Landlord Liability for Crime to Florida Tenants --
The New Duty to Protect from Foreseeable Attack

Kevin ODonnell

Follow this and additional works at: http://ir.law.fsu.edu/lr
Part of the Torts Commons

Recommended Citation
http://ir.law.fsu.edu/lr/vol11/iss4/6

This Comment is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Florida State University Law Review by an authorized editor of Scholarship Repository. For more information, please contact bkaplan@law.fsu.edu.
LANDLORD LIABILITY FOR CRIME TO FLORIDA TENANTS—THE NEW DUTY TO PROTECT FROM FORESEEABLE ATTACK

KEVIN J. O'DONNELL

I. INTRODUCTION

The recent imposition in Florida of the landlord's duty to mitigate the risk to tenants of foreseeable criminal attack requires an evaluation of the elements and scope of the duty, so that landlords will know what level of protection is expected from them, and tenants will know what level they can expect. The purpose of this comment is threefold: to examine Florida case law discussing a landlord's duty, to explain why courts differ about the nature and scope of this duty, and to attempt to define the direction in which the law may be headed with respect to the duty to protect.

The traditional rule holds that there is no duty obliging one private individual to protect another from criminal attack absent a special relationship or responsibility. However, the trend of late


2. "Scope" is used in this comment in its usual sense as denoting those risks of a particular course of conduct that would be foreseen by a reasonable person. E.g., Palsgraf v. Long Island R.R., 162 N.E. 99, 100 (N.Y. 1928). As for the areas in which the tenant must be protected, these include the common areas and areas only accessible through the common areas.

3. E.g., 1 AMERICAN LAW OF PROPERTY § 3.37 (A. Casner ed. 1952); R. POWELL, POWELL ON REAL PROPERTY ¶ 234[1], [2] (1983); RESTATEMENT (SECOND) OF TORTS § 315 (1965) [hereinafter cited as RESTATEMENT].

There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless

(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person’s conduct, or

(b) a special relation exists between the actor and the other which gives to the other a right to protection.

Id. The RESTATEMENT does not explicitly include the landlord-tenant relationship within its definition of a "special relationship." As a subset of the general rule, traditionally, the landlord-tenant relationship did not impose a duty on landlords to control the criminal acts of strangers, and tenants bore the full responsibility for protecting themselves from crime. See Note, Landlord's Duty to Protect Tenants from Criminal Acts of Third Parties: The View from 1500 Massachusetts Avenue, 59 GEO. L.J. 1153, 1161-68 (1971). See also W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 56, at 348-49 (4th ed. 1971).
requires some landlords to take reasonable steps to protect their tenants from foreseeable attack. After examining the facts of two recent Florida decisions, this comment will discuss the reasons for the change in the law and the effect that those reasons have had on the scope and nature of the duty. Of special significance are the issues of foreseeability, the evidence relevant to providing notice, and proximate cause, each of which has elicited divergent views from Florida's judiciary. Significant also are the variety of tests used to establish the existence of the duty to protect and the insight these tests provide into the differing attitudes as to the proper role of the jury. Finally, the ability of landlords to exculpate themselves from their negligent failure to discharge their duty will be considered.

II. TWO RECENT FLORIDA CASES INVOLVING THE DUTY TO PROTECT

According to the Third District Court of Appeal in Green Companies v. DiVincenzo, the occurrence of diverse crime throughout a neighborhood provides constructive notice, alerting the prudent landlord that reasonable safety measures must be in place to secure tenant safety. In DiVincenzo the plaintiff, a tenant in an office complex, was seriously injured when he returned to his unlocked, unattended office from the bathroom. It was approximately 6:00 p.m. when the incident took place. When DiVincenzo first rented in 1972, four years before the attack, security was tighter, with a guard at the building's main entrance from 4:00 p.m. until 11:00 p.m. By 1974, the guard was gone and the door was not locked until 7:00 p.m., at which time a camera, activated and viewed from a separate building, began monitoring an entrance equipped with an electronic lock and buzzer. According to the record, no prior violent criminal incidents had been reported in the

4. See Florida decisions cited supra note 1. Florida case law thus far requires multi-unit commercial and multi-unit residential landlords to take reasonable steps to protect in those districts which recognize the duty. DiVincenzo, 432 So. 2d at 87; Holley, 382 So. 2d at 99-100. A multi-unit can be defined here to include any unit which is attached to another unit by a common area over which the landlord retains control.
5. Green Cos. v. DiVincenzo, 432 So. 2d 86 (Fla. 3d DCA 1983); Whelan v. Dacoma Enterprises, Inc., 394 So. 2d 506 (Fla. 5th DCA 1981).
6. See infra notes 40-156 and accompanying text.
7. See infra notes 157-70 and accompanying text.
8. 432 So. 2d 86 (Fla. 3d DCA 1983).
9. Id. at 87-88.
10. Id. at 87.
building, which was situated in a high-crime area.\textsuperscript{11} The jury found that the landlord's negligence contributed seventy-five percent to the plaintiff's injury, while the plaintiff's own negligence contributed the remaining twenty-five percent. The award of $562,500 was affirmed.\textsuperscript{12} The court relied on the test announced earlier in Holley \textit{v. Mt. Zion Terrace Apartments, Inc.}\textsuperscript{13} That decision, based in part on the foreseeable nature of criminal activity in an apartment complex which had been the scene of at least twenty violent crimes in one year,\textsuperscript{14} stated:

\begin{quote}
Particularly in view of the evidence concerning the past record, and therefore the future foreseeability of violent crime at its premises, a jury could properly find that a discharge of the landlord's duty to keep the common areas reasonably safe required that a guard or other security measures be provided. . . .\textsuperscript{15}
\end{quote}

\textit{DiVincenzo} held that proof of a dangerous condition in the neighborhood was adequate to show that crime was foreseeable on the premises, at least when looked at in light of the landlord's past security practices. The landlord was therefore required to take and maintain reasonable steps to protect his tenants.\textsuperscript{16} Once the duty was found, it was for the jury to decide "whether reasonable care required that the stricter security precautions previously taken should have been in effect on the evening of the attack."\textsuperscript{17} The court would not conclude as a matter of law that the burden of continuing the previous methods outweighed the likelihood of such an assault occurring.\textsuperscript{18}

In a dissenting opinion, Judge Pearson discussed what he saw as an improper extension of \textit{Holley} to include office buildings.\textsuperscript{19} However, \textit{DiVincenzo} quells uncertainty as to which types of buildings\textsuperscript{20} and tenants the duty extends. Clearly, responsibility does not end at the door sill, as the landlord was held liable even

\begin{thebibliography}{99}
  \bibitem{11} Id. at 89 (Pearson, J., dissenting).
  \bibitem{12} Id. at 88.
  \bibitem{13} 382 So. 2d 98 (Fla. 3d DCA 1980).
  \bibitem{14} Id. at 99.
  \bibitem{15} Id. at 99-100 (footnotes omitted).
  \bibitem{16} DiVincenzo, 432 So. 2d at 87-88.
  \bibitem{17} Id.
  \bibitem{18} Id. at 88.
  \bibitem{19} Id. at 89 (Pearson, J., dissenting).
  \bibitem{20} The distinction between applying the duty to residences and to offices has gained little acceptance. \textit{E.g.}, Kline \textit{v. 1500 Mass. Ave. Apartment Corp.}, 439 F.2d 477, 478 n.24 (D.C. Cir. 1970); Samson \textit{v. Saginaw Professional Bldg.}, Inc., 224 N.W.2d 843 (Mich. 1975).
\end{thebibliography}
though the attack occurred wholly within DiVincenzo’s office.\textsuperscript{21} Inclusion of attacks occurring wholly within the leased premises contemplates extension of the early duty,\textsuperscript{22} but this extension was recognized in Holley.\textsuperscript{23} Judge Pearson also felt it unreasonable to premise the duty on evidence of criminal activity occurring at an adjacent shopping center, generally believing the matter to be one more properly for contract or legislative action.\textsuperscript{24} Due to the belief that the likelihood of the crime and combined with the magnitude of the risk did not outweigh the burden of protecting against it, the dissenting opinion would have granted the landlord’s motion for directed verdict.\textsuperscript{25}

Before going further, several points are worth early emphasis. The dangerous condition element the DiVincenzo opinion alludes to is important for at least two reasons. First, its presence was essential to finding a duty to protect and, second, to proving proximate cause. As the dissent inferred, an issue arises as to when the foreseeability of a criminal attack on the premises is presumed because of the presence of crime in an area, as shown by police records. Given the modern urban condition, the duty to protect would seem to automatically arise within almost every city.\textsuperscript{26}

The cause in fact issue,\textsuperscript{27} also deserving of early mention, surprisingly was absent from consideration in DiVincenzo. No evidence was reported from which a jury could infer that DiVincenzo’s attacker would not have entered the premises posing as a patron of one of the businesses even had a guard been posted. The nature of an office building demands it be left open to the public.\textsuperscript{28} Failure to require a plaintiff to prove what precautions would have prevented an attack has two effects. First, plaintiffs

\begin{itemize}
  \item \textsuperscript{21} DiVincenzo, 432 So. 2d at 87; accord Ramsay v. Morrisette, 252 A.2d 509 (D.C. 1969).
  \item \textsuperscript{22} E.g., Kline, 439 F.2d at 481.
  \item \textsuperscript{23} The court reasoned that access to Holley’s apartment must have been through the common area. Holley, 382 So. 2d at 101.
  \item \textsuperscript{24} DiVincenzo, 432 So. 2d at 89 (Pearson, J., dissenting). See infra notes 64-99 and accompanying text.
  \item \textsuperscript{25} Id.
  \item \textsuperscript{26} Id. But see, e.g., Highlands Ins. Co. v. Gilday, 398 So. 2d 834 (Fla. 4th DCA) (testimony concerning number of criminal complaints filed within police zone surrounding a hotel held inadmissible as not probative of notice to hotel), petition for rev. denied, 411 So. 2d 382 (Fla. 1981).
  \item \textsuperscript{27} Before liability may attach, there must be a causal connection between the breach of a duty and an injury such that, but for the breach, the injury would not have occurred. W. Prosser, supra note 3, § 41, at 236-41; see also infra notes 129-43 and accompanying text.
  \item \textsuperscript{28} Kline, 439 F.2d at 490 (MacKinnon, J., dissenting). See Henszey & Weisman, supra note 1, at 122-25.
\end{itemize}
need not show that, had reasonable steps been taken, the assault would not have occurred. Second, plaintiffs need not show that a landlord's unreasonable precautionary practices in fact caused an attack, as the jury may infer this.\textsuperscript{29} Other than close surveillance and an armed escort within striking distance, what could stop a patron bent on assaulting someone?\textsuperscript{30} What less would a jury find reasonable?

At the other end of the spectrum from \textit{DiVincenzo} sits \textit{Whelan v. Dacoma Enterprises, Inc.}\textsuperscript{31} In \textit{Whelan}, the complaint alleged that an intruder forced entry into the tenant's locked apartment where she was raped and assaulted in front of her young son who was also assaulted and battered. It was further alleged that there had been many other incidents of burglary and violence occurring both within and without the units.\textsuperscript{32} The essence of the holding can be traced to the following allegations:

The landlord . . . undertook to control the security system by forbidding the installation of any locks . . . without the explicit consent of the landlord. . . . Thus, . . . the landlord was in control and responsible for the types and number of locking devices. . . . Notwithstanding that duty, . . . the assailant was able to gain entry into the tenant's apartment due to unsatisfactory defective and ineffective locks on the exterior apartment door and/or because of the existence of unlimited passkeys.\textsuperscript{33}

The court held that the landlord had no duty to protect. "[O]therwise, each victimized tenant would sue his landlord every time a rape, murder, assault, arson, robbery or burglary occurred on or about any leased premises, be they single, multi-family or commercial."	extsuperscript{34} The court noted the absence of allegations that any statute had been violated, or that a lease or any implied contract had been breached.\textsuperscript{35} \textit{Holley} was distinguished because of its specific reference to a contractual responsibility arising out of an apportionment of rent, a portion of which was earmarked for security guards. Finally, the court held that the complaint did state a cause

\textsuperscript{29} See infra notes 129-143 and accompanying text.

\textsuperscript{30} See Reichenbach v. Days Inn of America, Inc., 401 So. 2d 1366, 1368 (Fla. 5th DCA 1981) (Cowart, J., specially concurring).

\textsuperscript{31} 394 So. 2d 506 (Fla. 5th DCA 1981).

\textsuperscript{32} Id. at 507.

\textsuperscript{33} Id.

\textsuperscript{34} Id.

\textsuperscript{35} Id. at 508.
of action sounding in negligence, based on the traditional theory that where defects are unknown to the tenant, but known to the landlord, they may give rise to a cause of action. Judge Beranek, dissenting, felt that the majority went too far and would add to the elements of the cause of action the requirements that there be a substantial breach of contract, that the injuries be caused by the breach and that the injuries be foreseeable.

III. THE REASON FOR FINDING A DUTY TO PROTECT GENERALLY

The divergence evident in Florida case law is in part attributable to *Kline v. 1500 Massachusetts Avenue Apartment Corp.*, wherein alternative theories were employed to impose the duty to protect. Because the nature of the duty was seen as duplicitous, the standard of care owed by the landlord to his tenants in *Kline* similarly partook of both tort and contract. *Kline* attempted to reflect emergent social concerns. The policy the court adopted was based upon a recognition of the change urbanization had wrought on the landlord-tenant relationship. The court was not, however, attempting to spread risk or require that there be insurance for damage already done. *Kline* determined

36. Id.
37. *E.g., Butler v. Maney, 200 So. 226 (Fla. 1941); 52 C.J.S. Landlord & Tenant § 417(3)(c) (1968).*
38. *Whelan, 394 So. 2d at 508. Unfortunately, the case was cast in a different light by at least one commentator who saw it as an extension of Holley. See Browder, The Taming of a Duty—The Liability of Landlords, 81 Mich. L. Rev. 99, 145-46 (1982).*
39. *Whelan, 394 So. 2d at 508 (Beranek, J., dissenting).*
41. *See infra note 75.*
42. *Kline, 439 F.2d at 485. If tort theory has been adopted, the standard is that of reasonable care under all the circumstances and/or that level of care customarily provided. If contract theory is implied, the same relative degree of security throughout the tenancy and/or the taking of those protective measures which only the landlord has the power to provide are required. Cf. Trentacost v. Brussel, 412 A.2d 436 (N.J. 1980).*
43. *Kline, 439 F.2d at 487-88. Compare Selvin, supra note 1, at 314-15, wherein the author states that the landlord provides a more efficient vehicle for arranging patrols and can prevent duplicative effort. So much was implicit in *Kline*, yet Selvin finds that “a landlord is in the best position to ensure against the risk of criminal attacks. While tenants must otherwise bear such costs alone, the costs of protection undertaken by landlords may be effectively spread throughout the community by the availability of liability insurance to cover such losses.” Id. at 315 (footnote omitted).*

In response, it is questionable whether tenants could not purchase insurance themselves if they so desired. Also, it is unlikely that the burden of protection would be spread any further than a particular tenant community. The costs of protection might be disproportionately borne by those least able to afford them. The cost of providing security guards might approximate the minimum wage ($3.35/hour), multiplied by the hours in a day (24), and
that "[t]he duty is the landlord's because by his control of the areas of common use and common danger he is the only party who has the power to make the necessary repairs or to provide the necessary protection." The intent was that the modern urban landlord take reasonable steps to "minimize the predictable risk" and pass the cost along to the tenant, while displaying "reasonable care in all the circumstances, the specific measures to achieve this standard vary[ing] with the individual circumstances." Thus, by imposing liability, courts could provide the economic incentive to upgrade security. At the very least, there would be no toleration of any relaxation of security. Tenants could not be expected to guard the garage entranceways, to provide scrutiny at the main entrance of the building, to patrol the common hallways and elevators, to set up any kind of a security alarm system in the building, to provide additional locking devices on the main doors, to provide a system of announcement for authorized visitors only, to close the garage doors at appropriate hours, and to see that the entrance was manned at all times.

Therefore, the duty would be placed on the party supposed to have the capacity to take such measures. The power held by the landlord made it suitable for a court to impose liability for two reasons. First, the relationship between landlord and tenant underwent change so that it is now more analogous to the innkeeper-guest relationship. This is because the tenant submits to the control of

again by the days in a year (365), which equals about $30,000 per year. As to the need for 24 hour service, see Cross v. Wells Fargo Alarm Servs., 412 N.E.2d 472 (Ill. 1980), wherein negligence was based on the landlord having increased the risk during those periods when the building's guards were off duty.

"[T]he alternative appears to be legislative action to provide more efficient and extensive crime control and prevention. This equitably spreads the burden over the whole community rather than just the landlord and tenant, because it is the community at large . . . which is the ultimate beneficiary." Comment, Landlord Held Negligent for Criminal Assault by Third Party Intruder on Tenant, 55 MINN. L. REV. 1097, 1111 (1971). It might be noted that the apartment building in Kline housed well over 500 occupants. Id.

44. Kline, 439 F.2d at 481.
45. Id.
46. Id. at 488.
47. Id. at 485-86 (footnote omitted).
48. Id. at 486. See DiVincenzo, 432 So. 2d at 87. See also Flood v. Wisconsin Real Estate Inv. Trust, 503 F. Supp. 1157 (D. Kan. 1980).
49. Kline, 439 F.2d at 480.
50. Id. at 482. Hotels have a duty to take reasonable care for the protection of their patrons. E.g., Highlands Ins. Co. v. Gilday, 398 So. 2d 834 (Fla. 4th DCA), petition for rev. denied, 411 So. 2d 382 (Fla. 1981); Rosier v. Gainesville Inns Assocs., Ltd., 347 So. 2d 1100
the landlord. So much was asserted by the plaintiff in *Whelan*, where it was alleged that the landlord's permission was required to put extra locks on the front door.51 Further, the tenancy is economically beneficial to the landlord. In short, the relationship is characterized by submission and dominance, especially if apartments are in short supply.52

Second, courts impose liability because the landlord retains substantial physical or structural control over the premises. Tenants have neither the inclination, resources or, for the most part, the expertise required to make their dwellings impervious to crime. The failure to recognize that the duty is a product of both the landlord/tenant relationship and of the landlord's retention of physical control can lead to unreasonable requests upon landlords. Today, dissenters53 and commentators54 scoff at the canard that "the landlord is not the insurer of tenant safety,"55 and call the result a form of strict liability.56 It is one thing to fix stairs and know the job done, but quite another to know what a jury will think were reasonable precautions to prevent crime.57

IV. THE PHYSICAL AREA TO WHICH THE DUTY EXTENDS

In *Medina v. 187th Street Apartments, Ltd.*58 the plaintiff was mugged in the landlord's parking lot as he was returning to his car after escorting two ladies to their apartment. The manager of the

---

51. *Whelan*, 394 So. 2d at 507.
52. *Cf. infra* notes 157–70 and accompanying text (discussion of the landlord's ability to exculpate). *See also* Stolzenberg v. Forte Towers South, Inc., 430 So. 2d 559 (Fla. 3d DCA 1983); Colon v. Lara, 389 So. 2d 1070 (Fla. 3d DCA 1980).
apartments testified to having knowledge of previous muggings at the complex and a police officer characterized the apartment complex as being in a high-crime area.\textsuperscript{59} The appellate court reversed the directed verdict for the defendant.\textsuperscript{60} The court found that the trial court properly classified the plaintiff as an invitee of the landlord. Since the court would not hold that the violent act was unforeseeable as a matter of law,\textsuperscript{61} a triable issue therefore existed.\textsuperscript{62} Thus, the landlord’s duty extends to the entire premises. The duty has been found where an attack occurred in a leased apartment, in common hallways and in apartment parking lots, even when such areas are readily accessible to police patrol and protection. As was said in another context:

Since all landowners owe a general duty of care to their invitees, the existence of prior criminal activity of an assaultive nature on their property, or in the area, under the majority view, makes a similar assault on every invitee reasonably foreseeable and thereby subjects every landowner to liability if “reasonable precautions” were not taken regardless of whether the precautions would have prevented the assault.\textsuperscript{63}

V. FINDING THE DUTY TO PROTECT

Foreseeability and Evidence Relevant to Establishing A Duty to Protect in a Given Situation

Another case intimating expansion of tort liability for the negligent failure to protect is \textit{Relyea v. State}.\textsuperscript{64} While much of \textit{Relyea} discussed sovereign immunity, the court found that “to impose a duty upon a landowner to protect an invitee . . . a plaintiff . . . must allege and prove that the landowner had actual or constructive knowledge of prior, similar criminal acts committed upon invitees.”\textsuperscript{65}

The complaints filed in \textit{Relyea} allege that the two decedents at-

\begin{footnotesize}
\begin{itemize}
\item 59. \textit{Medina}, 405 So. 2d at 486.
\item 60. \textit{Id}.
\item 61. \textit{Id}.
\item 62. \textit{Id.} at 487.
\item 63. \textit{Orlando Executive Park, Inc. v. P.D.R.}, 402 So. 2d 442, 452 (Fla. 5th DCA 1981) (Cowart, J., dissenting); \textit{but see, e.g.}, \textit{Drake v. Sun Bank & Trust Co.}, 377 So. 2d 1013, 1014 (Fla. 2d DCA 1979) (not adopting the majority view alluded to by Judge Cowart); \textit{see also infra} notes 64-99 and accompanying text.
\item 64. 385 So. 2d 1378 (Fla. 4th DCA 1980).
\item 65. \textit{Id.} at 1383.
\end{itemize}
\end{footnotesize}
tended class at a remote building on the campus of Florida Atlantic University (FAU). Both ladies arrived in the same car, parking near the building entrance. As they were leaving at approximately 7:20 p.m., they were assaulted, abducted and then murdered at a secluded location by three men.66

The court held that landowners are not bound to anticipate the criminal activities of strangers when an incident occurs precipitously. However, a duty to protect invitees might be imposed if an attack were reasonably foreseeable.67 According to the terms of DiVincenzo, it could be inferred that no dangerous condition existed and the murders were unforeseeable because there had never been a prior serious crime against persons on the FAU campus. As a result, there was no duty to protect the students from criminal assault.68 Thus, the duty of care owed an invitee is a function of the foreseeability of attack upon an invitee.69

DiVincenzo and Relyea appear to be at fundamental odds on the threshold question of what circumstances give rise to the duty to protect. Before the attack on DiVincenzo there had been no other instances of similar criminal activity on the premises.70 In Relyea, this absence of similar criminal activity on the FAU campus was crucial to the finding that no duty existed. Certainly, FAU foresaw the possibility of harm coming to one of its students at some future point in time and, recognizing an obligation, employed a security force. The threat was self-evident.71

What FAU could not foresee was the particular threat posed by the three murderers.72 Having taken general steps to prevent

---

66. *Id.* at 1380.
67. *Id.* at 1382-83.
68. *Id.* at 1383.
70. *DiVincenzo*, 432 So. 2d at 89 (Pearson, J., dissenting).
71. Generally, persons are entitled to assume that others will be law abiding:

There is normally much less reason to anticipate acts on the part of others which are malicious and intentionally damaging than those which are merely negligent; and this is all the more true where, as is usually the case, such acts are criminal. Under all ordinary and normal circumstances, *in the absence of any reason to expect the contrary*, the actor may reasonably proceed upon the assumption that others will obey the criminal law.

W. Prosser, *supra* note 3, § 33, at 173-74 (emphasis added). As can be seen, exception is made where criminal acts are foreseeable. *See infra* notes 129-43 and accompanying text.
72. *Compare* Reichenbach v. Days Inn of America, Inc., 401 So. 2d 1366, 1369 (Fla. 5th DCA 1981) (Cowart, J., specially concurring) *with DiVincenzo*, 432 So. 2d at 87-88. (Reichenbach adopted a more subjective view of foreseeability). "By their very nature assaults usually occur suddenly and without warning and without giving an opportunity to defend. Therefore, to prevent an assault by one person upon another requires an opportunity arising
crime, the college was under no further duty on the night of the murders. However, should the campus see another tragic assault, the school, having notice, would again have its precautions tested for their reasonableness. Such is the broad reading of Relyea. Narrowly read, the case requires the awareness of a particular attack's predictability and the means to do something about it before the court would impose liability.

Nevertheless, DiVincenzo and Relyea agree on the use of negligence principles to determine whether a duty exists. In this respect, they differ somewhat from Holley, which relied alternatively on contract and tort theory to impose liability. By relying solely on tort theory, DiVincenzo answered the question reserved by the Third District in Ten Associates v. McCutchen, wherein that court refused to decide whether foreseeability alone was a sufficient basis for the duty in Florida.

"Whatever may be the proper legal analysis, most of the recent cases have explicitly or implicitly asserted the foreseeability requirement." In those cases where the cause of action has sounded in contract, the tort concept of foreseeability has been of little significance. But, courts recognizing the duty to sound in negligence instruct that the duty to protect in a given situation is a function from some specific knowledge, notice or warning." Reichenbach, 401 So. 2d at 1369 (footnote omitted). See infra notes 99-122.

73. FAU employed a campus police force whose modus operandi was a discretionary or planning function, and not subject to judicial oversight. Relyea, 385 So. 2d at 1382.

74. Such a reading would concur with Judge Cowart's opinion in Reichenbach, but would be contrary to Stevens v. Jefferson, 436 So. 2d 33 (Fla. 1983) (refusing to limit proof of foreseeability to evidence of a particular assailant's propensity for violence where the tavern owners knowledge of the likelihood of violence was based upon past experience); see also Crown Liquors of Broward, Inc. v. Evenrud, 436 So. 2d 927 (Fla. 2d DCA 1983).

75. Holley, 382 So. 2d at 99-100. See also Kline, 439 F.2d at 481; Ten Assocs., 398 So. 2d at 862 n.2. Several grounds were offered for holding the landlord liable in Kline, including that the landlord's duty to maintain the common areas in a reasonably safe condition extended to taking protective steps where crime was reasonably foreseeable. 439 F.2d at 480-81. The court found the analogy between today's landlord-tenant relationship and the innkeeper-guest relationship compelling. Id. at 482-83. Finally, the court held that the landlord impliedly contracted to take those protective measures which he alone was in a position to take, and to maintain the same relative degree of security throughout the tenancy. Id. at 485-86.

76. 398 So. 2d 860, 862 n.2 (Fla. 3d DCA), petition for rev. denied, 411 So. 2d 384 (Fla. 1981).

77. Browder, supra note 38, at 151; see DiVincenzo, 432 So. 2d at 87-88; Relyea, 385 So. 2d at 1382-83; cf. Stahl v. Metropolitan Dade County, 438 So. 2d 14 (Fla. 3d DCA 1983). But cf. Schoen v. Gilbert, 436 So. 2d 75 (Fla. 1983) (since "a difference in floor levels is not an inherently dangerous condition, even in dim lighting, a homeowner has no duty to warn of such condition as a matter of law").

of the foreseeability of criminal attack.\textsuperscript{79}

On the issue of what notice the landlord had that his tenants were in danger within the confines of their building, relevance and probity are less certain as evidence of crime in the area and past security practices is introduced. Courts take various approaches to the admission as evidence of crime which has occurred in the neighborhood and not just on the victimized tenant's premises or apartment building.\textsuperscript{80} For example, Maryland courts find relevant only those prior acts occurring in the common areas of the injured tenant's building.\textsuperscript{81} This narrower focus is in line with that taken by the \textit{Relyea} court.\textsuperscript{82} On the other hand, \textit{DiVincenzo} concluded that the attack could have been foreseen in part because of the building's location adjacent to a high-crime area, and in part because of the landlord's past security practices.\textsuperscript{83}

The dissent in \textit{DiVincenzo} pointed out the building's lack of a

\textsuperscript{79} See generally Browder, supra note 38, at 151 (discussing the scope of the new duty). Whether the landlord could foresee the criminal act causing the injury is a question of fact for the jury. See infra notes 146-47 and accompanying text. Yet, the existence of a duty in the first instance "is entirely a question of law." W. Prosser, supra note 3, § 37, at 206.

\textsuperscript{80} Compare Scott v. Watson, 359 A.2d 548, 554 (Md. 1976) with \textit{DiVincenzo}, 432 So. 2d at 88.

\textsuperscript{81} See Scott v. Watson, 359 A.2d 548 (Md. 1976). "[O]rdinarly only criminal acts occurring on the landlord's premises, and of which he knows or should have known (and not those occurring generally in the surrounding neighborhood) constitute relevant factors in determining . . . the reasonable measures which a landlord is under a duty to take to keep the premises safe." \textit{Id.} at 554. See also Totten v. More Oakland Residential Hous., Inc., 134 Cal. Rptr. 29 (Cal. Ct. App. 1977).

\textsuperscript{82} \textit{Relyea}, 385 So. 2d at 1382-83. \textit{Accord} Admiral's Port Condominium Assoc., Inc. v. Feldman, 426 So. 2d 1054, 1055 (Fla. 3d DCA 1983) (court adopted the view that "[e]vidence of similar crimes committed off the premises and against persons other than the landowner's invitees is not probative of foreseeability") (emphasis added). In Crown Liquors of Broward, Inc. v. Evenrud, 436 So. 2d 927 (Fla. 2d DCA 1983), the court stated:

[A]ssuming arguendo the admissibility of all the evidence as to Crown's reputation as a trouble spot, such evidence does not support proof of any specific knowledge on Crown's part that Evenrud was in danger of being injured.

Crown does have a general duty to use reasonable care . . . [h]owever, this duty does not require Crown "to guard against the risk created by a specific patron, unless [it] has actual or constructive knowledge of the need for specific supervision and a reasonable opportunity to exercise it."

\textit{Id.} at 930 (emphasis in original). See also Babrab, Inc. v. Allen, 408 So. 2d 610 (Fla. 4th DCA 1981); Lucks v. Publix Supermarkets, Inc., 399 So. 2d 451 (Fla. 4th DCA 1981); Highlands Ins. Co. v. Gilday, 398 So. 2d 834 (Fla. 4th DCA), \textit{petition for rev. denied}, 411 So. 2d 382 (Fla. 1981); Drake v. Sun Bank & Trust Co., 377 So. 2d 1013 (Fla. 2d DCA 1979); Warner v. Florida Jai Alai, Inc., 221 So. 2d 777, 778 (Fla. 4th DCA 1969), \textit{cert. discharged}, 235 So. 2d 294 (Fla. 1970); see generally Gottschalk v. Smith, 334 So. 2d 102 (Fla. 3d DCA 1976); Murray v. Osenton, 126 So. 2d 603 (Fla. 2d DCA 1961).

\textsuperscript{83} \textit{DiVincenzo}, 432 So. 2d at 87-88.
history of crime. Nevertheless, the majority held there was adequate proof of a dangerous condition. Yet, for two years while the dangerous condition persisted at the adjacent shopping center, the security measures in place at the office building provided, it would seem, an adequate deterrent to crime within the building. One might ask what notice was provided the landlord, other than the general occurrence of crime in modern society, that his precautions were inadequate, ineffective or unreasonable up until that time? Reasonable inquiry would have found no prior breach of security. In short, that the assault would occur on the premises in DiVincenzo was probably as unforeseeable as that it would occur on the FAU campus in Relyea.

According to the court in Goldberg v. Housing Authority, anyone "can foresee the commission of crime virtually anywhere and at any time." The court stated that imposition of the duty is a question of fairness, considering the relationship of the parties, the nature of the risk, and the consequences of imposing the duty. "If foreseeability itself gave rise to a duty to provide 'police' protection for others, every residential curtilage, every shop, every store, every manufacturing plant would have to be patrolled by the private arms of the owner." Kline retorted that "[t]his language seems to indicate that the court was using the word foreseeable interchangeably with the word possible. . . . But we must reach the question of liability for attacks which are foreseeable in the

84. Id. at 89 (Pearson, J., dissenting).
85. Id. at 87. Cf. Samson v. Saginaw Professional Bldg., Inc., 224 N.W.2d 843, 851 (Mich. 1975) (landlord, when informed that the presence of a state mental health clinic within the building was of concern to other tenants, had a duty to investigate and take available preventive measures, although no prior attack had occurred).
86. DiVincenzo, 432 So. 2d at 89 (Pearson, J., dissenting).
87. See generally Lillie v. Thompson, 332 U.S. 459 (1947). There the employer, under a statutory duty to protect employees, required the petitioner, a 22-year old telegraph operator, to work alone at night in a one room building located in an isolated part of the rail yard without exterior illumination, guards or any means to visually identify trainmen coming for messages other than to unlock the door. One of the dangerous characters the respondent had reason to know frequented the railyard seriously injured the young lady. The Court held dismissal of her complaint improper as the peculiar conditions created a likelihood of misconduct. Id. at 460-62. Thus, under some circumstances it can be seen how an attack could be foreseen without the need for prior similar occurrences.
89. Id. at 293.
90. Id. The plaintiff was a milkman. The court explained that the duty to provide police protection is the government's, that the vagueness of the duty did not allow one to ascertain in advance of the jury's verdict the nature of the duty and whether it was being discharged and that the cost would be borne by those least able to afford it. Id. at 293-98.
91. Id. at 293.
sense that they are probable and predictable."\(^{92}\)

As the evidence tends toward proving the possible rather than the predictable, only a jury's conception of reasonableness prevents the unpalatable outcome envisioned in *Goldberg*. Therefore, a standard for testing foreseeability should require that the landlord have notice which can be implied from some circumstances.\(^{93}\) Once forewarned that tenants are in danger due to remediable inadequacies in building security, the threshold should be satisfied.\(^{94}\) Evidence, to be admissible on the issue of foreseeability, should show that a prudent person would have had notice of a dangerous condition which reasonably required those additional measures the plaintiff points out as available to deter a given type of incident.\(^{95}\) Since a landlord cannot be expected to do anything about dangerous conditions surrounding an apartment building, the scope of the duty should be limited to only those risks which a landlord can remedy.\(^{96}\) Under such a standard, given the prior history of crime on the premises, the prudent landlord would be alerted that his security precautions were not preventing crime.\(^{97}\) This is not to say

\(^{92}\) *Kline*, 439 F.2d at 483.

\(^{93}\) See supra note 87.

\(^{94}\) See *Warner v. Florida Jai Alai, Inc.*, 221 So. 2d 777, 778-79 (Fla. 4th DCA 1969), cert. discharged, 235 So. 2d 294 (Fla. 1970).

Under the evidentiary test for the introduction of similar factual evidence, exclusion will not be held error where the propounder fails "to show sufficient similarity of the conditions, causes and circumstances surrounding both incidents." *I.B.L. Corp. v. Florida Power & Light Co.*, 400 So. 2d 1288, 1288-89 (Fla. 3d DCA 1981). Similarity of circumstance should also be a factor used in determining the relevance of crime reports from the surrounding neighborhood. Further, even if relevant, evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice. *Fla. Stat.* § 90.403 (1981). The difference between the two exclusionary rules is that under an *I.B.L. Corp.*-type test, the tenant would bear the burden of showing similarity, while under § 90.403 the landlord would bear the burden of showing that the probative value is outweighed by the danger of prejudice.

\(^{95}\) See *Highlands Ins. Co. v. Gilday*, 398 So. 2d 834 (Fla. 4th DCA), petition for rev. denied, 411 So. 2d 382 (Fla. 1981). Plaintiff was beaten and robbed in a hotel restroom while a business invitee of the lounge. Testimony of crimes occurring throughout police zone 15 was entered over the defendant's objection. Zone 15 is approximately three miles long and one-half mile wide and the computer printout from which the police records supervisor testified did not specify location of the crime. 398 So. 2d at 835-36. On appeal the court held "that this evidence [is] not probative of this litigation's fundamental question—notice to the appellant hotel that there was a necessity to protect its guests against criminal attacks." *Id.* at 836. Evidence of both crime in the area and past building security practices have been admitted by other courts. E.g., *DiVincenzo*, 432 So. 2d at 87-88.

\(^{96}\) Nor for that matter will an action lie against the police. *Relyea*, 385 So. 2d at 1382.

\(^{97}\) Cf. *Scott v. Watson*, 359 A.2d 548 (Md. 1976) (liability would be imposed when the landlord had reason to be aware that his premises were particularly conducive to crime and could reasonably be expected to do something about it).
that those precautions should then be found unreasonable, as not even the best efforts can totally prevent crime and reasonable precautions may only deter some criminals. Furthermore, since the prior crime or crimes occurring in the landlord's building would not have to be similar in order to alert the landlord to the security problem on the premises, no such similarity should be required. However, account would be taken of the nature of any prior criminal activity to determine the reasonableness of the precautions in effect.

VI. PRIOR SECURITY PRACTICES AS AN ADMISSION THAT CRIME WAS FORESEEABLE

DiVincenzo could have grounded liability on an implied contract theory, to the effect that the landlord implicitly agreed to maintain the same relative degree of security throughout the tenancy. Nonetheless, the court chose to adopt negligence principles exclusively. Since the building record was clean of past criminal activity, the court found the landlord owed the tenant a duty in part by reasoning that if crime were not foreseeable, the landlord would not have instituted security measures in the first place.

It is doubtful whether use of past security practices to establish the existence of a duty is a sound basis for policy decisions. If the impetus for the duty to protect is to provide incentive for landlords to increase apartment security, then to hold landlords liable because, having increased security, they can be said to have foreseen crime thwarts this underlying purpose. Perhaps recognizing these conflicting signals, one commentator has counseled against taking protective steps. The shrewd landlord might choose not

98. But see Relyea, 385 So. 2d at 1383; Gulf Reston, Inc. v. Rogers, 207 S.E.2d 841 (Va. 1974).
99. As the gravity of the possible harm increases, the apparent likelihood of its occurrence may correspondingly decrease while the act remains negligent. E.g., United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).
101. DiVincenzo, 432 So. 2d at 89 (Pearson, J., dissenting).
102. Id. at 88. See Ten Assocs., 398 So. 2d at 862. In Holley, the landlord's prior practice, while not setting the standard for reasonable care, constituted "an admissible indication of the defendant's own 'knowledge of the risk and the precautions necessary to meet it.'" Holley, 382 So. 2d at 100 (citing W. PROSSER, supra note 3, § 33, at 168). The safety or accident record of a particular practice also indicates knowledge of the risk and of the precautions necessary to meet it. Id.
103. Henszey & Weisman, supra note 1, at 112.
to institute protective measures for fear of being found clairvoyant,
being held to an implied contract, or being liable for misfeas-
sance.\textsuperscript{104} Use of prior practice as an admission that crime generally
was forseen and that consequently a duty existed therefore seems
unwise.

Doubtful also is the even more limited use to which evidence of
past security practice was put in \textit{Kline}.\textsuperscript{105} Requiring the landlord
to maintain security as it was when the lease was made either im-
poses differing degrees of care as to each tenant,\textsuperscript{106} or stultifies any
technological change in protective measures, as a jury can find any
such change \textit{ipso facto} a reduction. When past security practice is
used in finding an implied contract that such practices will be car-
rried on throughout the tenancy, a duty so based might be orally
waived or waived by the insertion of a clause so providing in a
lease.\textsuperscript{107} Furthermore, implying a promise that security will not be
reduced, on a theory of detrimental reliance,\textsuperscript{108} is less than satisfy-
ing where a tenant continues residence for several years after se-
curity is reduced, as was the case in \textit{Kline}\textsuperscript{109} and \textit{DiVincenzo}.\textsuperscript{110}

Thus, if a quasi-contractual basis grounds the duty, comparative
negligence principles would not be applied to reduce the tenant's
award, as was done in \textit{DiVincenzo}.\textsuperscript{111}

\textsuperscript{104}. \textit{E.g.}, \textit{Scott}, 359 A.2d at 555 (improper performance constitutes misfeasance); \textit{Corn-
propst v. Sloan}, 528 S.W.2d 188 (Tenn. 1975) (distinguishing between misfeasance and non-
feasance); Annot., 43 A.L.R.3d 331 (1973).

\textsuperscript{105}. \textit{Cf. supra} note 43 (past practice an admission and some evidence of reasonable
care).

\textsuperscript{106}. \textit{Note}, \textit{Lessor's Duty to Repair: Tort Liability to Persons Injured on the Premises,
62 Harv. L. Rev. 669, 671 n.16 (1949)}.

\textsuperscript{107}. \textit{See infra} notes 157-70 and accompanying text.

\textsuperscript{108}. \textit{Cf. Javins v. First Nat'l Realty Corp.}, 428 F.2d 1071, 1079 (D.C. Cir.), \textit{cert. denied,
400 U.S. 925 (1970)} \text{([i]n order to keep the premises in their beginning condition
during the lease term}). Detrimental reliance need not be alleged or proved, but is merely
offered as justification for imposing the duty. \textit{See Ten Assocs. v. McCutchen}, 398 So. 2d 860
(Fla. 3d DCA), \textit{petition for rev. denied}, 411 So. 2d 384 (Fla. 1981).

\textsuperscript{109}. \textit{See Kline}, 439 F.2d at 490 (MacKinnon, J., dissenting) (Kline was a month-to-
month tenant). As a result of the adoption of the doctrine of comparative negligence, im-
plied assumption of risk has been merged into the affirmative defense of contributory negli-

\textsuperscript{110}. \textit{DiVincenzo}, 432 So. 2d at 87.

\textsuperscript{111}. \textit{E.g.}, Blackburn v. Dorta, 348 So. 2d 287 (Fla. 1977); \textit{see Tampa Elec. Co. v. Stone &
Webster Eng'g Corp.}, 367 F. Supp. 27 (M.D. Fla. 1973); \textit{see also} Recent Developments,
\textit{supra} note 54, at 1518.
VII. OTHER THRESHOLD TESTS FOR IMPOSING THE DUTY

The Florida Supreme Court, in Mansur v. Eubanks,112 required landlords to maintain "reasonably safe" dwellings, recognizing that "[w]e live in an age when the complexities of housing construction place the landlord in much better position than the tenant to guard against dangerous conditions."113 Mansur's introduction of common-law notions of warranty of habitability was limited to maintenance of the physical structure.114 However, the case may yet affect the final form of the emerging duty to protect against crime. Holley, in stating that the duty "to keep the common areas reasonably safe" might require that landlords post security guards,115 had no problem relying on the traditional rule that landlords are required to maintain common areas in a safe physical condition.116 Other jurisdictions already extend the doctrine of implied warranty of habitability to include provisions for tenant security.117 Thus, a warranty of security has been developing, divorced from the landlord's retention of physical control, which appears suitable for adaptation to Florida's single-family detached housing.118

Other states have adopted threshold tests for finding a duty to protect. For example, Illinois courts have long held that the existence of the duty is a question of law, to be determined by balancing the likelihood of the injury, the magnitude of the burden of guarding against it, and the consequences of placing that burden on the defendant.119 However, should a landlord undertake to provide security and do so negligently, the landlord may be held liable.120

In Trentacost v. Brussel,121 the court recognized an implied war-

112. 401 So. 2d 1328 (Fla. 1981).
113. Id. at 1330.
114. Id.
115. Holley, 382 So. 2d at 99.
116. The cases relied upon were Butler v. Maney, 200 So. 226 (Fla. 1941) and Hester v. Guarino, 251 So. 2d 563 (Fla. 3d DCA 1971), cert. denied, 259 So. 2d 715 (Fla. 1972). See also Westerbeke v. Reynolds, 19 So. 2d 413 (Fla. 1944); 52 C.J.S. Landlord & Tenant § 417 (1968).
119. E.g., Barnes v. Washington, 305 N.E.2d 535 (Ill. 1973); see also L. Green, JUDGE AND JURY 53-54 (1930); F. Harper & F. James, THE LAW OF TORTS § 18.8 (1956).
121. 412 A.2d 436 (N.J. 1980). See generally Recent Developments, supra note 54, at
warranty of habitability based on the shortage of housing and the landlord's position of power,\textsuperscript{122} which required the landlord to provide "reasonable safeguards to protect tenants from foreseeable criminal activity on the premises."\textsuperscript{123} Despite use of the word "foreseeable" in \textit{Trentacost}, the court held that notice of an unsafe condition need not be shown "[s]ince the landlord's implied undertaking to provide adequate security exists independently of his knowledge of any risks."\textsuperscript{124} In effect, the landlord-tenant relationship became indistinguishable from the innkeeper-guest relationship.\textsuperscript{125} \textit{Trentacost} has been said to "hold landlords strictly accountable for every crime committed on their property, without regard to the reasonableness of their precautions or their knowledge of any risk."\textsuperscript{126} In Massachusetts, a recent case held that "a duty finds its 'source in existing social values and customs.'"\textsuperscript{127} The court took cognizance of the care colleges customarily observe in protecting resident students and found that their recognition of the obligation indicated that "the imposition of a duty of care is firmly embedded in a community consensus."\textsuperscript{128}

\textbf{VIII. CAUSE IN FACT AND ITS EFFECT ON THE DUTY'S ANALYSIS}

The fact of causation\textsuperscript{129} must be established by a preponderance of the evidence,\textsuperscript{130} but the \textit{sine qua non} test\textsuperscript{131} has been only a

\begin{enumerate}
\item[1513-21] (discussing the decision in \textit{Trentacost}).
\item[122.] \textit{Trentacost}, 412 A.2d at 442. \textit{See supra} notes 40-57 and accompanying text.
\item[123.] \textit{Trentacost}, 412 A.2d at 443.
\item[124.] \textit{Id}.
\item[125.] Recent Developments, \textit{supra} note 54, at 1515. The duty is imposed solely because of the existence of the landlord-tenant relationship. However, the "adequate precautions" standard imposed by \textit{Trentacost} is arguably more difficult than the "reasonableness" standard imposed in negligence cases as, regardless of those taken, the precautions have proved inadequate on at least one occasion.
\item[126.] Browder, \textit{supra} note 38, at 150.
\item[128.] Mullins, 449 N.E.2d at 335.
\item[129.] Proximate cause consists of foreseeability and causation in fact. Foreseeability is used to determine whether social policy is served by holding one liable for another's injury. Causation in fact has been defined simply as follows: "The defendant's conduct is not a cause of the event, if the event would have occurred without it." W. \textbf{Prosser}, \textit{supra} note 3, § 41, at 239. \textit{See Orlando Executive Park, Inc. v. Robbins}, 433 So. 2d 491, 494 (Fla. 1983) (Boyd, J., dissenting); \textit{Restatement (Second) of Torts} §§ 448-49 (1965).
\item[130.] Heyman v. United States, 506 F. Supp. at 1145, 1150 (S.D. Fla. 1981); \textit{see also} Greene v. Flewelling, 366 So. 2d 777 (Fla. 2d DCA 1978); \textbf{FLA. STANDARD JURY INSTR. (CIV.) 5.1(a)} (1982).
\item[131.] \textit{See Stahl v. Metropolitan Dade County}, 438 So. 2d 14 (Fla. 3d DCA 1983).
\end{enumerate}
slightly more burdensome impediment to tenant recovery than the argument that a criminal act is an independent intervening cause which insulates the landlord from liability.\textsuperscript{133} The intervening cause argument was rejected as "entirely fallacious"\textsuperscript{133} by the Holley court.

Cause in fact is generally a jury question.\textsuperscript{134} To satisfy the test, the landlord's neglect needs to be a material and substantial factor in bringing about the tenant's injury.\textsuperscript{135} Where the chance of injury would have been slight had some additional measure been taken, courts have refused to overturn jury decisions finding absence of the addition unreasonable.\textsuperscript{136} In this regard some have called for greater judicial activism, believing that cases have gone to juries where there was no proof that the injury could have been prevented had the added precautions been taken.\textsuperscript{137}

In Orlando Executive Park, Inc. v. P.D.R.,\textsuperscript{138} suit was brought by a guest who had been brutalized in the interior hallway of the defendant's hotel. The district court held that "[c]ausation, like any other element of plaintiff's case, need not be demonstrated by conclusive proof. . . . Plaintiff adduced evidence that reasonable measures were not taken. . . . Thus the question of whether defendant's negligence was the proximate cause of plaintiff's injury was properly a jury question."\textsuperscript{139}

Dissenting, Judge Cowart argued:

The majority opinion effectively imposes a form of strict liability upon landowners and businesses. It is axiomatic that a person's duty should not be greater than his ability to meet that duty. Security measures . . . may increase a potential assailant's perception of his risk of apprehension and thereby discourage or


\textsuperscript{133} Holley, 382 So. 2d at 101.

\textsuperscript{134} See, e.g., Gibson v. Avis Rent-A-Car System, Inc., 386 So. 2d 520 (Fla. 1980).

\textsuperscript{135} Cf. Loftin v. Wilson, 67 So. 2d 185, 191 (Fla. 1953). See generally W. Prosser, supra note 3, \textsuperscript{3}, \textsuperscript{41}, at 240.

\textsuperscript{136} P.D.R., 402 So. 2d at 448. "Circumstantial evidence, expert testimony, or common knowledge may provide a basis from which the causal sequence may be inferred. . . . Such questions are peculiarly for the jury. . . ." W. Prosser, supra note 3, \textsuperscript{3}, \textsuperscript{41}, at 242.

\textsuperscript{137} See Robbins, 433 So. 2d at 494 (Boyd, J., dissenting); Reichenbach, 401 So. 2d at 1367 (Cowart, J., specially concurring).

\textsuperscript{138} 402 So. 2d 442, 446 (Fla. 5th DCA 1981).

\textsuperscript{139} Id. at 448.
deter some persons sometimes; however, they do not, and cannot, prevent a particular assault made without warning by a determined assailant in an area commonly open to the public. Therefore, any duty of care should be likewise limited. By imposing liability for failing to take reasonable security precautions without requiring that the assault would have been (not might have been) prevented by taking those precautions, the majority has effectively eliminated any real requirement of proximate cause and foreseeability in actions of this type.  

Although *P.D.R.* dealt with an innkeeper-guest relationship rather than a landlord-tenant relationship, that difference is not enough by itself to call for a different outcome in most instances given the general foreseeability of crime.  

Further, the case relies on and finds analogous *Holley*, which dealt with the landlord-tenant relationship.

Despite Judge Cowart’s lucidity, the trend is toward jury settlement, a development which should put fear into the hearts not only of landlords but anyone holding an estate in land and chargeable with notice of the foreseeable nature of crime on that land.  

IX. THE ROLE OF THE JURY—DETERMINING THE STANDARD OF CARE

Generally, the response to the concern that landlords face something akin to strict liability has been that trial by jury is the proper method of determining both foreseeability and security precautions reasonably required to discharge the duty to protect in a given situation. Once the existence of a duty is found, tradition has established the jury as the legitimate body for divining common prudence. The standard of care applied by the jury requires

---

140. *Id.* at 451-52 (Cowart, J., dissenting).
141. If the general incidence of crime in a neighborhood will suffice to give rise to the landlord’s duty to protect, the threshold has been overcome and both the landlord’s and innkeeper’s precautions will be equally scrutinized for reasonableness.
142. *P.D.R.*, 402 So. 2d at 446.
143. The landowner may have a duty to his invitee to reasonably protect the invitee from foreseeable criminal attack. Further, a tenant’s social guest may also have a valid cause of action against a landlord should the crime be foreseeable. *See Medina*, 405 So. 2d 485; *Relyea*, 385 So. 2d 1378; *but see Wood*, 284 So. 2d at 695.
144. *P.D.R.*, 402 So. 2d at 451 (Cowart, J., dissenting).
146. *E.g.*, *Graham v. M & J Corp.*, 424 A.2d 103, 104 (D.C. 1980); *Ten Assocs.*, 398 So. 2d at 862-63; *Holley*, 382 So. 2d at 100-01.
them to ascertain what would have been reasonable care on the landlord's part given all the circumstances.\footnote{147}

Generally no trouble is found with employing this vague standard.\footnote{148} After all, it "is no more obscure or unfair than the universal test of reasonableness which permeates the law."\footnote{149} However, the Florida Supreme Court has shown displeasure with the use of such a standard on at least one occasion.

We decline to recognize the purportedly innocuous rule suggested . . . that a jury should merely be instructed that the duty of care of the landowner is "whether the landowner's actions were reasonable in light of all the factual circumstances in the case." This is too vague and unreasonable a test to apply to a landowner because of the remaining, inherent distinctions in relationships involved between persons who come upon an owner's property; neither does it sufficiently afford a reasonable standard which can be applied as a measure by the jury. Some guidelines which the jury can apply to the facts in arriving at a just verdict, are indicated.\footnote{150}

One court has found an instance where the jury might not be allowed to decide the standard of care.\footnote{151} The court stated:

We have not implied either in the cited cases or in this one that when criminal activity is foreseeable it is invariably a jury question as to whether the duty of reasonable care has been discharged. In the case of a mom-and-pop store with one or two employees, for example, it might be unreasonable as a matter of law to require that a full-time guard be posted.\footnote{152}

Apparently recognizing the difficulties presented by use of such a vague test, the district court in \textit{P.D.R.}\footnote{153} set out particular factors for the jury's consideration. Those factors were found in a Wisconsin opinion of which the majority approved.\footnote{154} As for the

\begin{itemize}
  \item \textit{E.g., Ten Assocs.}, 398 So. 2d at 862-63.
  \item \textit{Note, supra note 3, at 1180-81.}
  \item \textit{Id. at 1181.}
  \item \textit{Wood v. Camp}, 284 So. 2d 691, 695 (Fla. 1973).
  \item \textit{Winn-Dixie Stores, Inc. v. Johstoneaux}, 395 So. 2d 599 (Fla. 3d DCA 1981).
  \item \textit{Id. at 600 n.4. See also P.D.R., 402 So. 2d at 447.} "Obviously, a six-unit, one building 'Mom and Pop' motel will not have the \textit{same} security problems as a large highrise thousand room hotel. . . ." \textit{Id.} (emphasis added). The small motel may nevertheless have large problems.
  \item \textit{P.D.R.}, 402 So. 2d at 447.
  \item \textit{Id. (citing Peters v. Holiday Inns, Inc., 278 N.W.2d 208 (Wis. 1979)).}
\end{itemize}
“Wisconsin factors,” their absence will not mean that the innkeeper is liable as a matter of law. However, neither does the presence of each preclude the innkeeper’s liability. The test remains for landowners, generally, that of reasonableness under all the circumstances. Thus, decisions will be made on a case-by-case basis. It has been said that if the question of liability goes to the jury under such a standard, “the often quoted expression, ‘the landlord is not an insurer of his tenants’ safety,’ will be mere pabulum.”

X. EXCUSLATION & WAIVER

In Kline the dissent noted that landlords might be forced to contract against liability “by contracting for exculpatory provisions in leases.” Early commentary dismissed this view, stating that such exculpatory provisions would be against public policy (and thus void) in many jurisdictions. But the possibility that the Florida lease may successfully pardon a landlord’s nonperformance of the new duty is of concern. Continued judicial toleration of exculpatory clauses can thwart the new duty before it has had its desired effect—the increased security of Florida’s tenants.

The reason for concern is, first, that the landlord’s response to the imposition of the duty will be to attempt the exigent of exculpation. Second, courts that are unable to meaningfully define or limit the duty using negligence principles, or that perceive that the duty is impossible to discharge, may be more receptive to contractual limitations on liability over which they retain greater control. The result might be that “tenants will get less instead of more protection.” However, if exculpation is not permitted and

155. P.D.R., 402 So. 2d at 448. See Rosier v. Gainsville Inns Assoc., Ltd., 347 So. 2d 1100, 1101 (Fla. 1st DCA 1977) (evidence of industry standard for locks admissible); Robbins, 433 So. 2d at 493 (absence of industry standard does not insulate a defendant from liability); cf. The T.J. Hooper, 60 F.2d 737, 740 (2d Cir.) (radio sets for tugboats), cert. denied sub nom., Eastern Trans. Co. v. Northern Barge Corp., 287 U.S. 662 (1932). See generally W. PROSSER, supra note 3, § 166-68.


158. E.g., Note, supra note 3, at 1197.

159. Compare Middleton v. Lomaskin, 266 So. 2d 678 (Fla. 3d DCA 1972) with John’s Pass Seafood Co. v. Weber, 369 So. 2d 616 (Fla. 2d DCA 1979).


161. The construction of a lease is normally a question of law for the court. E.g., Peacock Construction Co. v. Modern Air Conditioning, Inc., 353 So. 2d 840 (Fla. 1977).

162. Kline, 439 F.2d at 493 (MacKinnon, J., dissenting).
the nature and scope of the duty prevails as at present, landlords will likely become the insurers of tenant safety.

While exculpatory clauses are disfavored, generally, persons in Florida may be relieved of their own negligence by the use of such clauses when clearly stating their effect as such. In Mansur the court, while adopting the doctrine of implied warranty of habitability in Florida residential housing, stated: "This duty may be modified by agreement of the parties. After the tenant takes possession, the landlord has a continuing duty . . . unless waived by the tenant." Section 83.51(1)(b), Florida Statutes, the statutory warranty of habitability, states in part: "The landlord's obligations under this subsection may be altered or modified in writing with respect to a single-family home or duplex." Such does not alter the rule announced by section 83.47(1)(b) that clauses generally limiting the landlord's liability are void in Florida residential leases. Therefore, absent more, residential landlords may not exculpate from, nor tenants waive, the negligent failure to discharge the duty to protect.

XI. CONCLUSION

The trend of judicial opinion has been to hold landlords liable for foreseeable criminal attack on their tenants. The reason for finding a duty to protect in general has been to provide landlords with the economic incentive to upgrade apartment security over and above the housing market's competitive incentive. However, if landlords can expect to be held liable no matter what standard of care they adopt, any additional incentive will be lost. The result will be that the new duty will have only prospective effect, compensating tenants for damage done. Thus, to have its intended effect, the standard of care must be such that the maintenance of

163. E.g., Goyings v. Jack & Ruth Eckerd Found., 403 So. 2d 1144 (Fla. 2d DCA 1981).
164. Id. at 1146; Feuntes v. Owen, 310 So. 2d 458, 460 (Fla. 3d DCA 1975); Middleton, 266 So. 2d at 680.
165. Id. at 1330.
167. Id. (emphasis added).
168. "(1) A provision in a rental agreement is void and unenforceable to the extent that it: . . . (b) Purports to limit or preclude any liability of the landlord to the tenant or of the tenant to the landlord, arising under law." Fla. Stat. § 83.47 (1981). See also Fla. Stat. § 83.45(1)(b) (1981) (regarding an unconscionable rental agreement or provision).
reasonable precautions will discharge the duty. Reasonableness must be capable of some degree of determination in advance and must be in fact attainable.

If we entertain the plausible assumption that criminals, bent on committing crime, will choose the least protected victim and that crime can be deterred but not wholly prevented in our society, the solution providing optimal deterrence can only be supplied by society acting in concert. Historically this has meant that as long as one does not invite crime upon another, government has the responsibility for protecting society. In fact, providing for social order has long been a prime task of governments.

Rather than producing a more secure population, the imposition of the duty to protect, if serving a purpose other than compensation, will only serve to redistribute crime. Therefore, landlords should be required to take only those precautions commonly taken by persons similarly situated who own the property on which they reside. A tenant deserves to be compensated differently from landowners generally only because, as an incident of the tenant's relatively brief attachment to a given property, the landlord is the only party who can feasibly invest capital in the premises. Thus, it would be inappropriate to require more from landlords than similarly situated homeowners or condominium owners require of themselves.

If the judiciary takes it upon itself to require that precautions be taken, not only should a landlord be able to tell in advance whether the duty has been discharged but the standard of care should also be attainable and comport with that exercised by society generally. Otherwise, courts will only be requiring tenants to purchase insurance against attack in the form of increased rental cost.