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Between Bystander And Insurer: Locating The Duty Of The Georgia Landowner To Safeguard Against Third-Party Criminal Attacks On The Premises

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BETWEEN BYSTANDER AND INSURER:
LOCATING THE DUTY OF THE GEORGIA
LANDOWNER TO SAFEGUARD AGAINST THIRD-PARTY CRIMINAL ATTACKS ON THE PREMISES

INTRODUCTION

The law governing the landowner's duty to guard against third-party criminal attacks has undergone a dramatic transformation over the last three decades. Until the seminal 1970 decision in *Kline v. 1500 Massachusetts Avenue Apartment Corp.*, the law insulated property owners from civil liability, subject to a few relatively narrow exceptions, for injuries caused by criminal assaults on their premises. Since *Kline*, however, courts have abandoned almost completely the common law rule of immunity; today, landowners in many states have a broad legal duty to safeguard against foreseeable criminal acts.

In *Kline*, the court, with its oft-cited pronouncement that "[a] landlord is no insurer of his tenants' safety, but he certainly is no bystander," redefined the nature of a landowner's obligations. Although *Kline* established what a landowner's duty is not, courts have struggled ever since to articulate in affirmative and more precise terms the scope and basis of the obligation to protect against the criminal acts of a third party.

5. See McClung v. Delta Square Ltd. Partnership, 937 S.W.2d 891, 898 (Tenn. 1996) (holding that most jurisdictions now impose a duty on businesses to take reasonable care to protect against third-party criminal attack).

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While this issue has generated an impressive body of case law and commentary, no consensus has emerged in favor of a uniform standard of liability.  

Over the last thirty years, courts have looked to a variety of tort, contract, and warranty doctrines, as well as state and local statutes, to determine the landowner's duty to safeguard against criminal attacks. Although courts have increasingly relied on general negligence principles to determine the existence and scope of landowner liability, they have fashioned markedly different standards for defining the element of foreseeability, the central consideration in a negligence analysis of landowner duty. Moreover, the diversity of approaches among jurisdictions is paralleled by the instability of the law within jurisdictions, as state appellate courts have proved willing to regularly reexamine, refine, and sometimes entirely abandon existing standards in favor of new approaches.

The evolution of the Georgia case law on the landowner's duty to protect land users against criminal attack mirrors the

8. See Glesner, supra note 1, at 688 (noting the proliferation of theories of landlord liability).


10. See McClung, 937 S.W.2d at 888 (stating that most courts hold that businesses have a duty to protect customers from foreseeable criminal acts); Glesner, supra note 1, at 688 (observing that property owner's duty is most frequently defined in the context of a negligence action); see also Paula C. Murray, Premises Liability: Owner Liability for Criminal Acts of Third Parties, 22 Real Est. L.J. 341, 343 (1994).

11. See Glesner, supra note 1, at 702-03 (stating that foreseeability is the key to liability under a negligence approach); Kaufman, supra note 7, at 95-99 (reviewing alternative tort-based theories of liability).

12. The experience of California illustrates the fluidity of the law in this area. California initially adhered to a "prior similar incidents" test but subsequently abolished the test in Isaacs v. Huntington Mem'l Hosp., 605 P.2d 653 (Cal. 1980), in favor of a "totality of the circumstances" rule. Eight years later the California Supreme Court overruled Isaacs in Ann M. v. Pacific Plaza Shopping Ctr., 883 P.2d 207 (Cal. 1995) and adopted a "balancing" approach. See, e.g., Donna Lee Welch, Case Comment, Ann M. v. Pacific Plaza Shopping Center: The California Supreme Court Retreats from its "Totality of the Circumstances" Approach to Premises Liability, 28 Ga. L. Rev. 1053 (1994). As one observer notes, the flux and division among state appellate courts has, in turn, been reflected in the decisions of lower courts that have misinterpreted or even disregarded the decisions of their state's appellate courts. See Glesner, supra note 1, at 688.
unsettled character of the American law of premises liability. Like most states, Georgia long ago abrogated the no-duty rule and imposed a statutory duty on landowners “to exercise ordinary care in keeping the premises and approaches safe.”

Although the Georgia courts have long held that the statute requires property owners to guard against reasonably foreseeable criminal attacks, they have only recently endeavored to define the crucial element of foreseeability. The early cases, especially the Georgia Supreme Court’s decision in *Savannah College of Art and Design, Inc. v. Roe*, prompted significant debate and uncertainty as to the scope of the Georgia landowner’s duty of protection. Although sharp disagreements persist among individual members of the appellate courts, a discernible and well-founded standard of landowner liability has emerged from the recent cases.

Part I of this Note reviews the gradual erosion of the traditional “no-duty rule” of premises liability in the United States and the development of modern standards of landowner liability for injuries caused by the criminal acts of third parties. Part II charts the efforts of the Georgia courts, particularly the Georgia Supreme Court, to fashion a clear standard of landowner liability based on the reasonable foreseeability of the risk of criminal conduct. Part II also focuses on the courts’ attempts to refine and clarify the pivotal relationship between “prior similar incidents” of crime and the landowner’s duty to safeguard against subsequent criminal attacks. Finally, Part III seeks to identify the standard of liability that Georgia has adopted. This Part contends that the courts have wisely declined to embrace an overly restrictive formulation of the

17. See, e.g., *Prudential-Bache*, 268 Ga. at 606-08, 492 S.E.2d at 887-88 (Hunstein, J., dissenting); *Sturbridge*, 287 Ga. at 787-91, 482 S.E.2d at 341-44 (Benham, C.J., dissenting).
landowner’s obligation to protect tenants and business patrons against criminal attack. The Georgia Supreme Court’s adoption of a flexible, fact-based, “totality of the circumstances” approach equitably balances competing social interests, advances the traditional aims of tort law, and brings a welcome measure of stability to this area of the law.

I. HISTORICAL EVOLUTION OF LANDOWNER LIABILITY FOR THIRD-PARTY CRIMINAL ATTACKS

A. Erosion of the No-Duty Rule

Traditionally, courts were extremely reluctant to impose liability on landowners for harms caused by the criminal acts of third parties. This reluctance arose, in part, from the early common law conceptions of the leasehold as a conveyance of an interest in land. The value of the lease derived from the agricultural potential of the land, and dwellings or other structures on the land constituted mere “incidences” to the lease. The doctrine of caveat emptor prevailed as the lessor had little or no obligation to deliver or maintain the premises free from physical defects, much less safeguard the tenant from harms caused by third parties.

This reluctance to impose liability on landowners is also traceable to the fundamental distinction in American tort law between misfeasance and nonfeasance. The common law, with its focus on individual rights and responsibilities, was highly resistant to the notion of converting a moral obligation to aid


19. See Setliff, supra note 18, at 182.

20. See Pugh v. Holmes, 405 A.2d 897, 800-01 (Pa. 1979) (discussing the common law origins of the “no duty” rule).


others into a legal duty. This reluctance to impose an affirmative duty on defendants to protect against harms not of their own making has remained a highly durable aspect of the law of negligence.

As residential and commercial land uses supplanted the agricultural leasehold, courts eventually carved out limited exceptions to the rule of immunity in the landlord-tenant context to reflect the changing nature of this relationship. These exceptions included the imposition of liability for injuries to tenants resulting from latent defects known to the landlord, defects in common areas, negligently performed repairs, and defects on property leased for public use.

Despite the judicial willingness to broaden the scope of landlord liability for injuries resulting from structural defects on the premises, no jurisdiction extended the duty of reasonable care to include protection from criminal attack. In declining to impose such a duty, some courts reasoned that a criminal act committed by a third party superseded other possible causes of the victim's harm; thus, the courts barred the plaintiff's recovery for failure to establish proximate causation. Other courts cited various public policy rationales for declining to impose liability, including the belief that protection of public

23. See Keeton et al., supra note 18, § 56, at 373.
24. See id.
29. See Junkerman v. Tilyou Realty Co., 108 N.E. 190, 191 (N.Y. 1915) (holding that lessor may be liable for injuries caused by "tumble-down" structure rented for public use).
30. See Brown v. National Supermarkets, Inc., 679 S.W.2d 307, 309 (Mo. Ct. App. 1984) (citing the general rule that no duty exists to protect another from criminal attack).
31. See Kline v. 1500 Mass. Ave. Apartment Corp., 439 F.2d 477, 481 (D.C. Cir. 1970) (discussing courts' reliance on supervening cause rationale to avoid imposing liability on landlords for criminal attacks); Restatement (Second) of Torts § 448 (1965).
safety was the government's responsibility\textsuperscript{32} and concerns about the economic burden that a broad duty of protection might impose on property owners.\textsuperscript{33} Perhaps the most frequently expressed concern, however, was one of fairness because the creation of a duty to safeguard against criminal attack effectively would place the landowner in the role of insurer of the public safety.\textsuperscript{34} Courts have been reluctant to create a duty to safeguard against criminal attack because, in an era in which crime is nearly pandemic, it seems unfair to hold private property owners to a standard higher than that for even public police agencies.\textsuperscript{35}

B. Kline v. 1500 Massachusetts Avenue Apartment Corp.: 
\textit{Expansion of the Landowner's Duty to Protect Against Criminal Attack}

Modern judicial analysis of the landowner's duty to safeguard against criminal attacks on the premises finds its origins in a landmark decision of the District of Columbia Circuit Court of Appeals. In \textit{Kline v. 1500 Massachusetts Avenue Apartment Corp.},\textsuperscript{36} a tenant of a large apartment building in Washington, D.C. sought to recover damages from her landlord for injuries she sustained after an assault and robbery in a hallway.\textsuperscript{37} The court observed that common law conceptions of duty were of limited analytical utility when applied to the landlord-tenant relationships in the twentieth century United States,\textsuperscript{38} because the modern lease was viewed as a contract for a package of goods and services that included protection of the premises

\begin{itemize}
\item \textsuperscript{32} See Goldberg v. Housing Auth. of Newark, 188 A.2d 291, 297-99 (N.J. 1962). For a general discussion of the risks attending the "privatization" of law enforcement through the expansion of landlord liability, see Glesner, supra note 1, at 784-89.
\item \textsuperscript{33} See Goldberg, 188 A.2d at 297-98; see also Glesner, supra note 1, at 784 (noting that expanded liability may encourage abandonment or sale of housing in high-crime areas).
\item \textsuperscript{34} See Scott v. Watson, 359 A.2d 548, 553 (Md. 1976) (arguing that imposition of duty would place landlord "perilously close to the position of insurer of his tenants' safety"); Feld v. Merriam, 485 A.2d 742, 746 (Pa. 1984) (noting the inequity of making a landlord guarantor of tenants' security).
\item \textsuperscript{35} See Goldberg, 188 A.2d at 297 (doubting whether any public police force could meet a strict standard of protection against crime).
\item \textsuperscript{36} 439 F.2d 477 (D.C. Cir. 1970).
\item \textsuperscript{37} See id. at 478-80.
\item \textsuperscript{38} See id. at 481-82.
\end{itemize}
rather than as a conveyance of an interest in land for a term. The court reasoned that "the logic of the situation" dictated the landlord's duty to provide protection because most landlords possess both superior knowledge and resources to safeguard against criminal attack.

C. Contractual Bases of Liability

In *Kline*, the court rested its holding on multiple legal rationales. First, the court considered the landlord's duty in light of contract principles. For example, at the time the plaintiff signed her lease, the landlord had posted employees at the building's garage and front entrance on a twenty-four-hour-a-day basis; however, these security measures decreased over time, and at the time of the attack, several of the main entrances were left unguarded and unlocked. The court reasoned that the tenant had a reasonable expectation that the landlord would maintain the level of security services in place at the beginning of her tenancy. By voluntarily providing a certain measure of security at the inception of the lease, the landlord assumed an implied contractual obligation to ensure that security precautions did not fall below that level.

Although this implied warranty to maintain an existing level of security did not gain wide acceptance, it set the stage for a number of jurisdictions to ground the contractual liability of landlords on the implied warranty of habitability, a much more expansive doctrine. *Javins v. First National Realty Corp.*, *Kline*, 439 F.2d at 483.

39. *See id.* The conception of the lease as a contract for services rather than as a conveyance of a property interest had been recently articulated by the court in its earlier decision in *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970). In *Javins*, the court stated that the modern residential lessee seeks "a well-known package of goods and services—a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance." *Javins*, 428 F.2d at 1074.

40. *Kline*, 439 F.2d at 483.


42. *See Kline*, 439 F.2d at 485.

43. *See id.* at 479.

44. *See id.* at 485.

45. *See id.*

46. *See Weiss, supra* note 9, at 705 (stating that the implied warranty of security was not readily embraced by other courts).

47. *See, e.g.*, *Flood v. Wisconsin Real Estate Inv. Trust*, 503 F. Supp. 1157, 1160 (D.
decided by the District of Columbia Court of Appeals only a few months before *Kline*, offers the classic statement of this doctrine. Under *Javins*, a landlord impliedly warrants, in a residential lease, to deliver and maintain safe and habitable premises. Although this implied warranty doctrine initially encompassed only the structural integrity of the dwelling, courts quickly extended it to cover the security of the premises. For example, in *Trentacost v. Brussel*, the New Jersey Supreme Court held a landlord liable for injuries when an intruder assaulted an elderly woman in the hallway of her building. The court reasoned that, in a modern urban environment, the provision of security is a "facilit[y] vital to the use of the premises," and hence falls within the scope of the implied warranty of habitability.

**D. Tort Bases of Liability**

The *Kline* court also looked to general tenets of tort law in its analysis of the landowner's duty to safeguard against criminal acts on the premises. Under these principles, a duty to protect another from criminal acts may arise if a "special relationship" exists between the plaintiff and defendant or if the landowner could reasonably foresee the crime.

The common law recognized certain "special relationships," such as that of student-pupil and common carrier-passenger, that potentially gave rise to a duty of protection. The *Kline* court extended this class of "special relationships" to include the landlord-tenant relationship. The court reasoned that the modern landlord-tenant relationship had an analogue at common law in the innkeeper-guest relationship.

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Kan. 1980) (finding liability because landlord "failed to maintain the level of security imposed at the beginning of plaintiff's lease term, resulting in a breach of an implied warranty to maintain the conditions").

49. *See id.* at 1080.
51. *See id.* at 445.
52. *Id.* at 443, 445 (quoting Marini v. Ireland, 265 A.2d 529, 534 (N.J. 1970)).
54. *See id.*
55. *See id.* at 483.
56. *See KEETON ET AL., supra* note 18, § 33, at 201-02.
57. *See Kline*, 439 F.2d at 482.
observed that inns were "the only multiple dwelling houses known to the common law," and that the modern landlord much more closely resembled the innkeeper than the landlord who leased property for agricultural use. Courts have long held that innkeepers owe a duty of reasonable care to protect their guests against criminal attack. This duty derives from the fact that guests submit to the control of the innkeeper to a certain degree and, hence, are limited in their ability to take measures to defend themselves. Like the innkeeper, the modern landlord often controls common areas, regulates the use of security measures, and possesses superior knowledge about the prevalence of crime in and around the premises. Thus, the landlord is in the best position to predict and counter threats to the safety of tenants.

While a few states adopted the "special relationship" rationale in both the landlord-invitee and landlord-tenant contexts, many courts expressed profound misgivings about the fairness of imposing a nearly absolute duty of protection on landlords based solely on the status of the injured party. Given the pervasiveness of crime in modern society, some courts balked at the prospect of placing a duty on landowners that was "impossible of performance."

In light of concerns about the fairness of predicating liability on a "special relationship," courts looked to the principle of foreseeability to determine the obligation of landlords to protect their tenants against criminal acts. In a negligence action, the plaintiff must demonstrate that the defendant has a duty to

58. Id.
59. See id.
60. See id.
61. See id. at 484.
62. See Samson v. Saginaw Prof'l Bldg., Inc., 224 N.W.2d 843, 847-49 (Mich. 1975) (stating that special relationship gave rise to duty on the part of landlord to protect tenant against attack by mental patient in commercial office building).
63. See Miller v. Whitworth, 455 S.E.2d 821, 826 (W. Va. 1995) (declining to find a duty to protect against third party criminal attack based on the landlord-tenant relationship); Krier v. Safeway Stores 46, Inc., 943 P.2d 405, 413 (Wyo. 1997) (noting that most jurisdictions have abandoned the special relationship test).
protect the plaintiff from harm. Duty, defined as the legal obligation to exercise due care to guard against unreasonable risks of harm to others, is not a static concept, but rather reflects changing public policies and notions of fairness. The existence of a legal duty presents a question of law for the court.

While the judge may weigh a number of factors in assessing duty, the foreseeability of the harm has proved to be, by far, the most pivotal element in the analysis. Section 344 of the Restatement (Second) of Torts articulates the application of a foreseeability analysis to the criminal acts of third parties. A comment to the Restatement provides: "If the place or character of his business, or his past experience, is such that [a possessor of land] 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 . . . ."

Again, the *Kline* court relied on these principles to assess the duty of the landlord. In *Kline*, instances of violent crime had increased in the area around the building, and another tenant was assaulted in the hallway two months before the attack on the plaintiff. The landlord had notice of these conditions, yet he allowed security measures to deteriorate. The court emphasized that, on these facts, the attack on the plaintiff was both "probable and predictable." Thus, the court concluded that, given the foreseeability of criminal attack, "it does not

66. See KEETON ET AL., supra note 18, § 37, at 236.
68. See id.
69. See Kaufman, supra note 7, at 93-94.
70. See Murray, supra note 10, at 344 (stating that foreseeability is the crucial determinant of a defendant's duty to the plaintiff). The concept of foreseeability is implicated at two different stages of a negligence analysis. In addition to being integral to the determination of the existence of duty, it is also fundamental to an analysis of proximate cause. In the latter case, foreseeability "relates to the question of whether the specific act or omission of the defendant was such that the ultimate injury to the plaintiff reasonably flowed from defendant's breach of duty." Clohesy v. Food Circus Supermarkets, Inc., 694 A.2d 1017, 1021 (N.J. 1997) (quoting Hill v. Yaskin, 380 A.2d 1107 (1977)).
71. See RESTATEMENT (SECOND) OF TORTS § 344 cmt. f (1965).
72. Id.
74. See id. at 480.
75. See id.
76. Id. at 483.
seem unfair to place upon the landlord a duty to take those steps which are within his power to minimize the predictable risk to his tenants.\textsuperscript{77}

\textit{E. Gauging Foreseeability}

While most states adhere to the principle that a landowner may incur liability for foreseeable criminal attacks,\textsuperscript{78} courts have diverged widely in their interpretation of the foreseeability requirement.\textsuperscript{79} Since \textit{Kline}, a number of tests have emerged for gauging foreseeability.\textsuperscript{80}

A few courts interpret the foreseeability requirement quite narrowly.\textsuperscript{81} These courts refuse to find a foreseeable criminal attack unless the landowner knew or should have known that crimes were occurring on the premises and that an attack was imminent. Under this "imminent harm" test, simply presenting evidence of previous crimes on or around the premises may not suffice to demonstrate that the landowner reasonably could have anticipated the criminal act.\textsuperscript{82}

Another minority of courts falls at the other end of the spectrum and takes a much broader view of the element of foreseeability.\textsuperscript{83} These jurisdictions adhere to the "totality of the circumstances" test first enunciated by the California Supreme Court in \textit{Isaacs v. Huntington Memorial Hospital}.\textsuperscript{84} In \textit{Isaacs}, the court found that the foreseeability of the shooting of a doctor in a hospital parking lot presented a jury question.\textsuperscript{85} Under the "totality of the circumstances" approach, no single

\textsuperscript{77} Id. at 481.

\textsuperscript{78} See, e.g., McClung v. Delta Square Ltd. Partnership, 837 S.W.2d 891, 898 (Tenn. 1996) (holding that most courts find a duty for businesses to take precautions to safeguard customers against foreseeable acts of crime).

\textsuperscript{79} See Murray, supra note 10, at 344 (reviewing various tests of foreseeability).


\textsuperscript{81} See \textit{Whataburger}, 706 So. 2d at 1223.

\textsuperscript{82} See Kaufman, supra note 7, at 95-96.

\textsuperscript{83} See Siebert, 856 P.2d at 1339; Clohesy v. Food Circus Supermarkets, Inc., 694 A.2d 1017, 1023 (N.J. 1997).


\textsuperscript{85} See id. at 694.
factor is requisite to a finding of foreseeability.86 Thus, in assessing the foreseeability of the crime in *Isaacs*, the court considered a number of circumstances, such as the occurrence of previous crimes on the defendant's property, the rate of crime in the surrounding area, and the level of security in the parking lot.87

Two courts have developed a variation of the "totality of the circumstances" test.88 Under the so-called "balancing approach," the court weighs the foreseeability of the act against the burden of guarding against it.89 The court may consider a variety of factors, including the probability and gravity of the harm, the utility of the actor's conduct, and the feasibility and costs of alternative conduct.90

Finally, some jurisdictions utilize a "prior similar incidents" approach to landlord liability.91 The origins of this rule can be found in *Kline*.92 Recall that the plaintiff in *Kline* offered evidence of earlier assaults and robberies in the common areas of the building and in the area immediately adjacent to the property.93 The prior occurrence of crimes substantially similar to the attack on the plaintiff was crucial to the court's analysis of the landlord's duty.94 These acts "'created a likelihood' (actually, almost a certainty) that future criminal attacks upon tenants would occur."95 Because the attack was reasonably foreseeable, the landlord owed a duty of care to the tenant.96

The "prior similar incidents" rule is distinguishable from the "totality of the circumstances" approach in that, under the latter rule, a duty may be found in the absence of any prior similar

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86. *See Kaufman, supra* note 7, at 98-97.
89. *See McClung*, 937 S.W.2d at 901.
90. *See id.*
91. *See Laura DiCola Kulwicki, Comment, A Landowner's Duty to Guard Against Criminal Attack: Foreseeability and the Prior Similar Incidents Rule, 48 Ohio St. L.J. 247, 250 (1987) (noting that the occurrence of prior similar incidents of crime is the most commonly offered evidence to demonstrate that the landowner owes a duty of protection).*
92. *See 439 F.2d 477 (D.C. Cir. 1970); see also Kulwicki, supra* note 91, at 250-51.
93. *See Kline*, 439 F.2d at 470-80.
94. *See id.* at 483.
95. *Id.*
96. *See id.*
crimes on or near the premises. The court may consider and weigh a wide range of factors including the occurrence of prior crimes on the premises (even if they are different in nature and location), evidence of general criminal activity in the surrounding area, the nature of the business operated on the property, and the physical design of the property.

As the proliferation of tests suggests, no cohesive legal doctrine has emerged for determining landowner liability for third party criminal acts. One commentator notes that, despite the considerable quantity of cases and commentary generated over the last thirty years, this area of law has produced a "scattering of opinions" rather than a well-settled rule of law.

II. PREMISES LIABILITY LAW IN GEORGIA

In recent years, a substantial body of jurisprudence has accumulated on the question of the Georgia landowner's legal obligation to guard against criminal attacks on the premises. Prior to 1991, however, the Georgia courts only infrequently addressed this issue, and judges broadly defined the contours of landowner liability. They consistently held, for example, that the landowner was not expected to act as an insurer of the public's safety. The courts also regularly restated the general

97. See Kaufman, supra note 7, at 98-97.
99. Merrill, supra note 9, at 432.
rule that a defendant is immune from liability when the illegal act of a third person intervened between the defendant's negligence and plaintiff's injury, and the injury would not have occurred but for the unlawful act.\footnote{See McClendon v. Citizens and S. Nat'l Bank, 155 Ga. App. 755, 756, 272 S.E.2d 592, 593 (1980); Warner, 133 Ga. App. at 176, 210 S.E.2d at 352.}

Although the Georgia courts declined to impose an unqualified duty of protection on landowners, they also refused to confer absolute immunity for crimes committed on the premises by third parties.\footnote{See Warner, 133 Ga. App. at 177, 210 S.E.2d at 352.} Most importantly, the courts held that the rule barring liability for injuries caused by intervening criminal acts is inapplicable in circumstances in which the landowner may reasonably anticipate the occurrence of the crime.\footnote{See Atlantic Coast Line R.R. Co. v. Godard, 211 Ga. 373, 377, 86 S.E.2d 311, 315 (1955).}

Thus, foreseeability of the criminal act is the essential consideration in a judicial determination of the duty of the Georgia landowner to guard against attacks on patrons or tenants. As stated by the Georgia Supreme Court: “Simply put, without foreseeability that a criminal act will occur, no duty on the part of the proprietor to exercise ordinary care to prevent that act arises.”\footnote{Days Inns of Am., Inc. v. Matt, 265 Ga. 235, 236, 454 S.E.2d 507, 508 (1995).}

Prior to 1991, the case authority defining those particular conditions that might render a criminal attack foreseeable was sparse. In 1991, however, the Georgia Supreme Court squarely addressed the foreseeability issue in two cases, \textit{Lau's Corp. v. Haskins}\footnote{261 Ga. 491, 405 S.E.2d 474 (1991).} and \textit{Savannah College of Art and Design, Inc. v. Roe}.\footnote{261 Ga. 704, 409 S.E.2d 848 (1991).}

\textit{In Lau's Corp.}, assailants attacked a couple and snatched the wife's purse in a parking lot adjacent to the defendant's restaurant.\footnote{See Lau's Corp., 261 Ga. at 491, 405 S.E.2d at 474.} In their negligence action against the restaurant owner, the plaintiffs contended that the assault was foreseeable and presented evidence that the owner knew both that a prior purse-snatching incident had occurred in the parking lot and
that his business was located in a "high crime" area.\textsuperscript{110} Although the prior crime was not identical to the crime committed against the plaintiffs, because it involved no physical injury to the victim, it was similar in nature and occurred in the same location only four days prior to the assault on the plaintiffs.\textsuperscript{111} The court concluded that the plaintiffs' evidence, though weak, was sufficient to create a jury issue as to the duty of the defendant to guard against criminal attacks on his customers.\textsuperscript{112}

Several months after its decision in \textit{Lau's Corp.}, the Georgia Supreme Court decided a second premises liability case involving a criminal attack. In \textit{Savannah College}, an intruder sexually assaulted the plaintiffs in their dormitory.\textsuperscript{113} In support of their claim that the college failed to provide adequate security in spite of the foreseeable risk of an assault, the students offered evidence that the college was located in an urban environment and that school officials had received prior reports of "peeping toms," vagrants, petty thefts, and burglary.\textsuperscript{114} The court held that the mere fact that the college was aware that the dormitory was located in a downtown area where crimes had been committed was not sufficient to put it on notice of the risk of a violent attack against the students.\textsuperscript{115} The court further held that the prior crimes that occurred in the dormitory, unlike the purse snatching in \textit{Lau's Corp.}, were not sufficiently similar to the crimes committed against the plaintiffs and consequently were "irrelevant" to a determination of the college's duty of protection.\textsuperscript{116} Since no evidence existed that school officials had knowledge of any previous sexual assaults on the campus, the court reversed the lower court's denial of the defendant's motion for summary judgment on the question of negligence.\textsuperscript{117}

Unfortunately, the court's decisions in \textit{Lau's Corp.} and, especially, \textit{Savannah College}, provoked uncertainty and disagreement rather than establishing a well-settled rule of law of landowner liability. The decision in \textit{Savannah College} raised

\begin{itemize}
\item[110.] See id.
\item[111.] See id. at 491, 405 S.E.2d at 476.
\item[112.] See id. at 493, 405 S.E.2d at 477.
\item[113.] See \textit{Savannah College}, 281 Ga. at 764, 409 S.E.2d at 849.
\item[114.] See id. at 768, 409 S.E.2d at 850.
\item[115.] See id. at 765 n.2, 409 S.E.2d at 850 n.2.
\item[116.] See id. at 765, 409 S.E.2d at 850.
\item[117.] See id.
\end{itemize}
questions about whether a showing of prior similar incidents of crime was an absolutely essential element of a plaintiff's negligence claim. Prior to Savannah College, no Georgia case had expressly adopted a "totality of the circumstances" rule, and no court had declared a strict version of the "prior similar incidents" rule in which the occurrence of prior crimes is a prerequisite to the finding of a duty. The courts had merely held that when evidence of a similar incident tends to show knowledge of a dangerous condition, "the evidence is admissible." This approach was in accord with that taken in Lau's Corp. In concluding that a question of fact existed as to the foreseeability of the crime, the Lau's Corp. court relied on testimony that the defendant knew that his business was in a "high crime area" as well as evidence of a prior purse snatching.

However, the Savannah College court emphasized in a footnote that in Lau's Corp. the evidence of the defendant's knowledge of a high rate of crime in the surrounding area, "when coupled with his knowledge of a previous substantially similar purse snatching in his parking lot [four] days earlier, was sufficient, albeit weak, evidence to give rise to an issue of fact." The court then distinguished Savannah College from Lau's Corp. because the plaintiff failed to show the occurrence of a prior substantially similar crime.

The Savannah College court's analysis of the sufficiency of the evidence in Lau's Corp. arguably confirmed the interpretation that a demonstration of prior incidents of crime was an essential element of a plaintiff's case. That is to say, the plaintiffs in Lau's Corp. could not have succeeded in the absence of evidence of the prior purse snatching. Likewise, the failure of the plaintiffs in Savannah College to show a prior substantially similar crime was necessarily fatal to their case. Although a careful reading of the opinion in Savannah College casts some doubt on the soundness of this interpretation, a

119. Id.
121. Savannah College, 261 Ga. at 765 n.2, 405 S.E.2d at 850 n.2 (emphasis in original).
122. See id.
123. See id. In the body of the opinion, the Savannah College court held only that knowledge of the unreasonable risk of criminal attack "may" be established by evidence...
number of courts and commentators initially concluded that *Savannah College* had indeed announced a new standard of foreseeability in which a showing of previous similar crimes was a threshold requirement for a finding of duty on the part of the landowner.\textsuperscript{124} According to this view, while other kinds of evidence might have been pertinent to a determination of foreseeability and notice, a plaintiff could not prevail on the basis of such evidence alone.\textsuperscript{125}

The subsequent case law appears to clarify that Georgia adheres to a “totality of the circumstances” approach to landowner liability and does not require a plaintiff’s claim to be supported by evidence of prior similar crimes to survive a defendant’s motion for summary judgment. The Georgia Court of Appeals, in *Wallace v. Boys Club of Albany, Georgia, Inc.*,\textsuperscript{126} emphatically rejected the view that prior similar incidents are an absolute requirement of a plaintiff’s case. There, Chief Judge Pope expressed concern, in dicta, over the lower courts’ erroneous interpretation of *Savannah College* on this point.\textsuperscript{127} He reasoned that a plaintiff could conceivably establish foreseeability in other ways and noted that circumstances could

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\textsuperscript{125} See *Matt*, 212 Ga. App. at 798, 443 S.E.2d at 298 (Andrews, J., dissenting) (holding that evidence of location of business in high crime area is “irrelevant!” and cannot establish a duty to protect absent showing of prior similar incidents of crime on premises).


\textsuperscript{127} See *id.* at 536 n.2, 439 S.E.2d at 749 n.2.
exist in which the danger of criminal attack was so apparent (as a result, for example, of the defendant’s own acknowledgment of the danger of the risk of crime) that no evidence of prior attacks on the premises would be necessary.\(^{128}\)

Although \textit{Wallace} involved an action for negligent supervision of a child rather than a landowner liability claim, the Georgia Court of Appeals soon reached a similar conclusion in the premises liability context in \textit{Matt v. Days Inns of America, Inc.}\(^{129}\) There, the plaintiff was shot during a robbery attempt in a hotel parking lot.\(^{130}\) In holding that a genuine issue of material fact existed as to the foreseeability of the crime, the court relied on evidence showing that violent crime was rampant in the area surrounding the hotel, and that even the defendant’s own security guard did not feel safe patrolling the premises.\(^{131}\) The court also relied on evidence of prior crimes committed in the hotel’s parking lot.\(^{132}\) The court rejected the defendant’s contention that a showing of prior similar incidents of crime was essential to the plaintiff’s case and held that knowledge of an unreasonable risk “\textit{may be demonstrated by evidence of the occurrence of prior substantially similar incidents [of crime].}”\(^{133}\) The court reversed the trial court’s grant of summary judgment in favor of the defendant hotel operator, and the Georgia Supreme Court affirmed.\(^{134}\)

In subsequent cases, the Georgia Court of Appeals explicitly rejected an absolute prior similar incidents requirement in the premises liability context. In \textit{Shoney’s, Inc. v. Hudson},\(^{135}\) the court, in upholding the denial of summary judgment for a defendant restaurant owner, relied on evidence that the restaurant was located in a high-crime area and that the management had specifically acknowledged the potential for attacks on customers.\(^{136}\) The court stated flatly that a showing of prior incidents of crime “is not always required” to establish

\(^{128}\) See \textit{id.}.


\(^{130}\) See \textit{id.}.

\(^{131}\) See \textit{id. at 782-94}, 443 S.E.2d at 291-92.

\(^{132}\) See \textit{id.}.

\(^{133}\) \textit{Id. at 794}, 443 S.E.2d at 293 (emphasis added).


\(^{136}\) See \textit{id. at 173-74}, 460 S.E.2d at 811-12.
foreseeability. 137 Similarly, in Piggly Wiggly Southern, Inc. v. Snowden, 138 the plaintiff presented evidence of similar prior crimes in the defendant’s parking lot as well as testimony from store employees that they considered the lot unsafe and had repeatedly requested that the defendant increase security. 139 The court concluded that although the plaintiff presented sufficient evidence of similar prior crimes, her claim would have withstood a motion for summary judgment even if she had relied solely on the testimony of the store employees. 140

Even the most ardent advocates of a “totality of the circumstances” approach acknowledge, however, that a showing of prior similar incidents of crime on the premises will almost always be the plaintiff’s most compelling evidence of the crime’s foreseeability, and that, as a practical matter, few claims are likely to survive a motion for summary judgment absent a showing of such crimes. 141 Indeed, no Georgia appellate court has found a duty of care in the absence of a showing of prior similar crimes. Thus, the degree of similarity required between the prior crime and the criminal act that causes the plaintiff’s injury will become the vital consideration in determining a landowner’s obligation to safeguard users of the premises. 142

The pre-Savannah College cases provided authority for the application of a relatively flexible standard for determining the sufficiency of the similarity between crimes. In those cases, the courts held that the landowner need not anticipate the particular type of crime or injury that occurred. 143 Rather, the courts required that the prior incident need only “attract the owner’s attention to the dangerous condition which resulted in the litigated accident.” 144

137. Id. at 173, 480 S.E.2d at 812.
139. See id. at 149, 464 S.E.2d at 223.
140. See id.
142. See id.
The Georgia Supreme Court's decision in *Savannah College*, however, suggested, at least, a departure from this approach. One should note that the *Savannah College* court did not engage in an elaborate analysis of the degree of identity required between prior and subsequent crimes in premises liability cases. The decision rested largely on the facts in which the court noted that no prior violent sexual assault had occurred and that the other crimes committed on the premises—petty thefts, "peeping Toms," removal of a vagrant from the dormitory, and a burglary—were not substantially similar to the crimes committed against the plaintiffs.\(^1\)

Courts diverged widely in their interpretation of *Savannah College*'s outcome. Some courts seemed to interpret the case to require a high degree of similarity between the prior crimes and the crime that caused the plaintiff's harm. For example, in *J.C. Penney Co. v. Spivey*,\(^2\) the plaintiff was injured when her purse was snatched from her shoulder by a man who held the door as she entered a store in a mall.\(^3\) In her negligence suit, the plaintiff presented evidence of the occurrence of two other crimes outside the mall that were similar to that committed against the plaintiff.\(^4\) The court noted, however, that in one case the perpetrator snatched the victim’s purse after she placed it on the ground while opening her car door; in the other incident, the attacker lay in wait behind bushes and grabbed the victim’s purse as she entered another store in the mall.\(^5\) Relying on these differences in the location of the attacks and the *modus operandi* of the attacker, the court held that the crimes were not sufficiently similar and reversed the lower court's denial of the defendant's motion for summary judgment.\(^6\) According to the *J.C. Penney* court, a prior crime is sufficiently similar to a subsequent crime if it gives the landowner "reasonable grounds for apprehending that the very type [of] criminal act which resulted in injury to his guests is

\(^{3}\) See id. at 680-81, 452 S.E.2d at 191.
\(^{4}\) See id. at 681, 452 S.E.2d at 192.
\(^{5}\) See id. at 682, 452 S.E.2d at 193.
\(^{6}\) See id. at 682, 452 S.E.2d at 192.
reasonably likely to occur."\textsuperscript{151} Based on this formulation, the particular crime must be foreseeable, not merely the general risk of crime.

Another line of cases adopted a much more flexible and expansive interpretation of the concept of "sufficient similarity." For example, in \textit{Matt},\textsuperscript{152} the Georgia Court of Appeals concluded that \textit{Savannah College} "did not announce a new or more restrictive standard in [premises liability] cases."\textsuperscript{153} The \textit{Matt} court held that a robbery by force on the defendant's property was sufficiently similar to the armed robbery of the plaintiff even though the earlier crime did not involve the use of a weapon.\textsuperscript{154} It asserted that "substantially similar does not mean identical,"\textsuperscript{155} and that the fundamental inquiry for the court is simply whether "the prior crimes should have put an ordinarily prudent person on notice that the [plaintiffs] were facing increased risks."\textsuperscript{156}

The Georgia Court of Appeals applied this standard in \textit{Piggly Wiggly}.\textsuperscript{157} There, the plaintiff was abducted, assaulted, robbed, and raped in the defendant’s parking lot.\textsuperscript{158} The court affirmed the denial of the defendant's motion for summary judgment even though the plaintiff presented no evidence of prior violent physical assaults on customers.\textsuperscript{159} The court reiterated that "the prior similar crimes need not be identical to the criminal act suffered by the plaintiff,"\textsuperscript{160} and that the victim need only demonstrate that the defendant knew that "his property subjected his invitees to unreasonable risk of criminal attack."\textsuperscript{161}

Other courts and commentators frequently cited \textit{Savannah College} for the proposition that a prior "property crime" or "morals crime" could never create the foreseeability of a violent

\textsuperscript{151} \textit{Id.} (emphasis added).
\textsuperscript{154} \textit{See id.}
\textsuperscript{155} \textit{Id. at 794, 443 S.E.2d at 293.}
\textsuperscript{156} \textit{Id.}
\textsuperscript{158} \textit{See id. at 148, 464 S.E.2d at 222.}
\textsuperscript{159} \textit{See id. at 148, 464 S.E.2d at 223.}
\textsuperscript{160} \textit{Id. at 148, 464 S.E.2d at 222.}
\textsuperscript{161} \textit{Id.} (quoting \textit{Matt}, 212 Ga. App. at 795, 443 S.E.2d at 293).
crime against persons. In *Piggly Wiggly*, the court found that
purse snatchings, harassment of customers, and threats by
loiterers in the defendant's parking lot were sufficiently similar
to the vicious physical assault against the plaintiff. The court
reached that result by characterizing the prior crimes as
"confrontational attacks on persons" rather than property
crimes. Citing *Savannah College*, the court reasoned that "the
key to sufficient similarity [is] . . . in the nature of the offense:
was the prior incident also an offense against a person, or was
it an offense against property or public morals?"

In *Doe v. Prudential Bache/A.G. Spanos Realty Partners*, the
plaintiff, who was raped in an apartment complex parking
area, adduced evidence of prior thefts and acts of vandalism in
the garage; however, she produced no evidence of prior physical
assaults against residents. The Georgia Court of Appeals
observed that it had refused in *Matt* to distinguish between a
robbery by force without the use of a weapon and an armed
robbery because both involved actual violence toward the
victim. Relying again on *Savannah College*, the court
concluded that "[a] distinction does exist, however, between
crimes against property and crimes against persons." The
plaintiff presented no evidence that the apartment owner knew
of any violent crimes against individuals on the premises.
Thus, the court affirmed the trial court's grant of summary
judgment to the defendant, concluding that there was no triable
issue of foreseeability.

The Georgia Supreme Court considered this interpretation in
two 1997 decisions. In *Sturbridge Partners, Ltd. v. Walker*, an

162. See, e.g., Jonathan Ringel, *When Landlords Must Pay: Court Revisits Issue of Duty to Protect Tenants from Crime*, FULTON COUNTY DAILY REP., July 14, 1997, at 1 ("From 1991 [until 1997], the high court's position was that a landlord's knowing about prior property crimes—such as theft or burglary—didn't make him responsible for foreseeing a crime against a person, such as rape.").
164. Id.
165. Id.
167. See id. at 171, 474 S.E.2d at 94.
168. See id.
169. Id.
170. See id.
171. See id. at 169, 474 S.E.2d at 31.
intruder broke into an apartment and sexually assaulted the plaintiff. The plaintiff alleged that the landlord negligently failed to take security precautions after learning of three previous burglaries in the apartment complex. The defendants argued that, under the analysis set forth in Savannah College, the earlier offenses were crimes against property, and that prior property crimes could not establish the element of foreseeability necessary to create a duty to protect against sexual assault. Characterizing this analysis as a "restrictive and inflexible approach" that constituted "a significant departure from [the] precedent of this [c]ourt," the court, in a four-to-three decision, rejected the defendant's arguments and overruled Savannah College "to the extent that [it] supports such an analysis." Citing Matt, the court held that an inquiry into the similarity of the crimes should include an analysis of both the character of the prior crimes and their frequency, location, proximity, and "other relationship" to the crime in question. Furthermore, the court held that the issue was not the foreseeability of the particular crime committed, but whether the knowledge of the prior crimes put the defendant on notice of the risk of personal harm to potential plaintiffs. Emphasizing that these issues should generally be decided by the jury rather than by summary adjudication, the court concluded that the landowner could reasonably anticipate that burglaries of vacant apartments could lead to an intrusion into an occupied unit and the potential resulting harm to the occupant. Thus, the court held that the plaintiff's evidence gave rise to a jury issue on the apartment owner's duty of ordinary care to the tenant.

Just a few months later, however, the court reached a different result when it applied the newly refined rule of

173. See id. at 786, 482 S.E.2d at 340.
174. See id. at 785, 482 S.E.2d at 340.
175. See id. at 786, 482 S.E.2d at 340.
176. Id.
177. Id.
178. Id.
179. See id. at 786, 482 S.E.2d at 341.
180. See id. at 787, 482 S.E.2d at 341.
181. See id. at 786, 482 S.E.2d at 341.
182. See id. at 787, 482 S.E.2d at 341.
183. See id.
landlord liability to its review of the appeals court’s decision in *Doe v. Prudential-Bache/A.G. Spanos Realty Partners*.

As previously noted, the plaintiff was robbed and raped by an intruder in the underground parking lot of her apartment building. In support of her argument that the attack was foreseeable, the plaintiff relied on evidence of the occurrence of over fifteen instances of theft and vandalism in the building’s garage in the eleven-month period before the rape. However, the Georgia Supreme Court found important distinctions between the burglaries of private apartment units in *Sturbridge* and the occurrence of thefts and vandalism in a common area of a building. The court reasoned that the prospect of physical harm is implicit in Georgia’s statutory definition of burglary, whereas the “very nature” of the crimes of theft and vandalism does not suggest the potential for personal injury. Moreover, in the latter circumstances, the possibility of an assault is much less likely because an encounter with a thief or vandal in a common area is likely to be brief, and the opportunity for escape much greater, than in a burglary in which the victim is confined with the intruder inside an apartment. Hence, the court held that these crimes could not, as a matter of law, create a factual issue as to the foreseeability of a violent sexual assault.

III. ANALYSIS OF THE GEORGIA CASES

Over the last eight years, the Georgia courts have begun to define, with some particularity, the landowner’s liability for the criminal acts of third parties. The recent cases make it clear that Georgia embraces a flexible, fact-based, “totality of the circumstances” approach. Under Georgia law, a plaintiff will not be denied recovery as a matter of law for failure to

185. *See id.* at 604, 492 S.E.2d at 866.
186. *See id.* at 604, 607, 492 S.E.2d at 866, 868.
187. *See id.* at 605-06, 492 S.E.2d at 867.
188. *See id.* at 606, 492 S.E.2d at 867 (citing O.C.G.A. § 16-7-1 (a)(1996)).
189. *See id.*
190. *See id.*
demonstrate prior similar incidents of crime on the premises. A variety of evidence, other than prior instances of crime, may be pertinent to the court's determination of a landowner's duty. This evidence may include the defendant's awareness of a high incidence of crime in the area surrounding the premises or an acknowledgment by the landowner or the landowner's agents of the foreseeability of attacks on patrons or tenants.

Nonetheless, the Georgia courts have recognized that prior similar incidents of crime will be, in most instances, essential to a plaintiff's case. The courts have declined, however, to apply hard and fast rules governing the degree of identity required among particular crimes to meet the test of substantial similarity. For example, the notion that evidence of prior property crimes cannot, as a matter of law, create an issue of fact as to the foreseeability of a criminal assault has been firmly rejected. In assessing the sufficiency of the plaintiff's evidence of prior similar crimes, the courts may weigh a broad range of factors, including the nature of the offenses, the frequency of the previous crimes, the physical and temporal proximity of the earlier crimes to the latter crime, the location and time of the crime, and the particular circumstances surrounding the crime. In applying these factors, the fundamental inquiry for the court is not whether the landowner could have reasonably anticipated the particular crime perpetrated against the plaintiff, but whether the prior crimes

194. See Shoney's, 218 Ga. App. at 174, 460 S.E.2d at 812. In her concurring opinion in SunTrust Banks, Inc. v. Killebrew, 266 Ga. 109, 111-12, 464 S.E.2d 207, 209 (1995), Justice Sears made a cogent argument that the conduct of certain activities on the property, which by their nature make the premises an attractive target of crime (such as bank ATMs), should also weigh in a judicial analysis of landowner duty. In that case, however, the supreme court declined to reach the issue of sufficient similarity and decided the case on the narrow issue of the defendant's constructive knowledge of earlier crimes.
197. See id. at 786, 482 S.E.2d at 340.
198. See id. at 786, 482 S.E.2d at 341.
suggest that personal injury may occur.\footnote{See id. at 787, 482 S.E.2d at 341.} Finally, the court's analysis should be tempered by the rule that the question of reasonable foreseeability is generally one for the jury and not appropriate for summary adjudication.\footnote{See id. at 786, 482 S.E.2d at 341.}

Opponents of the "totality of the circumstances" approach have criticized it for placing the landowner in the role of insurer of the public's safety.\footnote{See id. at 786, 482 S.E.2d at 341 (Benham, C.J., dissenting).} As the argument goes, crime is so endemic in many areas as to always be foreseeable.\footnote{See Welch, supra note 12, at 1065.} Basing liability on a circumstance as vague as a defendant's awareness of a high level of crime in the surrounding area holds the landowner to a standard not even police agencies can meet. Dire economic consequences are certain to follow in the form of increased costs to consumers and the flight of businesses from poorer areas where crime is usually highest.\footnote{See McClung v. Delta Square Ltd. Partnership, 937 S.W.2d 891, 900 (Tenn. 1996) (summarizing criticisms of "totality of circumstances" approach).}

Observers have noted, however, that this criticism confuses the concept of foreseeability with the possibility of crime. The landowner is not expected to foresee the possibility of crime, only crimes that are both probable and predictable.\footnote{See Kilme v. 1500 Massachusetts Ave. Apartment Corp., 459 F.2d 477, 483 (D.C. Cir. 1970).} The Georgia courts' judicious application of the foreseeability analysis suggests that plaintiffs will not easily carry the burden of proving the probability and predictability of a crime. It will be the exceptional case in which a triable question of fact as to the reasonable foreseeability of a crime will be created in the absence of a prior substantially similar incident. Moreover, the Georgia Supreme Court's decisions in Sturbridge and Prudential-Bache suggest that a plaintiff's claim that rests solely on evidence of prior crimes against property and does not involve intrusion into the plaintiff's residence or business will be unlikely to survive summary judgment.\footnote{See Doe v. Prudential-Bache/A.G. Spanos Realty Partners, 288 Ga. 604, 482 S.E.2d 885 (1997); Sturbridge, 287 Ga. at 785, 482 S.E.2d at 339.}

Georgia's adherence to a "totality of circumstances" approach may sacrifice some measure of predictability in the law.\footnote{See Sturbridge, 287 Ga. at 788, 482 S.E.2d at 342 (Benham, C.J., dissenting).}
Particularly in those instances in which the plaintiff’s case turns on evidence of prior crimes that seem to fall at the margins of the property versus crimes-against-persons distinction (such as purse-snatching), some degree of uncertainty will persist as to the landowner’s duty to protect against a subsequent violent crime.

However, the merits of Georgia’s approach far outweigh its shortcomings. For one, this approach avoids the untoward results that often obtain from the formulaic application of “bright line” rules of law.207 Bright line rules almost invariably end up being both overinclusive and underinclusive. The leading treatise writers on the law of torts have noted the particular futility of crafting absolute rules of law with universal application in negligence cases.208 Such rules usually break down “in the face of the necessity of basing the standard upon the particular circumstances, the apparent risk, and the actor’s opportunity to deal with it.”209

Thus, in premises liability cases, one can easily conceive of instances in which the sheer magnitude of prior property crimes or morals crimes on the premises might be adequate to put the landowner on notice of the potential for injury to a patron or tenant.210 By contrast, one can also fairly imagine scenarios in which the occurrence of a prior violent crime on the premises might not create a reasonably foreseeable risk of a subsequent crime.211 In these cases, a host of factors other than the nature of the crime might bear on the question of foreseeability.212

Even the dissent in Sturbridge suggested that reliance on such rigid distinctions is misplaced.213 There, the dissent reasoned that although the Georgia Court of Appeals was “going

207. See id. at 786, 482 S.E.2d at 340; SunTrust Banks, Inc. v. Killebrew, 266 Ga. 109, 111, 484 S.E.2d 207, 209 (1995) (Sears, J., concurring).
208. See Keeton ET AL., supra note 18, § 35, at 218.
209. Id.
210. See Jardel Co. v. Hughes, 523 A.2d 518, 525 (Del. 1987) (holding that repetition of criminal activity limited to property offenses may be sufficient to create notice of possible personal injury).
in the right direction” (in the post-Savannah College case, 
Piggly Wiggly) when it held that the crime-against-property
versus crime-against-persons distinction was the crucial
consideration in the determination of sufficient similarity, the
foreseeability analysis should not end there.214 The court must
also weigh the “degree of force or violence involved” in the
crime and the circumstances that “have some defining effect on
the crime.”215 While the dissent noted that the prior crimes in
Sturbridge were daytime burglaries of unoccupied
apartments,216 it seems arguable, at least, that implicit in this
analysis of “defining circumstances” is the suggestion that had
the prior crimes in Sturbridge involved nighttime burglaries of
occupied apartments, the question of foreseeable risk of harm
should at least reach a jury.217

The tenuosity of distinctions among types of crimes is also
underscored by the fact that many crimes simply do not fall
neatly into one category or another.218 Is purse snatching closer
to larceny or to assault? Is the pickpocket’s offense a crime
against property or against persons? Might prior incidents of
indecent exposure create a foreseeable risk of a subsequent
sexual assault? Moreover, some “property” crimes, by their very
nature, carry with them a significantly greater risk of physical
confrontation or assault than do other offenses.219 For instance,
as the Georgia Supreme Court noted, the potential for violence
is certainly greater in a burglary than in an auto theft.220 Indeed,
according to the majority in Sturbridge, the very statutory
definition of burglary in Georgia suggests the risk of personal
injury to the occupant of the premises.221

Georgia’s standard of liability also furthers the social interest
of compensating innocent victims and preventing future harms.
It has long been recognized that application of a strict prior

214. Id. at 790, 482 S.E.2d at 343.
215. Id.
216. See id.
217. See id.
218. See Jardel Co. v. Hughes, 523 A.2d 518, 525 (Del. 1987) (observing that crimes are
not “easily compartmentalized”).
219. See id.
220. See Sturbridge, 287 Ga. at 787 n.1, 482 S.E.2d at 341 n.1.
221. See id. (holding that the “very nature of burglary” as defined by Georgia law
suggests a risk of violence).
similar incidents rule allows the landowner one "free bite."222 Under the analogy, because a highly similar crime must occur before the landowner is deemed to have notice of the danger of a subsequent crime, the first victim of a violent crime is denied relief while later victims are permitted recovery.223 As many observers have noted, such an outcome is contrary to public policy and the aims of tort law.224 Compensation is denied to injured victims, and losses are imposed on those who are often least able to bear them.225

Furthermore, under a strict application of the prior similar incidents rule, landowners have little or no incentive to take preventive measures to deter crime until the first victim is injured.226 Courts and commentators have reasoned that the landowner often has superior information as to the risks of crime on the premises and can more efficiently bear the costs of crime than individual users of the property.227 Furthermore, modern landowners have been able to maximize economic returns through the development of high-density multifamily housing and the concentration of retail merchandising in large shopping centers.228 These developments, which usually include expansive parking areas and attract large numbers of patrons carrying money or valuables, have created particularly fertile opportunities for crime.229 In light of these considerations, it does not seem inequitable or undesirable for landowners to bear some of the costs of crime attracted to these areas in the form of insurance or crime prevention measures. Georgia’s approach will encourage landowners to take reasonable measures to enhance the safety of their patrons and tenants.

Finally, the Georgia standard is sound because it is consistent with the long-standing principle of Georgia law that ‘reasonable foreseeability' of a criminal attack is generally ‘for

223. See id.
225. See id.
227. See McClung v. Delta Square Ltd. Partnership, 937 S.W.2d 891, 903 (Tenn. 1996); Merrill, supra note 9, at 447.
228. See McClung, 937 S.W.2d at 896.
229. See id. at 902.
a jury's determination rather than [for] summary adjudication by the courts."

Critics have argued that sending cases to juries under a less than precise formulation of the foreseeability standard would invariably lead to inequitable results. Juries may be unduly swayed by sympathy for the injured plaintiff and may render verdicts unsupported by the evidence. However, observers note that this criticism is little more than an attack on the negligence standard itself. Foreseeability is generally a question of fact that has historically been left to juries. Moreover, a number of safeguards exist—directed verdicts, judgments not withstanding the verdict, and jury instructions—that can be utilized to check irresponsible or irrational jury decisions.

CONCLUSION

A clearly articulated and consistently applied standard of liability for criminal attacks on the premises is essential so that landowners and land users alike may conform their behavior and adjust their expectations. After an initial period of confusion and uncertainty, an equitable and well-founded standard has emerged from the Georgia courts. In their decisions, the courts have recognized that foreseeability is largely a fact-based question and that a variety of factors may cause a landowner to reasonably anticipate the occurrence of a serious crime. The courts also have prudently avoided the adoption of rules that strictly equate foreseeability in the premises liability context with the occurrence of prior similar incidents or that rest on rigid distinctions between types of

231. See Kaufman, supra note 7, at 100 (observing that "any case which goes to a jury under general instructions on the foreseeability of a heinous crime almost invariably results in a verdict for the plaintiff").
233. See Bazylar, supra note 22, at 753 (arguing that various checks and balances are available to prevent irresponsible jury behavior).
235. See Bazylar, supra note 22, at 753.
crimes. The Georgia approach should encourage relatively predictable and consistent results, promote the implementation of reasonable security measures, and permit juries to decide meritorious cases without holding landowners strictly liable for the safety of their tenants and patrons.

W. Marshall Sanders