W.2d 409 (Mich. 1972) (finding that the victim's allegations were enough to raise question for the jury whether risk was foreseeable); Aaron v. Havens, 758 S.W.2d 446 (Mo. 1988) (holding that landlord has duty to protect tenant from dangerous conditions).

reached opposite extremes in protecting either party's interests.[162] Because some courts base liability on the special relationship between the premises owner and the victim, a closer analysis of the special relationship doctrine will explain hospital liability for patient injuries from third-party acts.

D. Premises Liability and the Special Relationship Doctrine

A special relationship exists when a person's protection and safety is entrusted to another.[163] In special relationships, the underlying theory for imposing an enhanced duty is that one person gives up the ability to protect himself to another.[164] Some courts have found that such a special relationship exists between a patient and a hospital, and have based a hospital's duty of protection from third party criminal acts on this relationship.[165]

Some jurisdictions have combined various special relationships with special circumstances to find a basis for imposing liability for failure to affirmatively protect another from injuries resulting from criminal acts.[166] In these

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162. Petersen, *supra* note 29, at 279. *See supra* note 161; *see also* Escobar v. Brent General Hosp., 308 N.W.2d 691 (Mich. Ct. App. 1981) (finding that hospital that leased house to tenants owed no duty to prevent unforeseeable criminal assaults).

163. Holland America Cruises, Inc. v. Underwood, 470 So. 2d 19, 20 (Fla. Dist. Ct. App. 1985) (quoting Nappier v. Kincade, 666 S.W.2d 858 (Mo. Ct. App. 1984)) (holding that cruise line had duty to protect its passengers from third party criminal acts because of special relationship). *See also* RESTATEMENT (SECOND) OF TORTS § 315, Duty to Control Conduct of Third Persons, that provides:

> There is no duty to control the conduct of a third person as to prevent him from causing physical harm to another unless
> (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
> (b) a special relation exists between the actor and the other which gives to the other a right to protection.

RESTATEMENT (SECOND) OF TORTS § 315 (1965); *see also* Hanson & Thomas, *supra* note 20, at 13 (stating that in cases of special relationships, a person relinquishes some ability to protect oneself to the control of another).

164. Cornpropst v. Sloan, 528 S.W.2d 188, 192 (Tenn. 1975) (stating that jurisdictions have combined various special relationships with certain conditions and circumstances to find liability for failure to protect another from criminal acts resulting in harm). *But see* Wright v. Webb, 362 S.E.2d 919, 920-21 (Va. 1987) (declining to impose liability on motel/dinner theater owner for patron's injuries caused by third party, despite special relationship).

165. Young v. Huntsville Hosp., 595 So. 2d 1386, 1387 (Ala. 1992); Stropes v. Heritage House Children's Ctr., 547 N.E.2d 244, 251 (Ind. 1989).

166. *Cornpropst*, 528 S.W.2d at 192; *see also* Young v. Huntsville Hosp., 595 So. 2d 1386 (Ala. 1992) (stating that hospital has special relationship to patient); Kline v. 1500 Massachusetts Ave. Apartment Corp., 439 F.2d 477 (D.C. Cir. 1970) (deciding that landlord has duty to protect tenants from criminal acts because of special relationship between landlord and tenant); Wright v. Webb, 362 S.E.2d 919, 922 (Va. 1987) (citing Hines v. Garrett, 108 S.E. 690 (Va. 1921)) (deciding that common carrier must use high degree of care to protect passengers).

jurisdictions, the person in control has a duty to reasonably protect the other from the foreseeable criminal attacks of third parties.[167] Unforeseeable, sudden, and unexpected violent acts by a third party, however, may not lead to the imposition of liability.[168] The *Second Restatement of Torts*, section 314A establishes examples of different special relationships that give rise to a duty to protect.[169] Examples of these special relationships are common carrier/passenger,[170] innkeeper/guest,[171] and land possessor/invitee.[172]

As just stated, one special relationship is the innkeeper/guest relationship.[173] The common law requires innkeepers to provide guests with

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167. *Cornpropst*, 528 S.W.2d at 192; *see also* Freeman v. St. Clare's Hosp. & Health Ctr., 548 N.Y.S.2d 686 (N.Y. App. Div. 1989) (holding a hospital liable for a patient who was raped while in multiple restraints while in emergency room, because the hospital's duty was commensurate with patient's ability to protect self); *but see* Virginia M. Chock & Leslie H. Kondo, Note, Knodle v. Waikiki Gateway Hotel, Inc.: *Imposing a Duty to Protect Against Third Party Criminal Conduct on the Premises*, 11 U. HAW. L. REV., 231, 242 (1989) (citing Knodle v. Waikiki Gateway Hotel, Inc., 742 P.2d 377 (Haw. 1987)) (Hawaii has not recognized the landlord/tenant relationship as one where an unquestionable duty arises, and until 1987, Hawaii had not imposed a duty upon innkeepers to protect guests because of a special relationship).

168. Kline v. 1500 Massachusetts Ave. Apt. Corp., 439 F.2d 477, 483 (D.C. Cir. 1970).

169. Section 314A provides:

Special Relations Giving Rise to Duty to Aid or Protect

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

(2) An innkeeper is under a similar duty to his guests.

(3) A possessor of land who holds it open to the public is under a similar duty to members of the public who enter in response to his invitation.

(4) One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a similar duty to the other.

RESTATEMENT (SECOND) OF TORTS § 314A (1965).

Section 314A includes a caveat that there may be other relations that would require the imposition of a duty. Another relationship listed in comment a to § 314A that would give rise to a special relationship includes that of employer/employee.

170. For discussion of common carrier/passenger and third-party crime, see generally Sonja A. Soehnel, Annotation, *Liability of Land Carrier to Passenger Who Becomes Victim of Third Party's Assault on or About Carrier's Vehicle or Premises*, 34 A.L.R.4th 1054 (1984).

171. *See, e.g.*, Virginia D. v. Madesco Inv. Corp., 648 S.W.2d 881 (Mo. 1983) (deciding that a hotel operator is in a special relationship with its guests and therefore owes an affirmative duty of protection); *see generally* Annotation, *Liability of Hotel or Motel Operator for Injury to Guest Resulting from Assault by Third Party*, 28 A.L.R.4th 80 (1984) (discussing the special relationship doctrine).

172. *See, e.g.*, Nappier v. Kincade, 666 S.W.2d 858 (Mo. Ct. App. 1984) (discussing how duty to protect business invitees can arise in situations where a special relationship exists).

173. RESTATEMENT (SECOND) OF TORTS § 314A (1965); Chock & Kondo, *supra* note 167, at 241 ("It is well established under the common law that there is a special legal relationship between innkeepers and registered guests.").

a higher standard of care than the average premises owner.[174] Innkeepers have generally had a duty to protect guests from third-party assaults by exercising reasonable care.[175] Liability is imposed as a matter of law, based upon either the innkeeper's direct control of the premises or upon the contract right a guest expects (i.e., comfort and safety) in return for money.[176] This last theory rests on the assumption that, among other things, the guest is paying for a safe place to stay.[177]

Another special relationship that gives rise to a duty to protect is between a common carrier and its passengers.[178] In *Stropes v. Heritage House Children's Center*,[179] the court analogized the common carrier/passenger relationship to that of health facility/patient, noting the extraordinary standard of care that Indiana courts had imposed on common carriers. The common carrier's imposed liability is based upon the control and autonomy that the

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174. Kline v. 1500 Massachusetts Ave. Apartment Corp., 439 F.2d 477, 482 (D.C. Cir. 1970); Chock & Kondo, *supra* note 167, at 241. "Innkeepers have been held to operate under a rigorous liability standard, 'approaching that of an insurer against all dangers save acts of God.'" *Id.* (quoting Kveragas v. Scottish Inns, Inc., 733 F.2d 409, 412 (6th Cir. 1984)); Steve M. Tumblin, *Recent Developments in Utah Law*, 1986 UTAH L. REV. 95, 139 (1986) (stating that most jurisdictions traditionally imposed a duty that was greater than one of reasonable care for protecting guests' property, but required a showing of negligence to hold the innkeeper liable for guests' physical injury); *but see* Virginia D. v. Madesco Inv. Corp., 648 S.W.2d 881, 886 (Mo. 1983) (holding that an innkeepers duty is only one of ordinary care).

175. *Kline*, 439 F.2d at 482.

176. *Id.*

177. Goldberg v. Housing Auth., 186 A.2d 291, 292 (N.J. 1962); *see also* Chock & Kondo, *supra* note 167, at 241 (stating that duty is based on the reasoning that the guest is paying for the innkeeper's implied or explicit suggestion of a safe overnight stay); Richard L. Small, *The Landowner/Occupier's Duty to Prevent Assaults by Third Parties*, MICH. BAR J., Jan. 1989, at 34 (stating that the substantive item that the guest is paying for is a safe place to stay).

178. Kline v. 1500 Massachusetts Ave. Apartment Corp., 439 F.2d 477, 483 (D.C. Cir. 1970) (holding that a carrier-passenger is one of the relationships in which the law imposes a special duty of care); Holland Am. Cruises, Inc. v. Underwood, 470 So. 2d 19, 20 (Fla. Dist. Ct. App. 1985) (holding that a common carrier is required to use the highest degree of care reasonably demanded to protect passengers); Goldberg v. Housing Auth., 186 A.2d 291, 294 (N.J. 1962) (deciding that common carriers have a duty to use a "high degree of care to protect the persons of their patrons"); Wright v. Webb, 362 S.E. 2d 919, 921 (Va. 1987) (holding that a common carrier has a duty to exercise a high degree of care in protecting passengers). *See generally* RESTATEMENT (SECOND) OF TORTS § 314A (1965); *see also* D. Mark Collins, *The Business Inviter's Duty to Protect Invitees from Third-Party Criminal Attacks on the Premises: An Overview and the Law in South Dakota After* Small v. McKennan Hosp., 33 S.D. L. REV. 90, 93 (1988) (noting that certain relationships have been the basis on which courts have imposed a duty to protect).

179. 547 N.E.2d 244 (Ind. 1989). In *Stropes*, a children's center employee raped a mentally retarded fourteen-year-old resident. The Indiana Supreme Court noted that it has extended the principles underlying the common carrier standard to reach other enterprises. *Id.* at 252.

passenger surrenders during the period of accommodation.[180] Some courts have imposed a duty on common carriers to use the highest degree of care for their passengers.[181] Nevertheless, not all courts require the common carrier to anticipate unforeseeable criminal acts,[182] and hold the carrier liable only if the criminal acts were foreseeable.[183]

The relationship of a business invitor to its invitees has caused some courts difficulty in determining the business' duty to protect.[184] Although special status has been bestowed on business invitees in some circumstances, no special relationship has been traditionally recognized that would impose a duty to protect the invitee from third-party criminal acts.[185] The scope of the business invitor's duty to prevent third party criminal assaults on its invitees has been the issue of much litigation in the last decade.[186]

Like private individuals, business invitors have traditionally had no duty to

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180. *Id.* The *Stropes* court listed two reasons for applying the concept of control as a basis for imposing liability upon common carriers. *Id.* (citing Rabon v. Guardsmark, Inc., 571 F.2d 1277 (4th Cir. 1978)). First, the contract between a carrier and a passenger contains the implied assurance of the passenger's safety. *Id.* Second, the trust of his safety that a passenger places in the hands of the common carrier imposes special duties upon the common carrier, like a bailor entrusted with goods. *Id.* at 253.

181. *See, e.g.*, Holland Am. Cruises, Inc. v. Underwood, 470 So. 2d 19, 20 (Fla. Dist. Ct. App. 1985) (quoting Whitman v. Red Top Sedan Serv., 219 So. 2d 213 (Fla. Dist. Ct. App. 1969)).

182. *See, e.g.*, Wright v. Webb, 362 S.E.2d 919, 921 (Va. 1987) (deciding that, under ordinary circumstances, it would be hard for the premises owner to anticipate an intentional criminal attack); Connell's Ex'rs v. Chesapeake & Ohio Ry. Co., 24 S.E. 467, 470-71 (Va. 1896) (stating that a passenger murdered on a train is an unforeseeable act). In *Connell's*, the court reasoned:

> It is better that the carrier should be held responsible to a passenger for injuries received at the hands of an intruder, a stranger, or a fellow passenger only in those cases where its agents or employees knew, or in the light of surrounding circumstances, ought to have known, that danger threatened or was to be apprehended . . . than that the hitherto recognized limits of responsibility for negligent acts should be enlarged, and the carrier be held to answer for a casualty wholly unforeseen . . . .

Connell's, 24 S.E. 467, 470-71 (Va. 1896).

183. *See supra* note 167 and accompanying text.

184. *See, e.g.*, McNeal v. Henry, 266 N.W.2d 469 (Mich. Ct. App. 1978) (holding that a store owner owed no duty to an invitee to prevent a shooting); Small, *supra* note 177, at 35 (noting that Michigan courts have had difficulty with the issue of imposing a duty of protection upon business owners for their invitees, because in spite of the special status that business invitees have historically enjoyed, the relationship itself between owner and invitee has not traditionally been the basis for a duty of protection from criminal assaults).

185. Small, *supra* note 177, at 35 (stating that Michigan courts have struggled with the issue of the business owner's liability); Wright v. Webb, 362 S.E.2d 919, 921 (Va. 1987).

186. WILLIAM L. PROSSER ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 477 n.1 (1988).

protect their patrons from criminal harm on the premises.[187] Courts have therefore been unwilling to impose a duty to protect, absent special circumstances.[188] Five policy reasons are advanced for the reluctance to impose liability on business invitors.[189] First, the judiciary is reluctant to interfere with the common law rule. Second, it is believed that the intentional criminal acts of a third person are a superseding, intervening cause of the harm. Third, criminal acts are often unforeseeable. Fourth, because business owners are unclear about the standard of care to which they will be held, they suffer an economic burden resulting from imposed liability based on unclear standards of care. Finally, there is the conflicting policy of government-provided police protection versus private police protection.[190] The duty a business invitor owes to an invitee who enters for business purposes is one of reasonable care to assure a reasonably safe premises.[191]

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187. *See, e.g.*, Nappier v. Kincade, 666 S.W.2d 858 (Mo. Ct. App. 1984) (deciding that although business owners have no duty to protect others from third-party criminal attacks, special circumstances may cause an exception to the general rule); Genovay v. Fox, 143 A.2d 229 (N. J. Super. Ct. App. Div. 1958) (not requiring a business person to take precautions that are clearly unreasonable); Cornpropst v. Sloan, 528 S.W.2d 188 (Tenn. 1975) (deciding that shopping center owners owed no duty to guard against third-party criminal acts unless they knew or had reason to know criminal acts were about to occur); Wright v. Webb, 362 S.E.2d 919 (Va. 1987) (deciding that motel/dinner theater parking lot owners owed patrons a duty of reasonable care, but had no duty to protect invitees from third-party assaults); Collins, *supra* note 178, at 93 (noting that, absent extenuating circumstances, business owners owe no duty to provide protective security measures for patrons); Harris & Gilbertson, *supra* note 89, at 14 (noting that business owners owed no duty to protect persons from criminal harm while on their premises); Small, *supra* note 177, at 32 (stating that, generally, premises owner owes no duty to prevent third-party intentional acts).

188. *See, e.g.*, Cornpropst v. Sloan, 528 S.W.2d 188 (Tenn. 1975) (deciding that various special relationships have led to the imposition of liability upon the landowner); Wright v. Webb, 362 S.E.2d 919, 922 (Va. 1987) (citing Hines v. Garrett, 108 S.E. 690 (Va. 1921)) (distinguishing business invitee from passenger-business invitee does not entrust safety to invitor as passenger does to common carrier); Yelnosky, *supra* note 19, at 883 (stating that despite the trend to impose duty, many jurisdictions continue to refuse to impose a duty to protect).

189. *See, e.g.*, McNeal v. Henry, 266 N.W.2d 469 (Mich. Ct. App. 1978), where the court refused to impose liability upon a store owner for a customer's death that resulted from a third party's criminal acts. Affirming the trial court's grant of summary judgment for the defendant-store owner, the court reasoned that "[a]s a matter of policy, we do not believe that commercial businesses should be required to answer for the type of bizarre consequence faced by defendant in this case, even though plaintiff's complaint clearly and correctly characterized plaintiff herself as a business invitee." *Id.* at 470. The court noted that both large and small businesses located in most urban communities cannot bear the oppressive insurance burden that imposition of liability for failure to protect business patrons would require. *Id.* Further, although the store had a duty of reasonable care to protect its patrons, it had not assumed a duty to protect the plaintiff from the criminal's extraordinary unforeseeable behavior. *Id.*

190. Nappier v. Kincade, 666 S.W.2d 858, 860 (Mo. Ct. App. 1984); Harris & Gilbertson, *supra* note 89, at 14.

191. Genovay v. Fox, 143 A.2d 229, 234 (citing Brody v. Albert Lifson & Sons, 111 A.2d 504 (N.J. 1955)) (deciding that an owner of premises where the public is invited owes duty of reasonable care to provide a reasonably safe place to conduct business); *see also* McNeal v. Henry, 266

Exceptions to the general rule of no duty exist, and courts have offered differing rationales for imposing liability upon the business invitor.[192] Some courts impose liability upon the business invitor if the criminal attack was reasonably foreseeable.[193] Many courts have interpreted section 344 of the *Second Restatement of Torts* as a basis for expanding a business invitor's duty to protect its invitees.[194] Still other courts impose a duty to protect if the

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N.W.2d 469 (Mich. Ct. App. 1978) (deciding that a store owner owes duty of reasonable care to its invitees).

192. Nappier v. Kincade, 666 S.W.2d 858, 860 (Mo. Ct. App. 1984) (deciding that a business owner generally owes a duty to make premises safe for customers, and under special circumstances the business owner owes a duty to protect a customer from criminal attack); Harris & Gilbertson, *supra* note 89, at 14 (stating that one justification for imposing liability is the increase in the nation's crime rate); Small, *supra* note 177, at 32 (noting that courts have based exception to no duty on existence of special relationship or special circumstances, or on the court's perception of public policy); Yelnosky, *supra* note 19, at 889 (noting that some courts explain exceptions as based on fairness or reluctance to make business inviter an insurer of safety). *See also* RESTATEMENT (SECOND) OF TORTS § 344 & cmt. f.

193. *See, e.g.*, Foster v. Winston-Salem Joint Venture, 281 S.E.2d 36 (N.C. 1981) (holding shopping mall owners liable for a female plaintiff's assault in mall parking lot, even though general rule is no duty to ensure safety of patrons, because the assault was foreseeable since 29 incidents of assault occurred in the preceding year).

194. Harris & Gilbertson, *supra* note 89, at 15. *See also* Yelnosky, *supra* note 19, at 898 (noting that acceptance of the *Restatement* approach has facilitated plaintiff's ability to not only prove that the premises owner breached its duty to protect, but also to get before the jury the pivotal question of the premises owner's breach of the duty).

Section 344 provides:

> Business Premises Open to Public: Acts of Third Persons or Animals
>
> A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to
>
> (a) discover that such acts are being done or are likely to be done, or
>
> (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

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

Comment f provides:

> *Duty to police premises.* Since the possessor is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring, or about to occur. He may, however, know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual. If the place or character of his business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection.

RESTATEMENT (SECOND) OF TORTS § 344 cmt. f (1965).

Yelnosky suggests that, because comment f makes the premises owner's duty contingent upon

business provides a climate that attracts criminals.[195]

Courts have issued conflicting results and standards as they have struggled to balance the competing interests of parties[196] within a special relationship when the dependent party has been injured by a third party. As with other special relationships, courts have also struggled with the hospital/patient relationship when patients have been injured by third-party criminal acts. Although not specifically included in section 314A, the hospital/patient relationship has been recognized by many courts as a special relationship that imposes a duty of protection.[197]

V. COURT RESPONSES TO THE PATIENT VICTIMIZATION PROBLEM

Having established that hospitals are being held to a duty of protection from third-party criminal acts in many jurisdictions,[198] an analysis of the various standards of care and their application is necessary. The courts have not developed a clear test or analysis that applies to third-party premises liability. Several states have addressed the problem of hospital liability for patient victimization with conflicting results.[199] Three standards have emerged in third-party premises liability cases: the ordinary or reasonable care under the circumstances standard,[200] the foreseeability of criminal activities standard,[201]

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notice of some kind, its use of the phrase "know or have reason to know" greatly increases the conditions that may comprise adequate notice. Yelnosky, *supra* note 19, at 897-98. This reading of notice is overbroad, however, and does not give the premises owner enough of a standard on which to rely. Note also that comment f begins with the common law notion of no duty and expresses that the "possessor is not an insurer of the visitor's safety." RESTATEMENT (SECOND) OF TORTS § 344 cmt. f (1965).

195. Yelnosky, *supra* note 19, at 891 (noting that no duty to protect arises unless the inviter's premises provide an attraction or unique climate for crime). Certain structures associated with businesses have been distinguished as being inherently dangerous places. For example, some courts have noted the dangerousness of parking facilities and the risks associated with their operation. Friedman & Worthington, *supra* note 100, at 286 (citing Isaacs v. Huntington Memorial Hosp., 695 P.2d 653 (Cal. 1985)); Gomez v. Ticor, 193 Cal. Rptr. 600 (Cal. Ct. App. 1983) (business patron fatally shot when he inadvertently observed an armed robbery while enroute to his car in parking garage).

196. The parties' interests are competing because the dependent party wants protection, and in many instances the owner does not want to pay for protection. Additionally, the dependent party does not want the owner to charge more for the product or service when the owner provides protection.

197. *See, e.g.*, Young v. Huntsville Hosp., 595 So. 2d 1386 (Ala. 1992) (deciding that a hospital owed a duty of protection to a sedated patient because of the special relationship that existed between the hospital and patient).

198. *See supra* notes 22-23 and accompanying text.

199. *See infra* notes 200-69 and accompanying text.

200. *See infra* notes 203-27 and accompanying text.

201. *See infra* notes 228-53 and accompanying text.

and the special relationship between the hospital and its patient standard.[202] The following case is illustrative of the reasonable care under the circumstances standard.

A. Reasonable Care Under the Circumstances Standard

The Minnesota Supreme Court decided the seminal case in hospital premises liability[203] when it applied the reasonable care under the circumstances standard in *Sylvester v. Northwestern Hospital.*[204] The *Sylvester* court held that, although a private hospital is not an insurer of patient safety, it "must exercise such reasonable care for the protection and well-being of a patient as his known physical and mental condition requires or as is required by his condition as it ought to be known to the hospital in the exercise of ordinary care."[205] The Minnesota high court further held that the hospital's reasonable care must bear some relation to the patient's incapacity to care for his own safety, but would not require the hospital to take precautions to avoid dangers

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202. *See infra* notes 254-70 and accompanying text.

203. Sylvester v. Northwestern Hosp., 53 N.W.2d 17 (Minn. 1952). In *Sylvester*, a patient recovering from an appendectomy was physically assaulted by another patient who was wandering around the hospital in an intoxicated condition. *Id.* at 18. The evidence showed that the same patient who assaulted the patient-victim had wandered into the patient-victim's room on other occasions while drunk. *Id.* at 19. The court imposed liability even though the plaintiff-victim failed to present evidence that the assailant had the reputation of being a violent drunk; rather, the hospital was liable because it either knew or should have known that the assailant was drunk on this occasion. *Id.*

204. 53 N.W.2d 17 (Minn. 1952). The Minnesota Court of Appeals adhered to the reasonable care under the circumstances standard in Roettger v. United Hosp., 380 N.W.2d 856 (Minn. Ct. App. 1986). In *Roettger*, the female patient was physically assaulted by a male intruder only one day after she had given birth. *Id.* at 858. Visitors reported that the intruder acted strangely in a visitor's lounge on another floor minutes before the attack on Mrs. Roettger. *Id.* The court held that the evidence supported the jury's conclusion that the hospital's failure to provide sufficient security was a substantial factor in the patient's injuries. *Id.* at 862.

The substantial factor that the *Roettger* court based liability upon is the key to third-party tort liability. Here, although the intruder directly caused Mrs. Roettger's injuries, the hospital was held liable for its failure to provide adequate security to prevent the intruder's criminal act. By imposing liability, the court recognized that the hospital owed a duty to protect its patients from a third party's intentional criminal acts. Although in *Sylvester* the criminal assailant was a patient, and in *Roettger* the criminal assailant was an intruder, the courts did not make this distinction. The hospital, therefore, has a duty to use reasonable care under the circumstances to protect its patients from *any* third-party criminal acts. *Roettger*, 380 N.W.2d at 862; *see also* Freeman v. St. Clare's Hosp. & Health Ctr., 548 N.Y.S.2d 686 (N.Y. App. Div. 1989) (deciding that a hospital has a duty of reasonable care to protect patients from third-party injury, and thus the hospital was liable when a patient in multiple restraints in the emergency room was raped by another patient).

205. *Sylvester*, 53 N.W.2d at 19. The court defined reasonable care as the care a reasonably prudent person would exercise, given the same or similar circumstances. *Id.* (citing WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 36 (1st ed. 1941)).

that a reasonable person would not anticipate.[206]

The Minnesota Supreme Court based its holding on the assaulter's being seen, on other occasions, roaming the hospital intoxicated. Thus, the hospital knew that he might cause harm to a patient.[207] The court found that the hospital was liable for the patient-victim's injuries even though it could not have foreseen the particular injury.[208]

The North Carolina Court of Appeals followed the reasonable care under the circumstances standard announced in *Sylvester*,[209] yet it reached a different result. In *Burns v. Forsyth County Hospital Authority, Inc.*,[210] a patient who was heavily sedated following a myelogram[211] was injured when another patient threw a chair across the room and hit him.[212] Focusing on the patient's entrant status,[213] the *Burns* court found that the injured patient was an invitee and, therefore, the hospital owed a duty to exercise ordinary care to assure reasonably safe premises.[214] The court reasoned that the hospital is not an insurer of patient safety, nor is it required to take such precautions as will hinder its business operations.[215] Although the *Burns*[216] court found no liability, the court recognized that hospitals have a duty to protect their patients from foreseeable assaults by others.[217] In affirming the jury verdict for the defendant-hospital, the court noted that the jury decided the threshold issue when it determined that the hospital did not have adequate notice of an unsafe

206. *Sylvester*, 53 N.W.2d at 19. The *Sylvester* court found the hospital liable based on its duty to exercise reasonable care to have known of the assaulter's dangerous and violent tendencies. *Id.*; *see also* Burns v. Forsyth County Hosp. Auth., 344 S.E.2d 839 (N.C. App. 1986) (deciding that a hospital is not an insurer of patient safety, and thus is not required to take such precautions as will hinder its business operations).

207. *Sylvester*, 53 N.W.2d at 19.

208. *Id.* at 20 (citing Knight v. Powers Dry Goods Co., 30 N.W.2d 536 (Minn. 1948)) (finding for a defendant store owner when a plaintiff was knocked down by an escaping shoplifter, because the store owner could not reasonably foresee that the shoplifter possessed vicious tendencies).

209. 53 N.W.2d 17 (Minn. 1952).

210. 344 S.E.2d 839 (N.C. App. 1986).

211. A myelogram is a diagnostic x-ray taken after a radiopaque dye is injected into the spinal canal. STEDMAN'S MEDICAL DICTIONARY 917 (5th ed. 1982).

212. *Burns*, 344 S.E.2d at 842.

213. *See supra* note 100 and accompanying text.

214. *Burns*, 344 S.E.2d at 846.

215. *Id.*

216. Burns v. Forsyth County Hosp. Auth., 344 S.E.2d 839 (N.C. App. 1986).

217. *Id.* at 847. In this case, the hospital owed its patients a duty to protect them from assaults by other patients. Nevertheless, the court held that, because the jury previously returned a verdict for the defendant-hospital, it decided that the hospital had no notice of an unsafe condition and therefore had no duty to prevent injury. *Id.*

condition.[218] The hospital's duty of care toward its patients, as articulated by the court, was limited to only those unsafe conditions of which the hospital had notice.[219]

In another decision based upon the reasonable care under the circumstances standard, the New York Supreme Court affirmed a jury verdict for an injured patient when it found that the defendant-hospital was negligent in its failure to take safety measures to prevent unauthorized persons from obtaining dangerous hospital instruments.[220] In *Clinton v. City of New York*, the court held that the jury's finding of negligence was proper, based on the hospital's failure to take safety measures to avert a patient's access to hospital instruments.[221]

The *Clinton* court found that the hospital's duty was one of reasonable care in protecting its patients from harm inflicted by others.[222] Reasonableness, according to the *Clinton* court, is "measured by the capacity of the patient to

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218. *Burns*, 344 S.E.2d at 847. Plaintiff's appeal was based in part on the following instructions given to the jury:

> The plaintiff contends and the defendant denies that the defendant was negligent in that the defendant knew or should have known that the patient Daniel Moore was dangerous or might reasonably be expected to be dangerous to other patients and that the defendant failed to use ordinary and reasonable care by allowing the patient Daniel Moore to be placed in the room with the plaintiff and or by failing to remove the patient Daniel Moore from the room of the plaintiff.

Id. (quoting jury instructions from trial record). The court held that the defendant hospital was not negligent in its failure to read through the medical records that were transferred with the patient from a mental health facility, which contained information regarding Daniel Moore's condition. *Id.* at 846. The *Burns* court stated, "It is overly burdensome to impose a legal duty upon defendant to read through the entire medical records of all referrals." *Id.* at 845. The court accordingly held that the exclusion of the medical records was proper. *Id.* However, had the hospital taken the time and effort to read the three pages of notes that the referring physician sent, the hospital may have been held to have had notice of Mr. Moore's violent tendencies, and therefore Mr. Burns' injuries may have been prevented. *Id.*

219. *Id.* at 846. The court noted that notice of an assault could be ascertained from evidence of a bad temper in the past. *Id.* (citing Wegner v. Delly-Land Delicatessen, Inc., 153 S.E.2d 804, 807 (N.C. 1967)).

220. Clinton v. City of New York, 528 N.Y.S.2d 108 (N.Y. App. Div. 1988). In *Clinton*, the plaintiff-patient was injured when another patient repeatedly stabbed her. *Id.* at 109. The attacker had apparently obtained and hidden suture scissors in her bedside drawer, and used them to attack the plaintiff. *Id.* In contrast to the court in Burns v. Forsyth County Hosp. Auth., 344 S.E.2d 839 (N.C. Ct. App. 1986), where the court based its liability determination on the patient's entrant classification, the *Clinton* court did not consider whether the patient was an invitee. Instead, the *Clinton* court focused on the hospital's duty to keep unsafe instruments from other patients. *Clinton*, 528 N.Y.S.2d at 109.

221. *Clinton*, 528 N.Y.S.2d at 109. Additionally, as in Sylvester v. Northwestern Hosp., 53 N.W.2d 17 (Minn. 1952), the *Clinton* court did not distinguish those criminal actors who are patients from those who are intruders when determining the hospital's liability. *Id.*

222. *Clinton*, 528 N.Y.S.2d at 108. By so holding, the *Clinton* court reaffirmed the standard first articulated in Sylvester v. Northwestern Hosp., 53 N.W.2d 17 (Minn. 1952).

provide for his or her own safety."[223] On the issue of foreseeability, the court noted that where the intentional, intervening act of another is foreseeable, the hospital will be held liable if it fails to prevent the act.[224] Thus, because a patient stealing scissors was a foreseeable act, the hospital was liable.[225]

The above cases demonstrate how courts have reached differing conclusions while applying the same standards. The reasonable care under the circumstances standard gives courts, juries, and hospitals only the broadest guidelines to follow.[226] Hospitals are left uncertain as to the conclusion a jury or court will reach when applying the reasonable care under the circumstances standard,

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223. *Burns*, 528 N.Y.S.2d at 109 (citing Killeen v. State of New York, 498 N.Y.S.2d 358 (N.Y. 1985)); Mochen v. State of New York, 396 N.Y.S.2d 113 (N.Y. App. Div. 1977). In Roettger v. United Hosp., 380 N.W.2d 856 (Minn. Ct. App. 1986), the court determined reasonableness by such factors as the hospital's knowledge of its patient's physical and mental condition. *Id.* at 859.

224. *Clinton*, 528 N.Y.S.2d at 109 (quoting Kush v. City of Buffalo, 462 N.Y.S.2d 831 (N.Y. 1983)). The hospital adduced evidence at trial that suture scissors are among the instruments that are normally kept locked. Contrast this holding with that of the court in Burns v. Forsyth County Hosp. Auth., 344 S.E.2d 839 (N.C. App. 1986), where the court held that the hospital did not have notice of an unsafe condition when a patient, transferred from a mental institution, threw a chair and hit a sedated patient. *Burns*, 344 S.E.2d at 844. In *Clinton*, the court had no notice that a patient would obtain suture scissors from a locked cabinet, yet the hospital was held liable because the court determined that the assailant's intentional, intervening act was foreseeable. *Clinton*, 528 N.Y.S.2d at 109.

225. The dissent maintained that a hospital's negligence cannot be inferred simply because a patient was injured. *Clinton*, 528 N.Y.S.2d at 109. To prove negligence, a patient must prove that a breach of the hospital's duty caused the injuries. *Id.* The patient must also prove that the injury was foreseeable. *Id.* Here, the hospital produced evidence that it kept instruments in a locked cabinet. *Id.* The patient failed to prove that the assailant obtained the scissors from the hospital, and the dissent noted that such suture scissors were available from other places outside the hospital. *Id.* In urging that the assault was an intervening, superseding act that caused the plaintiff-patient's injuries, the dissent observed that the hospital could neither have foreseen nor done more to avert the assault under the circumstances. *Id.* at 109-10; *see also supra* note 204 and accompanying text. The dissent was correct in its reasoning that because a patient has possession of suture scissors does not mean that the hospital was negligent. Here, the court went too far in finding that the attacker's act was foreseeable. With such reasoning, every hospital that uses sharp instruments would be liable under the *Clinton* court's notion of foreseeability.

226. Henderson, *supra* note 91, at 468. Professor Henderson states:

> The reforms and changes in the law of negligence in recent years have, purportedly to advance identifiable social objectives, eliminated much of the specificity with which negligence principles traditionally have been formulated. We are rapidly approaching the day when liability will be determined routinely on a case by case, "under all the circumstances" basis, with decision makers (often juries) guided only by the broadest of general principles. When that day arrives, the retreat from the rule of law will be complete, principled decision will have been replaced with decision by whim, and the common law of negligence will have degenerated into an unjustifiably inefficient, thinly disguised lottery.

Id.

because juries determine the standard on a case-by-case basis.[227] This leaves hospitals uncertain as to which standard a court will apply, and also as to the result a jury will reach.

B. Foreseeability of Criminal Activities Standard

In a negligence cause of action, the plaintiff must prove four elements: duty, breach of duty, causation, and damages.[228] The determination of the foreseeability of a third party's actions falls under the duty and causation analysis[229] and has caused some confusing results to issue from the courts.[230] Some states have followed the common law as set forth in the *Second Restatement of Torts*, which relieves the premises owner from liability for third party criminal acts.[231] Other states have applied the prior similar acts test to

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227. *See supra* note 225 and accompanying text. The collective jury verdict disguises the difficulty in applying the concept of "reasonableness" to a particular case's facts. Courts must realize that the interests at stake "are too important to be left to decision by intuition, or by whim." Henderson, *supra* note 91, at 479-80. A Michigan court gave the following jury instruction in a case where a theater patron was shot while on the theater's premises by a stranger:

> Now, in considering whether there was an act of negligence, the law provides that when a person is invited on the premises of a business he is a business invitee, and the person doing the inviting has a certain duty to that individual. That duty is, in this state, to use reasonable care for the safety of that person. Now, it is going to be up to you to determine what are the requirements of using reasonable care for the safety of the Plaintiff . . . .

Earle v. Colonial Theater Co., 266 N.W.2d 466, 467-68 (Mich. Ct. App. 1978).

228. *See supra* notes 80-84 and accompanying text.

229. PROSSER & KEETON, *supra* note 74, at 274-75.

230. Friedman & Worthington, *supra* note 100, at 268 (noting that the foreseeability determination in premises liability litigation, under the duty or proximate cause analysis, has been troublesome for courts and litigators to determine). *See, e.g.*, Isaacs v. Huntington Memorial Hosp., 695 P.2d 653 (Cal. 1985) (applying the totality of the circumstances test); C.S. v. Sophir, 368 N.W.2d 444 (Neb. 1985) (applying the prior similar acts rule); Small v. McKennan Hosp., 403 N.W.2d 410 (S.D. 1987) (abandoning the prior similar acts test and applying the totality of the circumstances test).

231. Section 448 provides:

> INTENTIONALLY TORTIOUS OR CRIMINAL ACTS DONE UNDER OPPORTUNITY AFFORDED BY ACTOR'S NEGLIGENCE
>
> 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).

Comment a to § 448 is instructive:

> The rule stated in this section applies when the actor's conduct creates a situation which is utilized by a third person to inflict intentional harm upon another or provides a temptation to do so to which the third person yields, but the actor has no reason to

determine foreseeability,[232] but this test has been largely abandoned in favor of the totality of the circumstances test.[233] Still other courts have relied on the existence of a special relationship on which to base foreseeability analysis.[234] Recent cases reveal that courts are moving toward the totality of the circumstances or the special relationship tests to decide the foreseeability issue.[235]

The California Supreme Court abandoned the prior similar acts[236] rule in favor of the totality of the circumstances rule in *Isaacs v. Huntington Memorial Hospital*.[237] In *Isaacs*,[238] a doctor was shot in the hospital parking lot as he

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expect that the third person would so act. Under the rule stated in this Section, the actor is not responsible for the harm thus inflicted merely because the situation which his negligence has created has afforded an opportunity or temptation for its infliction.

Id. at cmt. a.

Texas followed the *Restatement* approach. *See, e.g.*, Nixon v. Mr. Property Mgmt. Co., 690 S.W.2d 546 (Tex. 1985) (affirming grant of summary judgment for apartment interests because attack on ten-year-old girl who was abducted from apartment complex was not foreseeable; Texas Supreme Court reversed by finding a duty on other grounds); *see also* Hanson & Thomas, *supra* note 20, at 12.

232. *See, e.g.*, C.S. v. Sophir, 368 N.W.2d 444 (Neb. 1985) (upholding summary judgment for defendant property owner notwithstanding occurrence of identical incident two months prior). The prior similar acts rule states that "in the absence of prior similar incidents, an owner of land is not bound to anticipate the criminal activities of third persons, particularly where the wrongdoer was a complete stranger to both the landowner and the victim and where the criminal activity leading to the injury came about precipitously." Isaacs v. Huntington Memorial Hosp., 695 P.2d 653, 658 (Cal. 1985) (quoting Wingard v. Safeway Stores, Inc., 176 Cal. Rptr. 320 (Cal. Ct. App. 1981)). With this rule, a hospital would not be held liable for a patient's injuries if no prior similar criminal acts occurred on the hospital's premises.

233. *See* Isaacs v. Huntington Memorial Hosp., 695 P.2d 653 (Cal. 1985); Small v. McKennan Hosp., 403 N.W.2d 410 (S.D. 1987). *See infra* notes 237-51 and accompanying text. The *Isaacs* court abandoned the prior similar acts rule because it found that the rule violated public policy in several aspects. *Isaacs*, 695 P.2d at 658. First, application of the rule discouraged premises owners from taking measures to prevent future harm. *Id.* Secondly, the first victim loses under the prior similar acts rule, but subsequent victims may recover. *Id.* Third, application of the rule leads to arbitrary results, because of uncertainty as to how "similar" any prior incidents should be, and how close in time an incident must be for it to be considered a prior similar act. *Id.* at 658-59. Fourth, the rule considers the foreseeability of a particular act as equivalent to previous occurrences of similar acts. *Id.* at 659. Lastly, application of the prior similar acts rule takes too many cases away from the jury's consideration. *Id.*

234. *See, e.g.*, Young v. Huntsville Hosp., 595 So. 2d 1386 (Ala. 1992) (noting that special relationship between hospital and patient gives rise to duty to protect).

235. *See, e.g.*, Young v. Huntsville Hosp., 595 So. 2d 1386 (Ala. 1992) (special relationship test); Isaacs v. Huntington Memorial Hosp., 695 P.2d 653 (Cal. 1985) (totality of the circumstances test).

236. *See supra* note 232 and accompanying text.

237. 695 P.2d 653 (Cal. 1985).

238. *Id.*

was about to enter his car.[239] Dr. Isaacs brought a negligence action against the hospital, alleging that the hospital breached its duty by failing to provide adequate security to protect him from a third party's criminal acts.[240] The California Supreme Court, observing that the prior similar acts rule led to "one free assault" for the premises owner,[241] rejected that test on policy grounds and applied the totality of the circumstances test.[242] The totality of the circumstances test takes into account such factors as the surrounding area and the prevalence of crime there, the environmental conditions in the area, and other evidence, in addition to any prior similar acts.[243] The *Isaacs* court reversed and remanded the case, holding that there remained a question of fact as to the foreseeability of the incident, and that a foreseeability determination should be made by a jury.[244]

The *Isaacs*[245] decision is important to the analysis of premises owner liability because it leaves hospitals even more uncertain as to how foreseeability will be measured. Hospitals in jurisdictions that follow this approach may not be given the notice of a prior similar act on hospital premises before a jury decides that the hospital had a duty to protect its patients.[246] Additionally, the

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239. *Id.* at 655. Dr. Isaacs left the building at about 10:00 p.m., accompanied by his wife and a friend. His car was parked across the street from the hospital's emergency room.

240. *Id.*

241. Under the prior similar acts rule, "the first victim always loses, while subsequent victims are permitted recovery." *Isaacs*, 695 P.2d at 658. The *Isaacs* court noted that such a result is both unfair and goes against the policy of victim compensation. *Id.*

242. *Id.* at 658, 661. The court held that "foreseeability is determined in light of all the circumstances and not by a rigid application of a mechanical 'prior similars' rule." *Id.* at 659. *See supra* notes 232-35 and accompanying text.

243. *Id.* at 659, 661. Although prior incidents similar in nature to the instant crime may help establish foreseeability, they are not required for such a finding. *Id.* at 661.

244. *Id.* at 665. In so holding, the *Isaacs* court determined that the trial court erred when it concluded that, as a matter of law, the assault was unforeseeable. *Id.* at 662. The South Dakota Supreme Court followed the *Isaacs* decision in Small v. McKennan Hosp., 403 N.W.2d 410 (S.D. 1987), where the court abandoned the prior similar acts rule in favor of the totality of the circumstances rule. The facts in *Small* were similar to those in *Isaacs*, except the victim in *Small* was murdered in the hospital's parking garage. The *Small* court, like the *Isaacs* court, rejected the prior similar acts rule both on policy grounds and on the grounds that courts had difficulty in applying the prior similar acts rule. This difficulty stemmed from different interpretations as to what constituted "similar," and different definitions as to time and territory limits in determining foreseeability. *Small*, 403 N.W.2d at 412.

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

246. Moreover, to add to a hospital's uncertainty, a court could find that hospitals might be put on notice of similar incidents in *other* hospitals. The problem with this analysis is: Where does a court draw the line? Would a hospital be held to have had prior notice if a rape occurred at another hospital in the same town? The same county? What about different violent crimes—would they provide the same notice? Since courts have not given hospitals consistent and uniform standards, the answers are unknown. Therefore, hospitals are left without knowing how a court will view a given standard.

Isaacs[247] standard failed to set out exactly what factors the jury should consider when determining the foreseeability of a criminal act; the court found only that all the circumstances of a particular case will be considered.[248] The *Isaacs*[249] standard also failed to inform hospitals as to the weight each factor would be given in determining foreseeability. For instance, would evidence of prior crimes on the premises be given more weight by a jury than a hospital's location in a high-crime area? Hospitals will not get the answers from the totality of the circumstances test.

Another reason that the *Isaacs* decision is important in hospital premises liability cases is that it involved a plaintiff who was a doctor rather than a patient.[250] The doctor in *Isaacs* was mobile and presumably not hindered by illness or disability and, therefore, was capable of defending himself; yet the court found that the hospital owed him a duty of protection.[251] Many hospital patients, by contrast, are incapable of defending themselves because of illness, disability, or medications, and must therefore rely on the hospital to look after their safety.[252] The situation of helpless patients has caused some courts to apply the special relationship test in premises liability cases.[253]

C. Special Relationship Between Hospital and Patient Standard

The Alabama Supreme Court used a different approach to determine a hospital's liability for third-party crime directed at its patients when it recently addressed this issue in a case of first impression.[254] In *Young v. Huntsville Hospital*,[255] the Alabama Supreme Court held that, because of the "special

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247. *Isaacs*, 695 P.2d at 653.

248. *See infra* notes 317-34 and accompanying text.

249. Isaacs v. Huntington Memorial Hosp., 695 P.2d 653, 659 (Cal. 1985).

250. *Id.* at 655.

251. *Id.* at 662. *See infra* notes 254-62 and accompanying text. Because he practiced at the hospital, Dr. Isaacs was more familiar with his surroundings than most patients are who are hospitalized.

252. *See supra* notes 163-97 and accompanying text.

253. *See, e.g.*, Young v. Huntsville Hosp., 595 So. 2d 1386 (Ala. 1992). *See infra* notes 254-72 and accompanying text.

254. Young v. Huntsville Hosp., 595 So. 2d 1386, 1387 (Ala. 1992).

255. *Id.* at 1386. In *Young*, a female patient was admitted into the hospital to undergo treatment for kidney stones. *Id.* at 1387. While she lay in her bed, sedated by the effects of pain medication, an intruder entered her hospital room and sexually assaulted her. *Id.*; *see supra* note 2 and accompanying text. The assault occurred at approximately 6:00 a.m., four hours before posted visiting hours were to begin. *Id.* The court noted that the parties disputed the actual visiting hours. *Id.*; *see supra* note 3 and accompanying text. The patient contended that the hospital had been negligent in its failure to protect her from the intruder's criminal act. *Young*, 595 So. 2d at 1387. The trial court directed a verdict against the patient, and although it did not specify on what grounds the directed verdict was based, the Alabama Supreme Court inferred that the trial court found that the hospital had lacked a legal obligation to protect Ms. Young. *Id.*

relationship or circumstance" between the patient and the hospital, the hospital had a duty to protect the patient from third-party criminal acts.[256] Fundamental to the court's reasoning was that the patient was either unable or less able to protect herself from assaults such as this because of her sedated state.[257] The *Young* court noted, however, that the general rule in Alabama remains: "[A]bsent special relationships or circumstances, a person has no duty to protect another from criminal acts of a third person."[258] The court further noted that it still recognizes the difficulty of imposing liability for third-party intentional criminal acts on an innocent party.[259]

The *Young* court relied on *Second Restatement of Torts*, section 315 for its analysis,[260] and held that, because Ms. Young was under the influence of medication and therefore unable to protect herself from an assault,[261] a special relationship existed.[262] The court concluded that this case was excepted from the general rule because of the special relationship that existed between the

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256. *Id.* at 1387-88. *See supra* notes 163-97 and accompanying text.

257. *Young*, 595 So. 2d at 1388. The court stated: "[R]ecognition of an additional 'special relationship' should hinge on 'dependence or mutual dependence' among the parties." *Id.* at 1389 (quoting B. LINDAHL, DOOLEY'S MODERN TORT LAW: LIABILITY & LITIGATION § 3.12, at 34 (1984 & 1986 Supp.)) The court further noted that "applying the 'dependence' test, we can hardly imagine a situation in which a person is more dependent on another for basic bodily protection and care than the situation of an anesthetized or sedated patient." *Id.* at 1389.

258. *Id.* at 1387 (quoting Moye v. A.G. Gaston Motels, Inc., 499 So. 2d 1368, 1370 (Ala. 1986)).

259. Young v. Huntsville Hosp., 595 So. 2d 1386, 1388 (Ala. 1992) (quoting CIE Serv. Corp. v. Smith, 460 So. 2d 1244, 1247 (Ala. 1984)). The hospital argued that because no evidence of prior criminal acts existed, Ms. Young's injuries were unforeseeable. The Alabama Supreme Court, however, relied on the special relationship between Ms. Young and the hospital as the basis for excepting this case from the general rule, and left the determination of foreseeability for the jury. *Id.* at 1388.

260. *Id.* at 1388 n.3. The court concluded that "[l]ogically, the relationship between a hospital and a sedated or anesthetized patient would be covered under (b) above." *Id.*

> Section 315 of the Restatement provides:
>
> There is no duty so to control the conduct of a third person as to prevent him from causing harm to another unless
>
> (a) a special relationship exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
>
> (b) a special relationship exists between the actor and the other which gives to the other a right to protection.

RESTATEMENT (SECOND) OF TORTS § 315 (1965).

261. The hospital was granted a rehearing on its challenge that the patient was not "heavily sedated." *Young*, 595 So. 2d at 1390. Because the issue of sedation was controverted, the court modified its original opinion to reflect the controverted facts, yet reaffirmed its holding that the hospital was liable based on the special relationship. *Id.*

262. *Id.* at 1388.

hospital and the patient.[263] The *Young* court cited the national trend of expanding the special relationship doctrine as support for its decision.[264] The court also concluded that a situation where more dependence exists than between an anesthetized patient and the hospital is hardly imaginable.[265]

In *Young*, the hospital argued that the patient failed to prove that the intruder's criminal act was foreseeable because there was no evidence of prior criminal acts.[266] The Alabama Supreme Court held, however, that the jury should decide the question of foreseeability.[267] Again noting the special relationship that existed in this particular context, given the patient's dependence upon the hospital, the court observed that the risk of the patient's harm from an intruder's criminal conduct was reasonably foreseeable because "the resulting crime was one the general risk of which was foreseeable."[268] In so finding, the court recognized the special care that a hospital must take when its patients are dependent on it for their safety.

The *Young* court struggled with its decision to impose liability upon the hospital.[269] When courts impose liability upon hospitals for the intentional criminal acts of third parties, hospitals bear the burden for acts that they most often could not foresee. The financial burden may prove to be too much for financially weakened hospitals to continue their services. Therefore, because

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263. Young v. Huntsville Hosp., 595 So. 2d 1386, 1388 (Ala. 1992). The court cited Alabama cases where it upheld either summary judgments or directed verdicts for premises owners where third-party criminal acts caused injury to invitees, but noted that in none of the cases was the injured person incapacitated. *Id.* at 1388 n.4.

264. *Id.* at 1388.

265. *Id.* at 1389. The court noted that Ms. Young was dependent on the hospital for basic bodily protection, among other things, and therefore the special relationship doctrine should apply. *Id.*

266. *Id.* at 1388.

267. *Id.* The court did not give any guidance as to factors, other than the special relationship between patient and hospital, for the jury to consider when determining foreseeability.

268. *Id.* at 1389 (quoting Brock v. Watts Realty Co., 582 So. 2d 438, 441 (Ala. 1991)). For a complete discussion of *Brock*, see *supra* notes 153-60. The court left the task of determining the foreseeability of this particular criminal assault, however, to the jury after it examines all the facts.

269. The court reiterated the general rule for premises liability in Alabama on several occasions: "On numerous occasions this court has stated the general rule pertaining to a premises owner's or occupier's liability for criminal acts of third parties." Young v. Huntsville Hosp., 595 So. 2d 1386, 1387 (Ala. 1992). "[W]e still recognize that '[i]t is difficult to impose liability on one person for an intentional criminal act by a third person' . . . ." *Id.* at 1388 (quoting CIE Service Corp. v. Smith, 460 So. 2d 1244, 1247 (Ala. 1984)). "This court has repeatedly upheld summary judgments and directed verdicts for a premises owner or occupier in cases where an invitee or employee had sued because of third-party criminal acts." *Id.* at 1388 n.4. Finally, "[t]he general rule still is that" imposing liability on a premises owner for a third-party's criminal act is difficult. *Id.* at 1389. The court seemed to want to reassert the general rule of no liability even as it strayed from the general rule in this case, setting a precedent in Alabama for hospital premises liability.

current law places too great a burden upon hospitals, reform is needed by way of statutory guidance for both courts and hospitals.[270]

As courts continue to struggle with whether to impose liability, they impose burdens upon hospitals that are causing difficulties that deserve some analysis. The next section examines these burdens in greater detail.

VI. PROBLEMS WITH IMPOSING LIABILITY ON HOSPITALS

A. Burden on the Hospital

The corporate liability of a hospital includes responsibility for security problems.[271] Negligence in maintaining the premises, including security, is one of the oldest areas of corporate negligence.[272] Corporate negligence has been defined as "the failure of those entrusted with the task of providing accommodations and facilities necessary to carry out the charitable purposes of the corporation to follow . . . the established standard of conduct to which the corporation should conform."[273] When courts are determining the issue of whether to expand hospital corporate liability, public policy requires that the present system be changed to one where the risk associated with providing medical care can be shared.[274]

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270. *See infra* part VII.

271. Janine Fiesta, *Security—Whose Liability, Infant Kidnapping*, NURSING MGMT., May 1990, at 16. According to Arthur Southwick, "[W]ith respect to corporate negligence the legal question becomes what duties does the hospital owe directly to the patient?" Southwick, *supra* note 18, at 152.

272. Jim M. Perdue, *Direct Corporate Liability of Hospitals: A Modern Day Legal Concept of Liability for Injury Occurring in the Modern Day Hospital*, 24 S. TEX. L.J. 773, 789 (1983). Perdue discusses the three traditional areas of corporate liability for hospitals where, in addition to maintaining the premises, hospitals are also liable for negligently furnishing defective equipment, and negligence in staff selection and retention. Modern hospitals must bear corporate liability in six areas. These areas include the above three, and also: negligence for the failure to supervise physicians; negligence for failure to develop medical rules or policies as well as liability for any negligence in performing this duty; and for negligence in enforcing the medical rules or policies that the hospital formulates. *Id.*

273. Perdue, *supra* note 272, at 774 (quoting Bader v. United Orthodox Synagogue, 172 A.2d 192, 194 (Conn. 1961)).

274. Henry M. Brown, *Hospital Liability Law: Cost Containment, Marketing and Consumer Expectation*, 55 DEF. COUNS. J. 159, 166-67 (1988). "Since reducing costs of health care to taxpayers and consumers is a major reason for cost containment, it would be inequitable to expect hospitals to bear the full burden of expanded liability." *Id.*

Increasing violence is costing hospitals money.[275] Many courts are finding that hospitals failed to provide adequate security,[276] and the resulting damage awards are burdening an already financially strained health care system.[277] Additionally, as hospitals struggle for survival, half of all hospitals today are already technically bankrupt.[278] In light of the current trend of

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275. Downey, *supra* note 48, at 33. "Many judicial rulings have gone against hospitals for lack of security. I've heard of these cases all over the country—Florida, California, etc. These cases are costing health care institutions a lot of money." *Id.* (quoting Stan Price, Director of Security at NYU Medical Center).

276. *Id.*; *see also* Young v. Huntsville Hosp., 595 So. 2d 1386 (Ala. 1992) (finding that hospital failed to provide security to protect a patient from third-party criminal acts based on special relationship); Isaacs v. Huntington Memorial Hosp., 695 P.2d 653 (Cal. 1985) (deciding that hospital had a duty to protect its invitees based on the foreseeability of criminal acts, as determined by the totality of the circumstances); Rodis v. Herman Kiefer Hosp., 370 N.W.2d 18 (Mich. Ct. App. 1985) (reversing a summary judgment for a hospital when an independent contractor was shot by an unidentified assailant, because the property owner has a duty to protect tenants and invitees from foreseeable criminal activities of third parties); Sylvester v. Northwestern Hosp., 53 N.W.2d 17 (Minn. 1952) (deciding that hospital had a duty to protect patient and take precautions that were reasonable under the circumstances); Roettger v. United Hosp., 380 N.W.2d 856 (Minn. Ct. App. 1986) (finding that a hospital's negligent security procedures were the direct cause of a patient's injuries); Freeman v. St. Clare's Hosp. & Health Ctr., 548 N.Y.S.2d 686 (N.Y. App. Div. 1989) (finding that a hospital violated its duty of protection when a restrained patient was raped by another patient in emergency room); Clinton v. City of New York, 528 N.Y.S.2d 108 (N.Y. App. Div. 1988) (finding that a hospital failed to properly protect a patient when it negligently failed to control access to scissors); Small v. McKennan Hosp., 403 N.W.2d 410 (S.D. 1987) (finding that a hospital had a duty to protect its patients and invitees based on the foreseeability of crime as determined by the totality of the circumstances).

277. To say that the state of health care has reached a crisis point is all but a cliché. Gina Reese-Aldana, Comment, *The Drama of Third-Party Payor Tort Liability for Cost Containment Decisions: A Critical Review*, 12 WHITTIER L. REV. 591 (1991). The health care system has undergone tremendous changes over the past thirty years, which now threaten the system's ability to provide affordable health care to a large portion of the population. *Id.* This factor translates to a total health burden that "has been rising by twenty percent per year in the past five years." Donald Ratajczak, *Economic Trends: Health is Making Economy Sick*, J. AM. SOC'Y CLU & CHFC, Mar. 1992, at 11; *see also U.S. Health Care Spending Rising Faster Than Other Countries*, J. ACCT., June 1992, at 17 (stating that health spending increased faster in the United States between 1980 and 1990 than in ten other leading countries). Because of increases in health care insurance costs and health care costs in general, consumers have demanded cost containment measures. Reese-Aldana, *supra*, at 594-95. However, these cost constraints on health care are hard to achieve. Ratajczak, *supra*, at 11.

One reason advanced for the difficulty in achieving health care cost containment is that too many patients look for favorable outcomes from health care providers in the face of an inexact science. *Id.* Those patients who do not experience a favorable outcome often resort to litigation, where juries have awarded large judgments even when no errors have been made. *Id.* Without significant changes in our current health care system, almost twenty percent of all economic resources will be spent on health care in the next century. *Id.* at 12.

278. Jay Ryan, *The Changing American Hospital: Back to the Future*, HOSP. MATERIAL MGMT. Q., Feb. 1991 at 3; *see also* D. Louis Glaser, Comment, *Unrelated Trade or Business Income and Hospitals: Reconciling Operating Losses and Charity Care*, 19 LOY. U. CHI. L.J. 1307 (1988) (stating that many hospitals are already experiencing large operating losses because of

imposing liability, those hospitals that are already financially weakened in neighborhoods that most need health care services may be forced to close.[279]

Hospitals cannot survive in a climate of unlimited liability.[280] Hospitals have been left in the "precarious position of knowing that liability may be lurking just around the corner, but not knowing what they must do to protect themselves."[281] The current system has created a "no-win" situation for hospitals trying to maintain a balance between financial viability and delivery of liability-free, quality patient care.[282] In determining this balance, a hospital must either choose viability of the institution or accessibility for the patients it serves.

Hospitals have been held to indeterminate and arbitrary standards in cases involving third-party patient victimization.[283] The courts have failed to provide reliable and consistent standards that would define the duty hospitals could rely upon. The outcome of a successful lawsuit for the plaintiff leaves the hospital even more vulnerable and confused as to its duty, and the victim still suffering the consequences of the crime.[284] The damage awards from successful lawsuits are causing a financial burden because hospitals have

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increased operating costs and growth in uncompensated care); LEWIS & SHEPS, *supra* note 7, at 249 ("[Medical centers] may well discover that they cannot survive competitively without substantial curtailment of the expensive tertiary-care services on which they now focus. Alternatively, if the total resources become very limited, the *volume* of needed care may diminish very substantially.").

279. STARR, *supra* note 7, at 387. The Medicare and Medicaid reimbursement systems have caused hospitals in poor neighborhoods to have financial difficulties. The result is that healthcare institutions with limited resources are left to care for those people who remain uninsured. Hospital closings are threatened in some regulated states like Massachusetts, Maine, New York, and New Jersey. William O. Cleverley, *Hospital Closings: Fact & Fiction*, HEALTHCARE EXECUTIVE, Sept./Oct. 1990, at 27. A recently released list from the American Hospital Association names 65 community hospitals that closed in 1989. *Id.* at 26.

280. Indeed, hospitals would probably pass the cost of expanded liability on to its patients in order to survive. With the total costs of health care rising, institutions are passing those costs onto both consumers and taxpayers. Consumers bear the cost-shifting by paying more out-of-pocket expenses for health care, and taxpayers bear the cost by paying increased taxes. Reese-Aldana, *supra* note 277, at 591.

281. *Id.* at 626-27.

282. *Id.* at 599 (discussing concerns about how cost containment efforts affect the quality of patient care).

283. *See supra* notes 198-270 and accompanying text.

284. Crime victims experience physical, financial, and emotional trauma from the crime. Roland, *supra* note 93, at 35. In addition, the crime victim often endures intrusive questioning and frustration with a criminal justice system that offers little information concerning the status of the proceedings against the criminal. *Id.* Crime victims also often suffer lost wages, medical expenses, and lack of support from both the legal system and their own support system. *Id.* at 35.

difficulty insuring against an unforeseen risk.[285] The courts and legislatures must re-examine the health care system and its delivery in light of society's broader goals of access to health care[286] and equitable public policy issues.[287]

B. *Public Policy Issues*

Holding a hospital liable for the intentional criminal acts of a third person upon a patient "does little more than prefer the unjust treatment of one class of persons to the unjust treatment of another."[288] Where the hospital and the patient are both innocent victims of a third-party criminal, it is inequitable to place the entire burden on the hospital.[289] In *Goldberg v. Housing Authority*,[290] the court observed that "[f]airness ordinarily requires that a man be able to ascertain in advance of a jury's verdict whether the duty is his and whether he has performed it."[291] Duty is a question of fairness and requires that the court weigh several factors: the relationship between the parties, the

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285. Although some people would argue that a hospital's liability for third-party patient victimization is merely a cost of doing business, unlimited liability goes beyond any notion of foreseeable costs. That courts have failed to issue consistent standards that hospitals can rely upon and determine their risk is the core issue. *See* McNeal v. Henry, 266 N.W.2d 469 (Mich. Ct. App. 1978). This case discusses the presence of unsavory characters in both large and small communities who roam businesses, stealing and assaulting legitimate patrons. The court observed: "We fear that to hold businessmen liable for the clearly unforeseeable third-party torts and crimes incident to these activities would eventually drive them out of business." *Id.* at 470 n.1. A consistent approach would lead to predictable costs for the hospital, which the hospital could then insure for adequately.

286. *See supra* notes 275-79 and accompanying text.

287. Reese-Aldana, *supra* note 277, at 634. "[T]he hospital system has grown in response to perceived social need—in comparison with normal budgetary constraints and compromises have come to seem niggling and inappropriate. Security, like any absolute and immeasurable good, legitimates enormous demands on society's resources." *Rosenberg*, *supra* note 7, at 350.

288. Hanson & Thomas, *supra* note 20, at 31. The authors further state, "We doubt that a judicially-imposed redistribution of inequity deserves to be viewed as the cornerstone of any body of law." *Id.*

289. Wright v. Webb, 362 S.E.2d 919, 920 (Va. 1987); *see also* PROSSER & KEETON, *supra* note 74, at 20:

> It is sometimes said that compensation for losses is the primary function of tort law and the primary factor influencing its development. It is perhaps more accurate to describe the primary function as one of determining when compensation is to be required. Courts leave a loss where it is unless they find good reason to shift it.

Id. The authors then suggested that a need for compensation is a powerful, driving factor in tort law; however, it is not the sole determinant that victims' rights activists would have courts believe. *Id.* *See also supra* notes 68-97 and accompanying text.

290. Goldberg v. Housing Auth., 186 A.2d 291 (N.J. 1962).

291. *Id.* at 297 (discussing the inherent vagueness of the duty to protect that the plaintiff-victim urged the court to impose upon the Housing Authority).

nature and extent of the risk, and the public's interest in any proposed solution.[292]

Hospitals are left with the arduous task of trying to balance the desire to maintain a hospitable and open environment with the need to create a safe and secure situation for patients, visitors, and staff.[293] Recent marketing techniques, in response to consumer demands, have left hospitals more vulnerable to criminal activities.[294] For example, many hospitals have developed obstetrics units where, in order to facilitate the bonding process between the infant and its family, friends and relatives are allowed to visit.[295] The result is that many obstetrics units are now more easily accessible,[296] and hospitals advertise this vulnerability by way of marketing.[297] Imposing liability may, therefore, force hospitals to restrict visitor access to patients to achieve a higher level of security. Alternatively, hospitals may need to discontinue some of the outreach and outpatient services they offer so that, by

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292. *Id.* at 293. The New Jersey Supreme Court observed, "The question is not simply whether a criminal event is foreseeable, but whether a *duty* exists to take measures to guard against it." *Id.* The court ultimately determined that, in this case, the Housing Authority did not have a duty to provide police protection to prevent third-party criminal attacks. *Id.*

293. Morgan, *supra* note 47, at 29; *see also* Ryan, *supra* note 278, at 4 ("The vision is that while hospitals will continue to be places for the seriously ill, hospitals will become less intimidating, more friendly, and more sensitive to the needs of the patient and the potential patient."); *Hospital's Duty to Protect Patients Explored*, HOSP. L. NEWSL., June 1993, at 2 (discussing Young v. Huntsville Hosp., 595 So. 2d. 1386 (Ala. 1991): "[A] hospital . . . has a very difficult chore. It seeks to balance its interest in not having the hospital emphasize security like a military base, and thereby change the milieu of the institution, with recognition of its duty to protect dependent individuals from the transgressions of others.").

294. Best, *supra* note 14, at 77 (stating that hospitals now provide an open door policy); American Health Consultants, *supra* note 14, at 127 (revealing that hospital obstetrics units provide more accessibility so that family members may "bond" with the new infant); Ryan, *supra* note 278, at 4 (explaining that hospitals are encouraging outreach programs and elder programs). In addition to these programs, hospitals are marketing outpatient fitness and wellness programs, mental health programs, and drug addiction services. *See, e.g.*, Newspaper Advertisement from Chicago Institute or Neurosurgery and Neuroresearch, CHI. TRIB., Nov. 1, 1993, § 2, at 3 (describing outpatient physical therapy services for the facility's Comprehensive Spine Care Center); Newspaper Advertisement from EHS Health Care, CHI. TRIB., Nov. 1, 1993, § 5, at 3 (advertising psychiatric referral services offered by the facility and its subsidiaries).

295. American Health Consultants, *supra* note 14, at 127.

296. *Id.* Many hospitals advertise birthing centers that are more like a home atmosphere than a hospital room, where family and friends can visit during expanded visiting hours. This advertising has been distributed through the mail, television, radio, and newspaper media.

297. *See, e.g.*, AMERICAN HEALTH CONSULTANTS, *supra* note 14, at 127 (stating that hospitals offer birthing rooms so that families can bond with the new infant). Other examples of marketing to increase hospital use, thereby increasing hospital vulnerability, are elder clubs and other outreach programs. Ryan, *supra* note 278, at 4; *see also supra* notes 50-54 and accompanying text.

restricting the traffic within the hospital, premises security may be enhanced.[298]

While hospitals struggle with marketing techniques, courts struggle with victim compensation statutes, another public policy issue. Other forums, however, have already addressed victim compensation issues.[299] Many states, along with the federal legislature, have designed a remedy for victims to recover costs for medical expenses, lost wages, and other losses, in the form of victim restitution and victim compensation acts.[300] Some states are even addressing the victims' rights problem through state constitutional amendments.[301] Courts and juries understandably feel compassion and sympathy toward victims of criminal acts.[302] This sympathy often results in a jury awarding a judgment for the victim against the premises owner.[303] These efforts, through legislative acts and constitutional amendments, provide a remedy for the problem that courts and juries try to correct.[304] Therefore, no need exists to try and provide a double recovery for victims of crime, thereby overburdening hospitals.

The burden of shifting public protection functions from government to the private sector is also a public policy concern. Crime detection and prevention belong to police forces that are trained by the government in highly specialized

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298. *See supra* note 293 and accompanying text. In response to successful security lawsuits, hospitals may restrict access to hospitals, thereby turning hospitals into "mini-prisons." Patients would be restricted to certain areas, and visitor access would be severely curtailed. Visiting hours would be strictly enforced, but in addition, the hospitals could restrict who could visit patients. The relative freedom of access to patients that our society now enjoys would be dramatically altered. As one author states, "The confluence of cost containment, alternatives in marketing and increasing consumer expectation impacts the practice of hospital liability law now and will in the future." Brown, *supra* note 274, at 160.

299. *See supra* notes 92-96 and accompanying text.

300. Roland, *supra* note 93, at 35, 36 & n.8. *See supra* notes 92-96 and accompanying text.

301. *See, e.g., Victims-Rights Effort Rolling, But Some Question Fairness*, THE JOURNAL-GAZETTE (Fort Wayne, Ind.), Nov. 8, 1992, at 1. At least five states have already endorsed a constitutional amendment that would create a Victims' Bill of Rights, and the measure has been proposed in at least thirteen states. *Id.*

302. Cope, *supra* note 22, at 87.

303. Tort law cannot provide a remedy to every injured patient who is harmed by another's antisocial conduct. Henderson, *supra* note 91, at 514. Where a patient is injured by a third-party's criminal act, jury sympathy may lie with the innocent injured patient. The problem becomes, then, one of defining the limits of liability "with sufficient formality to allow the courts to implement them in a principled fashion." *Id.* at 515; *but see* Cope, *supra* note 22, at 87:

> Property owners . . . can only be held liable for another's criminal acts if the risk was foreseeable and reasonable precautions were not taken. Juries don't blindly award huge sums to victims. You have to have a very strong case for juror appeal because you've got the intervening act of a third person.

Id. (quoting a Chicago attorney).

304. *See supra* notes 92-95 and accompanying text.

skills.[305] Traditionally, an increase in the crime rate has been addressed by legislative enactments, which are then implemented by an executive body.[306] The public sector historically has taken such measures as increasing the quantity of police patrols or providing for more severe criminal penalties.[307] However, with the growing willingness of courts to shift the government's public protection functions to private businesses,[308] the public will lose rather than gain protection. Police forces will lose the incentive to diligently patrol in business areas because they will rely on the business owners to provide security on the premises. In addition, because the training of private security forces is not regulated,[309] differing levels of competence will determine the effectiveness of such forces.[310] As the *Goldberg*[311] court observed, "the duty to provide police protection is and should remain the duty of government and not of the [private sector]."[312]

That is not to say, however, that a hospital does not have a duty to provide security for its patients. Hospitals should have a statutory duty[313] to employ security guards and train them according to established standards. Legislatures, rather than the courts, should be responsible for imposing a duty to protect upon hospitals.

VII. PROPOSAL

This Note proposes a model statute that states can adopt to ensure a consistent approach to hospital premises liability for patients. The following model statute mandates that all hospitals establish and maintain a security force

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305. Goldberg v. Housing Auth., 186 A.2d 291, 296 (N.J. 1962).

306. Harris & Gilbertson, *supra* note 89, at 15.

307. *Id.*

308. *Id.* Private businesses can contract for security services, rather than employing and training their own security guards. *Guardsmark Forms Healthcare Division*, MODERN HEALTHCARE, Oct. 26, 1992, at 17.

309. Interview with William Smith, President of Indiana Association of Hospital Security, and Director of Safety & Security, Parkview Memorial Hospital, Fort Wayne, Indiana (Nov. 3, 1992) (stating that no formal regulations exist for hospital security, but many hospitals use the International Association for Healthcare Security & Safety standards for annual training).

310. "It must be remembered that the criminal is also a professional, frequently more professional than the security guard." Robert Yeager, *The Security Duty of Care*, 3 J. HEALTHCARE PROTECTION MGMT. (1987) (discussing the importance of a security survey to develop a plan to eliminate security weaknesses).

311. Goldberg v. Housing Auth., 186 A.2d 291 (N.J. 1962).

312. *Id.* at 298-99.

313. A trend in hospital liability law is for the courts to take away a hospital's temptation to formulate and follow inferior standards of care, and to look to statutes and other standards, rather than custom, on which to base liability. Perdue, *supra* note 272, at 813. According to Professor Henderson, courts are not competent, without appreciable direction from the law, to solve all societal problems, even risk management problems. Henderson, *supra* note 91, at 478.

to detect and deter crime and other dangerous acts.[314] When hospitals are required to create and maintain a security force, the probability of patient injury from a third party's criminal acts will decrease.[315] Because it is unlikely that a hospital can prevent all crimes on its premises, the hospital must devise ways to detect crime and respond to patient needs.[316] By enacting the following statute, states can provide a basis to find liability for patient injuries caused by third parties, and hospitals will know the standard they will be held to in such an event.

The statute adopts the totality of the circumstances test that the *Isaacs*[317] court set forth, and expands it to include the special relationship that the *Young*[318] court used to determine liability. Additionally, the statute considers the crime factors set forth by United States Department of Justice,[319] as well as the procedural aspects of a hospital's operation, the types of services it

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314. The Emergency Nurses Association, which boasts 21,000 members, recently proposed legislation in California that would:

1) require hospitals with major problems in their emergency rooms to position metal detectors and cameras in the vicinity;
2) establish minimum standards for security guard training;
3) require staff education on handling aggressive people;
4) require reporting of violence against ER staff; and
5) prosecute the perpetrators of criminal violent acts.

Faivelson, *supra* note 16, at 61. The group's recommendations also include a provision that would charge the Joint Commission of the Accreditation of Healthcare Organizations or another state surveyor group with assessing a hospital's security requirements during each accreditation site visit. Nigel Keep & Paul Glibert, *California Emergency Nurses Association Introduces Prototype State Legislation to Fight Violence in the Emergency Department*, J. EMERGENCY NURSING, Oct. 1992, at 441.

315. Total eradication of third party crime is probably not an achievable goal. One author equates a hospital to a living organism and finds that some crime and security-related losses are expected and even tolerated, "while still permitting survivability of the system (i.e., continued existence of the hospital)." Robert A. Smith, *A Systems Approach to Understanding Problems and Solutions in the Healthcare Security Field*, J. HEALTHCARE PROTECTION MGMT., Summer 1991, at 58; *see also* Carrington, *A New Tort?*, *supra* note 22, at 41 (stating that forced security measures may make premises less inviting to criminals).

316. JAMES T. TURNER, VIOLENCE IN THE MEDICAL CARE SETTING: A SURVIVAL GUIDE 218 (1984). Turner suggests that four security functions exist: prevention, detection, response, and security education. These four functions should be carefully integrated into any hospital security plan, so that hospitals will not have to respond to situations in a "knee-jerk" fashion. *Id.* at 218-19. Similarly, courts should not respond to hospital premises liability cases in a "knee-jerk" fashion. Courts should have a basis on which to impose a hospital's liability, rather than some vague standard that depends upon the whim of the court or of the jury.

317. Isaacs v. Huntington Memorial Hosp., 695 P.2d 653 (Cal. 1985); *see also supra* notes 236-51 and accompanying text.

318. Young v. Huntsville Hosp., 595 So. 2d 1386 (Ala. 1992); *see also supra* notes 163-97, 255-70 and accompanying text.

319. U.S. DEP'T OF JUSTICE, *supra* note 36, at v.

provides, and the types of clients it serves.[320]

A. Uniform Hospital Security Statute

1.1 Definitions

As used in this statute—

(a) The term "hospital" shall refer to any health care facility that provides acute inpatient care.

(b) The term "security" shall refer to persons employed in the role of security officer or guard, and who are responsible for security, safety, and the prevention of criminal activity.

(c) The term "third party" shall refer to persons who are neither employed by the hospital nor are patients of the hospital.

(d) The term "patient" shall refer to a person who enters the hospital for medical or other care.

1.2 Minimum Standards for Hospital Security

(a) A hospital shall create and maintain a security program that shall include, but not be limited to, the use of security officer(s) as necessary to protect patients, considering the factors in § 1.3(b).

(b) Each security officer shall be certified according to standards set forth by the International Association of Hospital Safety and Security, as amended, and shall undergo annual recertification.

(c) A hospital shall also install and maintain any security equipment and device that the hospital board deems necessary in consideration of § 1.3(b).

(d) A hospital shall establish a security training program for all hospital employees, and shall provide such training to each employee upon initial employment, and annually thereafter.

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320. Many of the factors were also obtained from an article by Chris E. McGoey, *A Model of Foreseeability*, J. HEALTHCARE PROTECTION MGMT., Spring 1990, at 54-57. McGoey's article outlines a model for hospital security directors to follow to determine the crime foreseeability of their particular premises.

1.3 Cause of Action

(a) A hospital shall be liable for the failure to provide reasonably necessary security to prevent the foreseeable criminal acts of third parties against its patients, as determined by § 1.3(b).

(b) The foreseeability of criminal acts as used in § 1.3(a) shall be determined by the following crime foreseeability evaluation factors:

(1) nature of the premises, including premises type and usage, hours of operation, type of patients, type of services available, and extent of public accessibility to the premises; and

(2) crime demographics for the geographic area surrounding the premises, the time frame consideration, the nature and extent of available data, and the consideration of documented criminal acts and an estimate of their proportion to the true number of criminal acts actually committed, both on the premises and in the surrounding geographic area; and

(3) location of the premises, including consideration of the geographical location of the city, the geographical relationship of the premises to other businesses and residences, the density of the population, the economic demographics of the hospital's neighborhood, and the hospital's accessibility to major traffic arteries; and

(4) physical conditions of and surrounding the premises, including amount and nature of security devices employed, lighting, noise level, visibility, and traffic flow, both pedestrian and vehicular; and

(5) security procedures used by the hospital such as security policies and methods (including patrol routes and frequency, procedures and schedules for locking doors, the use of restricted areas that are either card-access or key-access), and incident reporting procedures; and

(6) the hospital's annual budget in relation to the types of services it provides; and

(7) the nature and extent of the injury that the patient incurs; and

(8) the relationship of the patient to the hospital; and

(9) the extent of the patient's disability; and

(10) all other relevant factors.

1.4 Statute of Limitations

The statute of limitations begins to run at the time the patient is injured, and ends two years after the date of injury.

1.5 Remedy

The injured patient may recover medical expenses, lost wages, and other actual damages related to the injury. Punitive damages are not recoverable, unless the hospital, by clear and convincing evidence, acted with malice or with willful or wanton misconduct.

B. Application of the Statute

A statute is needed to remedy the problem of defining a hospital's duty to protect its patients from third-party criminal acts, because the common law schemes that courts have applied have left hospitals open to unlimited liability. The legislative purposes of this statute are to protect patients' safety and to give hospitals notice of both the standard and the foreseeability factors that courts will use to determine liability. The statute's ultimate effect will be to preserve health care services in areas where these services are most needed.[321]

Adoption of this statute would ensure that hospitals provide properly trained security officers to enhance patient safety.[322] The cost of yearly re-certification for each security officer is minimal, so that the hospital would not be unduly burdened financially.[323] In addition, patient safety would be

321. *See supra* notes 275-82 and accompanying text.

322. *See supra* notes 44-54 and accompanying text.

323. According to the International Association of Hospital Security and Safety, certification using the standards set by the same group, is $20.00 per officer. INT'L ASS'N HEALTHCARE SECURITY & SAFETY, BASIC TRAINING STANDARD FOR HEALTHCARE SECURITY PERSONNEL, May 1990. However, Louis Gasbarro, president of the International Association for Healthcare Security and Safety, argues that because security measures cost money, hospital administrators must balance patient and staff protection with the hospitals' budgets. Faivelson, *supra* note 16, at 61.

enhanced by providing security training to all hospital employees.[324] For example, training would possibly decrease the vulnerability of patients who enter the hospital with injuries caused by an abusive spouse,[325] because security trained employees could take measures to insulate the patient from the abuser.[326]

Due to the unlimited number of variables that exist, the proposed model statute cannot provide for all of the individual characteristics of hospitals or for unique locations.[327] Specific guidelines would, if appropriate, need to come from the individual state legislatures as they modify the statute to fit the particular needs of their states.

Nevertheless, the statute sets forth many of the key factors that courts must

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324. According to a survey conducted by the California Emergency Nurses Association, most nursing managers felt insufficiently trained to respond to a violent emergency situation adequately. Nigel Keep & Paul Glibert, *California Emergency Nurses Association's Informal Survey of Violence in California Emergency Departments*, J. EMERGENCY NURSING, Oct. 1992, at 436. The key to enlarging security measures is in training each hospital employee in basic security measures and general crime prevention techniques. Anthony J. Luizzo, *Stretching the Security Dollar*, J. HEALTHCARE PROTECTION MGMT., Summer 1991, at 101. According to William Smith, President of the Indiana chapter of the International Association of Hospital Security and Safety, "hospital staff accepts everybody at face value, and they need to be more in tune with the circumstances of a situation." He further noted that most hospitals have no ongoing staff training in security issues. Smith, *supra* note 309. Security directors have had difficulty persuading hospital administration that staff security training programs are necessary. This difficulty has been due to several factors, including insufficient security staff to provide staff training, inadequate knowledge of continuing education principles, equipment shortages, high employee turnover, and the lack of interest among hospital supervisors and employees in security training. Sharyn Taitz, *Winning Employee Support for Your Crime Prevention Program*, 3 J. HEALTHCARE PROTECTION MGMT., 1987, at 36-37. *See also supra* notes 314-16 and accompanying text.

325. *See supra* notes 61-67 and accompanying text.

326. Such measures could include altering the information entered into the computer (such as using an alias name), and possibly alerting other hospital employees of potential further harm from the abuser; *see also* Robert A. Massey & Dan Ballard, *Unit Safety Coordinator Program—Sharing the Safety Responsibility*, 4 J. HEALTHCARE PROTECTION MGMT., Fall 1988, at 105 (stating that because a small safety staff has limited capabilities, enlisting the entire hospital staff to assist in safety issues will not only enhance compliance with safety standards, but also offer hospitals a cost-effective way to enhance security).

327. Each hospital could develop a crime-tracking program in conjunction with other hospitals in a designated area. Such a program was developed by fourteen hospitals in northern California, and was patterned after a similar program police used for gathering crime statistics. Estrella, *supra* note 9, at 30-31, However, hospitals could rely on the crime statistics that each state compiles to determine the risk of crime in the hospital's location. *See supra* note 36 and accompanying text (containing a discussion of factors that the Unites States Department of Justice has identified that affect the crime rate in a geographical area). Note the distinction from a medical malpractice standard, which is a nationwide standard, rather than a "community" standard. Southwick, *supra* note 18, at 147; *see also* Morrison v. MacNamara, 407 A.2d 555 (D.C. 1979) (stating that a standard of care for medical malpractice should be national, not local).

consider when determining the foreseeability of a given criminal act. By using the criteria suggested by the United States Department of Justice,[328] courts can have uniform factors by which to determine foreseeability. By considering factors such as services,[329] clientele,[330] and location,[331] courts can consider that poor hospitals in crime-ridden neighborhoods may be held to different standards than private hospitals in safer environments. By giving the courts the factors that they must consider, much of the arbitrariness will be eliminated from the decisions that they issue. Additionally, by directing courts to consider the relevant radius, the court can apply a smaller radius in an urban area where population is more dense, and use a larger radius in a rural area where the population is more diffuse, thereby making the inquiry more useful in determining foreseeability.

Given the variables under which hospitals operate and the varying conditions that contribute to crime, a rigid definition of foreseeability is inconceivable. However, if courts have a framework to base their inquiries upon, a more consistent and less arbitrary body of hospital premises liability law will be developed. Hospitals, too, will have a framework on which to base their security programs. A particular hospital can then measure its own risk aversion against the factors that it knows a court will hold it to in a lawsuit. Therefore, rather than developing a rigid definition for foreseeability, the statute attempts to develop a "cohesive methodology"[332] to determine whether crime is foreseeable. Also, when viewed in its entirety, the statute discourages an emphasis on one particular factor and encourages an analysis of all the conditions. The flexibility of the statute allows consideration of changes that occur within hospitals, such as construction[333] or use of the facility, and allows for changes in hospital neighborhood characteristics.[334]

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328. *See supra* note 36 and accompanying text.

329. For example, a hospital that offers many outpatient services may be at more risk of criminal activity because of the increased traffic flow and because the hospital has less control over the patients it sees.

330. The type of clientele served may be a significant factor when determining foreseeability. For example, a children's hospital may have special security needs because the age of its patients would make the patients perhaps more vulnerable. Moreover, a hospital that specializes in obstetrics and gynecology may put its patients at risk by providing health services to exclusively women. By contrast, hospitals that serve veterans may be less inviting to criminals because of the large numbers of male patients.

331. *See supra* note 49 and accompanying text.

332. McGoey, *supra* note 320, at 53. McGoey suggests that such an approach will provide a sound assessment of the reasonable foreseeability of crime in a particular situation. *Id.*

333. *See, e.g.*, Robert A. Massey & Dan Ballard, *Unit Safety Coordinator Program—Sharing the Safety Responsibility*, 4 J. HEALTHCARE PROTECTION MGMT., Fall 1988, at 104 (stating that hospitals may face increased safety risks during periods of construction).

334. McGoey, *supra* note 320, at 53.

The statute also gives courts and hospitals guidelines as to the statute of limitations and remedies that may be sought under the statute. These guidelines will help ensure that patients bring their lawsuits in a timely manner,[335] and will also ensure that hospitals are not held to unlimited liability.

VIII. CONCLUSION

Hospitals are being held liable for patient victimization from third-party criminals, yet they lack a consistent standard to define the hospital's duty. The rising crime rate has not exempted hospital patients from the risk of being victimized by third-party criminals, and patients are suing hospitals for the failure to provide adequate protection. Courts have based hospital liability upon the emerging third-party tort suits against premises owners. Some modern courts have recognized the special relationship that exists between the patient and the hospital, and have based premises liability on the special relationship. Other courts have determined the foreseeability of a criminal act by looking at the totality of the circumstances surrounding the incident.

Nevertheless, because courts have not used a uniform and consistent standard to determine the hospital's liability, hospitals are open to unlimited liability for often unforeseeable patient harm. Such unlimited liability may result in hospitals providing fewer healthcare services in areas that need these services the most. Imposing unlimited liability upon hospitals is also against the public policy of equity. A model statute that requires hospitals to provide security can both help prevent future patient injury and give courts a consistent standard for measuring hospital liability. Therefore, patients will be protected and hospitals will know the standard that courts will use to determine liability.

N. Jean Schendel

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335. *See, e.g.*, Johnson v. St. Vincent Hosp., 404 N.E.2d 585, 604 (Ind. 1980): The general purpose of a statute of limitation is to encourage prompt presentation of claims. *Id.* (quoting United States v. Kubrick, 444 U.S. 111 (1979)).