

“Place or Character” of a Business: Environmental Criminology and Negligent Security Litigation

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journals.sagepub.com/home/jax**Kevin Fox Gotham**¹**Abstract**

This paper describes the use and application of environmental criminology and social science methods in court cases involving allegations of negligent security. Negligent security is an area of premises liability that involves claims against business owners for damages or injuries on their property due to a lack of security precautions against reasonably foreseeable criminal actions. For decades, courts have embraced the view that the “place or character” of a business may invite criminal conduct and various jurisdictions have asserted that business owners may be under a duty to protect patrons against third-party criminal conduct. Yet, courts have struggled to define precisely how the place or character of a business would make a crime reasonably foreseeable. The paper explains the ways in which courts utilize crime and noncrime data in negligent security cases and discusses the affinities between environmental criminology and expert evidence in the courts. In doing so, the paper highlights the practical application, legal utility, and explanatory power of criminological theories and social science knowledge in the U.S. civil court system.

Keywords

environmental criminology, negligent security, premises liability, crime foreseeability

Introduction

The purpose of this paper is to illustrate the ways in which researchers can use criminological theories and social science methods to generate information and data to assist courts in determining case-specific facts, using examples drawn from negligent security litigation. A premises liability for negligent security lawsuit is a claim for damages in civil court on behalf of a crime victim against the owner or controller of the premises where the crime event occurred (Kaminsky 2008). The injury in a negligent security case may arise out of robbery, rape, assault, carjacking, kidnapping, or battery. The victim of the crime usually asserts that business owner failed to prevent foreseeable and avoidable attacks from happening. Even though the business owner did not actually commit the crime, the crime victim will claim that the court should hold the owner liable for the crime and therefore compensate the crime victim for his or her injuries. To impose civil liability in negligent security cases, the crime victim must first establish that the business owner(s)

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had a duty under the law to provide adequate security measures or undertake precautions to protect the victim from the criminal acts of other persons.

Over the last several decades, courts in the United States have been increasingly holding landlords, inn keepers, and other business owners liable for failing to take sufficient security precautions to prevent criminal attack on their invitees, tenants, and guests. Multimillion-dollar settlements and jury verdicts against business owners and landlords have become commonplace, not only for physical and psychological injuries suffered by victims of crime but also involving punitive and compensatory damages against corporate entities for negligence (Anderson 2002; Bates 2004; deTreville, 2004). In 2012, juries awarded \$1.7 million to a plaintiff after a fatal stabbing at a nightclub; \$1.6 million dollars to a plaintiff who was raped at mobile home park; \$68,318.14 to a patron assaulted at a bar; and \$8,010,000 to the estate of a man shot and killed in parking lot while walking to his vehicle (LexisNexis 2012). In 2017, a jury awarded the family of a 24-year-old deceased South Florida man almost \$5.5 million after he was shot and killed during a robbery at the carwash he worked at. In 2017, attorneys settled a \$35 million-dollar lawsuit brought by a young man who was severely beaten while leaving the Six Flags over Georgia amusement park in 2007. In May 2018, a jury in Georgia handed down a \$1 billion verdict against a security company after an apartment complex guard was convicted of raping a 14-year-old girl (Brumback 2018; Victor 2018). These reported cases are only the tip of the iceberg, however. Far more cases go unreported because they are resolved by settlement between the parties before trial, and these settlements can often involve amounts exceeding a million dollars.

I have two major goals in this paper. First, I demonstrate the ways in which sociologists and criminologists can use the theoretical variants of environmental criminology to interpret legal facts in court cases involving premises liability for negligent security. For decades, courts have embraced a view that the “place or character” of a business may give rise to a duty to protect patrons against third-party criminal actions. Evaluating the criminogenic nature of the place or character of a business can be a complicated research task and courts have struggled to identify various tests, criteria, or parameters regarding how “place” or “character” is to be established or assessed. I explore the extent to which forensic social scientists can use the research strategy of triangulation—for example, the combination of data sources and methods—to assess whether the place or character of a business favors imposing a duty to guard against crime events. Triangulation involves comparing and contrasting different methods and sources of data as a means of fact checking and verification (Denzin 2012; Flick 2018). In this paper, I describe how forensic social scientists can apply triangulation to address counterfactual evidence and conflicting results, and enhance the overall credibility of a forensic criminological investigation.

Second, I describe the various social science methods and data analytic techniques sociologists and criminologists can use to evaluate crime foreseeability and address causation in the analysis of crime events. Foreseeability and causation are two factors that a plaintiff must prove to prevail in a lawsuit (the other two factors are breach of duty and damages/harm). Both plaintiffs and defendants in negligent security lawsuits frequently use criminologists, psychologists, or sociologists to build their cases and examine premises liability from the perspective of foreseeability (as it relates to duty), breach of duty, causation, and damages in individual cases. The paper shows the legal applicability of social science research methods in lawsuits in which meanings of crime foreseeability are contested terrain, subject to conflict and struggle between plaintiff and defendant attorneys to persuade (or dissuade) a judge and jury as to the scientific relevance of expert testimony. Overall, this paper contributes to the growing literature that documents not only how “social scientists are playing an increasingly important role in the prosecution and defense of both criminal and civil matters before the courts” (Kennedy 2013:233) but how forensic sociology and criminology can enrich and improve the validity and reliability of social science methods and data analysis techniques in general.

Legal Aspects of Security-Related Litigation

Negligent or inadequate security lawsuits can arise in many different situations and socio-spatial contexts. The nature of the claims and counter-claims will vary based upon the unique set of facts, circumstances, and evidence presented in each case. In addition to the specific facts surrounding the crime itself, other factors can influence the merits of each case: the type of premises involved and how that property was being used at the time of the crime; the type and amount of criminal activity known to normally occur on or around the premises; the history or pattern of similar crimes at the premises; the level of security at the premises; the need for security under the circumstances; and the amount of resources committed to meeting such security requirements relative to the size and profitability of the business. In general, negligence means that the property owner failed to use reasonable care in connection with the property.

In a negligent security case, the plaintiff must establish by a preponderance of the evidence that the defendant owed the plaintiff a *duty* to have reasonably safe and secure premises; the defendant *breached* his or her duty by failing to act as the duty required; the defendant's breach of duty *caused* some *harm* or *injury* to the plaintiff. Generally, the landlord or landowner does not owe a duty of care "unless there is a special relationship between the two parties such as that of merchant-invitee, landlord-tenant, innkeeper-guest, public carrier-passenger, or the like" (Kennedy 2006:122). The special relationship imposes a duty of care. Nevertheless, the key ingredient, in connection with this obligation, is that the risk of criminal attack must be "reasonably foreseeable."

These legal principles underlying tort law have been defined and codified in the American Law Institute's (1965) the Restatement (Second) of Torts (Section 344). The Restatement (Second) of Torts specifies the duty of business to take reasonable measures to prevent foreseeable injuries and harms to people that legitimately enter their premises. According to the Restatement,

A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to (a) discover that such acts are being done or are likely to be done, or (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

Section 344 notes that a business owner is "not an insurer of the visitor's safety" but she or he may

know or have reason to know . . . that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual.

In discussing the "Duty to Police Premises," Section 344 asserts the following:

If the *place or character* of his business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection. (Emphasis added)

Since the 1960s, courts have struggled to evaluate how and under what conditions the "place or character" of a business may invite or create opportunities for criminal behavior. In *Early v. N.L.V. Casino Corp.*, 100 Nev. 200, 678 P.2d 683 (1984), an assailant attacked the plaintiff in a

Las Vegas casino restroom. The court held that a duty on the part of the defendant to protect the plaintiff from the attack would arise if, in addition to prior violent crimes on the premises, “the location and character of the Silver Nugget’s business could provide the requisite foreseeability.” According to the court,

a gambling casino where cash and liquor are constantly flowing may provide a fertile environment for criminal conduct such as robbery and assault. Such crimes are most likely to occur, moreover, in areas such as restrooms, which are removed from the protection offered by crowds.

Also, in a recent case before the Oregon Supreme Court, the court ruled that a nightclub shooting death was reasonably foreseeable since

the scene of this shooting was an inadequately secured sidewalk queue where teenagers were waiting to enter a nightclub, late in the evening, in a high-crime urban neighborhood that, based on publicized past experience, posed a risk of violent harm to persons present. (*Piazza v. Kellim*, 377 P. 3d 513. OR: Supreme Court (2016))

The “place or character” of a business specification is one of several general American Law Institute Restatement provisions that have been tailored into four conceptions or “tests” of foreseeability endorsed by various courts. That is, different jurisdictions employ their own tests to assess foreseeability and it is up to a jury to make a determination whether a criminal event on a premises was reasonably foreseeable. One test, the *imminent danger* approach, suggests that a property owner is generally not liable to protect visitors or keep tenants safe from third-party criminal activities unless there is a reason to know that an assailant was aggressive or prone to violence. A *prior similar incidents* approach focuses on the similarity of past criminal events at or near the premises to establish foreseeability and thus determine whether a property owner is liable for negligent security. A third test, the *totality of circumstances* test, considers the existence of prior similar incidents but also other relevant factual circumstances including the crime rates in the surrounding area, place and character of the land use or business that may attract criminals, and the appropriateness of any security measures (e.g., cameras, guards, and lighting) that a business owner has adopted. Finally, the *balancing test* evaluates the foreseeability of harm and the gravity of harm against the commensurate burden imposed on the business to protect against that harm (Gotham and Kennedy 2019; Kennedy 2006, 2013; Kennedy and Sakis 2008).

To prove foreseeability, plaintiffs typically must show that the defendant had actual or constructive prior notice of the type of harm in question. Actual notice refers to past criminal conduct in the general area or on the specific site. Actual notice is important because past events tend to be reliable predictors or forecasters of future events. To determine whether crime is likely to happen in the future, a researcher would examine what has happened in the past, particularly immediate past, and investigate whether there is evidence that the business owner was aware or should have been aware of the danger. Constructive notice refers to environmental and behavioral patterns commonly correlated with crime. A key question to address is whether there are certain characteristics of the environment and land usage around a particular business that would lead a careful observer to reasonably anticipate a criminal attack. Constructive notice may occur independently of actual notice to suggest that a certain level of crime is reasonably foreseeable. Here one would examine whether there was sufficient information available that a reasonably prudent person would have been aware or should have been aware of the danger.

Environmental Criminology and Crime Foreseeability

Several variants of environment criminology provide the theoretical and analytical basis for investigating allegations of negligent security and determining crime foreseeability. These

variants include routine activity theory, crime pattern theory (CPT), rational-choice theory, situational crime prevention (SCP), and crime protection through environment design (CPTED). Common to these approaches is the attempt to identify the contextual or situational risk factors that are causally related to criminal behavior. A core concern is to understand and explain the etiology of a criminal event and identify the situational opportunities that motivate offenders to commit crimes at particular places and times. That is, situational opportunities can help explain individual victimization, and delineate why some places become criminogenic places (for overviews, see Weisburd et al. 2016; Wilcox and Cullen 2018; Wortley and Townsley 2017). According to Bottoms and Wiles (2002),

Environmental criminology is the study of crime, criminality, and victimization as they relate, first, to particular places and, secondly, to the way that individuals and organizations shape their activities spatially, and in so doing are in turn influenced by place-based or spatial factors. (P. 621)

Variants of environmental criminology focus analytical attention on the opportunities that offenders may come across or actively foment to carry out a crime in a particular situation. According to routine activity theory, developed by Cohen and Felson (1979), for a crime to occur, three elements must converge in space and time: (1) a motivated offender, (2) a suitable target, and (3) the absence of capable guardians against a violation. CPT (Brantingham and Brantingham 1995) considers how offenders locate or encounter crime opportunities as part of their routine activities. CPT is chiefly interested in the spatial patterns of crime in a geographical area (e.g., neighborhood, city, region), providing an account of the clustering of crime events in time and space. SCP seeks to reduce crime opportunities by altering the socio-spatial environment through five broad strategies: increase the perceived effort of committing a crime, increase the perceived risks, reduce the perceived rewards, reduce provocations, and remove excuses. SCP is based on a rational-choice model of the offender, one whose behavioral choices are open to and influenced by changes in the immediate environment. A person is more likely to commit a crime if she or he perceives the losses or negatives to be less than the positive gains. Rational refers to a process of decision-making and is not an outcome of behavior. That is, criminal behavior is deliberative and informed by information in the socio-spatial environment (for overviews, see Newman and Clarke 2016; Sidebottom and Wortley 2016).

CPTED uses physical design knowledge and awareness of criminal intent and motivation to reduce crime opportunities and thereby promote community safety. The main principles of CPTED are territoriality, target hardening, access control, surveillance, legitimate activity support, and image/space management. The idea behind territoriality is that people will pay more attention to, protect, and maintain the safety and security of their surroundings if they have a psychological “ownership.” Target hardening refers to alternations in physical design to increase the effort and risk of criminal activity and reduce the benefits or rewards associated with the initiation of a crime. Access control refers to the use of different tools and techniques to limit the ways in and out of place. Surveillance refers to different techniques and activities to detect and record unwelcome intruders. Legitimate activity support refers to design and signage to encourage acceptable behavior (e.g., placement of activities involving money transactions in areas with high levels of activity and with surveillance opportunities). Finally, image/space management refers to efforts to promote a positive image with property upkeep. Proponents of CPTED suggest that routine property maintenance can ensure the continued effective functioning of socio-spatial environment that, in turn, can send a message of territorial reinforcement (Atlas 2013; Cozens and Love 2015; Crowe and Fennelly 2013).

What unites the above variants of environment criminology is the central focus on place—for example, the geographic location or concentration of social activities and socio-physical arrangement of spaces—in providing opportunities or constraints to crime. Some land uses

and particular places including schools, fast food restaurants, nightclubs, and bars have been associated with elevated risks of criminal activities. Some vacant homes in some low-income neighborhoods can become crime “magnets” providing opportunities for criminal offenses (Grubestic and Pridemore 2011; Roncek and Lobosco 1983; Roncek and Maier 1991; Stucky and Ottensmann 2009). Criminologists have also found that busy activity nodes—bus stops, train stations, and so on—can create fertile environments for offenders to target vulnerable and unsuspecting victims (Bernasco and Block 2011; Hart and Miethe 2014; Stucky and Ottensmann 2009; Summers and Johnson 2017; but see Ridgeway and MacDonald 2017 for conflicting evidence).

Convenience stores, shopping centers, and parking lots may attract crime due to convenience of location, teenage loitering, and the multiple opportunities for auto theft, shoplifting, and assault on female shoppers (Brantingham, Brantingham, and Wong 1990; Engstad 1975). Reviews of studies comparing convenience stores with few and many robberies point to the efficacy of several crime deterrent features: unobstructed windows, placement of the cash register so that the entrance can be monitored, and lighted parking areas fully visible from inside the store (Hunter and Jeffery 1992). Criminologists have long known that some parking lots can be hot spots for crime since there are just enough victims to attract the attention of a criminal predator yet not enough people to deter her or him. Parking lots and other land uses and spaces (even natural space in the wilderness) may become criminogenic spaces if these areas offer offenders refuge, and victims limited prospect and escape (Fisher and Nasar 1995; Gatersleben and Andrews 2013; Nasar, Fisher, and Grannis 1993).

In short, the built environment and the social arrangement of land uses and business activities can have an impact on the rates and patterns of different types of crime events (Stucky and Ottensmann 2009). When large volumes of people pass through particular land uses and different social activities, some of these people will commit opportunistic crimes. Different land uses and different routine activity nodes—for example, school locations, shopping areas, entertainment districts, apartments, and so on—may have special characteristics that can pull in people with high levels of criminal motivation and histories of repeat offending. Sherman, Gartin, and Buerger’s (1989) seminal study of calls-for-service in Minneapolis found that during a single year, only 3 percent of all local addresses generated 50 percent of all calls-for-service. This high concentration of criminal events in a small set of places has also been found by Eck, Clarke, and Guerette (2007); Braga, Papachristos, and Hureau (2014); Weisburd and colleagues (2016); and White and Katz (2013). Studies examining so-called “risky facilities” such as bars, parking lots, and convenience stores have found that most places within each category experience little or no crime, while there is small percentage of each facility that accounts for the majority of crime experienced by all the place or facilities in that category (Madensen and Eck 2008; Wilcox and Eck 2011). The takeaway here is that crime is not randomly distributed in the built environment but is concentrated in certain places.

Social Science Evidence and Methods for Determining Crime Foreseeability

Importantly, courts distinguish between foreseeability as a determinant of a business owner’s duty of care to its customers from foreseeability as a determinant of whether a breach of duty is a proximate cause of an injury. La Fetra (2006:410) made a distinction between *duty-foreseeability* cases that “center on the question of whether the property owner should have provided security measures that would have reduced the probability of a certain type of criminal attack” and *causation-foreseeability* cases that “consider whether the property owners’ adoption of the duty-required security measures would have prevented the actual attack that precipitated the lawsuit.” In duty-foreseeability cases, foreseeability as it impacts duty determinations refers to

the knowledge of the risk of injury to be apprehended. The risk reasonably to be perceived defines the duty to be obeyed; it is the risk reasonably within the range of apprehension, of injury to another person, that is taken into account in determining the existence of the duty to exercise care. (P. 410)

Foreseeability that affects proximate cause, however, 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 (p. 410).

Duty-Foreseeability Analysis

One analytical step to determine crime foreseeability is to examine the history and nature of the area or neighborhood in which the crime event occurred. Socioeconomic and demographic factors may suggest the likelihood or not of a convergence of suitable targets, motivated offenders, and lack of capable guardians. The socio-spatial environment is the context within which to evaluate crime foreseeability because spatial-temporal factors can suggest opportunities for motivated offenders to victimize targets at particular properties. Meta-analytic studies have shown that disadvantaged neighborhoods are significantly associated with crime (Ellis, Beaver, and Wright 2009; Hsieh and Pugh 1993; Pratt and Cullen 2005). Disadvantaged neighborhoods are characterized by high levels of poverty, low levels of home ownership or vehicle ownership, frequent residential turnover, meager and few business and cultural amenities, high levels of physical disorder and environmental decay (e.g., graffiti, dilapidated and burnt buildings, abandoned vehicles and appliances, trash and litter), and high levels of social disorder (e.g., open and flagrant drug sales and drug use, prostitution, and unemployed persons loitering) (Hipp 2007; Sampson 2012; Sampson, Raudenbush, and Earls 1997).

Another component of a duty-foreseeability analysis is a thorough investigation of the criminal history of the property and the surrounding area using past law enforcement records summarized by crime category and location of criminal events. Environmental criminology provides the theoretical foundations for this type of crime analysis to the extent that places rather than individuals (offenders and victims) become the fundamental unit of analysis. When investigating the criminal history of a specific property, it is important to examine police incident reports, in-house or contracted security incident reports, and other law enforcement records. Police incident reports may provide a clearer picture about the nature and types of crime occurring on a property compared with police calls for service. The latter may over or undercount crime, whereas police incident reports may provide actual crime known to police (Savard and Kennedy 2014). Moreover, police incident reports can yield much information and provide a qualitative understanding of a particular incident. A forensic criminologist can identify if a particular place is criminogenic by aggregating discrete crime event locations to areal units such as census boundaries or other administrative areas (e.g., patrol districts or police beats) and then examining the spatial association between them. The forensic criminologist should consult with retaining counsel to formulate requests to local law enforcement for access to local crime records. Requests for crime data can include a formal public records request or a subpoena.

Another component of duty-foreseeability analyses is the evaluation of the recency, frequency, and similarity of past crimes on the property and in the vicinity. Courts have generally argued that nonviolent criminal actions do not necessarily predict violent criminal actions (Voigt and Thornton 1996). “Reports of vandalism, theft, and neighborhood disturbances are not enough to make a stabbing death foreseeable” (*Trammell Crow Cent. Texas v. Gutierrez*, 267 SW 3d 13—Tex: Supreme Court 2008). “A criminal act is more likely foreseeable if numerous prior crimes are concentrated within a short time span than if few prior crimes are diffused across a long time span” (*Trammell Crow Cent. Texas v. Gutierrez*, 267 SW 3d 16—Tex: Supreme Court 2008; *Timberwalk*, 972 S.W.2d at 758).

Similarity does not mean identical and the analysis and assessment of foreseeability does not require that “the exact sequence of events that produced the harm [to] be foreseeable” (*Id.* at 756). Rather, for some courts, previous crimes need only be “sufficiently similar to the crime in question as to place the landowner on notice of the specific danger” (*Id.*, 758). Some but not all courts recognize that “crimes fitting one category can relate to or result in crimes of another category: a string of violent crimes such as robberies or assaults can make other violent crimes like murder or rape foreseeable” (*Trammell Crow*, 267 S.W.3d at 16).

Calculating crime rates allows a researcher to compare crime across different geographical areas, land uses, and facilities (Vellani 2010; Voigt and Thornton 1996). By computing the crime rate, a criminologist can make comparisons of properties of similar design and operations in the same city, to similar businesses in the area, and to larger geographic areas such as the city in which the property is situated. To measure the crime rate, a forensic criminologist can compute the volume of offenses experienced against the population of the area which results in a certain number of crimes occurring in that area. Within this information, the forensic criminologist can compare crime across scales—for example, neighborhood, intersection, or city (Calder and Sipes 1992).

Another important factor of a duty-foreseeability analysis is the timeframe in which to examine the criminal history of a property. Both the International Association of Professional Security Consultants (2014) and the American Society for Industrial Security (ASIS) International (2003) suggested a three- to five-year period for examining data sources, such as local police crime statistics, that will provide an understanding of a property’s criminal history. Some forensic criminologists, however, prefer to examine a two- to three-year period. Not surprisingly, plaintiff expert witnesses may want to extend the number of years back while defense experts may prefer to consider a much shorter period. Time limitations on prior similar acts are most likely to be decided during in limine motions preceding trial (Kennedy 2006).

Since there is no standard, universally agreed upon, definition or measure of crime foreseeability, courts may define “reasonable foreseeability” as probable, possible, and/or predictable. Sherman and colleagues (1989) contrasted absolute foreseeability—asking how likely it is that a crime (or type of crime) will occur to any victim at a particular place over some indefinite time period—with relative foreseeability—the statistical probability of some particular crime occurring in a particular location. Jacobs (2005) has argued that foreseeability has two dimensions: theoretical and realistic. Theoretical foreseeability refers to “the *possibility* that a given criminal incident will occur irrespective of time” (pp. 19–20, emphasis in original). In contrast, realistic foreseeability refers to “the *probability* that an incident will occur at a specific place over a specific time period” (p. 20, emphasis in original). According to Jacobs, “realistic foreseeability is a much more precise and meaningful concept” because it “determined through a rate” (p. 20).

Using the strategy of triangulation, a forensic criminologist can use multiple methods to collect multiple forms of data—for example, crime data and noncrime data—with the goal to assist a jury in understanding the various facts of a negligent security case. A duty-foreseeability analysis considers multiple factors including the likelihood that a criminal event may occur in the future based on historical data at the site; the history of criminal events at similar sites; the nature of the neighborhood, immediate vicinity, and overall geographical location; and other situational factors that may affect crime foreseeability. Triangulation can increase the soundness of research findings and produce higher quality results than single data sources and single method studies. Triangulation can also allow the forensic sociologist or criminologist to improve the validity and reliability of findings by searching for convergence, divergence, or contradiction among different sources of information related to the crime foreseeability. By comparing and contrasting the evidence collected from different sources, a forensic sociologist or criminologist can better understand advantages and limitations of each source of evidence.

Causation-Foreseeability Analysis

A business owner's security measures can also become issue in a court case if a plaintiff argues that these measures or lack of were casually related to the injury or harm. Courts may focus on two issues of causation: cause-in-fact and proximate causation. Cause-in-fact means that a certain act, or a failure to act reasonably, was the actual cause of the injury. To determine this relationship, many courts use the "but for" test. This poses the question "but for" the defendant's act or failure to act, would the injury have occurred? Another common test is the "substantial factor" test that addresses the question: was the failure to implement a reasonable security program a substantial factor in the plaintiff's injury or loss? Juries typically decide issues of causation (Kennedy 2006).

As for proximate cause, the plaintiff must show the defendants possessed or should have possessed knowledge concerning the possibility of danger to customers on the property. That is, it was foreseeable that if the defendant did not provide reasonable security, a criminal act would occur. For the plaintiff to support a claim of negligence, there must be a reasonably foreseeable connection between the negligent act of the defendant and the damage suffered by the plaintiff. According to Kennedy (1997),

By "proximate cause" jurists refer to that which, in a natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which the result would not have occurred. It is the cause that necessarily sets any other causes in operation. It may or may not be the cause immediately preceding an effect, but is clearly a principle cause. For the plaintiff to support a cause of action, there must be a reasonably foreseeable connection between the negligent act of the defendant and the damage suffered by the plaintiff. (P. 6, citations omitted)

Causation-foreseeability analyses usually require a security evaluation or assessment of the premises. The purpose is to determine the current state of security and identify any security weaknesses. A key factor in evaluating causality is whether security breaches, failures, or deficiencies more likely than not contributed to the criminal event. To determine the reasonableness of a business's security measures, a criminologist can examine industry standards and evaluate what security measures have been implemented by similar facilities. To establish proximate causation, the forensic criminologist should investigate whether the defendant's violation of the standard of care played a role in facilitating the criminal event that caused the client's injury (Nolan and Connolly 1983). "[N]ot only must a crime be foreseeable for duty to attach, it must also be foreseeable that a given breach would lead to injury" (Kennedy 2006:133). A jury ultimately decides whether a defendant's actions or lack of actions was a proximate cause of a plaintiff's injury. But a forensic criminologist's investigation will reveal the factual background that will allow the fact finder to determine causation and liability.

An important element of a causation-foreseeability analysis is the identification of any cost-effective measures (e.g., adequate key control, effective locks, functioning gates, attentive security guard) that were not in place at the time of the incident and that could have deterred the crime. If an offender enters a tenant's apartment through a defective door lock, for example, then assaults the tenant in the apartment, a plaintiff may be able to establish a strong causal connection between the breach of duty and the injury. The forensic investigation should address whether or not reasonable security measures could have deterred or prevented a crime. To address this issue, a criminologist should examine whether a criminal act is one of "opportunity" or "victim-targeted," a central question that can aid a jury in evaluating the issue of causation. Criminologists have generally found the criminal who acts instrumentally (theft, burglary) to be more deterrable than one whose crimes tend to be expressive (assault, sexual victimization) (Turvey 2013). Whether or not a specific type of criminal (as characterized by forensic criminologists) can be deterred by reasonable security measures can be a major issue of debate. Like the issue of duty,

a jury will assess the issue of causation on a case-by-case basis “after full evaluation of the type of crime, the qualifications of the expert, and the amount of scientifically accepted research available on the topic” (p. 330).

For decades, courts have debated whether the character or place of a business can be a consideration in evaluating the foreseeability of a criminal act. Some courts address whether the “place” of a business within a high-crime urban area justifies imposing a duty on the business to protect others from third-party criminal acts. In particular, Michigan and Washington have rejected the idea that the location of a business in an urban area with a high incidence of crime favors imposing a duty. According to the Washington State Supreme Court, “[w]e have recognized that mere statistical evidence, such as a higher crime rate in a particular city or neighborhood, or a higher crime rate among similar businesses nationwide or statewide, is insufficient to support the imposition of a duty” (*McKown v. Simon Property Group, Inc.*, Wash: Supreme Court 2015). Some courts have taken a pragmatic approach, arguing that “if the premises are located in an area where criminal assaults often occur, imposition of a duty could result in the departure of businesses from urban core areas—an undesirable result” (*Hutchins*, 116 Wn.2d at 236). In *McNeal v. Henry*, the Michigan Court of Appeals held,

Some of our big cities have more than their share of destructive and violent persons, young and old, who roam through downtown department stores and other small retail businesses stealing and physically abusing legitimate patrons . . . We fear that to hold businessmen liable for the clearly unforeseeable third-party torts and crimes incident to these activities would eventually drive them out of business. (*McNeal v. Henry* 82 Mich. App. 88, 90 n.1, 266 N.W.2d 469 (1978))

Related, in *Stafford v. Church’s Fried Chicken, Inc.*, a Michigan District Court rejected a plaintiff’s argument that since the restaurant where a criminal assault occurred was in a high-crime area, the business knew security was necessary to protect the patrons. The court ruled that requiring the business to provide police protection against criminal third parties may compel these businesses to leave those neighborhoods (*Stafford v. Church’s Fried Chicken, Inc.* 629 [E.D. Mich. 1986; F. Supp. 1109]).

Over the decades, courts have found that certain socio-spatial features and situational characteristics of convenience stores/gas stations can create a heightened risk of criminal behavior. In *Cohen v. Southland Corporation*, 157 Cal.App.3d 130, 203 Cal. Rptr. 572, 578 (1984), the California Court of Appeals found that

[i]n the very operation of an allnight [*sic*] convenience store, defendants may be said to have created “an especial temptation and opportunity for criminal misconduct,” thus increasing the foreseeability of injury resulting from third party misconduct in the early morning hours. (*Ann M. v. Pacific Plaza Shopping Center*: 863 P. 2d 207—Cal: Supreme Court 1993)

In *Richardson v. QuikTrip Corp.* (81 S.W.3d 65 Mo. Ct. App. 2002), a customer (the plaintiff) was raped by an unknown assailant in a gas station restroom in Kansas City. The restroom was only accessible from outside the building, and originally had locks installed. However, the gas station’s employees removed the locks because past customers repeatedly walked off with the keys. As a result, the plaintiff was not able to lock the restroom door, the assailant entered the restroom while the plaintiff was in it, and he raped her. The Court held the gas station owed the plaintiff a duty of care to protect her from the criminal acts of third parties based on a totality of the circumstances test. The evidence in the case supported a finding of foreseeability where (1) the restroom was only accessible from the outside, out of the view of employees and security cameras; (2) the gas station operated 24 hours, making it a greater target for crime; and (3) the gas station’s own policies recognized the threat of crime, in that it had installed locks on the

restroom in the past (and only removed them out of convenience) and the store prohibited employees from taking out the trash at night.

In *Bryant v. Lawson Milk Co.* (22 Ohio App. 3d 69—Ohio: Court of Appeals 1985), an employee had been assaulted and raped while working as a clerk at a Lawson convenience store in Ohio. The court of appeals held that evidence offered by the victim created a triable issue of fact as to whether her injuries were a foreseeable outcome of the nature of the business and the deficient security measures. The evidence showed that the employee was required to work alone on the third shift from 11:00 p.m. to 6:00 a.m.; that she had no means of communicating from the store except by pay telephone; that no security devices were provided in the store except for a mounted camera which seldom worked and on the night of the incident had no film; she received no training on personal or employee security; the defendant had experienced 274 robberies in its Columbus area stores in the past five years; and in the five-year period of May 13, 1978, to May 13, 1983, there had been nine robberies at the South Fourth Street store (*Id.* at 73, 488 N.E.2d 934).

The above points suggest that triangulation can be a useful methodological tool to assist a judge and jury determine the issues of fact in a negligent security case. Olsen (2004) suggests that triangulation can help generate a “dialectic of learning” in which a researcher can employ validation and falsification strategies to untangle complex interacting causal mechanisms. Flick (2018) suggests that triangulation can be means to increase the scope, depth, and consistency of a study’s findings and to help confirm the results of the research. In a causation-foreseeability analysis, a forensic criminologist can use qualitative and quantitative methods to address whether an intentional criminal act was a superseding cause that broke the chain of causation between a defendant’s negligence and the plaintiff’s injury. A forensic criminologist can also triangulate data sources and methods to evaluate whether the incorporation of various security measures could have prevented an actual attack that precipitated a lawsuit. Triangulation encompasses a dual-strategy to increase the validity of research results, and increase the scope, depth and consistency in forensic criminological investigations.

Conclusion

For decades, courts have wrestled with question of whether the place or character of a business represents a relevant factor in assessing the risk of a violent crime. Generally, courts have looked with skepticism on claims that the place or character of a business, without a history of criminal assaults and violence, is a relevant factor in assessing the risk of a criminal event—*Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn.2d 217, 236, 802 P.2d 1360 (1991); *Errico v. Southland Corp.*, 509 N.W.2d 585 (Minn. App. 1993); *Basicker v. Denny’s, Inc.*, 704 (Ind. Ct. App. 1999; N.E.2d 1077). By themselves, the place or character of a business may not be conditions that will determine whether a criminal attack against a patron is reasonably foreseeable. Place or character may influence initial crime risk or become a driver for heightening crime risk. Place or character are not singular conditions or homogenous and clearly defined variables. They only make sense as components of a foreseeability analysis in the context of other factors.

As I have pointed out in this paper, triangulation can be a useful strategy for the forensic criminologist to use to consider the specific combinations of factors that can influence the opportunity structure of crime events at particular places. That is, triangulation can help a forensic criminologist understand place or character as part of the puzzle of facts and circumstances that she or he must evaluate and weigh on a case-by-case basis. The place or character of a business can be one element of the overall investigation of crime foreseeability. Other relevant facts include, as noted in this paper, the proximity, recency, frequency, similarity, and publicity of criminal acts. Importantly, courts will generally consider these factors together in determining whether criminal conduct was foreseeable. Thus, as one court has noted,

the frequency of previous crimes necessary to show foreseeability lessens as the similarity of the previous crimes to the incident at issue increases. The frequent occurrence of property crimes in the vicinity is not as indicative of foreseeability as the less frequent occurrence of personal crimes on the landowner's property itself. (*Timberwalk Apartments, Partners, Inc. v. Cain*, 972 SW 2d 759—Tex: Supreme Court 1998)

Criminological research in the realm of negligent security litigation has an affinity with the theoretical tradition of environmental criminology. Central to crime foreseeability analysis is an effort to understand crime as an event that happens in time and place. Related, both environmental criminology and negligent security investigation are interested in the place characteristics and socio-spatial environment that may attract or generate criminal activity. Place-based criminology seeks answers to questions about crime, opportunity structure, and the characteristics of a business that may invite crime. Likewise, since courts deal with particularizing knowledge and the evaluation of individual cases (Faigman, Monahan, and Slobogin 2014), they may need (depending on the case) social science theories, methods, and analytical techniques to assess the forensic evidence and help resolve cases.

Finally, this paper contributes to the growing field of forensic sociology and forensic criminology by highlighting the different roles that social science methods and theories play in lawsuits alleging inadequate or negligent security. Security-related litigation is a burgeoning field that offers fertile opportunities for the social scientist to apply her or his methodological and analytical expertise to assist the courts in making legal decisions. Negligent security cases are complex, and courts need methodologically trained and skilled experts to help judges and juries understand evidence, determine the facts of a case, and adjudicate between rival interpretations of facts. In recent years, scholars and researchers have published a variety of books and articles that offer suggestions and advice on how to apply social science methods and theories to assist the courts in rendering legal decisions (Burns 2008; Forsyth 2014; Gotham and Kennedy 2019; Hirsch and Quartaroli 2011; Kennedy 2013; Morewitz and Goldstein 2014; Otto and Weiner 2013; Peyrot and Burns 2001). Sociologists and criminologists who work as premises security experts not only have access to rich crime and security data but research results that derive from a case investigation can be valuable sources for making substantive, theoretical, and methodological contributions to academic sociology, criminology, and other social science disciplines and fields.

Related Resources

1. The Forensic Social Sciences Association (FSSA) is an international and interdisciplinary association dedicated to advancing training, practice, policy, and innovations in the forensic social sciences. The organization provides information on the latest trends in forensic social science and forensic social scientists' expert testimony related to litigation and government testimony (see <https://homeearthlinknet.wordpress.com/>).
2. In various countries, laws and policies govern the use of testimony in court. In the United States, *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) is a U.S. Supreme Court case that determined the standard for admitting expert testimony in federal courts. The Daubert Court held that the enactment of the Federal Rules of Evidence superseded the Frye standard, also known as the Frye test or general acceptance test, which came from *Frye v. United States*, 293 (D.C. Cir. 1923F. 1013).
3. American Society for Industrial Security (ASIS) International, headquartered in Alexandria, Virginia, is a professional organization for security professionals that issues various certifications, standards, and guidelines for the security profession. ASIS International offers classroom programs, webinars, information on security trends, and research (see <https://www.asisonline.org/>)

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