

Louisiana Law Review

Volume 53 | Number 6

July 1993

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Repository Citation

Suzanne Ciaccio, *Business Owners' Duty to Protect Patrons From the Criminal Acts of Third Parties in Louisiana*, 53 La. L. Rev. (1993)
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol53/iss6/4>

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COMMENTS

Business Owners' Duty to Protect Patrons From the Criminal Acts of Third Parties in Louisiana

INTRODUCTION

The prevalence of crime in American society tops the list of the country's most pressing domestic problems.¹ Louisiana joins the rest of the nation in experiencing its fair share of crime.² The pervasiveness of the crime problem and public law enforcement's inability to control it suggest that other segments of society need to contribute their efforts to combat crime.

Business establishments constitute a particular source of crime victimization, and consequently business patrons³ face a high risk of criminal assaults.⁴ Courts and legislatures could help remedy the situation by using tort law to impose a duty on the business owner to take precautionary measures against crime.⁵ One of the

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1. Each year the Federal Bureau of Investigation publishes the Uniform Crime Reports for the United States. The report contains the amount of crime that is officially noted by the police throughout the nation. During 1991, nearly fifteen million offenses were reported to law enforcement. Federal Bureau of Investigation, U. S. Dep't of Justice, Uniform Crime Reports for the United States 1991, 6 (1992) [hereinafter FBI Crime Reports]. The violent crimes total which includes the offenses of murder, non-negligent manslaughter, forcible rape, robbery, and aggravated assault exceeded 1.9 million offenses, up five percent from 1990 and the highest annual total ever recorded. *Id.* at 11. In a special report of the trends in violent crime, the Bureau of Justice Statistics determined that the chance of being a victim of a violent crime is greater than that of being hurt in a traffic accident. Bureau of Justice Statistics, U. S. Dep't of Justice, Violent Crime in the United States 2 (1991).

2. There were 273,170 offenses reported in Louisiana in 1991. Although the total number of crimes reported decreased by two-tenths of one percent, the number of violent crimes reported increased by nearly seven percent. FBI Crime Reports, *supra* note 1, at 64.

3. "Patron" means anyone entering the premises of a business establishment. The common law classifications of invitee, trespasser, and licensee are inappropriate in Louisiana. See *Cates v. Beauregard Electric Coop., Inc.*, 328 So. 2d 367, 370-71 (La. 1976), *cert. denied*, 429 U.S. 833, 97 S. Ct. 97 (1976). *But cf. Entrevia v. Hood*, 427 So. 2d 1146 (La. 1983) (considering status as a relevant concern).

4. Michael J. Bazylar, *The Duty to Provide Adequate Protection: Landowners' Liability for Failure to Protect Patrons from Criminal Attack*, 21 Ariz. L. Rev. 727, 728 (1979). The author provides a compilation of crime statistics illustrating the severity of the crime problem at commercial establishments.

This comment focuses on the personal crimes which comprise the violent crimes category of the FBI Crime Reports rather than on property crimes because the most serious aspect of the crime problem at business establishments is the risk of personal injury or death to the patron.

5. Imposing a duty on the business owner has been advocated by various commentators. See *id.*; see also Michael J. Yelnosky, Comment, *Business Inviters' Duty to Protect Invitees from Criminal Acts*, 134 U. Pa. L. Rev. 883 (1986).

purposes of tort law is the deterrence of socially undesirable behavior.⁶ One way to deter crime is to encourage business owners to make their establishments less inviting to criminals through such measures as adequate lighting, design, security systems, and security guards.⁷

Some courts have recognized the severity of the crime problem and the role that business owners can play in deterring crime. For example, the California Supreme Court in *Isaacs v. Huntington Memorial Hospital*⁸ determined the duty of the defendant hospital with respect to third party criminal acts by considering the nature, condition, location, and past experience of the hospital.⁹ A duty analysis based on these factors allows courts to ask such questions as: What type of business establishment was involved? Was the business located in a high crime area? Was the lighting inadequate? Were there any security measures in place, such as fencing off or a security guard or system? Did any prior crimes occur on the premises giving notice to the business owner of the dangers facing his patrons?¹⁰ By analyzing the duty in this way, courts can particularize the business owner's duty to exercise reasonable care in criminal acts cases and encourage him to take a variety of precautionary measures that could make his premises less inviting to criminals.¹¹

In contrast, Louisiana courts analyze the business owner's duty insufficiently in that they fail to consider the above factors in criminal acts cases. The courts maintain that the business owner has a duty to exercise reasonable care under the circumstances; however, his duty to protect patrons from the criminal acts of third parties only extends to those acts which are foreseeable.¹² At first glance, this approach would seem to allow for a consideration of any factor which makes a crime more likely. Conceivably, foreseeability should include looking at the nature, condition, location, and past experience of a business establishment. However, the overwhelming majority of Louisiana courts define foreseeability narrowly in either of two ways: (1) a crime is foreseeable if the business owner knows or should know that it is about to occur (the "impending assault" doctrine),¹³ or (2) a crime is

A business owner is a person who owns and/or occupies land for a business purpose and holds it open to the public.

6. William L. Prosser et al., *Cases and Materials on Torts* 1 (8th ed. 1988).

7. See Laura D. Kulwicki, Comment, *A Landowner's Duty to Guard Against Criminal Attack: Foreseeability and the Prior Similar Incidents Rule*, 48 Ohio St. L.J. 247, 263 (1987); George B. South, Note, *The Duty to Protect Customers from Criminal Acts Occurring Off the Premises: The Watering-Down of the "Prior Similar Incidents" Rule*, 19 Hofstra L. Rev. 1271, 1276-77 (1991).

8. 695 P.2d 653 (Cal. 1985).

9. *Id.* at 661.

10. See *id.* at 653-63.

11. The analysis encourages the business owner to adopt precautionary measures in that it increases his duty to exercise reasonable care. Business owners will have an incentive to adopt preventive measures in order to avoid liability arising out of this higher duty.

12. *Davenport v. Nixon*, 434 So. 2d 1203, 1205 (La. App. 1st Cir. 1983).

13. Cases which feature the "impending assault" doctrine include: *Rodriguez v. NOPSI*, 400 So. 2d 884, 887 (La. 1981); *Johnston v. Fontana*, 610 So. 2d 1119, 1121 (La. App. 2d Cir. 1992); *Harrison v. Clark*, 607 So. 2d 1, 2 (La. App. 2d Cir. 1992); *Potter v. First Federal Sav. & Loan Ass'n*

foreseeable if the business owner knows a high number of prior similar incidents have occurred on the business premises (the "prior crimes" rule).¹⁴ As a result, the business owner's duty to protect patrons from the criminal acts of third parties in Louisiana is very limited. The business owner is called to react to a specific crime in progress or to take precautionary measures only after the business has encountered a high number of prior criminal acts.¹⁵ Thus, by restricting their analyses to two definitions of foreseeability, Louisiana courts do little to encourage the business owner to take precautionary measures against crime.¹⁶

The second flaw in the courts' analyses is their failure to consider the policies inherent in the duty/risk analysis which the Louisiana Supreme Court adopted in *Hill v. Lundin*.¹⁷ When the supreme court adopted the duty/risk approach, it conveyed to the Louisiana courts that they should always consider a variety of socio-economic factors when determining duty in a negligence case.¹⁸ For example, the courts should address whether imposing a duty on the business owner would open the floodgates to unmanageable litigation; whether the patron's damages are easily associated with the business owner's conduct; whether the business owner is better able to bear the loss than the patron; whether it seems morally appropriate to impose a duty on the business owner; whether the

of Scotlandville, 602 So. 2d 1070, 1073 n.3 (La. App. 1st Cir. 1992), *vacated*, 615 So. 2d 318 (1993); *Owens v. Regional Transit Auth.*, 559 So. 2d 870, 871 (La. App. 4th Cir. 1990); *Coblentz v. North Peters Parking, Inc.*, 533 So. 2d 98, 101 (La. App. 4th Cir. 1988); *Delgado v. Laboucherie, Inc.*, 508 So. 2d 956, 958 (La. App. 4th Cir. 1987); *Toups v. Hawkins*, 518 So. 2d 1077, 1081 (La. App. 5th Cir. 1987); *Ballew v. Southland Corp.*, 482 So. 2d 890, 893 n.1 (La. App. 2d Cir. 1986); *Crochet v. Hospital Serv. Dist. No. 1 of Terrebonne Parish*, 476 So. 2d 516, 517 (La. App. 1st Cir.), *writ denied*, 478 So. 2d 1235 (1985); *Davenport v. Nixon*, 434 So. 2d 1203, 1205 (La. App. 1st Cir. 1983); *Pinkney v. Miller*, 439 So. 2d 1113, 1117 (La. App. 4th Cir. 1983), *writ denied*, 444 So. 2d 117, *reconsideration denied*, 445 So. 2d 443 (1984).

14. Cases which feature a "prior crimes" rule include: *Harris v. Pizza Hut*, 455 So. 2d 1364, 1371 (La. 1984); *Mundy v. Department of Health & Human Resources*, 609 So. 2d 909, 915 (La. App. 4th Cir. 1992), *aff'd*, 620 So. 2d 811 (1993); *Russell v. McDonald's Corp.*, 576 So. 2d 1213, 1215-16 (La. App. 5th Cir. 1991); *Smith v. Walgreens Louisiana Co., Inc.*, 542 So. 2d 766, 767-68 (La. App. 4th Cir. 1989); *Sutter v. Audubon Park Comm'n*, 533 So. 2d 1226, 1232-33 (La. App. 4th Cir. 1988), *writ denied*, 538 So. 2d 597 (1989); *Foster v. Colonel Sanders Kentucky Fried Chicken, Inc.*, 526 So. 2d 252, 256-58 (La. App. 2d Cir.), *writ denied*, 531 So. 2d 483 (1988); *Landry v. St. Charles Inn, Inc.*, 446 So. 2d 1246, 1249 (La. App. 4th Cir. 1984); *Miles v. Flor-Line Assocs.*, 442 So. 2d 584, 586 (La. App. 1st Cir. 1983); *Pennington v. Church's Fried Chicken, Inc.*, 393 So. 2d 360, 361-62 (La. App. 1st Cir. 1980); *Roberts v. Tiny Tim Thrifty Check*, 367 So. 2d 64, 65 (La. App. 4th Cir. 1979).

15. The business owner is required to react to an "impending assault" as outlined in *Rodriguez v. NOPSI*, 400 So. 2d 884, 887 (La. 1981). He also may be required to take crime preventive measures if a high number of crimes occurs on the premises. *Foster v. Colonel Sanders Kentucky Fried Chicken, Inc.*, 526 So. 2d 252, 258 n.2 (La. App. 2d Cir.), *writ denied*, 531 So. 2d 483 (1988) (stating that four crimes may be enough to create a duty to take deterrent measures).

16. In Part III, this comment discusses the negative effects of using narrow approaches to foreseeability in the duty determination.

17. 260 La. 542, 256 So. 2d 620 (La. 1972).

18. See generally David W. Robertson, *Reason Versus Rule in Louisiana Tort Law: Dialogues on Hill v. Lundin & Associates, Inc.*, 34 La. L. Rev. 1 (1973).

jurisprudence paves the way for the business owner's duty to take precautionary measures; and whether societal views call the courts to impose a duty in this area of tort law.¹⁹ Presently, the courts fail to address these issues in determining the business owner's duty and are instead guided in their analyses by a narrow approach to foreseeability.²⁰ If the courts were to look closely at the duty/risk factors suggested in *Hill*, they would discover (as this comment will illustrate in Part III) that these factors support a more demanding duty for the business owner to take precautionary measures against crime.

This comment proposes that Louisiana courts abandon their traditional approaches to the business owner's duty to protect patrons from the criminal acts of third parties and adopt an approach which allows them to consider factors, in addition to the duty/risk factors, which are specifically relevant in criminal acts cases. By adopting such an approach, Louisiana courts can impose a duty upon the business owner not only to react to a specific crime in progress or to take precautionary measures after a high number of crimes have occurred on the premises, but also to adopt precautionary measures according to the nature, condition, location, and past experience of the business establishment.²¹

To understand the need for a more demanding approach, Part I of this comment discusses the severity of the crime problem and how business owners can play a vital role in decreasing crime. Part II discusses Louisiana law as it now stands and illustrates the confusion which has resulted from the courts' use of two definitions of foreseeability. Part III analyzes and criticizes the present approaches taken by the various courts. Part IV proposes an approach which is sensitive to the factors which facilitate crime on business premises and maintains that Louisiana statutes and jurisprudence provide support for a court willing to adopt the proposal.

I. WHY THE BUSINESS OWNER?

Louisiana business owners may respond to a higher duty imposed by the courts by asking why they, rather than law enforcement, should be responsible for protecting patrons by taking precautionary measures. There are several reasons why courts should impose a legal duty on business owners. The most overwhelming reason is that the threat of crime has reached incredible proportions and has become a fact of life for most Americans.²² In the past, people in the cities were the only ones forced to worry about crime, but since 1969, suburbs, small towns, and rural areas have experienced high increases in crime rates. Victimization surveys and

19. Professor Crowe has labeled these questions as the administrative, ease of association, economic, moral, and historical or precedent factors. William L. Crowe, Sr., *The Anatomy of a Tort—Greenian, As Interpreted by Crowe Who Has Been Influenced by Malone—A Primer*, 22 Loy. L. Rev. 903, 906-09 (1976).

20. See *supra* notes 13-14 and accompanying text.

21. For an example of this approach, see *Isaacs v. Huntington Memorial Hosp.*, 695 P.2d 653 (Cal. 1985). For an evaluation of the *Isaacs* approach, see Kulwicki, *supra* note 7, at 256-71.

22. *Supra* notes 1-2.

public opinion polls show that the fear of crime pervades American society.²³ As mentioned, commercial establishments constitute a particular source of criminal victimization. Criminal activity at commercial establishments is the highest at retail stores and proprietary parking structures.²⁴ Tort law could possibly help remedy the situation by imposing a duty on business owners to adopt crime prevention measures in the hopes of decreasing the crime rate at business establishments.²⁵

Proponents of the market theory maintain that a legal duty imposed on the business owner is unwarranted. They argue that customers may always refuse to shop at establishments which pose a particularly apparent risk of criminal attack. The argument follows that fewer customers will patronize those establishments resulting in a decline in business. To compensate for this decline in business, business owners will charge higher prices, and as prices increase, the demand for goods will decrease. As a result, businesses will be forced to adopt precautionary measures or eventually will go out of business. Thus, the market theory suggests that a tort duty is unnecessary because business owners already have an incentive to adopt precautionary measures in accordance with their self-interest.²⁶

The market theory is flawed, however, because it assumes that patrons have adequate information about the dangers presented by a particular business establishment. Patrons are more likely to be uninformed about the extent of the crime problem. Local patrons will most likely possess only a general awareness of the dangerous conditions, and the occasional customer unfamiliar with the area may be completely ignorant of the crime problem.²⁷ Certainly, the market does nothing to encourage businesses to provide customers with this information.

More importantly, common experience demonstrates that the very generalized economic incentives espoused by the market theorists are not enough to encourage efficient crime prevention.²⁸ Business owners in general have been unresponsive to the dangers their establishments pose and have contributed to the crime problem because their inadequate security measures facilitate criminal attacks; "Considered as a group, commercial establishments have inadequate gate and guard service, lack proper anti-theft devices and fail to provide proper lighting to protect themselves and their patrons . . ."²⁹ Because the business owner in many instances creates

23. Yelnosky, *supra* note 5, at 885-86 and sources cited therein.

24. See Bazylar, *supra* note 4 and accompanying text. In 1990, almost nine percent of violent crimes occurred in a parking lot or garage. Bureau of Justice Statistics, U.S. Dep't of Justice, *Criminal Victimization in the United States*, 1990, 67 (1992).

25. See Uri Kaufman, *When Crime Pays: Business Landlords' Duty to Protect Customers From Criminal Acts Committed on the Premises*, 31 S. Tex. L. Rev. 89, 111 (1990) ("While crime prevention has traditionally been a government function, it is both unwise and wasteful to let preventable crimes occur simply because the common law did not require businessmen to take preventive measures.").

26. Kulwicki, *supra* note 7, at 264.

27. *Id.* at 265.

28. Kaufman, *supra* note 25, at 110-11.

29. Bazylar, *supra* note 4, at 730.

opportunities for criminal activity on his premises, he should then be responsible for eliminating those opportunities.

Imposing a duty on business owners also furthers the tort law purposes of deterring socially undesirable behavior, compensating injured parties, and spreading risks.³⁰ The business owner's duty to adopt precautionary measures will result in deterring criminal behavior because the premises will be less inviting to criminals.³¹ Another benefit of the higher duty is that those who do fall victim to crime will have better chances of compensation as the business owner will have to meet higher standards of crime prevention.³² As a result of the tougher standards, victims are more likely to receive compensation.

Finally, this higher duty is fair to the business owner because he can pass the costs of security measures on to the patrons through higher prices in the goods and services he offers.³³ Therefore, the business owner is not the only one paying for the crime problem.³⁴ Another fairness factor is that the business owner is in a better position than his customers to prevent crime on his premises. The business owner is better able to assess the crime problem in the area and determine which security devices should be utilized. For instance, he might know the details of crimes which have occurred and the specific measures necessary to prevent their reoccurrence.³⁵ In addition, the business owner will benefit from the higher duty because his business will be less inviting to criminals while at the same time more attractive to patrons. Thus, the business owner should experience an increase in business as a result of the higher duty.

Courts can ensure that this higher duty does not create the potential for unlimited liability by controlling lawsuits through the duty determination process.³⁶ By using the duty/risk approach plus the factors proposed in Part IV, courts can prevent business owners from becoming subject to unlimited liability.

Thus, the business owner's duty to adopt crime prevention measures could help reduce the crime rate, furthers the purposes of tort law, and is fair to the business owner. Louisiana courts have been slow to recognize the benefits of imposing such a duty. The jurisprudence reveals that a narrow standard of foreseeability has

30. Prosser et al., *supra* note 6, at 1-2.

31. South, *supra* note 7, at 1276-77.

32. This comment's proposed approach allows courts to consider a variety of factors to determine the business owner's duty. As a result, crime victims will have more avenues to pursue to obtain compensation.

33. Kulwicki, *supra* note 7, at 265.

34. *Id.* Passing the costs on to the patron could have devastating effects on the patrons and businesses of high crime areas. These patrons are typically least able to afford the higher cost. Consequently, the business establishments in those areas will experience a decrease in sales and ultimately may be forced out of business. As a possible solution to this problem, public law enforcement should increase their presence in those areas. *Id.* at 266.

35. Kaufman, *supra* note 25, at 114.

36. As Professor Leonard writes, "[T]he duty concept serves as a filtering tool in the hands of the court." David P. Leonard, *The Good Samaritan Rule as a Procedural Control Device: Is It Worth Saving?*, 19 U.C. Davis L. Rev. 807, 817 (1986).

constrained the courts in their analyses of the business owner's duty. As a result, the courts' rulings provide little incentive for the business owner to take precautionary measures to protect his patrons from crime.³⁷

II. JURISPRUDENCE

The following survey organizes the jurisprudence involving the business owner's duty to protect patrons around the leading cases of *Banks v. Hyatt Corporation*³⁸ and *Harris v. Pizza Hut of Louisiana, Inc.*,³⁹ both of which were decided in 1984. *Banks* and the cases before it employed an "impending assault" definition of foreseeability in determining the business owner's duty. That is, those cases only required the business owner to react to a specific crime that he knew or should have known was about to occur.⁴⁰

Harris appeared to impose a higher duty on the business owner by using a "prior crimes" rule to analyze duty.⁴¹ This rule requires the business owner to take precautionary measures after a high number of incidents have occurred on the business premises.⁴² However, as will be more fully explained, the *Harris* opinion caused confusion in the lower courts about how the business owner's duty was to be determined.⁴³ As a result, some courts continued to use the pre-*Harris* "impending assault" doctrine, others used a "prior crimes" rule, and still others used a combination of the two.⁴⁴ Meanwhile, three cases departed from the narrow foreseeability approaches of *Banks* and *Harris* and analyzed the duty by considering factors similar to those proposed by this comment.⁴⁵

The law as it stands today is inconsistent because it imposes several different duties on the business owner. The confusion in the law stems from the tendency of some courts to continue using the narrow duty analysis of the pre-*Harris* cases while others try to expand the factors in the duty determination. Another reason for the confusion is that the Louisiana Supreme Court has shown a general reluctance

37. The business owner has little legal incentive to adopt precautionary measures (except under a prior crimes rule) because the present law does not require him to do so.

38. 722 F.2d 214 (5th Cir. 1984).

39. 455 So. 2d 1364 (La. 1984).

40. *Banks*, 722 F.2d at 220. For more examples of "impending assault" cases, see *supra* note 13.

41. *Harris*, 455 So. 2d at 1371. By stating that "it is unnecessary to decide how many prior criminal acts create a duty to hire a private guard," the court assumed that the business owner's duty should be determined using a "prior crimes" rule.

42. See *Smith v. Walgreens Louisiana Co., Inc.*, 542 So. 2d 766, 768 (La. App. 4th Cir. 1989) (stating that a high number of prior similar incidents is necessary to trigger the business owner's duty to protect).

43. See *infra* text accompanying notes 84-94.

44. See *infra* text accompanying notes 98-113.

45. See *Willie v. American Casualty Co.*, 547 So. 2d 1075 (La. App. 1st Cir. 1989), *writ denied*, 584 So. 2d 678 (1991); *Phillips v. Equitable Life Assurance Co. of the United States*, 413 So. 2d 696 (La. App. 4th Cir.), *writ denied*, 420 So. 2d 164 (1982); and *Day v. Castilow*, 407 So. 2d 510 (La. App. 4th Cir. 1981).

to address this very important issue and on numerous occasions has avoided setting any clear standards for the lower courts to follow.⁴⁶

The following discussion of the caselaw is meant to shed some light on these problems by first discussing the criminal acts cases before *Banks* and *Harris*, examining *Banks* and *Harris* in detail, and finally illustrating the present confusion plaguing the courts' analyses today.

A. *Before Banks and Harris*

The jurisprudence before *Banks* and *Harris* regarding the business owner's duty is best reflected in dicta found in cases involving the common carrier's and innkeeper's duties to protect patrons from the criminal acts of third parties.⁴⁷ For instance, in *Rodriguez v. New Orleans Public Service, Inc.*,⁴⁸ the Louisiana Supreme Court held that NOPSI, a common carrier, should be held to the same duty as a reasonable business establishment with respect to criminal acts of third parties. The court explained:

When the independent, intentional tortious or criminal acts of a third person constitute the unreasonable risk, this duty does not require the proprietor to risk physical injury or civil or criminal liability by physical intervention. Rather, the duty can be discharged by the summoning of those entrusted by law with the power of immediately maintaining the peace, the police, at the time the proprietor knows or should reasonably know of the third person's intention and apparent ability to execute the intended acts.⁴⁹

The plaintiff in the case argued that NOPSI breached its duty of care when its motorman failed to do anything between the time another passenger began insulting the plaintiff's son and the time the other passenger attacked the son. The court found NOPSI not liable because the record did not show that the motorman should have known the attack would occur.⁵⁰

Thus, in the process of establishing the common carrier's duty, the court in *Rodriguez* clearly stated the business owner's duty when faced with an "impending assault." The business owner can discharge his duty by calling the police at the time he knows or should know the crime is about to occur.⁵¹ The following cases

46. See *infra* text accompanying notes 166-76.

47. Although common carriers and innkeepers are both business owners in that they operate a business for profit open to the public, the courts traditionally have placed them in separate categories. This comment's proposed duty is meant to apply to all types of business owners. Therefore, the traditional categories of innkeeper, common carrier, and commercial business inviter should be abandoned.

48. 400 So. 2d 884 (La. 1981).

49. *Id.* at 887 (citations omitted).

50. *Id.* at 886-88.

51. *Id.* at 887.

contrast the business owner's duty with that of the innkeeper, and, as a result, they more fully develop the business owner's duty and the "impending assault" doctrine.

In *Davenport v. Nixon*,⁵² the first circuit court of appeal found a motel liable for the negligence of the motel operator, who did nothing after a guest informed her that a suspicious man had approached him. Later, the same man assaulted the guest in the parking lot.⁵³ The court first discussed the duty of a business owner, stating that a business owner's duty to protect patrons did not extend to the unforeseeable or unanticipated criminal acts of an independent third person:

Only when the owner or management of a business has knowledge, or can be imputed with knowledge, of a third person's intended criminal conduct *which is about to occur*, and which is within the power of the owner or management to protect against, does such a duty of care towards a guest arise.⁵⁴

Davenport thus added the foreseeability factor to the business owner's duty. His duty extends to those criminal acts which are foreseeable, and foreseeable acts are those which are impending or imminent. Once an act is impending, the business owner has a duty to react as described in *Rodríguez*.

In contrast, the innkeeper has a higher duty than the business owner with respect to the criminal acts of third parties. In *Kraaz v. La Quinta Motor Inns, Inc.*,⁵⁵ two robbers obtained a pass key to motel rooms from the desk clerk by claiming to be guests. The robbers used the key to enter the Kraazs' room, then robbed and assaulted the couple. The court affirmed the lower court's judgment in favor of the plaintiffs. In determining the duty of the motel, the Louisiana Supreme Court recognized that a guest is entitled to a high degree of care and protection. More importantly, it defined this higher degree of care as the "duty to take *reasonable precautions against criminals*."⁵⁶

Therefore, the innkeeper has a duty to prepare for the criminal acts of third parties, while the business owner must only react to a specific crime in progress. The *Kraaz* court did not provide any factors which a court should consider in determining the innkeeper's duty to take precautions. However, the *Banks* court later would use a "prior crimes" standard of foreseeability for the innkeeper.⁵⁷

Thus, before *Banks* and *Harris*, there were two different duties with two different standards for the courts to apply: a high duty for the innkeeper and a limited duty for the business owner. However, the following cases illustrate that one court imposed a more demanding duty than both of these on the business owner.

52. 434 So. 2d 1203 (La. App. 1st Cir. 1983).

53. *Id.* at 1204-05.

54. *Id.* at 1205 (citations omitted) (emphasis added).

55. 410 So. 2d 1048 (La. 1982).

56. *Id.* at 1050-53 (emphasis added).

57. See *infra* text accompanying notes 67-79.

B. A Third Approach?

The fourth circuit court of appeal departed from the "impending assault" standard for the business owner and concentrated on other specific relevant factors in *Day v. Castilow*⁵⁸ and *Phillips v. Equitable Life Assurance Co. of the United States*.⁵⁹ The court analyzed the business owner's duty by considering factors which would make the business establishment more inviting to criminals.⁶⁰ As more fully discussed in Part IV, these cases are significant because they provide authority for courts willing to recognize the vital role the business owner can play in deterring crime through crime prevention measures.⁶¹

In *Day*, an intruder in an apartment complex hid in an apartment with a broken lock and then assaulted a lessee. The fourth circuit held that the plaintiff had a cause of action, reversing the summary judgment of the trial court. The court explained that the Louisiana law of torts as stated in Civil Code article 2315 is very broad. If the lessee could prove that the "lessor both *facilitated* the concealed presence of violent intruders upon the premises and failed to warn the lessee that such an intruder had previously assaulted a tenant," then the lessor was at fault under Louisiana law.⁶²

In its determination of the landlord's duty, the court considered these factors: the lessor knew of the unreliability of the gate lock; the lessor kept the vacant apartment unlocked; the lessor had been told by a former tenant that she had been assaulted in the same apartment building as the plaintiff. The court stated that the lessor had the duty to inform the lessee of the prior incident and to keep the other apartment secure against intruders. Had the lessor fulfilled his duty, the court reasoned, he could have impeded the intruder's access to the vacant apartment and would have made the lessee more cautious about leaving her apartment at night.⁶³

Thus, the court required the business owner to be careful not to facilitate—*i.e.*, invite—crime on his premises. The business owner, like the innkeeper, should take reasonable precautions against criminals. In addition, the business owner should warn others of prior criminal incidents on the premises in the hopes of making them more cautious.

The fourth circuit again used a similar analysis in *Phillips*, which involved a fatal shooting in the parking lot of a food store. The case also acknowledged a higher duty for the business owner and considered several different factors to determine duty. As outlined by the fourth circuit, the trial court instructed the jury with the following: "An owner . . . of land owes . . . the duty of exercising ordinary care to maintain the premises in a reasonably safe condition."⁶⁴ That responsibili-

58. 407 So. 2d 510 (La. App. 4th Cir. 1981).

59. 413 So. 2d 696 (La. App. 4th Cir.), writ denied, 420 So. 2d 164 (1982).

60. *Id.* at 697; *Day*, 407 So. 2d at 511.

61. See *infra* text accompanying notes 193-95.

62. *Day*, 407 So. 2d at 511 (emphasis added).

63. *Id.*

64. *Phillips v. Equitable Life Assurance Co. of the United States*, 413 So. 2d 696, 697 (La.

ty includes the duty to protect patrons from criminal acts of third parties when those acts are reasonably foreseeable under the circumstances prevailing.⁶⁵

To determine whether the acts were reasonably foreseeable, the court looked at such factors as security for the shopping center, prior crimes on the premises and in the area, adequacy of the lighting, and whether there were any signs indicating the parking lot was patrolled. By analyzing the duty in this way, the court imposed a duty on the business owner to take precautionary measures against crime.⁶⁶

Day and *Phillips* thus offer a different approach to the business owner's duty. The approach is similar to the one proposed in Part IV in that the court considered the condition, location, and past experience of the business establishment. However, the following leading cases reveal that this approach was, more than anything, an exception to the prevailing narrow approach to the business owner's duty.

C. The Leading Cases

1. *Banks v. Hyatt Corporation*⁶⁷

In *Banks*, an armed robber murdered Dr. Banks a few feet from the entrance to the Hyatt Hotel and the Poydras Plaza Mall in New Orleans. His widow and children brought an action for wrongful death against the hotel and mall operators. They charged the defendants with failing to provide adequate security and failing to warn the doctor of the danger of being assaulted.⁶⁸ Although *Banks* is a U.S. Fifth Circuit Court of Appeals case, Louisiana courts have effectively placed it on equal footing with *Harris*, a Louisiana Supreme Court case.⁶⁹

As described, the cases leading up to *Banks* held the innkeeper to a high duty of care, which involved taking reasonable precautions against criminals. However, the cases failed to provide any factors for an analysis of the innkeeper's duty.⁷⁰ The cases involving the business owner extended his duty to protect patrons to those criminal acts which were foreseeable.⁷¹ Most courts equated foreseeability to an impending assault while two others used several different factors to determine

App. 4th Cir.), writ denied, 420 So. 2d 164 (1982).

65. *Id.*

66. *Id.* at 697-700. By discussing factors such as prior crimes, lighting, and security, the court particularized the business owner's duty to exercise reasonable care, thereby providing some guidelines as to how the business owner can fulfill his duty.

67. 722 F.2d 214 (5th Cir. 1984).

68. *Id.* at 215-16.

69. Professor Maraist maintains that "*Banks* expresses the present state of the law" in Louisiana regarding the rule that a business owner owes no duty to protect a patron until he knows or has reason to know a criminal act is about to occur. Frank L. Maraist, *Louisiana Torts Law: Cases and Materials* 519 (1991).

70. See *supra* text accompanying notes 55-57.

71. See *supra* text accompanying notes 47-54.

foreseeability.⁷² Not surprisingly, the Fifth Circuit certified questions to the Louisiana Supreme Court as to which standard to apply, but the supreme court answered with a denial, thereby allowing the Fifth Circuit to choose which duties and analyses to employ.⁷³

In its discussion of the hotel's liability, the Fifth Circuit focused on the language from *Kraaz* stating that an innkeeper has a duty to take reasonable precautions against criminals and that a guest is entitled to a high degree of care and protection.⁷⁴ It then cited Florida law for the rule that an innkeeper "may be liable if he fails to take *reasonable precautions to deter the type of criminal activity which resulted in a guest's injury.*"⁷⁵ It concluded that the hotel was potentially liable not only for dangerous physical conditions, but also for foreseeable criminal assaults by third persons.⁷⁶ The court thus adopted a foreseeability standard for its analysis of the innkeeper's duty.

The court determined foreseeability for the innkeeper by using a "prior crimes" rule. It reviewed the "incident reports" and "security log" of the hotel, both of which showed a high incidence of crime in the area.⁷⁷ According to the court, the evidence showed that the hotel "clearly was aware of the risk of criminal assault that its guests faced."⁷⁸ The hotel therefore had a duty to protect its patrons, and the jury determined that the hotel had breached that duty by employing inadequate security measures.⁷⁹

In discussing the mall owner's (business owner's) duty, the court referred to the "impending assault" language of the earlier Louisiana cases—that the business owner's duty to protect his patrons from injury extends to the criminal acts of third parties when the business owner knows or should know of a third person's conduct

72. See *supra* text accompanying notes 58-66.

73. *Banks v. Hyatt Corp.*, 436 So. 2d 1171 (La. 1983) (denying certification). The questions which the Fifth Circuit certified directly addressed the method of determining the business owner's duty:

Is a [business owner] . . . under a duty of care to protect its invitees . . . by warning or by taking alternative security measures, from assaults or injury by third persons when it has knowledge or should have knowledge . . . that an injury or an assault might occur

How immediate or foreseeable must the threat of harm be in order for the duty of care to come into existence?

Banks v. Hyatt Corp., 722 F.2d 214, 216 n.1 (5th Cir. 1984) (citing *Banks v. Hyatt Corp.*, 708 F.2d 159, 162 (5th Cir. 1983)).

74. *Id.* at 220.

75. *Id.* at 220-21 (alteration in original) (citing *Reichenbach v. Days Inn, Inc.*, 401 So. 2d 1366, 1367 (Fla. App. 1981), *petition for review denied*, 412 So. 2d 469 (1982)).

76. *Id.* at 226.

77. *Id.* at 218-19. These reports showed that in the three-month period prior to Dr. Banks' murder, which occurred on April 12, 1979, there were eleven armed robberies and five simple robberies within the immediate surroundings of the hotel. In addition, Banks was the second person to be shot at that entrance since 1976, and the fifth armed robbery victim at that specific entrance.

78. *Id.* at 226.

79. *Id.*

which is about to occur and that conduct is within his power to prevent. The court held the mall owner not liable because there was no evidence that he knew or should have known that Dr. Banks was about to be assaulted.⁸⁰ Thus, the court concluded that the business owner's duty of care does not include a duty to adopt precautionary measures to reduce the general risk of criminal assault.

The *Banks* court applied two different duties for the innkeeper and the business owner. It adopted the innkeeper's duty to take precautionary measures from *Kraaz* and created an analysis for that duty based on a "prior crimes" rule.⁸¹ The court chose the limited "impending assault" standard for the business owner, thus requiring him only to react to a crime he knows or should know is imminent.⁸²

Part III criticizes the application of the "impending assault" doctrine in cases such as *Banks* because, as in *Banks*, most crimes occur without any warning to the business owner or patron. The "impending assault" standard is not only unrealistic, but it also creates little incentive for the business owner to take precautionary measures against crime.⁸³ Several months after *Banks*, the Louisiana Supreme Court had the opportunity to clearly reject the "impending assault" standard and to propose new standards for the lower courts to use in determining the business owner's duty. As the following case illustrates, the supreme court unfortunately chose not to take advantage of that opportunity.

2. *Harris v. Pizza Hut*⁸⁴

In *Harris*, the Louisiana Supreme Court found a Pizza Hut security guard negligent in the performance of his duties when faced by two armed robbers.⁸⁵ As a result of the confrontation, the robbers shot at the guard, not only injuring him in the process, but also killing Ms. Harris and wounding one of her children.⁸⁶

The supreme court's opinion is rather confusing because while it appears to impose a higher duty on the business owner, the court emphatically denied it was doing so. For instance, the court, citing "pertinent law" from other jurisdictions, stated: "[A]ny business which invites the company of the public must take 'reasonably necessary acts to guard against the predictable risk of assaults.' A business proprietor owes a duty to those entering its premises to provide a

80. *Id.* at 220. The Fifth Circuit used the "impending assault" language used in *Davenport*.

81. *Id.* The evidence which the court used to determine that Hyatt was clearly aware of the risks of criminal assaults was comprised solely of previous criminal incidents. *Id.* at 218-19.

82. *Id.* at 220.

83. The "impending assault" doctrine calls the business owner to react to a specific crime which is about to occur or that is in progress. Thus, the business owner has no legal obligation to adopt preventive measures and therefore has little incentive to do so.

84. 455 So. 2d 1364 (La. 1984).

85. *Id.* at 1372.

86. *Id.* at 1367.

reasonably safe place."⁸⁷ It would seem that under this standard the business owner, like the innkeeper, must take precautionary measures to deter crime. However, the court set down another principle as the *main rule* of the case: "A duty of protection which has been voluntarily assumed must be performed with due care."⁸⁸ Since Pizza Hut assumed the duty to protect, it was potentially liable for the negligence of the guard. The jury found the guard negligent in the way he responded to the robber; therefore, Pizza Hut was liable.⁸⁹

The court used the "assumed duty" principle to sidestep the issue of what factors a court should consider to establish the business owner's duty to protect—in this case, specifically whether Pizza Hut had the duty to hire a security guard in the first place. After reviewing prior criminal incidents and stating that the Pizza Hut was located in a high crime area,⁹⁰ the court stated in dicta that it was "unnecessary to decide how many prior criminal acts create a duty" to hire a guard because Pizza Hut had already acknowledged that the "risk of crime . . . was *sufficiently foreseeable*" to require a guard.⁹¹ Therefore, the duty existed as a matter of law because Pizza Hut had assumed it.⁹²

To make sure the lower courts understood the "assumed duty" principle, Justice Dennis wrote a concurring opinion stressing that *Harris* was "an ordinary negligence case."⁹³ However, this surely was not an ordinary negligence case, and the court could not conceal that fact. The broad language it used regarding the business owner's duty "to provide a reasonably safe place," and the fact that it reviewed prior criminal acts to conclude that the risk was sufficiently foreseeable, reveal that the court indeed may have been setting new and higher standards in the determination of the business owner's duty.⁹⁴ In effect, the court required the business owner, as it did the innkeeper, to take precautionary measures against crime.

87. *Id.* at 1369 (citations omitted).

88. *Id.* (citations omitted).

89. *Id.* at 1372.

90. *Id.* at 1366. Pizza Hut's own reports showed that it had been robbed or burglarized more than twenty times. The New Orleans Police Department's reports indicated seven previous instances of criminal activity at the restaurant from January 1976, to the date of the fatal shooting on March 17, 1979. Most of these incidents were armed robberies occurring between the hours of 9:00 and 10:00 P.M. *Id.* at 1368.

91. *Id.* at 1371 (emphasis added).

92. *Id.* at 1372.

93. *Id.* at 1373 (Dennis, J., concurring).

94. Professor Robertson maintains that the language in *Harris* might be read to suggest that a business owner has the same duty to protect patrons as the innkeeper; therefore, he may have an obligation to adopt security measures if the risk of crime is high enough. David W. Robertson, *Negligence Liability for Crimes and Intentional Torts Committed by Others*, 67 Tul. L. Rev. 135, 173 (1992) [hereinafter Robertson, *Negligence*].

The Louisiana Supreme Court has recently reiterated the principles of *Harris* while applying them to the case of *Mundy v. Department of Health & Human Resources*, 620 So. 2d 811 (La. 1993). See *infra* text accompanying notes 177-80.

D. Confusion in the Law Today

Banks, Harris, and the cases leading up to them provide Louisiana courts with several different standards for determining the business owner's duty. *Banks* held that the business owner has a limited duty to react to an "impending assault" and does not have to take precautionary measures even though prior crimes may have occurred on the premises.⁹⁵ *Harris* held that once a duty is assumed, it exists as a matter of law, and a breach of that duty is determined by the jury. However, in its analysis the *Harris* court implied through a "prior crimes" approach that the business owner had a duty to take precautions against sufficiently foreseeable risks of crime.⁹⁶ *Day* and *Phillips* determined the duty of the business owner by focusing on a variety of factors which would invite criminal attacks on the premises. These two cases imposed on the business owner a duty to take precautionary measures not only after a high number of prior crimes occurred, but also if the location and condition of the premises called for such measures.⁹⁷

Recent cases illustrate that courts continue to grapple with these three different degrees of duty. Some courts strictly adhere to the "impending assault" standard, others use a combination of the "impending assault" and "prior crimes" standards, and one other, as discussed in Part IV, uses a more demanding approach. There is added confusion in the courts' analyses resulting from the application of the assumed duty principle. The inconsistency in the law undoubtedly leaves the business owner uncertain of his legal obligations.

1. Strict Adherence to the Impending Assault Doctrine

*Potter v. First Savings and Loan Association of Scotlandville*⁹⁸ involved a lessee of an apartment who was raped and robbed in the parking lot of the complex. Although the first circuit court of appeal found the lessor not liable based on Louisiana Civil Code article 2703⁹⁹ which pertains to lease (and thereby affirmed the trial court's summary judgment),¹⁰⁰ the court also expressed its opinion as to whether the plaintiff would prevail in tort. In a rather lengthy footnote, the court quoted language from a previous case outlining the "impending assault" doctrine. The court stated that the facts were insufficient to show that the defendant knew or should have known of the rapist's intended conduct.¹⁰¹

95. See *supra* text accompanying notes 80-82.

96. See *supra* text accompanying notes 87-94.

97. See *supra* text accompanying notes 58-66.

98. 602 So. 2d 1070 (La. App. 1st Cir. 1992), *vacated*, 615 So. 2d 318 (1993).

99. Louisiana Civil Code article 2703 provides:

The lessor is not bound to guarantee the lessee against disturbances caused by persons not claiming any right to the premises; but in that case the lessee has a right of action for damages sustained against the person occasioning such disturbance.

100. *Potter*, 602 So. 2d at 1072-73.

101. *Id.* at 1073 n.3.

Thus, according to the court's reasoning, the business owner in this case would only have a duty to protect if she knew or should have known the rapist was about to attack the lessee. Even though there was overwhelming evidence of the dangers in and around the apartment complex,¹⁰² the court chose to follow the strict "impending assault" cases. As will be shown in Part III, the impending assault analysis is inappropriate in such a case and the standard should be abandoned for one which is sensitive to the factors which facilitate crime.¹⁰³

The Louisiana Supreme Court recently vacated the summary judgment in *Potter* and remanded the case for further proceedings.¹⁰⁴ The court held that Article 2703 does not immunize the lessor from the lessee's claims of breaches of "contractual and/or tort duties to maintain adequate exterior lighting, to keep the complex in a reasonably safe condition and/or to provide her a reasonably safe place."¹⁰⁵ Although the supreme court referred to the footnote in the first circuit's opinion,¹⁰⁶ it did not address whether the "impending assault" standard was the proper standard to apply.

However, the court found relevant to the issue of foreseeability of the criminal attack that another tenant had noticed an unknown male lurking in the parking lot on an earlier occasion. In addition, the court found that "[g]enuine issues . . . exist as to . . . whether the inadequate lighting *encouraged* criminal attacks and/or *enhanced* their foreseeability . . ."¹⁰⁷ This language seems to suggest that courts should apply a broader standard than the "impending assault" in cases such as *Potter* and consider such factors as prior incidents and inadequate lighting. Again, however, the court did not directly reject the "impending assault" doctrine and thus courts conceivably may still apply it to cases in which there is no warning of an impending criminal attack.

2. Combination of Impending Assault and Prior Crimes

Some courts choose not to adhere strictly to the "impending assault" standard and have moved towards imposing a higher duty on the business owner by employing a combination of the "impending assault" and "prior crimes" standards.¹⁰⁸ In *Foster v. Colonel Sanders Kentucky Fried Chicken, Inc.*,¹⁰⁹ the trial

102. Prior to the rape, the apartment complex had experienced several instances of burglary and vandalism. The rear two units had been badly vandalized and the apartment manager was fully aware of the criminal activity that was taking place. In addition, the lighting around the complex was so inadequate that the tenants filed several complaints with the manager. Moreover, the complex was located in a high crime area of Baton Rouge. *Id.* at 1071-72.

103. See *infra* text accompanying notes 149-55.

104. *Potter v. First Federal Sav. and Loan Ass'n of Scotlandville*, 615 So. 2d 318 (La. 1993).

105. *Id.* at 325-26.

106. *Id.* at 322.

107. *Id.* at 326 (emphasis added).

108. See *Mundy v. Department of Health and Human Resources*, 609 So. 2d 909 (La. App. 4th Cir. 1992), *aff'd*, 620 So. 2d 811 (1993); *Russell v. McDonald's Corp.*, 576 So. 2d 1213 (La. App. 5th Cir. 1991); *Smith v. Walgreens Louisiana Co.*, 542 So. 2d 766 (La. App. 4th Cir. 1989); *Ballew*

judge dismissed the claims of a customer who was shot in an attempted robbery. The plaintiff argued that the employees had a duty to react to the impending assault and that the store should have adopted more adequate safety measures.¹¹⁰

The second circuit court of appeal found that the employees could not have known of the impending specific robbery. The court then turned to the dicta in *Harris* regarding the business owner's duty to take preventive measures after a high number of prior crimes had occurred on the premises. The court determined that the one prior robbery which had occurred at the restaurant was not enough to activate the duty of taking precautionary measures against crime.¹¹¹

The *Foster* court thus analyzed the business owner's duty using a two-step process. It first determined whether the case involved an impending assault and then inquired into the risk of crime at the store employing a prior crimes approach. This case is significant in that it recognized the business owner should not only react to a specific impending assault, but also should adopt precautionary measures if there is a history of criminal incidents at the business establishment. By using a combination of the "impending assault" and "prior crimes" standards, the court demonstrated that these two standards are not mutually exclusive. In other words, it is possible for courts to impose both a duty to react and a duty to take precautionary measures on the business owner.¹¹² Thus, through its use of a combination of the "impending assault" and "prior crimes" standards, *Foster* added yet another aspect to the business owner's duty.¹¹³

3. The "Assumed Duty" Principle

The "assumed duty" principle of *Harris*¹¹⁴ added confusion rather than guidance to the lower courts' analyses of the business owner's duty. Two recent cases dealt with business owners who had security measures in place. Under *Harris*, the duty to protect was assumed and therefore existed as a matter of law, allowing the jury to determine breach.¹¹⁵ However, in *Sutter v. Audubon Park*

v. Southland Corp., 482 So. 2d 890 (La. App. 2d Cir. 1986); *Miles v. Flor-Line Assocs.*, 442 So. 2d 584 (La. App. 1st Cir. 1983); *Pennington v. Church's Fried Chicken, Inc.*, 393 So. 2d 360 (La. App. 1st Cir. 1980).

109. 526 So. 2d 252 (La. App. 2d Cir.), writ denied, 531 So. 2d 483 (1988).

110. *Id.* at 253-54.

111. *Id.* at 256-58. However, the court stated, "This is not to say the evidence of this shooting, together with two subsequent crimes admitted into evidence, might not on some future occasion be construed as grounds of knowledge that the store is in an area prone to crime and that deterrent measures should have been taken." *Id.* at 258 n.2.

112. See *infra* text accompanying notes 149-165.

113. What is meant by "another aspect" is that the analysis for the business owner should not be based on only one standard of foreseeability. The courts should first determine if the case involves an "impending assault" and then move on to other relevant factors making a crime more likely, such as prior crimes, high crime area, lighting, and design. See *infra* Part IV.

114. See *supra* text accompanying notes 88-92.

115. *Harris v. Pizza Hut*, 455 So. 2d 1364, 1372 (La. 1984).

Commission,¹¹⁶ the fourth circuit held that, as a matter of law, the park had no duty to protect one specific shelter, even though security measures existed to cover the whole park.¹¹⁷ Similarly, in *Mundy v. Department of Health and Human Resources*,¹¹⁸ the fourth circuit again held that, as a matter of law, the hospital had no legal duty to employ guards at a specific elevator of the hospital, even though security measures were in place throughout the hospital in general.¹¹⁹

These decisions reveal that the courts have turned the assumed duty principle into a malleable concept. Instead of allowing juries to determine breach in such cases,¹²⁰ the courts have reserved the power to decide them at the duty level by breaking down the assumed security measures into specific duties to guard specific places on the premises. As a result, the assumed duty principle seems to have lost its original meaning as outlined in *Harris*.¹²¹

E. Summary of the Jurisprudence

The jurisprudence involving the business owner's duty to protect patrons from the criminal acts of third parties provides the courts with a variety of choices in determining duty. The courts may impose a limited duty to react, a higher duty to take precautionary measures after a high number of prior crimes have occurred, or an even higher duty to take such measures according to the location, condition, and past experience of the business establishment. As the following analysis explains, these approaches are deficient in that they fail to consider all the relevant factors specific to criminal acts cases as well as the factors comprising the duty/risk analysis.

III. ANALYSIS

The jurisprudence reveals that in the overwhelming majority of cases, the Louisiana courts have relied on foreseeability, whether defined in terms of "impending assault" or "prior crimes," as the all-important factor in determining the business owner's duty to protect patrons from the criminal acts of third parties. In doing so, the courts have neglected the significant socio-economic factors

116. 533 So. 2d 1226 (La. App. 4th Cir. 1988), writ denied, 538 So. 2d 597 (1989).

117. *Id.* at 1234. The plaintiff was confronted by an unknown gunman and shot in the chest while using the restroom facilities in Shelter No. 12 of the park. Shelters are small buildings which contain the park's restroom facilities. *Id.* at 1228.

118. 609 So. 2d 909 (La. App. 4th Cir. 1992), *aff'd*, 620 So. 2d 811 (1993).

119. *Id.* at 915.

120. Although *Sutter* and *Mundy* were both judge trials (the city and state were both defendants in these cases), the fact that the court stated it was deciding the cases at the duty level is significant. Courts can use these cases as authority to keep juries from determining "assumed duty" cases at the breach level.

121. However, an example of a correct application of the *Harris* principles is the fifth circuit's decision in *Hanewinkel v. St. Paul's Property & Liability Ins. Co.*, 611 So. 2d 174 (La. App. 5th Cir. 1992), writ denied, 614 So. 2d 65 (1993).

inherent in the duty/risk approach.¹²² The effect of not reviewing the duty/risk factors is that the courts fail to impose a more demanding duty on the business owner to take a variety of precautionary measures against criminals according to the circumstances.¹²³

Moreover, the courts have failed to recognize that the "impending assault" and "prior crimes" approaches are two different standards for two different factual situations.¹²⁴ The courts should employ the "impending assault" approach only in those situations in which the business owner has actual knowledge that a crime is about to occur. The approach is inappropriate when applied in the more usual occurrence of the "spontaneous" crime in which the patron falls victim to a surprise attack.¹²⁵

Courts should apply the "prior crimes" approach in that case because although there are no warning signs of the impending attack, prior incidents are a good indication that a crime is likely to occur in the future.¹²⁶ The proper analysis to follow in third party criminal acts cases is the one used by the second circuit in *Foster*—a two-step process. They should first see if the incident was an impending assault and then consider factors which facilitated criminal activity on the premises.

The Louisiana Supreme Court has compounded these deficiencies in the courts' analyses by providing little guidance, even though it has had several opportunities to institute some standards in this area of tort law. The court has shown a general reluctance to discuss the policies behind establishing a business owner's duty to take precautionary measures against crime. As a result, it too has used foreseeability as the all important factor in determining duty.¹²⁷

A. *The Role of Foreseeability in the Duty/Risk Analysis as Applied to Business Owners*

When the Louisiana Supreme Court expressly adopted the duty/risk approach in *Hill v. Lundin*,¹²⁸ it intended to make foreseeability just one factor in the determination of a duty: "Foreseeability is not always a reliable guide, and certainly it is not the only criterion for determining whether there is a duty/risk relationship."¹²⁹ Professor Robertson maintains that in *Hill*, the supreme court

122. For descriptions of the duty/risk approach, see Robertson, *supra* note 18, and Crowe, *supra* note 19. For a modern analysis of the approach, see Thomas C. Galligan, Jr., *Hill v. Lundin and Associates Revisited: Duty Risked to Death?*, LSU Publications (forthcoming 1993).

123. See *infra* text accompanying notes 138-148.

124. Professor Robertson maintains a similar view: "A number of post-*Harris* decisions discuss both views on the extent of an ordinary business' duty to take anti-crime precautions and apply [the "prior crimes" rule] without explicit acknowledgement that the two views are inconsistent." Robertson, *Negligence*, *supra* note 94, at 174 (emphasis added) (footnotes omitted).

125. See Yelnosky, *supra* note 5, at 904.

126. See Kaufman, *supra* note 25, at 113-14.

127. See *infra* text accompanying notes 166-176.

128. 260 La. 542, 256 So. 2d 620 (La. 1972).

129. *Id.* at 549, 256 So. 2d at 622.

meant to admonish the lower courts against the notion that foreseeability is magic.¹³⁰ Courts should instead discuss a variety of socio-economic factors shaping their decisions to impose a duty in a case. In other words, the courts should be asking: Will the courts be able to manage the litigation resulting from the imposition of a duty in a given situation? Is the plaintiff's harm easily associated with the defendant's conduct? What are the economic impacts on the plaintiff and defendant and those similarly situated from the imposition of a duty? Does it seem right to impose a duty in this case? Does society call the courts to impose a duty in this situation? Professor Crowe (drawing from the works of Malone and McDonald) has labeled these questions as the administrative, ease of association, economic, moral, and historical or precedent factors.¹³¹

This section will apply the duty/risk analysis to the business owner's duty to protect patrons from the criminal acts of third parties. First, however, the courts' continuing struggle with the role of foreseeability in the determination of duty will be explored.

1. Struggling With the Foreseeability Factor

Even though the supreme court adopted the duty/risk approach over twenty years ago, Louisiana courts still grapple with the notion of foreseeability and who decides it at what stage in a negligence case. The fourth circuit's opinion in *Smith v. Walgreens Louisiana Co.*¹³² illustrates the conflict among the court in using foreseeability to determine the business owner's duty to protect patrons from the criminal acts of third parties. In *Smith*, a woman was raped and robbed after being abducted from a Walgreens parking lot. The trial judge entered summary judgment in favor of Walgreens, which the fourth circuit reversed and remanded for trial on the merits. The fourth circuit explained that the duty to protect arises when the crime is sufficiently foreseeable. It concluded that the jurisprudence indicated that "a high number of such incidents is necessary to establish foreseeability."¹³³

The court then maintained that since it was unable to say that the incident was foreseeable from the evidence presented in the record, the issue of foreseeability should be referred to the trial on the merits.¹³⁴ However, if foreseeability produces the duty to protect, and duty is a question of law, then would not sending the issue of foreseeability to the jury in effect mean that the jury would be deciding duty?

The dissent maintained that Walgreens owed no duty as a matter of law. It reasoned that by sending the case to trial, the majority had assumed Walgreens had a duty because the jury was not supposed to have a role in the duty inquiry.¹³⁵

130. See Robertson, *supra* note 18, at 25.

131. Crowe, *supra* note 19, at 906.

132. 542 So. 2d 766 (La. App. 4th Cir. 1989).

133. *Id.* at 768.

134. *Id.*

135. *Id.* at 769 (Ward, J., dissenting) ("Whether a duty exists is a question of law, to be decided

The dissent also maintained that foreseeability of the criminal attack should not be relevant to a duty inquiry. It referred to the socio-economic factors outlined by Professor Crowe and noted that the foreseeability which played a role in the duty inquiry was actually the ease of association factor.¹³⁶ In applying the duty/risk approach, the dissent determined that Walgreens owed no duty to the plaintiff. It found that a rape was not easily associated with the conduct of permitting invitees to park in a parking lot adjacent to a retail establishment; that the imposition of a duty would be too great of an economic burden because Walgreens and other retail establishments similarly situated would have to hire security guards; and that establishing a duty in this case would undermine the jurisprudence of *Banks* and *Harris* which expressly limited the business owner's duty to protect patrons against the criminal acts of third parties.¹³⁷

2. Duty/Risk as Applied to Business Owners

The dissenters in *Smith* should be praised for discussing the policy factors which a court should consider in determining duty; however, their analysis of those factors fails to account for a changing society. For instance, the rape could be easily associated with Walgreens' conduct of permitting invitees to park in the lot. Retail establishments and parking structures head the list of targets for criminal activity.¹³⁸ Parking lots themselves present an "especial temptation and opportunity for criminal misconduct."¹³⁹ In addition, Walgreens was located in a high crime area and had encountered prior criminal incidents.¹⁴⁰ Thus, in actuality, the rape was easily associated with permitting invitees to park on the lot if the dissenters were to consider the nature, condition, location, and past experience of the premises. Such factors are specifically relevant in criminal acts cases.¹⁴¹

In deciding that the duty would be too much of an economic burden, the dissent failed to recognize the business owner's ability to spread the costs of providing protection among its patrons.¹⁴² Moreover, measures such as proper lighting in parking areas "are easily definable and relatively inexpensive to maintain."¹⁴³

Although the dissenters were correct in finding that the jurisprudence created a limited duty for the business owner, they did not consider the other significant

in the first instance by the Trial Court.") (citations omitted).

136. *Id.* at 770.

137. *Id.* at 769-70.

138. *See supra* note 24.

139. *Isaacs v. Huntington Memorial Hosp.*, 695 P.2d 653, 660 (Cal. 1985).

140. *Smith v. Walgreens Louisiana Co.*, 542 So. 2d 766, 768 (La. App. 4th Cir. 1989).

141. *See infra* text accompanying notes 182-187.

142. *See supra* text accompanying notes 33-35.

143. Kaufman, *supra* note 25, at 114 (footnote omitted).

component of the precedent factor. As Professor Crowe writes, this factor involves not only looking back but also looking forward.¹⁴⁴

Precedent is important but one can never rely upon it completely and securely. If a rule were established as a precedent over a century ago, and if many exceptions have eroded the rule to an empty and meaningless proposition, one does not have to be a seer to understand that the last vestiges of the rule are subject to momentary collapse. This type of viewing the past with an eye to the future is much in accord with the civilian concept of *jurisprudence constante*¹⁴⁵

The commentators have noted that in common law there was traditionally a no-duty-to-act rule.¹⁴⁶ Louisiana courts followed that rule but have been slow to recognize its erosion. The "impending assault" doctrine, the "prior crimes" rule, and cases such as *Day* and *Phillips* illustrate the withering away of the no-duty-to-act rule. If Louisiana courts were to look at these exceptions with an eye toward the future, they would appreciate the vital role the business owner could play in deterring crime and realize the great need to impose a more demanding duty on the business owner.

If the dissent had discussed the administrative factor, it would have discovered that the courts can manage the litigation that would result from imposing a higher duty on the business owner by carefully articulating the factors important in deciding criminal acts cases.¹⁴⁷ The factors proposed in Part IV should help convey to crime victims that business owners do not owe them an unqualified duty of protection, but the circumstances determine the business owner's duty to adopt preventive measures. For example, the moral factor in criminal acts cases would be shaped by how much the business owner is to blame for creating an environment which facilitated criminal activity.¹⁴⁸

Thus, if the courts were to examine the duty/risk factors, they would understand the need to impose a higher duty on the business owner to take precautionary measures against crime. Unfortunately, the overwhelming majority of Louisiana cases neglect the duty/risk factors and continue to use a narrow definition of foreseeability as the key factor in determining the business owner's duty. The following section describes the negative effects of the courts' undue reliance on foreseeability in analyzing the business owner's duty.

144. Crowe, *supra* note 19, at 908.

145. *Id.* at 908-09.

146. See generally Fowler V. Harper and Posey M. Kime, *The Duty to Control the Conduct of Another*, 43 Yale L.J. 886 (1934); Leonard, *supra* note 36, at 830-34; Yelnosky, *supra* note 5, at 888-89.

147. Courts can manage the litigation in the same way that they can prevent the business owner from becoming subject to unlimited liability, *i.e.*, through the duty decisionmaking process. See *supra* note 36 and accompanying text.

148. "The moral factor is essentially a visceral reaction to what seems right or wrong." Crowe, *supra* note 19, at 908.

B. Reaction v. Precaution

The "impending assault" doctrine articulated in such cases as *Rodriguez*, *Davenport*, and *Banks* focuses on the business owner's reaction to a crime occurring on the premises.¹⁴⁹ All of the courts have recognized that business owners at least have a duty to react under that circumstance to protect their patrons.¹⁵⁰ Imposing this duty to react is proper if the situation calls for it, such as in *Davenport* when the motel operator was informed of the danger facing a guest.¹⁵¹ However, in most cases this standard is inappropriate as most criminal acts occur without actual warning.¹⁵² The "impending assault" doctrine is thus a harsh standard as it serves as a bar to recovery for most victims of spontaneous criminal acts.¹⁵³ The standard does not take into account prior criminal acts, but "deals with each incident in isolation, as if it were the first of its kind."¹⁵⁴ More importantly, it discourages business owners from investigating crime in the area or taking safety measures because under this standard they are not required to do so.¹⁵⁵

An approach using prior criminal acts to determine duty at least recognizes that a business owner may have a duty to take precautionary measures to deter crime.¹⁵⁶ Some courts have employed this approach, as in *Foster*, *Day*, *Phillips*, *Smith*, and arguably *Harris*. However, an approach based solely on prior criminal acts also has its faults. For instance, the business owner is not quite sure of when

149. See *supra* text accompanying notes 47-54 and 67-83.

150. The "impending assault" and "prior crimes" cases comprise the majority of the jurisprudence involving the business owner's duty to protect patrons from the criminal acts of third parties in Louisiana. These cases employ the language that business owners have a duty to protect patrons only from those crimes which are foreseeable. The most conservative view of foreseeability is that the business owner must know that a specific crime is about to occur. No court seems to dispute that that situation fits under the category of foreseeable.

151. *Davenport v. Nixon*, 434 So. 2d 1203, 1205-06 (La. App. 1st Cir. 1983).

152. *Yelnosky*, *supra* note 5, at 904-05.

153. See *Banks v. Hyatt Corp.*, 722 F.2d 214 (5th Cir. 1984); *Rodriguez v. NOPS*, 400 So. 2d 884 (La. 1981); *Potter v. First Federal Sav. and Loan Ass'n*, 602 So. 2d 1070 (La. App. 1st Cir. 1992), *vacated*, 615 So. 2d 318 (1993); *Owens v. Regional Transit Auth.*, 559 So. 2d 870 (La. App. 4th Cir. 1990); *Brent v. Williams*, 524 So. 2d 158 (La. App. 4th Cir. 1988); *Coblentz v. North Peters Parking Inc.*, 533 So. 2d 98 (La. App. 4th Cir. 1988); *Pinkney v. Miller*, 439 So. 2d 1113 (La. App. 4th Cir. 1983), *writ denied*, 444 So. 2d 117, *reconsideration denied*, 445 So. 2d 443 (1984).

154. *Yelnosky*, *supra* note 5, at 905.

155. *Id.* at 904. *Yelnosky* notes that under the "impending assault" standard, "[i]gnorance can be bliss." That is, as long as the business owner does not know about the dangers facing his patrons, he is not obligated to act on their behalf. Thus, the standard does nothing to encourage the business owner to keep informed about dangerous situations which might occur on his premises. *Id.*

Although, as the market theorists argue, adopting precautionary measures would be in the business owner's economic interest, common experience demonstrates that generalized economic incentives have not been enough to encourage efficient crime prevention. See *supra* text accompanying notes 26-29.

156. See *supra* text accompanying notes 74-79.

his duty to take precautionary measures arises.¹⁵⁷ In *Smith*, the court required the past incidents to be at or near the time the crime at issue occurred.¹⁵⁸ In *Foster*, the court stated in a footnote that four crimes may be enough.¹⁵⁹ In addition, the standard is very harsh for the first, second, or maybe third crime victim as they will go uncompensated.¹⁶⁰ The standard also does not provide incentives for the business owners to *design* their property with an eye on crime prevention or to investigate crime in the area.¹⁶¹ Only after a high number of crimes has occurred on the premises does the business owner's duty to take preventive measures arise.

Some courts mix the "impending assault" and "prior crimes" standards without even acknowledging that these approaches involve two different situations.¹⁶² Professor Robertson argues that an explanation of the confusion lies in the comment to Section 344 of the Restatement (Second) of Torts which outlines the business owner's duty.¹⁶³ The comment lists both standards and provides a subtle distinction between the two according to the facts of the case.¹⁶⁴ Many courts have failed to recognize that distinction and incorrectly apply the "impending assault" doctrine in cases where there was no actual warning of the crime.¹⁶⁵

The "impending assault" doctrine and "prior crimes" rule should be applied only as factors in the determination of the business owner's duty. That is, they should be applied when the facts call for them, but they should never be the only factors a court uses to determine the business owner's duty as they do little to encourage him to take preventive measures to deter crime. Courts should employ the duty/risk approach along with a variety of relevant factors as outlined in Part IV.

C. The Louisiana Supreme Court Avoids an Important Issue

The confusion in the courts of appeal may be a result of the supreme court's lack of guidance and its conflicting messages in this area of tort law. For instance, in *Banks*, the U.S. Fifth Circuit Court of Appeals certified several questions to the Louisiana Supreme Court concerning the duties of the innkeeper and business owner to protect their patrons from the criminal acts of third parties.¹⁶⁶ The Fifth Circuit specifically asked how foreseeable the threat of harm must be in order for the duty to arise for the innkeeper and business owner, and what sorts of security

157. Yelnosky, *supra* note 5, at 905-06.

158. *Smith v. Walgreens Louisiana Co.*, 542 So. 2d 766, 768 (La. App. 4th Cir. 1989).

159. *Foster v. Colonel Sanders Kentucky Fried Chicken, Inc.*, 526 So. 2d 252, 258 n.2 (La. App. 2d Cir.), *writ denied*, 531 So. 2d 483 (1988).

160. Yelnosky, *supra* note 5, at 905.

161. *Id.*

162. *See supra* note 98 and cases cited therein.

163. Robertson, *Negligence*, *supra* note 94, at 174.

164. Restatement (Second) of Torts, § 344, comment f (1965).

165. *See supra* note 153 and cases cited therein.

166. *See supra* note 73 and accompanying text.

measures must they take.¹⁶⁷ It apparently could not find any controlling law in Louisiana, but the supreme court denied certification because it believed there were existing principles of law applicable to the case.¹⁶⁸ However, the Fifth Circuit resorted to Florida law for the innkeeper's duty and adopted the "impending assault" language from *Davenport* for the business owner's duty.¹⁶⁹ There were other Louisiana cases the court could have easily applied that uphold a higher duty for the business owner, such as *Day* and *Phillips*. Unfortunately, in denying certification, the Louisiana Supreme Court permitted the Fifth Circuit to adopt the "impending assault" standard for business owners. The courts of appeal would use *Banks* in later cases as authority for a narrow duty for business owners.¹⁷⁰

In *Harris*, the Louisiana Supreme Court had an opportunity to either adopt *Banks* or set standards of its own.¹⁷¹ The court seemed to set a higher standard for business owners than the one stated in *Banks*. At the same time, the court denied it was doing so.¹⁷² In fact, the court in responding to the amicus briefs of the Louisiana Restaurant Association stated that that issue "is left for decision at another time."¹⁷³ Although the court enunciated the "assumed duty" principle, the courts have applied it in such a way that the concept seems to have lost its intended meaning.¹⁷⁴ In addition, the principle may actually prevent the business owner from taking such steps as hiring a security guard to protect patrons because it provides that those cases go immediately to the jury. Therefore, the business owner may want to avoid the risk of being liable for the negligence of a guard, which was the result in *Harris*, by not hiring a guard to protect patrons.

In *Dye v. Schwegmann Giant Super Markets, Inc.*,¹⁷⁵ the supreme court vacated and remanded the case back to the fourth circuit, stating that the jury instructions were erroneous under *Harris*.¹⁷⁶ Arguably, the supreme court meant that the assumed duty principle should have comprised the jury instructions; however, its reasoning was not clear. On the other hand, the court could have meant that the jury should be guided by a "prior crimes" approach in their determination of breach. Again the court failed to take advantage of the opportunity to set down standards for determining the duty of the business owner.

167. *Id.*

168. *Banks v. Hyatt Corp.*, 722 F.2d 214, 216 (5th Cir. 1984) (citing *Banks v. Hyatt Corp.*, 436 So. 2d 1171 (La. 1983)).

169. *Id.* at 220.

170. See *Potter v. First Federal Sav. and Loan Ass'n of Scotlandville*, 602 So. 2d 1070, 1073 n.3 (La. App. 1st Cir. 1992), *vacated*, 615 So. 2d 318 (1993).

171. "*Harris* . . . was considered by some as a vehicle for re-examination of the rule that a storekeeper owes no duty to protect a patron until he knows that a criminal act is about to occur." Maraist, *supra* note 69, at 519.

172. See *supra* text accompanying notes 84-94.

173. *Harris v. Pizza Hut of Louisiana, Inc.*, 455 So. 2d 1364, 1372 n.16 (La. 1984).

174. See *supra* text accompanying notes 114-120.

175. 607 So. 2d 564 (La.), *reh'g denied*, 609 So. 2d 248 (1992).

176. *Id.* at 565.

Finally, in the recent case of *Mundy v. Department of Health and Human Resources*, the supreme court, in affirming the fourth circuit's decision, clearly stated the "assumed duty" principle of *Harris*, but at the same time included rather confusing dicta in its opinion.¹⁷⁷ The court stated that because the Department had assumed a duty to protect, the only question was whether the Department breached that duty, that is, "whether the security measures or procedures undertaken by the Department were reasonable."¹⁷⁸ The court then surprisingly quoted from the Restatement (Second) of Torts, § 344 comment (f) (1965):

If the place or character of his business, or his past experience, is such that he [the proprietor] 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.¹⁷⁹

As can be seen, this comment focuses primarily on the factors which should be considered when determining whether a duty to protect exists; however, the court cited the comment in its discussion of breach. The court's citing of the comment at that point in its opinion may be an indication that the court is willing to consider the place, character, and past experience of the business when determining breach (and perhaps even when determining duty). However, the court's analysis reveals instead that the overriding factor used to determine breach was that there were no prior incidents in and around the elevator in which the crime occurred.¹⁸⁰ Judging from the court's analysis, *Mundy* is simply *Harris* revisited with some confusing dicta. Again the supreme court failed to seize this opportunity to announce clear or new standards for determining the business owner's duty to protect patrons and/or breach of that duty.

IV. RECOMMENDATIONS

As illustrated in Part II, the overwhelming majority of Louisiana courts presently consider a narrow set of factors in determining the business owner's duty to protect patrons from the criminal acts of third parties. The courts focus on foreseeability of the criminal act by either applying the "impending assault" or "prior crimes" standards. Part III criticized both approaches because they do little to encourage the business owner to take precautionary measures against crime nor do they increase the victim's chances of compensation. Louisiana courts should adopt an approach that allows them to articulate and consider a number of factors in determining the business owner's duty. By articulating these factors, the courts can particularize the general reasonable care standard so that the business owner

177. 620 So. 2d 811 (La. 1993).

178. *Id.* at 813-14.

179. *Id.* at 814.

180. *Id.* at 814-15.

will know that he has a duty to adopt precautionary measures and what that duty entails. This section discusses the factors comprising this approach to the business owner's duty and demonstrates how Louisiana courts can employ this approach within the framework of Louisiana law.

A. *Proposed Approach to the Business Owner's Duty*

In determining the duty of the business owner in third party criminal acts cases, the courts should employ the duty/risk approach, first considering if the case involved an "impending assault" in which there were actual warnings that the criminal attack was imminent,¹⁸¹ and second focusing on the nature, condition, location, and past experience of the business establishment.¹⁸²

1. *Nature*

When considering the nature of the business establishment, the courts should focus on the type or character of the business establishment and whether it is one which by its nature attracts crime. For instance, the parking lots of retail establishments present the criminal with an opportunity to rob.¹⁸³ Patrons usually arrive at stores carrying money ready to purchase items, and leave carrying bags of those items.

Business owners should be sensitive to the nature of parking lots and adopt surveillance measures such as video cameras and roving patrols to deter criminal activity on the premises. Courts can provide incentives for business owners to take such measures by considering the nature of the business establishment in determining the business owner's duty.

2. *Condition*

When considering the condition of a business establishment, a court should look at the characteristics of the property itself and whether those characteristics

181. Examples of cases in which there were actual warning signs that a criminal attack was imminent include: *Johnston v. Fontana*, 610 So. 2d 1119 (La. App. 2d Cir. 1992); *Ballew v. Southland Corp.*, 482 So. 2d 890 (La. App. 2d Cir. 1986); *Davenport v. Nixon*, 434 So. 2d 1203 (La. App. 1st Cir. 1983).

182. For a similar approach, see *Isaacs v. Huntington Memorial Hosp.*, 695 P.2d 652 (Cal. 1985). The *Isaacs* approach has been adopted in Alabama and Florida. See *Brock v. Watts Realty Company, Inc.*, 582 So. 2d 438 (Ala. 1991); and *Paterson v. Deeb*, 472 So. 2d 1210 (Fla. Dist. Ct. 1985), *review denied*, 484 So. 2d 8 (1986). Comment f to Section 344 of Restatement (Second) of Torts also seems to advocate such an approach: "If the *place or character* of his business, or his *past experience*, is such that he should reasonably anticipate . . . 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 . . ." (emphasis added). This section will define the factors identified by both *Isaacs* and the Restatement.

183. See *supra* text accompanying note 24.

invite crime on the premises. For instance, under this category courts should focus on the *design* of the building. Are there any exits or entrances which bring patrons into isolated areas where they could be in danger? Are there unlocked rooms in the building into which intruders could force patrons and assault them? Were the premises fenced off so as to keep intruders from coming onto the premises and/or making an escape difficult?

In addition to design, the courts should consider whether there is inadequate lighting for the business' nighttime operation and whether there are any obstructions, such as bushes, which could conceal criminals for surprise attacks. In *Potter*, for example, the first circuit should have considered the role that the inadequate lighting in the apartment complex parking lot played in facilitating the assault which occurred. As noted, the supreme court's opinion recognized the importance of this factor.¹⁸⁴ Courts also should consider the effectiveness of security locks on doors and windows, and the adequacy of surveillance measures such as patrols and video cameras.

3. Location

The most important consideration under the location category is whether the business is located in a high crime area. Courts should consider the severity of the crime problem around business establishments and encourage business owners to keep informed about these incidents and take measures to prevent their proliferation.¹⁸⁵

4. Past Experience

This category is the prior crimes rule that some courts have applied in past cases.¹⁸⁶ Courts should consider the history of crime for a particular business and encourage the owner to discover criminal activity occurring on his premises. Although some courts stress the differences between personal crimes (assaults) and property crimes (car thefts),¹⁸⁷ courts should recognize that property crimes can always escalate into personal crimes. The business owner should keep apprised of all criminal activities occurring on his premises and adopt precautionary measures accordingly.

Thus, the main categories which courts should consider in determining the business owner's duty are the nature, condition, location, and past experience of the business establishment. Under each of these categories, the courts should articulate the various factors outlined above so as to create incentives for the business owner

184. *Potter v. First Federal Sav. and Loan Ass'n of Scotlandville*, 615 So. 2d 318, 326 (La. 1993).

185. *But see supra* note 34 and accompanying text.

186. *See supra* text accompanying notes 74-81.

187. *Willie v. American Casualty Co.*, 547 So. 2d 1075, 1085 (La. App. 1st Cir. 1989), *writ denied*, 584 So. 2d 678 (1991).

to take crime prevention measures. This list is not exclusive and the courts should always be open to considering any new factors which may be relevant in a particular case.

It should also be noted that courts should use the proposed approach in conjunction with the duty/risk approach. In Part III the duty/risk approach was applied to the business owner case of *Smith*. By considering the administrative, economic, ease of association, moral, and historical or precedent factors, it was determined that the courts should impose a more demanding duty on the business owner to take precautionary measures against crime. The proposed categories are meant to be supplemental factors which specifically deal with criminal acts cases.

B. Model Cases

In *Isaacs v. Huntington Memorial Hospital*,¹⁸⁸ the California Supreme Court used an approach similar to the one proposed in its determination of the business owner's duty to protect patrons from the criminal acts of third parties. In *Isaacs*, a doctor sued a hospital for injuries he sustained when he was shot in the hospital parking lot. The issue to be decided by the supreme court was whether the plaintiff could establish foreseeability other than by evidence of prior similar incidents. The California courts of appeal had apparently formed a rule that foreseeability in third party criminal acts cases could only be proven by prior similar incidents.¹⁸⁹

The supreme court held that foreseeability is "but one factor in determining whether a landowner owes a duty in a particular case," and that "foreseeability is an elastic factor."¹⁹⁰ The other factors which the California Supreme Court used to determine the hospital's duty reflect the court's modern analysis. For instance, the court considered the *location* of the hospital and found it was located in a high crime area and that there had been thefts and assaults in nearby areas around the hospital. It examined the *condition* of the hospital premises and discovered that the lighting was inadequate in the parking lot on the evening of the shooting and there was no security. The court also discussed the *nature* of the premises and found that parking areas create an "especial temptation and opportunity for crime," and that "emergency room facilities and surrounding areas are inherently dangerous."¹⁹¹

In Louisiana, there are three cases in which the courts employed a similar approach: *Day, Phillips*, and *Willie v. American Casualty, Co.*¹⁹² The *Day* court focused on the way the landlord had facilitated the assault which occurred on the premises.¹⁹³ The court considered the condition of the complex and found that the gate lock was unreliable and that the lessor kept a vacant apartment unlocked. The court also noted that a prior assault had occurred in the same apartment

188. 695 P.2d 653 (Cal. 1985).

189. *Id.* at 655-58.

190. *Id.* at 658.

191. *Id.* at 661-62.

192. 547 So. 2d 1075 (La. App. 1st Cir. 1989), *writ denied*, 584 So. 2d 678 (1991).

193. See *supra* text accompanying notes 62-63.

building as the plaintiff.¹⁹⁴ In *Phillips* the court examined the condition of the shopping center parking lot by asking if the lighting was adequate and if there were any signs indicating the parking lot was patrolled.¹⁹⁵

The *Willie* court took an even more sophisticated approach. The plaintiff suffered a severe gunshot injury after being abducted from a shopping center parking lot.¹⁹⁶ In determining the duty of the mall, the first circuit considered the condition of the premises and found that the lighting was inferior in some areas of the lot and there were no security measures in place. It reviewed the past experience of the mall which indicated an abnormally high incidence of "crimes against persons" on the premises. The court also considered the nature of this particular mall and found evidence that there had been numerous complaints about people consuming alcohol and illegal drugs on the premises.¹⁹⁷

The *Willie* court found support for its use of prior crimes from *Phillips* and *Harris*, among others. For its consideration of the condition and nature of the premises, the court adopted Section 344 of the Restatement (Second) of Torts as authority.¹⁹⁸ Comment (f) to that section provides that a business owner may be under a duty to take precautions against crime if the "place or character of his business, or his past experience, is such that he should reasonably anticipate . . . criminal conduct on the part of third persons."¹⁹⁹ Finally, the court recognized that other jurisdictions acknowledge the viability of a cause of action under comment (f), citing *Isaacs* and several other cases from other jurisdictions.²⁰⁰

C. Support for the Proposed Duty in Louisiana Law

Louisiana law, through its statutes and jurisprudence, provides authority for courts who desire to employ the proposed approach. In *Day*, the fourth circuit noted that the Louisiana law of torts as stated in Louisiana Civil Code article 2315 is very broad and used that notion to impose liability on the lessor.²⁰¹ The Louisiana Supreme Court has also indicated that Article 2315 calls on the courts to employ a "traditional negligence analysis," meaning the courts should examine the particular facts in each case.²⁰² More importantly, a traditional negligence analysis means that a court's decision should not be controlled by the existence or

194. *Day v. Castilow*, 407 So. 2d 510, 511 (La. App. 4th Cir. 1981).

195. *Phillips v. Equitable Life Assurance Co.*, 413 So. 2d 696, 698-700 (La. App. 4th Cir.), writ denied, 420 So. 2d 164 (1982).

196. *Willie v. American Casualty Co.*, 547 So. 2d 1075, 1076 (La. App. 1st Cir. 1989), writ denied, 584 So. 2d 678 (1991).

197. *Id.* at 1084.

198. *Id.* at 1081-82.

199. Restatement (Second) Torts § 344, comment f, (1965). The Louisiana Supreme Court quoted this provision in dicta in *Mundy*, but failed to apply this provision in its analysis of the case. See *supra* text accompanying notes 177-180.

200. *Willie*, 547 So. 2d at 1083.

201. *Day v. Castilow*, 407 So. 2d 510, 511 (La. App. 4th Cir. 1981).

202. See *Cates v. Beauregard Electric Coop., Inc.*, 328 So. 2d 367, 371 (La. 1976).

non-existence of only one factor or a set of narrow factors, but instead the court's decision should depend on as many different factors as are relevant to the particular case.²⁰³ The proposed approach follows the courts' interpretation of Article 2315 in that it allows courts to consider many different factors in determining the existence of a duty.

As referred to throughout this comment, there are three Louisiana cases which have employed an approach similar to the one proposed: *Day, Phillips*, and *Willie*. In addition, the recent case of *Potter* seems to suggest that the Louisiana Supreme Court is broadening the factors it considers relevant to the issue of foreseeability of criminal attacks.²⁰⁴ Although the overwhelming majority of the courts continue to use either the "impending assault" or "prior crimes" rules, these cases provide authority for courts desiring to use the proposed approach.

Finally, the duty/risk approach which the supreme court adopted in *Hill* also provides support for the courts' use of the proposed approach because it encourages courts to articulate and consider many different policies and factors. The duty/risk approach allows the courts to engage in a discussion of administrative, ease of association, economic, moral, and precedent or historical factors.²⁰⁵ In criminal acts cases, courts should consider these factors along with those of the proposed approach to establish a more demanding duty for the business owner, thereby creating incentives for him to adopt precautionary measures against crime.

CONCLUSION

The pervasiveness of the crime problem, the inability of traditional law enforcement to stem it, and the fact that commercial establishments are the hardest hit by crime suggest that the law should impose a duty on the business owner to take precautionary measures against crime. Louisiana courts should adopt a new approach in determining the business owner's duty to guide him in the performance of his duty. The courts should employ the traditional duty/risk analysis with a focus on the nature, condition, location, and past experience of the business establishment.

There is a tremendous need for Louisiana courts to abandon their traditional approach to the business owner's duty, which is restricted to a narrow foreseeability standard, for one which is sensitive to our changing society. There is a need because innocent people's lives are being destroyed as they fall victim to crime. If the business owner were to take precautionary measures according to the nature, condition, location, and past experience of the business establishment, then perhaps the number of criminal incidents would decrease. The courts should recognize the

203. *Id.* In *Cates*, the Louisiana Supreme Court repudiated the common law classifications of invitee-trespasser-licensee, in favor of a traditional negligence analysis.

204. See *supra* text accompanying notes 104-107.

205. See generally Robertson *supra*, note 18, and Crowe, *supra* note 19.

importance of such a policy and institute these new standards at their first opportunity.

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