Prior Criminal Acts Evidence in Negligent Security Cases

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Crime breeds crime.[1] One of the most crucial categories of evidence in nearly every premises liability case founded upon a theory of inadequate security is evidence of prior crimes that have occurred on or near the property. Many courts have held that evidence of prior criminal acts is admissible to prove notice of a dangerous condition, and to establish the foreseeability of the criminal act at issue. These showings are necessary in order to impose a duty upon a property owner that might not otherwise exist. Courts have also admitted evidence of prior criminal incidents as relevant in deciding the level of care to be required of the owner of the premises.[2] Finally, depending upon the nature and frequency of prior crimes, and the defendant's responses thereto, prior crimes evidence may be important in supporting a punitive damages count. However, jurisdictions maintain different views about what constitutes admissible prior criminal acts evidence. As a result, courts have developed several rules that attorneys and others should know.

Substantial Similarity

The federal courts and nearly all state courts follow the general rule that prior criminal acts may be admitted if they are "substantially similar" to the present act and are otherwise relevant. However, courts vary in their interpretations of what constitutes "substantial similarity." For example, if a group of teenagers assaults a victim in Room 205 of the defendant's hotel on a Sunday morning between 3:00 and 4:00 a.m., should a court only permit evidence of other attacks by groups of teenagers that occurred in the same room at the same time? The answer is almost certainly "no," but this example illustrates some of the problems in defining "substantial similarity."

Jurisdictions maintain different views about what constitutes admissible prior criminal acts evidence.

Admissibility of prior crimes evidence turns largely upon what a particular jurisdiction requires in order to establish that the landowner/possessor owed a duty to the crime victim in the first place. For example, many jurisdictions have adopted a liberalized "totality of the circumstances" approach, which takes into account not only prior criminal acts that have occurred on the premises, but also the general nature of crimes that have occurred in the neighborhood of the defendant's property. In these jurisdictions, evidence of criminal activity which has occurred in the general vicinity of the defendant's premises may be considered as part of the "totality," and therefore, should be admitted for the jury's consideration. At the other end of the spectrum, jurisdictions that employ a "prior similar incidents" test or "imminent harm" approach require a higher degree of similarity or recency between the prior crimes and the one at issue in the case.

Totality of the Circumstances—Balancing Approach

The jurisdictions that follow the "totality of the circumstances" approach,[3] or the related "balancing" approach,[4] to determine whether a particular criminal act was foreseeable generally recognize that evidence of criminal activity *near*, but not necessarily *on*, the premises may help prove that the defendant should have taken appropriate precautions to protect the public.[5] In addition, courts in these jurisdictions may consider the nature of the defendant's business[6] and surrounding businesses, the condition of the defendant's property,[7] whether adequate lighting was provided,[8] the level of police protection in the area, and the level of security provided on the premises.[9] Moreover, courts that follow a "totality of the circumstances" or "balancing" approach are more likely to admit evidence of both violent and non-violent crimes,[10] and evidence of crimes that

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are factually dissimilar to the crime at issue.[11] These courts recognize that the nature and severity of crimes may escalate over time.[12]

Imminent Harm—Prior Specific Incidents

A minority of jurisdictions have a more restrictive view of prior crimes evidence, and require a higher showing of likelihood that the specific type of crime would occur. This approach results in the admission of less prior crimes evidence. In these jurisdictions, courts require proof that the landowner/possessor had either knowledge of imminent harm about to be committed by the criminal,[13] or proof of very similar prior crimes, before a duty may be established.[14]

For example, in one negligent security case, the Court of Appeals of Missouri looked to the degree of similarity of prior incidents, and required that such prior incidents have "recently" occurred on the same area of the premises in order for evidence of the incidents to be admissible. The court approved of the exclusion of evidence of other shootings because the shootings were too remote in time, and did not occur in the same area of the defendant's premises.[15]

Analysis of Prior Crimes Data

In any negligent security case, particularly in one pending in a jurisdiction with a more stringent "similarity" requirement, plaintiff's counsel or the expert must conduct an analysis of the similarities between the prior criminal incidents and the present crime so that relevant patterns may be recognized. Examples of the types of patterns that might come to light are that "all incidents occurred on weekend nights," "all incidents occurred during Manager Smith's shift," "all incidents involved gun violence," or "all incidents occurred in the parking lot." If this type of analysis reveals these kinds of patterns, a court may be less likely to find evidence of the prior incidents irrelevant or cumulative.

Where the purpose of prior crimes evidence is to prove the defendant's notice of a dangerous or potentially dangerous condition upon its property so as to impose a duty of inquiry upon the defendant, the degree of similarity required should be less than if the evidence is being offered for some other purpose. Taking a unique approach, the Texas Supreme Court has held that a balancing of the proximity, recency, frequency, similarity, and publicity of prior crimes may be considered together in determining foreseeability. This approach results in a wider scope of admissibility for prior crimes evidence.[16]

Some courts go so far as to *require* evidence of prior criminal acts on the defendant's property before liability will be imposed, creating a situation similar to the "first-bite free" rule found in some dog bite cases.[17] At least one court has even required that there exist "sufficiently numerous" "violent" crimes on the premises before a duty would be imposed upon the defendant.[18] The flaw in this approach was succinctly stated by the Florida Appellate Court, which observed that, "[We will not] sacrifice the first victim's right to safety upon the altar of foreseeability by slavishly adhering to the now-discredited notion that at least one criminal assault must have occurred" before liability can be established.[19]

Plaintiff's counsel must conduct an analysis of the similarities between the prior criminal incidents and the present crime so that relevant patterns may be recognized.

Sources of Prior Criminal Acts Evidence

Evidence of prior criminal incidents can be obtained from numerous sources. The search for this type of evidence should not be limited to discovery requests that are sent to the defendant. First and foremost, police reports and records of police dispatch calls for crimes occurring in the geographic area of the defendant's property should be obtained by means of subpoena or freedom of information act requests. Counsel should also not limit the investigation to incidents that result in the creation of a police report, because police respond to numerous calls that result in no report being taken. The number and types of calls where no full report is taken are equally important in establishing that the landowner/possessor had notice of the need for security or other preventive measures.

When possible, counsel should interview police officers, security guards, former employees of the defendant, proprietors of surrounding businesses, and witnesses to past criminal acts that occurred on or near the premises. Searches of court dockets or Internet searches of local newspapers may also prove useful in locating prior criminal acts. Counsel should also try to obtain copies of incident reports filed with the defendant or with security companies retained by the defendant or by neighboring businesses.

Evidentiary Challenges to Prior Crimes Evidence

Defense counsel may object to police reports or other prior crimes documentation as constituting hearsay. However, even when the police reports or other similar documents are deemed hearsay, counsel can argue that such evidence is a business record or public record, and that the document should be admitted not for the truth of the matter asserted, but rather for the purpose of proving the defendant's notice and knowledge of potentially dangerous conditions upon its premises.[20] In addition, under Federal Rule of Evidence 703 and under many state rules, a security or property management expert can rely upon prior crime reports in forming opinions, regardless of the report's admissibility.

Presentation of Prior Criminal Acts Evidence

After accumulating evidence of prior

crimes, counsel should present this evidence at trial in summary form through the use of charts or graphs.[21] The trends in the crime data can be highlighted in demonstrative form,[21] further emphasizing the foreseeability of such crime occurring under similar conditions. Demonstrative exhibits, such as a comparison of the history of prior criminal acts occurring on or near the premises with the defendant's response (or lack thereof), may prove highly effective in demonstrating both foreseeability and the defendant's breach of its duty. In addition, the presentation of testimony from the victims of the crimes that occurred on the defendant's premises before the plaintiff's incident constitutes memorable, tangible evidence that is beneficial in proving foreseeability and breach.

Evidence of prior criminal acts occurring on or near the defendant's premises is a significant part of nearly every negligent security/premises liability case. In some jurisdictions, this evidence marks the threshold as to whether the court will allow the victim's case to proceed to trial. Every attempt must be made to gather the details of prior crimes, to present these details to the court so that admissibility will be guaranteed, and to summarize the significance of this evidence for the members of the jury so that they will understand that the defendant should have foreseen and reasonably protected against the crime which resulted in the victim's injuries or death.

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1. *See, e.g., Clohesy v. Food Circus Supermarkets, Inc.*, 149 N.J. 496, 509, 694 A.2d 1017, 1024 (1997) (recognizing that "property crimes can easily escalate into violent crimes"); *see also Galloway v. Bankers Trust Co.*, 420 N.W.2d 437, 439 (Iowa 1988) (noting that "even shoplifting cases can turn ugly").
2. *See, e.g., Keenan v. Miriam Foundation*, 784 S.W.2d 298 (Mo. Ct. App. 1990) (violent and non-violent prior incidents held admissible).
3. *See, e.g., Taco Bell, Inc. v. Lannon*, 744 P.2d 43 (Colo. 1987); *Antrum v. Church's Fried Chicken*, 40 Conn. Supp. 343, 499 A.2d 807 (1985); *Jardel Co. v. Hughes*, 523 A.2d 518 (Del. 1987); *Doe v. Dominion Bank of Washington, N.A.*, 963 F.2d 1552 (D.C. Cir. 1992); *Hardy v. Pier 99 Motor Inn*, 664 So. 2d 1095 (Fla. Dist. Ct. App. 1995); *Sturbridge Partners, Ltd. v. Walker*, 267 Ga. 785, 482 S.E.2d 339 (1997); *McNeal v. Days Inn of America, Inc.*, 230 Ga. App. 786, 498 S.E.2d 294, (1998), *cert. denied*, 1998 Ga. LEXIS 584; *Maguire v. Hilton Hotels Corp.*, 79 Haw. 110, 899 P.2d 393 (1995); *Orthman v. Idaho Power Co.*, 130 Idaho 597, 944 P.2d 1360 (1997); *Shea v. Preservation Chicago, Inc.*, 206 Ill.App.3d 657, 565 N.E.2d 20 (1990); *Bearman v. Univ. of Notre Dame*, 453 N.E.2d 1196 (Ind. Ct. App. 1983); *Galloway v. Bankers Trust Co.*, 420 N.W.2d 437 (Iowa 1988); *Seibert v. Vic Regnier Builder's Inc.*, 253 Kan. 540, 856 P.2d 1332 (1993); *Erickson v. Curtis Inv. Co.*, 432 N.W.2d 199 (Minn. Ct. App. 1988); *Whitehead v. Food Max of Mississippi, Inc.*, 163 F.3d 265, 272 (5th Cir. 1998) (applying Mississippi law and finding that evidence of one prior assault and six robberies was admissible in case involving assault and rape); *Doe v. Gunny's Limited Partnership*, 256 Neb. 653, 593 N.W.2d 284 (1999) (but *requiring* evidence of prior criminal activity); *Doud v. Las Vegas Hilton Corp.*, 109 Nev. 1096, 864 P.2d 796 (1993); *Clohesy*, 149 N.J. at 520; *Reichert v. Atler*, 117 N.M. 628, 875 P.2d 384 (N.M. App.Ct. 1993); *Crinkley v. Holiday Inns, Inc.*, 844 F.2d 156, 160-61 (4th Cir. 1988) (applying North Carolina law); *Zueger v. Carlson*, 542 N.W.2d 92 (N.D. 1996); *Hickman v. Warehouse Beer Systems, Inc.*, 86 Ohio App. 3d 271, 620 N.E.2d 949 (1993) (but requiring "somewhat overwhelming" circumstances before liability will attach); *Brown v. J.C.Penney*, 297 Or. 695 (1984); *Murphy v. Penn Fruit Co.*, 274 Pa.Super. 427, 418 A.2d 480 (1980); *Small v. McKennan Hospital*, 437 N.W.2d 194 (S.D. 1989); *Garner v. McGinty*, 771 S.W.2d 242 (Tex.Ct.App. 1989); *Stffensen v. Smith's Management Corp.*, 862 P.2d 1342 (Utah 1993); *but see Krier v. Safeway Stores 46, Inc.*, 943 P.2d 405 (Wyo. 1997) (indicating that the court is undecided as to what standard should be applied).
4. Courts applying the "balancing" approach seek to find a happy medium between the "prior incidents" rule or "imminent harm" approach and the "totality of the circumstances" approach by recognizing that duty is a flexible concept, and by weighing foreseeability against the burden of the duty to be imposed. *See Ann M. v. Pacific Plaza Shopping Center*, 6 Cal. 4th 666, 863 P.2d 207 (1993); *McClung v. Delta Square Limited Partnership*, 937 S.W.2d 891 (Tenn. 1996)
5. *See Phillips v. Equitable Life Ins. Co.*, 413 So.2d 696 (La. Ct. App. 1982) (criminal acts in and around shopping center admitted for determining whether liability producing incident was reasonably foreseeable); *Murrow v. Daniels*, 321 N.C. 494, 364 S.E.2d 392 (N.C. 1988); *Crinkley*, 844 F.2d at 160-61; *Flood v. Southland Corp.*, 33 Mass. App. Ct. 287, 601 N.E.2d 23 (1992) and 416 Mass. 62, 616 N.E.2d 1068 (1993) (evidence of police reports about disturbances and fights near store where the plaintiff was attacked was admissible); *Parslow v. Pilgrim Parking, Inc.*, 5 Mass. App. Ct. 822, 362 N.E.2d 933 (1977); *accord Nallan v. Helmsley-Spear, Inc.*, 50 N.Y.2d 507, 407 N.E.2d 451, 429 N.Y.S.2d 606 (1980) (in "prior incidents" jurisdiction, jury could consider evidence of the crime rate in the surrounding area).
6. *Gordon v. Alaska Pacific Bancorporation*, 753 P.2d 721 (Alaska 1988) (jury question presented where free alcohol was provided to a large crowd of people and where one of the activities "was a dance, where jealousies, proposals for sexual transactions, and social slights might play a motivational role"); *Doud*, 109 Nev. at 1104("a gambling casino where cash and liquor are constantly flowing may provide a fertile environment for criminal conduct").
7. *Dominion Bank of Washington, N.A.*, 963 F.2d at 1560-61.
8. *Stewart*, 234 Conn. at 613; *Kenny v. Southeastern Pennsylvania Transportation Authority*, 581 F.2d 351 (3rd Cir. 1978).
9. *Crinkley*, 844 F.2d at 161.
10. *See, e.g., Jardel Co.*, 523 A.2d at 526 ("crimes of whatever type and whenever occurring on the premises are part of the circumstantial setting in which security needs are measured"); *McNeal*, 230 Ga. App. at 788, *cert. denied*, 1998 Ga. LEXIS 584 ("it is required only that the prior incident be sufficient to attract the landlord's attention"); *Hickman*, 86 Ohio App.3d at 277; *Butler v. Acme Markets, Inc.*, 177 N.J. Super. 279, 426 A.2d 521 (1981), *aff'd*, 89 N.J. 270, 445 A.2d 1141 (1982); *Foster v. Winston-Salem Joint Venture*, 281 S.E.2d at 40; *Murphy*, 274 Pa.Super. at 433; *Nallan*, 50 N.Y.2d at 519-20; cf. *Taylor v. Hocker*, 101 Ill. App.3d 639, 428 N.E.2d 662, 57 Ill. Dec. 112 (1981) (holding that previous crimes against property were insufficient to give rise to a duty to protect customers from personal assaults).
11. *See, e.g., Sturbridge Partners, Ltd.*, 267 Ga. at 787 (prior daytime burglaries could provide notice that a night-time rape would occur); *Galloway*, 420 N.W.2d at 440 ("similar" acts may include crimes in general); *but see Hillcrest Foods, Inc. v. Kiritsy*, 227 Ga. App. 554, 489 S.E.2d 547 (1997), *cert. denied*, 1998 Ga. LEXIS 117 (prior dissimilar crimes not admissible to foresee drive-by shooting).
12. *See, e.g., Erickson*, 432 N.W.2d at 202 ("property crimes can easily escalate to violent crimes.").
13. *See, e.g., Bailey v. Bruno's, Inc.*, 561 So. 2d 509 (Ala. 1990) (no duty to protect where the plaintiff presented numerous similar crimes that had occurred in the parking lot of defendant's store, but could not present proof of defendant's knowledge of her imminent harm); *Parnell v. C&N Bowl Corp., Inc.*, 954 F. Supp. 1326 (W.D.Ark. 1997) (recognizing and validating both the "imminent harm" approach and the "prior similar incidents" approach); *Mason v. Royal Dequindre, Inc.*, 455 Mich. 391, 566 N.W.2d 199 (1997) (plaintiff must be "readily identifiable as [being] foreseeably endangered"); *Folmar v. Marriott, Inc.*, 1996 Ok.Civ.App. 50, 918 P.2d 86 (1996); *Wright v. Webb*, 234 Va. 527, 362 S.E.2d 919 (1987) (no duty where plaintiff presented evidence of two previous assaultive attacks on patrons); *cf. Thetford v. City of Clanton*, 605 So. 2d 835 (Ala. 1992) (duty found where defendant hotel had actual knowledge of an imminent threat); *but see Lay v. Dworman*, 732 P.2d 455 (Okla. 1986) (finding in *Folmar* disapproved in the landlord-tenant context).
14. *See, e.g., Moye v. A.G. Gaston Motels, Inc.*, 499 So. 2d 1368, 1372-73 (Ala. 1986)(requiring analysis of the number and frequency of prior criminal acts at the place where the injury occurred because these are "objective, verifiable criteria"); *Cotterhill v. Bafile*, 177 Ariz. 76, 865 P.2d 120 (Ariz. Ct. App. 1993); *Parnell*, 954 F.Supp. at 1331-32 (recognizing and validating both the "imminent harm" approach and the "prior similar incidents" approach) *Scott v. Watson*, 278 Md. 160, 359 A.2d 548 (1976) (suggesting that only crimes to persons which occurred in common areas of an apartment complex would be relevant to foreseeability of crime that occurred in common area of apartment complex); *Thiele v. Rieter*, 838 S.W.2d 441 (Mo. Ct. App. 1992); *Polomie v. Golub Corp.*, 640 N.Y.S.2d 700 (N.Y. App. Div. 1996); *Nallan*, 50 N.Y.2d at 519-20 (107 reported crimes in the previous 21 months, including 10 crimes against the person, established a prima facie negligence case against the building's owner); *Shipes v. Piggly Wiggly*, 269 S.C. 479, 238 S.E.2d 167 (1977); *A.H. v. Rockingham Publishing Co., Inc.*, 255 Va. 216, 495 S.E.2d 482 (1998) (three previous sexual assaults of newspaper carriers employed by defendant not sufficient evidence to make subsequent sexual assault foreseeable where the previous assaults did not occur on the same paper route); *Yarbrough v. Nahon*, 91 Wash. App. 1066 (1998) (holding that general knowledge of gang activity near the premises was insufficient to show prior violent crimes); *Doe v. Wal-Mart Stores, Inc.*, 198 W. Va. 100, 479 S.E.2d 610 (1996) (plaintiff must show more than generalized knowledge of crime by presenting evidence of very similar, recent criminal acts); but see *E.G. Rock v. Danly*, 98 Md. App. 411, 633 A.2d 485 (1993) (holding that evidence of prior similar criminal acts may not be required if landlord was negligent in voluntarily undertaking a duty).
15. *Bowman v. McDonald's Corp.*, 916 S.W.2d 270, 278 (Mo. Ct. App. 1995) (only prior shootings that occurred in the parking lot of the premises over the previous two years were admissible in action stemming from parking lot shooting).
16. Timberwalk Apts. v. Cain, 972 S.W.2d 749 (Tex. 1998); see also Dickenson Arms-REO v. Campbell, 972 S.W.2d 144 (Tex. Ct. App. 1998) ("the necessity of showing frequency of previous crimes lessens if you can show similar previous crimes.").
17. *See, e.g., Moye*, 499 So. 2d at 1372-73 (Ala. 1986) ("When the number and frequency of the crimes on the premises rises, and notice is shown on the part of the owner, then, and only then, would criminal activity become reasonably foreseeable.") (emphasis added); *Scott*, 278 Md. at 169 ("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, in the particular circumstances, the reasonable measures which a landlord is under a duty to take to keep the premises safe."); *cf. McNeal*, 230 Ga. App. at 789, cert. denied, 1998 Ga. LEXIS 584; ("there is a first time for everything"); *Wallace v. Boys Club of Albany*, 211 Ga. App. 534, 536 n. 2, 439 S.E.2d 746 (Ga. Ct. App. 1993) ("An absolute requirement of this nature would create the equivalent of a 'one free bite rule' for premises liability, even if the [proprietor] otherwise knew that the danger existed."); *Sharp v. W.H. Moore, Inc.*, 118 Idaho 297, 796 P.2d 506 (1990) ("there is no 'one free rape' rule in Idaho").
18. *Faheen by Hebron v. City Parking Corp.*, 734 S.W.2d 270, 272-73 (Mo. Ct. App. 1987); *see also Ortell*, 477 So. 2d at 299 (Ala. 1985) (no duty where plaintiff presented evidence of five robberies, one assault with a weapon, one theft, and one burglary on the premises in the prior three-year period on the premises along with evidence that within that same three-year period, in a two-block area surrounding the premises there had been 33 burglaries, eight acts of malicious mischief, eight robberies, and five aggravated assaults).
19. *Paterson v. Deeb*, 472 So. 2d 1210, 1219 (Fla. Dist. Ct. App. 1985), *rev. denied*, 484 So. 2d 8 (Fla. 1986).
20. *See, e.g., Dominion Bank of Washington, N.A.*, 963 F.2d at 1555, n. 6; *Shoney's, Inc. v. Hudson*, 218 Ga. App. 171, 460 S.E.2d 809 (1995) (prior calls admissible evidence towards proving whether defendant knew that it was in a high crime area); *Willie*, 547 So. 2d at 1079 (reports admissible as evidence of the "reported numbers and types of crimes at a location" because, even if not all reports were true, they are an indicator of the kinds and frequency of crimes actually occurring); *Brown v. J.C.Penney*, 297 Or. at 710(large number of reports of complaints of crimes in the immediate area sufficient to get to jury regardless of the types of crimes or whether the crimes were actually committed).
21. Philip M. Gerson, *An Ounce of Prevention*, **Trial**, August 1997, at 55.
22. *Id.*