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Abstract

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KEYWORDS: crimes, liability, landlord

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Introduction

In recent decisions,[1] Florida courts have allowed tenants to recover damages from landlords resulting from criminal acts of third parties which occurred on the landlord's premises. These decisions raise questions regarding the basis of the landlord's duty to provide security, the foreseeability of the crime, and the standard of care to which the landlord will be held.

The decisions of Florida District Courts of Appeal which have addressed the issue share common denominators which will serve to narrow the focus of this note. Each of the three cases dealt with a landlord-tenant relationship in a residential setting where the tenant was the victim of a violent crime.[2] The criminal's access to the premises was accomplished in each instance by entry through a common area. The landlord in all three situations had no prior connection with the criminal; but each landlord had some form of notice of previous crimes on the premises or in the surrounding area.

There is a dearth of Florida cases[3] on the issue of a landlord's liability to his tenant for the violent crimes of a third party. The three district courts which have addressed the issue proposed criteria, albeit hazy, for the finding of duty and foreseeability. Equally vague are the courts' guidelines establishing the standard of care to which the land-

1. Ten Assocs. v. McCutchen, 398 So. 2d 860 (Fla. 3d Dist. Ct. App. 1981); Whelan v. Dacoma Enterprises, Inc., 394 So. 2d 506 (Fla. 5th Dist. Ct. App. 1981); Holley v. Mt. Zion Terrace Apts., Inc., 382 So. 2d 98 (Fla. 3d Dist. Ct. App. 1980).

2. The court in *Holley* describes these reported crimes as "class one" presumably indicating those crimes which are typified by personal injury to the victim. 382 So. 2d at 99.

3. Judge Letts' majority opinion expressly notes the scarcity of Florida case law on the question of a landlord's liability to his tenants for the violent crimes of a third party. 394 So. 2d at 507

lord is to be held.[4] In the following discussion an attempt will be made to predict the possible responses of Florida courts to the questions of: a) whether a landlord has a duty to provide the tenant with security in the leased premises; b) whether the foreseeability of criminal activity on the leased premises can be imputed to the landlord; and c) to what standard of care is the landlord to be held.

Traditionally the landlord has been insulated from liability to his tenant. Consideration will be given to changes in the legal relationship between the landlord and tenant which have caused a diminution in the traditional insulation. In addition, leading cases from other jurisdictions which have addressed the issue of landlord liability will be examined along with the reaction of Florida courts to these decisions.

Background

The court's reluctance to impose liability on landlords for the criminal acts of third parties has its discernable roots in the agrarian based landlord-tenant relationship.[5] The nature of this relationship at early common law centered upon the conveyance of land for a term of years, or an estate at will[6] which gave the tenant a property interest in the land.[7] Once this interest vested, the tenant acquired exclusive possession of, and control over, the land.[8] With power and control came the tenant's unfettered ability to provide self-protection.[9] Hence, it was unreasonable to impose upon the landlord liability for injuries occurring on property over which he had no control or present possessory interest.[10]

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4. 398 So. 2d 860; 382 So. 2d at 100-01.

5. Kline v. 1500 Massachusetts Ave. Apt. Corp., 439 F.2d 477, 481 (D.C. Cir. 1970).

6. 2 *W. Blackstone, Commentaries** 140-42.

7. 2 R. POWELL, THE LAW OF REAL PROPERTY ¶ 221 [1] (P.J. Roahn rev. 1977); 1 CASNER, AMERICAN LAW OF PROPERTY § 1.11 (1952).

8. RESTATEMENT (SECOND) OF THE LAW OF PROPERTY, Historical Perspective (1977); *see generally* R. BOYER, SURVEY OF THE LAW OF PROPERTY (3d ed. 1981) for a discussion of the nature of the leasehold as a mutant of personal and real property interests.

9. R. SCHOSHINSKI, AMERICAN LAW OF LANDLORD TENANT § 1.3 (1980).

10. W. PROSSER, THE HANDBOOK OF THE LAW OF TORTS § 63 (4th ed. 1971); *see generally* AMERICAN LAW OF LANDLORD TENANT, note 9 *supra* for a thorough

Traditional theories of tort liability for acts of a third party were equally narrow.[11] The general rule, that no duty is placed on an individual to control the behavior of a third party which results in physical harm to another is reflected in the *Restatement (Second) of Torts*.[12] But, as set forth in the *Restatement (Second) of Torts*, the general rule has two exceptions: when "(a) a special relation exists between the actor and the third party 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."[13] Employing these exceptions Florida courts have limited finding the existence of a special relationship to innkeeper-guest, common carrier-passenger, and business-invitee relationships.[14] The landlord-tenant relationship has not yet been recognized as sufficiently special for the purpose of imposing liability on the landlord.[15]

Evolution of the Traditional Theories in *Kline v. 1500 Massachusetts Avenue, Inc.*

The United States Court of Appeals for the District of Columbia Circuit considered the traditional landlord-tenant relationship in *Kline v. 1500 Massachusetts Avenue Apartments, Inc.*[16] The plaintiff in *Kline* was a female tenant residing in the defendant's high rise apart-

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treatment of the agrarian tenurial relationship and its gradual progression into the contemporary landlord-tenant setting.

11. SCHOSHINSKI, *supra* note 9, § 4.1.

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

13. *Id.*

14. Orlando Executive Park, Inc. v. P.D.R., 402 So. 2d 442 (Fla. 5th Dist. Ct. App. 1981); Reichenback v. Days Inn of America, Inc., 1981 Fla. Law Weekly 1673 (Fla. 5th Dist. Ct. App. July 15, 1981); Werndli v. Greyhound Corp., 365 So. 2d 177 (Fla. 2d Dist. Ct. App. 1978); Robart v. Jordan Marsh Co., 305 So. 2d 255 (Fla. 3d Dist. Ct. App. 1974).

15. *See* note 42 and accompanying text *infra*. Although Florida district courts have imposed a landlord's duty to take reasonable security measures in the face of foreseeable criminal acts of a third party, the duty stems from either contract obligation, the foreseeability of the criminal acts, or a combination of both. 382 So. 2d 98; 398 So. 2d 860; 394 So. 2d 506. None of the Florida district court decisions imposing the duty do so on the basis of a special relationship between the landlord and tenant. *Id.*

16. 439 F.2d 477 (D.C. Cir. 1970).

ments.[17] She was robbed and assaulted in the hallway of her apartment building and she sought compensation for the injuries she had received.

When the plaintiff initially moved into the building the defendant provided its tenants with some security measures. There were attendants by the front door and in the lobby of the building on a round-the-clock schedule. In addition, garage attendants locked street entrances when they went off duty in the evening. These measures deteriorated to such a degree that, at the time plaintiff was assaulted, the building was unattended and frequently left unlocked. As a result, criminal activity, of which the landlord had notice, occurred on the premises.[18]

Analyzing the traditional theories governing landlord liability,[19] the court discussed the landlord's early common law insulation from liability to tenants and its evolution into the present day landlord's duty to use reasonable care in maintenance of common areas.[20] The court noted that this duty was based on the landlord's exclusive control over undemised areas. Furthermore, the court recognized that the landlord would be liable for tenant injuries caused by his failure to use reasonable care in the maintenance and repair of common areas.[21]

After discussing the general rule that individuals are under no duty to protect others from the crimes of third parties, the *Kline* court

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17. The *Kline* court notes that portions of defendant's building housed office space. *Id.* at 487 n.24. This fact is not determinative to the *Kline* court in light of the fact that the assault on plaintiff took place well past normal business hours.

> To this we add our own comment that it is unlikely . . . that a patron of one of the businesses, even if disposed to criminal conduct, would have waited for five hours after the usual closing time to perpetrate his crime - especially one of a violent nature. Further, although it is not essential to our decision in this case, we point out that it is not at all clear that a landlord who permits a portion of his premises to be used for business purposes and the remainder for apartments would be free from liability to a tenant injured by the criminal act of a lingering patron of one of the businesses. If the risk of such injury is forseeable, then the landlord may be liable for failing to take reasonable measures to protect his tenant from it.

Id.

18. *Id.* at 479.

19. *See* notes 9-14 and accompanying text *supra.*

20. 439 F.2d at 480-81.

21. *Id.* at 481; *see also* Marlo Invs., Inc. v. Verne, 227 So. 2d 58 (Fla. 4th Dist. Ct. App. 1969).

listed the traditional reasons for its application to the landlord-tenant relationship:

> judicial reluctance to tamper with the traditional concept of the landlord-tenant relationship; the notion that the act of a third person in committing an intentional tort or crime is a superseding cause of the harm to another resulting therefrom; the oftentimes difficult problem of determining foreseeability of criminal acts; the vagueness of the standard which the landlord must meet; the economic consequences of the imposition of the duty; and conflict with public policy of allocating the duty of protecting citizens from criminal acts to the government rather than the private sector.[22]

Implicit in this catalogue of reasons is the court's hesitancy to establish a duty for which a basis and standard of care are difficult to ascertain. On the other hand the *Kline* court stated that "the rationale falters when it is applied to the conditions of modern day apartment living . . . . The rationale of the general rule exonerating a third party from criminal attack has no applicability to the landlord-tenant relationship."[23] Thus, the establishment of the landlord's duty to use reasonable care to protect a tenant from the foreseeable crimes of a third party[24] ultimately rests on the anachronistic character of the general rule and the foundation laid by the duty to use ordinary, reasonable, prudent care in the maintenance of common areas.

In establishing the landlord's duty, the *Kline* court emphasized the landlord's control over the common areas and his power to regulate security.[25] This power and control over the common areas has shifted from the tenant, where it rested in the agrarian relationship, to the landlord in the contemporary setting. In the court's opinion the tenant

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22. 439 F.2d at 481.

23. *Id.*

24. The court in *Kline* declines credit for creating this exception to the general rule choosing rather to view the decision as an amplification of the holding in Kendall v. Gore Properties, Inc., 236 F.2d 673 (D.C. Cir. 1956). *Id.* at 485 n.19. The court in *Kendall* was faced with an issue which can be distinguished from *Kline* in that plaintiff's decedent in *Kendall* was strangled by an employee of the landlord. The gravamen of plaintiff's complaint was not the landlord's failure to provide adequate security but rather the negligent hiring and supervision of the employee.

25. 439 F.2d at 481.

no longer has the control and the power necessary to adequately protect himself against the violent crimes of third parties. This shift of power, coupled with the landlord's notice of criminal activity on the premises led the court to conclude that "it d[id] not seem unfair to place upon the landlord a duty to take those steps which are within his power [and] to minimize the predictable risk to his tenant."[26] This analysis provided the reasoning underlying imposition of tort based liability on the landlord. It stopped short, however, of declaring the landlord-tenant relationship as 'special' for the purpose of establishing a *prima facie* duty such as found in the innkeeper-guest relationship.

The court broadly defined foreseeability in terms of the probability and the predictability of the criminal acts of third parties.[27] Other than the broad range of conceivable situations suggested by these terms, the *Kline* decision offered no guidelines as to fact patterns which might be predictable or establish foreseeability. The court recognized that the finding of a duty without guidelines would result in uncertain and inconsistent application of the duty,[28] but the standards it set forth, i.e., predictability and probability, do little to alleviate these pitfalls.[29]

After examining the traditional property interpretation of the leasehold interest, which it found to be anachronistic,[30] the court suggested an alternative basis of recovery founded on contract theory. The basis for this alternative recovery is found in the holding of *Javins v. First National Realty Corp.*[31] *Javins* advocated departure from the feudal based interpretation of the landlord-tenant relationship in favor

26. *Id.*

27. *Id.* at 483. The court takes issue with the looser definition set forth by the New Jersey Supreme Court in Goldberg v. Housing Auth. of Newark, 38 N.J. 578, 186 A.2d 291 (1962) which defined foreseeability with a view towards possibilities as opposed to probabilities. The *Kline* court presumably is not engaging in a semantic discussion, but rather underscoring the thought that its decision is not a radical departure from prior case law. *See* note 24 *supra.*

28. 439 F.2d at 481.

29. *See generally* Selvin, *Landlord Tort Liability for Criminal Attacks on Tenants: Developments Since Kline*, 9 REAL EST. L.J., 311 (1981); Comment, *The Landlord's Duty in New York to Protect His Tenant Against Criminal Intrusions*, 45 ALB. L. REV. 988 (1981); Note, *Security: A New Standard For Habitability*, 42 U. PITT. L. REV. 415 (1981).

30. 439 F.2d at 481. *See* note 25 and accompanying text *supra.*

31. 428 F.2d 1071 (D.C. Cir. 1970).

of one based on contract theory, recognizing "the modern trend toward treating leases as contracts [as] wise and well considered."[32] In *Kline*, this interpretation was the groundwork for implying that the landlord assumed a contractual obligation to provide security.[33] The landlord's power and control over common areas again were found at the heart of his obligation.[34] *Kline* suggests that the landlord's contractual obligations to repair the common areas may be more far-reaching than those imposed by tort theories.[35] By using contract theory the court placed "the duty of taking protective measures guarding the *entire premises* and the areas peculiarly under the landlord's control against the perpetration of criminal acts upon the landlord, the party to the lease contract who has the effective capacity to perform these necessary acts."[36]

Finally, the *Kline* court suggested a landlord's duty to provide security might be found by analogy to recognized special relationships.[37] The court suggested an analogy to the innkeeper-guest relationship[38] because of its contractual nature and the court's perception of the landlord-tenant relationship as one of its modern equivalents.[39] The analogy is predicated on the identical factors used in establishing foreseeability in tort and contract based duties: power and control. The court reasoned that where "the ability of one of the parties to provide for his own protection has been limited in some way by his submission to the control of the other, . . . [the] duty should be imposed upon the one possessing control . . . ."[40] However, courts of other jurisdictions have overwhelmingly found the landlord-tenant relationship to be outside the confines of recognized special relationships.[41] Therefore, the analogy based duty found in *Kline* has had, at best, a tepid reception.[42]

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32. *Id.* at 1076.
33. 439 F.2d at 481.
34. *Id.* at 482.
35. *See* note 21 and accompanying text *supra.*
36. 439 F.2d at 482 (emphasis supplied).
37. *Id.* at 485.
38. *Id. See also* note 14 *supra.*
39. *Id.*
40. *Id.* at 483.
41. SCHOSHINSKI, *supra* note 9, § 1.3.
42. Gulf Reston Inc. v. Rogers, 215 Va. 155, 207 S.E.2d 841 (1974); Ten Assocs. v. McCutchen, 398 So. 2d 860; Whelan v. Dacoma Enterprises, Inc., 394 So. 2d 506; Scott v. Watson, 278 Md. 160, 359 A.2d 548 (Ct. App. 1976); Hall v. Frakoni, 68

Tort and contract theories as applied in *Kline* present litigants with a practicable means of establishing a landlord's duty although the innkeeper-guest analogy has met with little success. The remainder of this note will examine Florida's reaction to tort and contract theories, as well as the treatment they have received in other jurisdictions.

Florida's Reaction to *Kline* and its Progeny

The *Kline* court used the modern contractual construction of the leasehold, as suggested in *Javins,*[43] to find landlord duty, and Florida generally has accepted the same interpretation of the leasehold interest.[44] This approach removes the obstacles associated with traditional property-oriented methods of lease interpretation. *Holley v. Mt. Zion Terrace Apartments, Inc.* and *Ten Associates v. McCutchen*[45] acknowledged the existence of a contractual duty to provide security. In neither case did the landlord overtly assume to protect the tenant from crimes of third parties.[46]

Florida's Third District Court of Appeal, in *Holley*[47] approved and followed the *Kline* inroads to landlord liability when it set aside a summary judgment in favor of the landlord.[48] In *Holley* the defendant leased an apartment located in a high crime area to the plaintiff's decedent.[49] The defendant instituted and charged fees over and above the

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Misc. 2d 470, 330 N.Y.S.2d 637 (Civ. Ct. 1972); *but see* Trentacost v. Brussel, 82 N.J. 214, ___, 412 A.2d 436, 441 (1980) where the court in dictum indicates that reconsideration of the feasibility of a special duty based on the landlord-tenant relationship might be in order.

43. *See* note 31 and accompanying text *supra.*

44. The case generally credited as Florida's acceptance of a contractual interpretation of the leasehold interest is Butler v. Maney, 146 Fla. 41, 200 S. 226 (1941).

45. 382 So. 2d 98; 398 So. 2d 860.

46. Presumably since *Holley* and *McCutchen* have legitimized recovery based on implied contractual obligations the landlord's duty would be crystalline in a factual setting with an express assumption of the landlord's obligation to provide security. Research has not divulged a landlord who was willing to expressly assume this obligation. *Id. See* note 15 and accompanying text *supra.*

47. 382 So. 2d 98.

48. *Id.* at 99-100. In order for the *Holley* court to find the existence of a genuine issue of fact regarding the defendant's conduct which might give rise to liability, the court first had to recognize that the landlord had a duty to provide security.

49. 382 So. 2d at 99.

agreed rent for security measures it subsequently abandoned.[50] The court greatly emphasized that although the defendant continued to derive income from these fees,[51] none of this money was spent on security the year plaintiff's decedent was raped and murdered.[52] In finding that a contractual duty to provide security existed, the court focused on the defendant's continued acceptance of these additional monies. It found that receipt of the fees raised a genuine issue as to whether the landlord had implicitly assumed to provide protective measures for the tenants. The existence of this factual question required reversal of the summary judgment; thus the cause was remanded for further determination.[53]

The *Holley* decision also established a duty on the landlord based on the foreseeability of criminal acts as set forth in *Kline*.[54] The court found foreseeability via its reference to the frequency of reported violent crimes on the landlord's premises.[55] The foundation for finding foreseeability in *Holley* stemmed from defendant's notice of crime in the area.[56] Not only were crimes frequently reported, but the defendant himself refused to accept cash for business transactions on the premises.[57]

It is apparent that an individual landlord's notice[58] of repeated criminal incidents on, or near, his premises is determinative in finding sufficient foreseeability to impose liability.[59] A broad range of circum-

50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.* at 100.
54. *Id.* at 99.
55. *Id.*
56. *Id.* at 100.
57. *Id.* at 99.
58. An issue which conceivably would have a great impact on Florida's non-resident landlords deals with basing the duty to protect against foreseeable criminal acts on constructive notice. The court in *Kline* refers to numerous police reports of crimes on the landlord's premises and states that the "reports in themselves constitute constructive notice to the landlords." 439 F.2d at 479 n.2.
59. *But see* Trentacost v. Brussel, 82 N.J. at ___, 412 A.2d at 443, where, in dictum, the New Jersey Supreme Court indicates that a landlord's duty to protect tenants from foreseeable criminal acts of third persons might be founded on a breach of an implied warranty of habitability which the court reasoned "exists independently of . . . [the landlord's] knowledge of any risks, [hence] there is no need to prove notice of

stances have provided a landlord with the necessary notice for the imposition of a duty based on foreseeability. Florida decisions indicate that the location of the landlord's premises in a high crime area may be sufficient to impose this duty.[60] Other jurisdictions have suggested that any of the following factual settings warrant imposition of a foreseeability based duty: a) previous crimes specifically on the landlord's property;[61] b) possession of "composite drawings of the suspect and a general description of his *modus operandi*" coupled with the knowledge that prior crimes meeting this description had occurred on, or near, the landlord's premises;[62] c) the posting of a notice by the landlord informing the tenants of the commission of crimes on the premises.[63]

The question of whether the criminal attack must occur in an area under the landlord's exclusive control apparently presents little controversy. The murder in *Holley* did not occur in the common area, under the landlord's exclusive control; rather, the act occurred in the decedent's apartment which was entered through a window adjoining the building's common walkway.[64] However, this fact did not preclude recovery where "the basis of the plaintiff's case [was] the almost undisputed fact that the intruder could have entered the apartment only through the common walkway . . . ."[65]

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such a defective and unsafe condition to establish the landlord's duty." It could be argued that faced with the proper situation New Jersey courts would dispense with the notice requirement found in the vast majority of other jurisdictions. For a sampling of these holdings, *see* cases cited in notes 59-61 *infra*.

60. 398 So. 2d 860; 394 So. 2d 506.

61. Scott v. Watson, 278 Md. at ___, 359 A.2d at 554. The court in *Scott* "think[s] this duty arises primarily from criminal activities existing on the landlord's premises, and not from knowledge of general criminal activities in the neighborhood." *Id.*

62. O'Hara v. Western Seven Trees Corp., 75 Cal. App. 3d 802, 142 Cal. Rptr. 487 (Ct. App. 1977). In addition, there apparently had been previous rapes in the same building that the plaintiff inhabited. *Id.*

63. Sherman v. Concourse Realty Corp., 47 A.D.2d 134, 365 N.Y.S.2d 239 (App. Div. 1975); *but see* Dick v. Great South Bay Co., 106 Misc. 2d 686, 435 N.Y.S.2d 240 (Civ. Ct. 1981) wherein the court held that plaintiff's failure to prove prior criminal activity did not negate her cause of action. Plaintiff sought recovery from her landlord for injuries she suffered in a robbery in the hallway of her apartment building. *Id.*

64. 382 So. 2d at 99.

65. *Id.* at 101. *See also* 75 Cal. App. 3d at ___, 142 Cal. Rptr. at 490, wherein

In Florida, the related question of whether a previous crime must be of the same specific kind as the one complained of remains unanswered in the context of the landlord-tenant relationship.[66] The Court of Appeals of the District of Columbia responded to the question in *Spar v. Oboya*,[67] where the tenant was shot as he was walking through an unsecured door into the foyer of his apartment building. The landlord argued that a record of prior robberies was inadequate to establish that he could have foreseen a shooting.[68] The court found no merit in this argument in light of "evidence of (a) individual apartment units of the building being burglarized . . ., and (b) the presence of unauthorized persons in the building."[69] The court in *Spar* considered these factors collectively and concluded the prior incidents were sufficient "to have put . . . [the landlords] on notice of the likelihood of unauthorized entry into the building by persons with criminal intent."[70] It is possible that a stricter standard than that used in *Spar* will be required by Florida courts. The application of a stricter standard was suggested by the Fourth District Court of Appeal in *Relyea v. State*.[71] The plaintiff alleged that the assault and murder of students at a state university was the result of inadequate security.[72] However, plaintiff was unable to prove the incidence of prior assaults on campus, the "similar criminal acts committed" requirement necessary for a successful recovery.[73]

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the landlords "contend[ed] that the fact the assault took place inside [the tenant's] apartment should absolve them, since she, not they had control over the common area. This fact is not determinative. Failure to take reasonable precautions to safeguard the common areas under . . . [the landlord's] control could have contributed substantially, as alleged, to [the tenant's] injuries." *Id.*

66. *See* dissenting opinion by Judge MacKinnon in *Kline*. He takes issue with a finding of notice on the landlord's part arguing that evidence of "one solitary instance of an assault and robbery is an insufficient base to support a finding that assaults and robberies are a predictable risk from which the landlord would have every reason to expect like crimes to happen again." 439 F.2d at 489.

67. 369 A.2d 173 (D.C. Cir. 1977).

68. *Id.* at 177.

69. *Id.*

70. *Id.*

71. 385 So. 2d 1378 (Fla. 4th Dist. Ct. App. 1980).

72. *Id.* at 1383.

73. *Id.* The *Relyea* court upheld a judgment for the defendant insurance company based on the absence of prior crimes and consequently the unforseeability of the incident complained of. *Id.* The State of Florida and its agents operating the university

The sufficiency of foreseeability alone as a basis for imposition of a duty in Florida is unclear. *Holley* recognized duties based on both foreseeability and contract theories, but the court never declared them to be interdependent or independent. The Fifth District Court of Appeal in *Whelan v. Dacoma Enterprises, Inc.*[74] found a duty existed on the part of the landlord to protect his tenant from the foreseeable criminal acts of a third party despite the absence of any allegation of a contractual obligation. Certainly this holding suggests that the court is amenable to imposition of a duty based on foreseeability alone.[75] It could be argued that this hypothesis is supported, implicitly, in Judge Beranek's dissenting opinion in *Whelan.*[76] He would require either the landlord's express or implied contractual obligation to provide security prior to

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in question were exempted from liability based on theories of sovereign immunity. *Id.* at 1381.

74. 394 So. 2d 506. Although *Whelan* emanates from Florida's Fifth District, the panel is comprised of Judges Letts, Downey and Beranek all of whom are Fourth District judges. It could be argued that presented with a similar case the Fourth District would impose liability similar to that found in *Whelan.*

75. The court in *Whelan* notes the absence of any allegation of statutory violations on the landlord's part. FLA. STAT. § 83.51 (2)(a) (1973)(emphasis supplied) provides:

> Unless otherwise agreed in writing, in addition to the requirements of subsection (1) which deals with health code violations and structural requirements, the landlord of dwelling units other than a single-family home or a duplex shall, at all times during the tenancy, make *reasonable* provisions for:
>
> 1. . . .
>
> 2. Locks & keys
>
> 3. The clean and safe condition of common areas . . . .

This portion of the Landlord Tenant Act apparently has never been presented as a basis for recovery for injuries resulting from a criminal attack. The likelihood of success on such a basis is limited in light of the holding in deJesus v. Seaboard Coast Line R. Co., 281 So. 2d 198, 200 (Fla. 1973), and Beaches Hosp. v. Lee, 384 So. 2d 234, 237 (Fla. 1st Dist. Ct. App. 1980). Both the Florida Supreme Court and the First District Court of Appeal concluded that violation of a statute which does not impose strict liability is not negligence per se, but rather evidence of negligence. It is interesting to note that FLA. STAT. § 83.51(2)(a) requires a landlord to employ *reasonable* measures. This standard presents the same difficulties as tort and contract recoveries in failing to establish parameters of conduct for the landlord. *See* note 89 and accompanying text *infra.*

76. 394 So. 2d at 508-09.

the imposition of duty.[77] The dissent's addition of a prerequisite contractual duty suggests that Judge Beranek also viewed the majority's decision as approval for landlord duty based on foreseeability alone.

Whether Florida will impose a duty based solely on foreseeability is clouded by the Third District Court of Appeal in the *McCutchen* opinion.[78] The court in *McCutchen* imposed a duty on a landlord to use reasonable care in providing his tenants with protection against criminal acts of third parties without stating whether this duty arose from a tortious or contractual basis. The facts in *McCutchen* showed the defendant's apartment complex was located in a high crime area where there had been "substantial criminal activity within the year prior to the attack on McCutchen . . . . "[79] Furthermore, defendant's advertisements specifically referred to the provision of twenty-four hour security services.[80] Based on these facts the court concluded that the landlord "clearly recognized and assumed the duty to protect his tenants from foreseeable criminal conduct."[81] Noting the presence of both foreseeability and express or implied contractual duties the court specifically declined to decide "whether in Florida foreseeability alone is a sufficient basis for finding the duty, or whether, in addition, a landlord must expressly or impliedly assume such a duty."[82]

The stage is set for potential conflict between at least two of Florida's five judicial districts. There is a suggestion that the *Whelan* court is amenable to the imposition of a landlord's duty based on foreseeability alone.[83] The *McCutchen* court expressly declined to decide whether either tort or contract theories would serve independently as a basis for finding a duty to provide security.[84] Obviously, without a duty to provide security a landlord cannot be held liable for injuries resulting from inadequate security. As such, the basis for the landlord's duty is a critical element of an action seeking recovery for injuries resulting from inadequate security measures and clarity of the requisite basis of the

77. *Id.* at 508.
78. 398 So. 2d 860.
79. *Id.* at 1023.
80. *Id.*
81. *Id.*
82. *Id.* at 1024 n.2.
83. *See* note 74 and accompanying text *supra.*
84. *See* note 81 and accompanying text *supra.*

duty undoubtedly would be helpful to litigants, their counsel and the courts.

The decisions of *Holley, McCutchen* and *Whelan*[85] embrace the landlord's duties under contract and tort theories to provide a tenant with protection from the foreseeable crimes of a third party. The recognition of the threshold requirement of duty, however, does not establish a landlord's liability nor does it guarantee a tenant's recovery for injuries suffered.[86] The next question becomes: what measures must a landlord take in order to discharge this duty? Certainly the answer to this question is of paramount concern to the landlord, in his attempt to avoid incurring liability,[87] and to the tenant, in his attempt to prove an actionable breach of duty.[88]

As in most situations where the issue hinges upon an individual's use of ordinary, reasonable, prudent care, Florida courts have placed the responsibility of determining the issue on the jury.[89] In attempting to offer a prediction of the jury's determination of the standard of care,

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85. *See* note 1 *supra.*

86. Navajo Circle, Inc. v. Developments Concepts Corp., 373 So. 2d 689, 691 (Fla. 2d Dist. Ct. App. 1979).

87. "One who has performed his full duty with respect to the exercise of care is not liable for an injury to the person of another . . . ." Robb v. Pike, 119 Fla. 833, ___, 161 So. 732, 734 (1935).

88. In addition to proving duty and subsequent breach the tenant should be aware of possible defenses to actions sounding either in contract or in tort. A thorough analysis of the possible defenses is beyond the scope of this note, however, *see* John's Pass Seafood Co. v. Weber, 369 So. 2d 616 (Fla. 2d Dist. Ct. App. 1979); Smith v. General Apt. Co., 133 Ga. 927, 213 S.E.2d 74 (Ct. App. 1975); FLA. STAT. § 83.47 for an indication of the effect of exculpatory clauses on a landlord's liability to a residential tenant. *See* 382 So. 2d at 101; Scott v. Watson, 278 Md. 160, 359 A.2d 548 (Ct. App. 1976); Gibson v. Avis Rent-a-Car Sys., Inc., 368 So. 2d 520 (Fla. 1980), for rejections of arguments seeking to dispel liability based on proximate cause where the foreseeability of intervention and the resultant avoidable harm is the negligent conduct in itself. *See* Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973); Blackburn v. Dorta, 348 So. 2d 287 (Fla. 1977); Kuhn v. Harless, 390 So. 2d 721 (Fla. 4th Dist. Ct. App. 1980); 394 So. 2d at 508 for language to the effect that, in Florida, a plaintiff's comparative negligence would not preclude recovery.

89. "Under our system, it is peculiarly a jury function to determine what precautions are reasonably required in the exercise of a particular duty of due care." 382 So. 2d at 100-01. *See also* Bennett v. Mattison, 382 So. 2d 873, 875 (Fla. 1st Dist. Ct. App. 1980).

consideration of the findings of other courts offer little elucidation. Other courts have suggested provisions ranging from a lock "capable of adequately performing the function to which it was put"[90] to avoidance of conditions which are "conducive to criminal assaults."[91] The spectrum of reasonable care seems to range from preventive measures[92] to steps which avoid fostering the criminal's purposes.[93] In essence the range consists of the subtle distinction between keeping an incident from happening and not promoting its occurence.

In light of the prominent role a jury plays in finding what is currently demanded of an ordinary, reasonable, prudent landlord, it is virtually impossible to accurately predict what measures will satisfy a landlord's duty in any but the most extreme cases. The Court of Appeals of the District of Columbia Circuit in *Ramsey v. Morrisette* addressed the question of standard of care as follows: "We by no means suggest that there is a general legal duty on the landlord to provide full time resident managers or to install locks on the front door of an apartment house. The test is what is reasonable in all the circumstances."[94] Ultimately, as suggested by *Ramsey*, and alluded to by the Florida courts, the fact finder will have to make a determination of reasonable care considering the facts and circumstances of each individual case.

Conclusion

Under traditional property interpretations of the leasehold interest, and tort concepts basing liability on the existence of a special relationship, a landlord was exempted from liability to a tenant for the crimi-

90. Warner v. Arnold, 133 Ga. App. 174, ___, 210 S.E.2d 350, 353 (1974). It is interesting to note that the *Warner* court defines adequate security measures in terms of adequacy. The definition of a word which employs the word sought to be defined has never proven effective and serves to emphasize the elusive nature of the standard of care.

91. Johnston v. Harris, 387 Mich. 569, 198 N.W.2d 409 (1972). This case deals with the inadequacy of locks and illumination. Apparently the testimony of a public lighting expert who drew corollaries between the inadequacy of the lighting and the high incidence of crime carried some weight in the court's decision.

92. *E.g.*, the installation of locks. 133 Ga. App. 174, 210 S.E.2d 350.

93. *E.g.*, increasing the intensity of lighting to provide an atmosphere which discourages criminal activity. 387 Mich. 569, 198 N.W.2d 409.

94. 252 A.2d 509, 512 (D.C. Cir. 1969).

nal acts of a third party. Two of Florida's district courts have limited a landlord's exemptions and imposed upon him a duty to provide adequate security measures in instances where a landlord has contractually assumed that obligation or when criminal acts of third parties are foreseeable.[95] The question of whether Florida will impose a duty to provide security based on the tort concept of foreseeability alone remains unanswered.

Even when the duty has been established, circumstances constituting foreseeability appear unsettled. Notice of prior criminal activity, hence foreseeability, is elementary to the imposition of a duty. Whether to constitute notice these prior activities must have occurred on the landlord's premises and whether the incidents must be of the same kind as the acts complained of remains unclear in the context of the landlord-tenant relationship.[96] Furthermore, Florida decisions do not indicate whether the landlord must have actual notice of the incidents of crimes on, or near, his premises.[97]

The determination of fulfillment of the standard of care continues to be a factual question for the jury to decide. Cases from other jurisdictions indicate that these decisions will be made on a case by case basis. Florida courts have not expressly adopted the case by case approach in the context of a landlord's use of reasonable care to protect his tenants from the criminal acts of third parties. However, application of a case by case approach in the landlord-tenant context is probable in light of its use in other tort actions dependent on a standard of reasonable care.

The threshold question of whether a landlord has a duty to protect his tenants from the foreseeable criminal acts of third parties has been answered affirmatively by two District Courts of Appeal in Florida.[98] Now that a landlord is under an obligation to exercise reasonable care in his provision of security against foreseeable criminal acts, the area of liability resulting from a breach of this duty may be litigated more often. With new cases will come clearer pronouncements by Florida courts on the questions of the basis for the duty, the criteria for finding

95. Florida's Third District Court of Appeal in *McCutchen* and *Holley*, and Florida's Fifth District Court of Appeal in *Whelan*.

96. *See* note 72 and accompanying text *supra*.

97. *See* note 57 and accompanying text *supra*.

98. *See* note 94 *supra*.

foreseeability, and the standards of care to be employed when addressing the landlord's liability to his tenants for the crimes of a third party made possible by inadequate security.

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