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Tort Law—*Foster v. Winston-Salem Joint Venture*: Duty of Mall Owners to Take Measures to Protect Invitees from Criminal Acts

In a time of rising crime rates, courts are often presented with the difficult task of drawing the line between the business owner's duty to provide security for his patrons and the customer's obligation to accept the risks associated with venturing into public places. In *Foster v. Winston-Salem Joint Venture*,¹ the North Carolina Supreme Court faced this task and held that the owner of a shopping mall had a duty to provide security measures to protect its customers from criminal assaults in the mall parking lot if the criminal assaults were reasonably foreseeable and could have been prevented by the exercise of reasonable care.² This appears to be the first time that the court has found explicitly that a business invitor has the duty to protect his patrons from the foreseeable criminal conduct of a third party.³

Defendant, Winston-Salem Joint Venture, is a general partnership that owns Hanes Shopping Mall in Winston-Salem, North Carolina. On December 20, 1976, plaintiff, Irene B. Foster, drove to the mall to do some Christmas shopping. After making some purchases, Ms. Foster returned to her car at approximately 4:30 p.m., while it was still light.⁴ As Ms. Foster was placing her packages in her car, two unidentified males suddenly appeared, violently pushed Ms. Foster into her car, then grabbed her by her feet and pulled her out of the car onto the pavement where she was kicked, beaten and robbed of \$145.00.⁵

In the ensuing action against the mall owner, Ms. Foster alleged that the defendants negligently represented that the parking lot was in a reasonably safe condition and free from dangers;⁶ that they negligently failed to warn plaintiff of the risk of harm from criminal assaults although they had knowledge of prior criminal incidents;⁷ that they negligently failed to provide ade-

1. 303 N.C. 636, 281 S.E.2d 36 (1981).

2. *Id.* at 640, 281 S.E.2d at 39.

3. Cf. *Manganello v. Permastone, Inc.*, 291 N.C. 666, 231 S.E.2d 678 (1977); *Aaser v. City of Charlotte*, 265 N.C. 494, 144 S.E.2d 610 (1965). Both of these cases addressed a landowner's duty to protect his invitees from injury by third parties; neither case, however, involved intentional criminal conduct. In *Manganello*, plaintiff, a patron at defendant's lake, was injured by the "rough or boisterous" horseplay of other swimmers. 291 N.C. at 671, 231 S.E.2d at 681. In *Aaser*, plaintiff, a paying spectator at an ice hockey game, was injured when she was struck by a puck that a group of young boys were slapping back and forth in a corridor of the arena. 265 N.C. at 495, 144 S.E.2d at 612.

4. Record at 31-32, *Foster v. Winston-Salem Joint Venture*, 50 N.C. App. 516, 274 S.E.2d 265, *aff'd in part, rev'd in part*, 303 N.C. 636, 281 S.E.2d 36 (1981).

5. *Id.* at 32-36.

6. In his deposition, the manager of the mall indicated that prior to the attack, he had told a staff writer for the local newspaper that security had been "beefed up," *id.* at 24, but he could "not recall any specifics about how [he] increased the security." *Id.* at 26.

7. The record indicated that there were 31 reported criminal incidents at the mall in the year prior to Ms. Foster's assault. *Id.* at 36-38. Although larceny of property was the more common crime, six or seven physical assaults had been reported. *Id.*

quate security protection for mall patrons;⁸ and that these negligent acts were the proximate cause of her injuries.⁹ The trial court granted defendants' motion for summary judgment and dismissed the action.¹⁰ Plaintiff then prosecuted an appeal to the North Carolina Court of Appeals.

The court of appeals found that the pleadings stated a cause of action,¹¹ but nevertheless, affirmed the trial court's grant of summary judgment for defendant.¹² In finding that summary judgment was properly granted, the court determined that the record presented insufficient evidence that the defendant had either actual or constructive knowledge of the existence of a dangerous condition in the parking lot.¹³

On appeal,¹⁴ the North Carolina Supreme Court affirmed the court of appeals' finding that plaintiff had stated a proper claim for relief but reversed the affirmance of summary judgment and remanded the case to the trial court for a trial on the merits.¹⁵ Justice Copeland, writing for the court, found that

[i]f an invitee . . . alleges in a complaint that he or she was on the premises of a store owner, during business hours for the purpose of transacting business thereon, and that while he or she was on the premises injuries were sustained from the criminal acts of a third person, which acts were reasonably foreseeable by the store owner, and which could have been prevented by the exercise of ordinary care, then the plaintiff has set forth a cause of action in negligence which,

8. From the time the mall opened until Ms. Foster's assault, the usual security was a single guard patrolling the parking lot. *Id.* at 18-20. The lot was also equipped with a series of mercury vapor lights. *Id.* at 19. At least one patron had complained to the manager that the lighting intensity was inadequate and less than that provided at another mall in the Winston-Salem area. *Id.* at 39.

9. Brief for Appellant at 4, *Foster v. Winston-Salem Joint Venture*, 50 N.C. App. 516, 274 S.E.2d 265, *aff'd* in part, *rev'd* in part, 303 N.C. 636, 281 S.E.2d 36 (1981).

10. 50 N.C. App. at 517, 274 S.E.2d at 266. The trial judge dismissed the action under N.C.R. Civ. P. 12(b)(6). The court of appeals found this to be error because defendant had not moved to dismiss for failure to state a claim upon which relief could be granted. This error was harmless, however, in light of the court's finding that the trial judge correctly granted summary judgment for the defendant. *Id.*

11. Noting the general rule "that the criminal acts of third parties are entirely unforeseeable" the court nonetheless found that "such [a rule], . . . when applied to . . . a shopping center setting where large amounts of money and merchandise are exchanged and numerous people with no apparent purpose in being at the shopping center . . . loiter about, is fallacious." 50 N.C. App. at 517, 274 S.E.2d at 266-67. Consequently, the court found "that it is entirely consistent with the mainstream of North Carolina law to hold landowners responsible for protecting their business invitees from the foreseeable criminal action of third parties." *Id.*

12. *Id.* at 519, 274 S.E.2d at 267.

13. *Id.* While acknowledging that "at first blush" the record of prior criminal acts might warrant the conclusion that the defendant had actual or constructive notice of foreseeable criminal activity, the court was not willing to let the factual issue of foreseeability go to the jury. Rather, it found that neither "the numerous petty larcenies in the 76-acre parking lot . . . [nor the] six or seven assaults in such a large and heavily trafficked area gave defendants knowledge of a dangerous condition." *Id.* In contrast, Judge Wells in dissent found the evidence sufficient to establish the element of foreseeability of risk of harm from criminal conduct, and would have allowed the case to go to the jury. *Id.* at 520, 274 S.E.2d at 267-68 (Wells, J., dissenting).

14. Plaintiff appealed the court of appeals' decision pursuant to N.C. Gen. Stat. § 7A-30(2) (1981) which provides, in pertinent part, for appeals of right "from any decision of the Court of Appeals rendered in a case . . . (2) In which there is a dissent."

15. *Foster v. Winston-Salem Joint Venture*, 303 N.C. 636, 281 S.E.2d 36 (1981).

if proved, would entitle that plaintiff to recover damages from the store owner.¹⁶

Having determined as a matter of law that the duty to exercise ordinary care existed,¹⁷ the court turned to the question of whether the criminal acts of these third persons were foreseeable and, if so, whether the defendant exercised reasonable care under the circumstances to fulfill its duty.¹⁸ In contrast to the court of appeals, the supreme court found that plaintiff's evidence raised sufficient issues of fact for jury determination. On the issue of foreseeability, the court could not "hold as a matter of law that the thirty-one criminal incidents reported as occurring on the shopping mall premises within the year preceding the assault on plaintiff were insufficient to charge defendants with knowledge that such injuries were likely to occur."¹⁹ The supreme court also found "that a jury could reasonably find that by providing only one guard to patrol the large parking area during the busy shopping period five days before Christmas, defendants breached their duty to exercise reasonable care to maintain the . . . premises in such a manner that they might be used safely by the customers invited thereon."²⁰

Dissenting, Justice Carlton emphasized that the imposition of this duty should be a question of fairness, rather than of foreseeability. On the issue of fairness, one "should take into account the relationship of the parties, the na-

16. *Id.* at 640, 281 S.E.2d at 39. In reaching this holding, the court relied heavily on the Restatement (Second) of Torts, which provides as follows:

A possessor of land who holds it open to the public for entry for his business purposes is subject in 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.

Comment f:

Duty to police premises. Since the possessor is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring, or are about to occur. He may, however, know or have reason to know, from past experience, 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. 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.

Restatement (Second) of Torts § 344 & comment f (1965).

17. Duty is a question of law for the court to determine. See, e.g., *McNair v. Boyette*, 282 N.C. 230, 192 S.E.2d 457 (1972); *Ashe v. Acme Builders, Inc.*, 267 N.C. 384, 148 S.E.2d 244 (1966); *Redding v. F.W. Woolworth Co.*, 9 N.C. App. 406, 176 S.E.2d 383 (1970).

18. Once the duty is found to exist, it is a question of fact for the jury whether the defendant exercised reasonable care under the circumstances to fulfill that duty. See, e.g., *Kekelis v. Whitin Mach. Works*, 273 N.C. 439, 160 S.E.2d 320 (1968); *Lassiter v. Williams*, 272 N.C. 473, 158 S.E.2d 593 (1968); *Brewer v. Majors*, 48 N.C. App. 202, 268 S.E.2d 229 (1980).

19. 303 N.C. at 642, 281 S.E.2d at 40.

20. *Id.* at 643, 281 S.E.2d at 40-41.

ture of the risk, and the public interest in the proposed solution."²¹ The ultimate test of fairness is whether "a man [can] ascertain in advance of a jury's verdict whether the duty is his and whether he has performed it."²² Carlton found a duty predicated merely on foreseeability too vague and uncertain, and expressed the fear that the duty was of "potentially limitless scope."²³

The vigorous dissent of Justice Carlton in *Foster* highlights the difficult issues presented in this area of tort law. Generally, courts have been hesitant to find a duty to protect another against the intentional criminal acts of third parties. Such acts usually cannot be anticipated, and ordinarily one has the right to assume that others will obey the law. In other words, criminal acts are usually unforeseeable, and one does not have the duty to protect against an unforeseeable risk of harm.

Courts have recognized, however, that under special circumstances, one has the duty to anticipate dangers and take precautions for the protection of another. This duty typically arises in situations in which one stands in a special relationship to another and the other may reasonably be expected to believe that such protection is forthcoming. Thus, the common carrier,²⁴ the innkeeper,²⁵ the employer²⁶ and the public utility²⁷ all have a general duty to take active measures to see that certain individuals are protected from an unreasonable risk of harm.

Yet even in those special relationships in which one has a duty to take precautions for the protection of another, an intervening criminal act is often found to supersede any initial negligence and terminate defendant's liability.²⁸ The defendant's initial negligence is seen as the remote cause of the injury; his

21. Id. at 644, 281 S.E.2d at 41 (Carlton, J., dissenting).

22. Id. at 644, 281 S.E.2d at 41-42 (Carlton, J., dissenting) (quoting *Goldberg v. Housing Auth.*, 38 N.J. 578, 589, 186 A.2d 291, 297 (1962)).

23. 303 N.C. at 643, 281 S.E.2d at 41 (Carlton, J., dissenting).

24. See, e.g., *Mann v. Virginia Dare Transp. Co.*, 283 N.C. 734, 743, 198 S.E.2d 558, 565 (1973) ("[A] carrier owes to the passengers whom it undertakes to transport 'the highest degree of care for their safety so far as is consistent with the practical operations and conduct of its business.'") (quoting *White v. Chappell*, 219 N.C. 652, 659, 14 S.E.2d 843, 847 (1941)).

25. See, e.g., *Rappaport v. Days Inn of Am., Inc.*, 296 N.C. 382, 383, 250 S.E.2d 245, 247 (1979) ("[A]n innkeeper is not an insurer of the personal safety of his guests but is required to 'exercise due care to keep his premises in a reasonably safe condition and to warn his guests of any hidden peril.'") (quoting *Barnes v. Hotel O'Henry Corp.*, 229 N.C. 730, 731, 51 S.E.2d 180, 181 (1949)).

26. See, e.g., *Whitaker v. Blackburn*, 47 N.C. App. 144, 148, 266 S.E.2d 763, 765 (1980) (An employer's "duty is to exercise ordinary care to keep the premises in a reasonably safe condition and to give warning or notice of hidden perils or unsafe conditions insofar as they can be ascertained by reasonable inspection and supervision.").

27. See, e.g., *Graham v. North Carolina Butane Gas Co.*, 231 N.C. 680, 685, 58 S.E.2d 757, 761-62 (1950) ("Where a gas company . . . becomes aware that . . . gas is escaping from the gas fixtures on the premises into the building, it becomes the duty of the gas company to shut off the gas supply until the further escape of gas from the fixture can be prevented, even though the fixtures do not belong to the company and are not in its charge or custody.").

28. See, e.g., *Ward v. Southern Ry.*, 206 N.C. 530, 532, 174 S.E. 443, 444 (1934) (employee killed by coal thieves; criminal act of third party broke "causal chain between the original negligence and the accident"); *Chancey v. Norfolk & W. Ry.*, 174 N.C. 351, 354, 93 S.E. 834, 836 (1917) (passenger robbed and assaulted on overcrowded and poorly lit train; "there was no causal connection between the supposed negligent act of the defendant and the injury which it is alleged resulted therefrom").

liability is insulated by the unforeseeable, intervening criminal act.²⁹ If, however, the defendant could anticipate the intervening criminal act, the criminal act will not insulate the negligence which created the opportunity for the criminal activity.³⁰

Therefore, the initial inquiry in *Foster* is whether defendant had a duty to provide security against criminal attack. If it did have this duty, it would be for the jury to determine whether reasonable care was exercised in fulfilling this duty.³¹ If negligent conduct is found, further inquiry must be made to determine whether the injury that occurred was a foreseeable result of that negligence. The question then becomes whether defendant's conduct was the "proximate cause"³² of the injury.

As a customer of the retail establishments of the mall, Ms. Foster's visit was for the mutual advantage of both her and defendant mall owners. Consequently, she held the common law status of an invitee.³³ Defendant therefore

29. See *Phelps v. City of Winston-Salem*, 272 N.C. 24, 30, 157 S.E.2d 719, 723 (1967) ("If the connection between negligence and the injury appears unnatural, unreasonable and improbable in the light of common experience, the negligence, if deemed a cause of the injury at all, is to be considered a remote rather than a proximate cause."); *Nance v. Parks*, 266 N.C. 206, 211, 146 S.E.2d 24, 28 (1966) ("To exculpate a negligent defendant by insulating his negligence, the intervening cause must be one which breaks the connection between defendant's negligence and the injury alleged in such a manner that it itself becomes the proximate cause of the injury.").

30. See, e.g., *Wesley v. Greyhound Lines, Inc.*, 47 N.C. App. 680, 268 S.E.2d 855 (1980). In *Wesley* the party who attacked plaintiff had committed other crimes in the bus station and had been removed from the station "approximately 50 times" by defendant's employees. *Id.* at 699, 268 S.E.2d at 867. Also, "[p]imps, prostitutes, transvestites, bums, winos, and loiterers . . . were allowed to linger in the bus station where they frequently pestered defendant's passengers." *Id.* at 700, 268 S.E.2d at 867. The court of appeals found this evidence "more than sufficient" to show that a criminal assault upon defendant's passengers was foreseeable. *Id.* The Restatement (Second) of Torts takes a similar approach:

*Intentionally Tortious or Criminal Acts Done Under Opportunity
Afforded by Actor's Negligence*

The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.

Restatement (Second) of Torts § 448 (1965) (emphasis added).

31. See note 18 supra.

32. "Proximate cause is that cause which produces the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under all the facts then existing." *Kanoy v. Hinshaw*, 273 N.C. 418, 426, 160 S.E.2d 296, 302 (1968). See also *Hall v. Coble Dairies, Inc.*, 234 N.C. 206, 214, 67 S.E.2d 63, 68-69 (1951); *Goode v. Harrison*, 45 N.C. App. 547, 548-49, 263 S.E.2d 33, 34 (1980).

33. "To constitute one as an invitee there must be some mutuality of interest. Usually an invitation will be inferred where the reason for the visit is of mutual advantage to the parties. To be an invitee, the purpose of the visit must be of interest or advantage to the invitor." *Briles v. Briles*, 43 N.C. App. 575, 577, 259 S.E.2d 393, 395, cert. denied, 299 N.C. 329, 265 S.E.2d 394 (1980).

North Carolina has not followed the minority of jurisdictions that have abrogated the common-law classifications of invitee, licensee and trespasser in favor of a general negligence test of reasonableness under the circumstances. See, e.g., *Starr v. Clapp*, 40 N.C. App. 142, 143, 252 S.E.2d 220, 221, aff'd, 298 N.C. 275, 258 S.E.2d 348 (1979) ("The duty owed a person on the premises of another depends upon whether that person is an invitee, licensee or trespasser."). For formulations of the minority view, see *Smith v. Arbaugh's Restaurant, Inc.*, 469 F.2d 97 (D.C. Cir.

had the duty to provide a reasonably safe place for plaintiff to do that which was within the scope of her invitation, or to provide warning of hidden dangers discoverable by reasonable inspection.³⁴ The theory is that the "invitation" by defendant to enter gives an implied assurance that the premises have been made safe for their intended use.³⁵

Expressed in these terms, the duty imposed upon business inviters in *Foster* is not a radical departure from accepted concepts in invitee-invitor case law.³⁶ The invitor has the duty to "exercise ordinary care to keep his premises . . . in a safe condition."³⁷ There is no distinction made in the rule between danger created by a physical condition on the land and danger created by a third party's act.³⁸

It is fundamental that the existence of the invitor's duty is judged by the foreseeability of unreasonable risk of harm to the invitee.³⁹ Thus, a finding that "foreseeability is the test in determining the extent of a landowner's duty to safeguard his business invitees from the criminal acts of third persons"⁴⁰ is

1972), cert. denied, 412 U.S. 939 (1973); *Rowland v. Christian*, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968); *Mile Fence Co. v. Radovich*, 175 Colo. 537, 489 P.2d 308 (1971); *Pickard v. City of Honolulu*, 51 Hawaii 134, 452 P.2d 445 (1969); *Ouellette v. Blanchard*, 116 N.H. 552, 364 A.2d 631 (1976); *Basso v. Miller*, 40 N.Y.2d 233, 352 N.E.2d 868, 386 N.Y.S.2d 564 (1976); *Mariorenzi v. Joseph DiPonte, Inc.*, 114 R.I. 294, 333 A.2d 129 (1975).

34. [An invitor is] under the legal duty to his patrons to exercise ordinary care to keep his premises, and all parts thereof to which persons lawfully present may go, in a safe condition for the use for which they are designed and intended, and to give warning of hidden dangers or unsafe conditions in so far as can be ascertained by reasonable inspection and supervision.

Revis v. Orr, 234 N.C. 158, 160, 66 S.E.2d 652, 653 (1951). There is no question that the scope of the owner's duty extends to the parking lot provided for the convenience of the invitees. See *Game v. Charles Stores Co.*, 268 N.C. 676, 151 S.E.2d 560 (1966); *Berger v. Cornwell*, 260 N.C. 198, 132 S.E.2d 317 (1963).

35. See W. Prosser, *Handbook of the Law of Torts* § 61, at 388-91 (4th ed. 1971).

36. In fact, the court of appeals recognized "that it is entirely consistent with the mainstream of North Carolina law to hold landowners responsible for protecting their business invitees from the foreseeable criminal action of third parties." 50 N.C. App. at 518, 274 S.E.2d at 266.

37. See note 34 *supra*.

38. This is consistent with prior cases in which third persons may have negligently created dangerous conditions. See, e.g., *Aaser v. City of Charlotte*, 265 N.C. 494, 499, 144 S.E.2d 610, 615 (1965) ("[W]hen the dangerous condition or activity . . . arises from the act of third persons, whether themselves invitees or not, the owner is not liable for injury resulting unless he knew of its existence or it had existed long enough for him to have discovered it by the exercise of due diligence and to have removed or warned against it."); *Long v. National Food Stores, Inc.*, 262 N.C. 57, 60, 136 S.E.2d 275, 278 (1964) ("[W]here the unsafe or dangerous condition is created by a third party, . . . an invitee proximately injured thereby may not recover, unless he can show that the unsafe or dangerous condition had remained there for such a length of time that the invitor [*sic*] knew, or by the exercise of reasonable care should have known, of its existence."); *Stafford v. Food World, Inc.*, 31 N.C. App. 213, 216, 228 S.E.2d 756, 757, cert. denied, 291 N.C. 324, 230 S.E.2d 677 (1976) ("If the unsafe condition is created by third parties . . . a showing must be made that it had existed for such length of time that the store proprietor knew or by the exercise of reasonable care should have known of its existence in time to have removed the danger or given warning of its presence."); *Gaskill v. Great Atl. & Pac. Tea Co.*, 6 N.C. App. 690, 693, 171 S.E.2d 95, 97 (1969).

39. Foreseeability is a major variable in the initial judicial determination whether a duty exists. See W. Prosser, *supra* note 35, § 33. Foreseeability also plays a crucial role in determining whether negligent conduct was the cause of plaintiff's injury. See text accompanying notes 77-79 *infra*.

40. 303 N.C. at 640, 281 S.E.2d at 39.

neither novel nor unsupportable in the case law.⁴¹

There is some concern, however, that foreseeability is an inadequate test of duty when the cause of injury is intentional criminal conduct. Due to the pervasive nature of criminal activity in our society, "[e]veryone can foresee the commission of crime virtually anywhere and at any time."⁴² Thus, a duty predicated on foreseeability might have "potentially limitless scope."⁴³

These fears are in most cases unfounded. Since the general rule is that criminal activity is unforeseeable, any claim that it was foreseeable will be subject to strict scrutiny by the court. Therefore, questionable claims should rarely reach the jury.

Also, foreseeability is tied directly to the "place or character of the business, or . . . past experience."⁴⁴ These variables are figured into the calculus to determine whether any duty exists. *Foster* is illustrative of the use of these variables. It is recognized that suburban shopping malls attract both shoppers and those who prey on shoppers. Activity, both legal and illegal, is known to increase during the holiday season.⁴⁵ Recognizing the existence of these problems and the likelihood that they would continue, the Hanes mall owners represented to the public that they were taking extra security measures.⁴⁶ The special nature of mall activity put defendants on notice of the need to anticipate and take reasonable precautions against criminal activity.

Actual past occurrences of criminal conduct provide further evidence on the issue of foreseeability. While the court of appeals found that the thirty-one reported criminal incidents in the year prior to the assault were insufficient evidence of foreseeability, the supreme court determined that the matter should go to the jury. When the jury does hear evidence on foreseeability, it will be presented with the conceptually difficult issue of determining how many criminal acts must occur before the unforeseeable becomes foreseeable.⁴⁷ Yet when coupled with the special circumstances found in the mall

41. See, e.g., *Tyndall v. United States*, 295 F. Supp. 448, 452-53 (E.D.N.C. 1969).

42. 303 N.C. at 644, 281 S.E.2d at 41 (Carlton, J., dissenting) (quoting *Goldberg v. Housing Auth.*, 38 N.J. 578, 583, 186 A.2d 291, 293 (1962)). See also *Cook v. Safeway Stores, Inc.*, 354 A.2d 507, 509 (D.C. 1976):

This court is all too familiar through daily police reports of the high incidence throughout the entire city of such crimes as mugging, purse-snatching, assault and robbery—a constant hazard to all law-abiding persons who use the streets and public places of business. But simply because this hazard exists, it does not follow that the common law of negligence imposes an obligation upon private enterprises to provide armed guards to insure the safety of persons invited to do business with them.

43. 303 N.C. at 643, 281 S.E.2d at 41 (Carlton, J., dissenting).

44. Restatement (Second) of Torts § 344, comment f (1965). See note 16 supra.

45. Ms. Foster was assaulted on December 20, 1976. 303 N.C. at 637, 281 S.E.2d at 37.

46. See note 6 supra.

47. The uncertainties inherent in this evaluation led one court to inquire:

[H]ow many criminal acts are necessary to invoke the duty to warn and how many are necessary to impose the duty to hire a private police force? Is the Court to determine the number, or is the jury to be permitted to speculate upon the appropriate number of criminal acts to give rise to the duty? Is it not also appropriate to consider the time element? After a lapse of six months, one year or two years without an incident or a criminal act, can a merchant disband his private police force?

Compropt v. Sloan, 528 S.W.2d 188, 197 (Tenn. 1975).

environment, and the general duty of a business invitor,⁴⁸ it is reasonable to find that the mall owners were put on sufficient notice to raise a duty to protect against this type of harm.⁴⁹

In an effort to limit the scope of the foreseeability test, the dissent would inquire into both the invitee's *and* the mall owners' actual or constructive notice of foreseeable risk of harm. Under this view a comparison of the criminal activity of the parking lot with the crime rate of the surrounding neighborhood is necessary.⁵⁰ If the parking lot and the surrounding neighborhood experience similar criminal activity, "no duty on the part of the owner should arise because the foreseeability of criminal activity is equally obvious to the owner or the patron . . . and . . . the patron is simply taking a *known* and *accepted* risk in venturing out."⁵¹ This analysis recognizes the scope of criminal activity in society, and looks beyond past occurrences to the general risks of venturing out into a particular location. The underlying rationale seems to be that an invitee should not expect the business owner to make his premises any safer than those of the surrounding community.⁵²

There are at least two flaws in the dissent's approach. First, this analysis clearly would be inappropriate if used to determine invitor liability for injuries caused by physical conditions. It would, for example, deny relief to an invitee who patronizes a business located in a deteriorating section of town. An invitor could claim he had no duty to keep the premises in a reasonably safe condition since the surrounding neighborhood would have put the invitee on notice that the premises would likely be in disrepair. Such a result is clearly objectionable. Second, the dissent's approach would be contrary to the public interest which is served by requiring the private sector to supplement govern-

48. See note 34 *supra*.

49. Compare *Atamian v. Supermarkets Gen. Corp.*, 146 N.J. Super. 149, 369 A.2d 38 (1976) (patron assaulted and raped in parking lot of supermarket; similar occurrences immediately prior to attack on plaintiff gave rise to duty to provide reasonable security measures to deter foreseeable criminal acts); and *Murphy v. Penn Fruit Co.*, 274 Pa. Super. 427, 418 A.2d 480 (1980) (patron assaulted, stabbed in parking lot of grocery store; past criminal acts in vicinity of store created inference that plaintiff's injury was foreseeable) with *Drake v. Sun Bank & Trust Co.*, 377 So.2d 1013 (Fla. Dist. Ct. App. 1979) (bank customer kidnapped in bank parking lot, robbed and murdered; plaintiff failed to allege facts sufficient to meet test of foreseeability); *McClendon v. Citizens & S. Nat'l Bank*, 155 Ga. App. 755, 272 S.E.2d 592 (1980) (bank customer robbed at gunpoint in parking lot of bank; defendant had no notice of dangerous condition in lot as no robberies had occurred there previously); *O'Brien v. Colonial Village, Inc.*, 119 Ill. App. 2d 105, 255 N.E.2d 205 (1970) (patron of shopping center assaulted in parking lot; plaintiff failed to allege previous incidents or special circumstances that would charge owners with knowledge of dangers); and *Shipes v. Piggly Wiggly St. Andrews, Inc.*, 269 S.C. 479, 238 S.E.2d 167 (1977) (customer assaulted in parking lot; plaintiff failed to prove that defendant knew or had reason to know of such attacks).

50. In North Carolina, evidence of crime in the surrounding area is admissible to show constructive knowledge of the need for security measures. See *Wesley v. Greyhound Lines, Inc.*, 47 N.C. App. 680, 685, 268 S.E.2d 855, 859 (1980). *Contra*, *Compropst v. Sloan*, 528 S.W.2d 188, 197 (Tenn. 1975) ("Conditions in the area are irrelevant.").

51. 303 N.C. at 647, 281 S.E.2d at 43 (Carlton, J., dissenting) (emphasis in original). If a dangerous condition is apparent to both the invitor and invitee, the invitor usually has no duty to take affirmative action to warn the invitee of the danger. See, e.g., *Long v. Methodist Home for the Aged, Inc.*, 281 N.C. 137, 187 S.E.2d 718 (1972) (invitee slipped and fell on wet floor that was the result of the invitee's overstuffing the commode with toilet paper).

52. See 303 N.C. at 647, 281 S.E.2d at 43 (Carlton, J., dissenting) ("What right does a patron have to demand that the store premises be safer than the general area in which it is situated?").

mental efforts to fight crime.⁵³

Finding that a duty exists does not resolve the issue of whether it is wise or reasonable to impose it. "Duty" is a term of art expressing a court's evaluation that the creation of a particular legal obligation is determined to be in the public interest.⁵⁴ Therefore, any meaningful analysis of *Foster* requires an inquiry into the various policies which would be reflected in an imposition of this duty on mall owners.

To ensure the greatest benefit to society, liability should be limited by a cost-benefit analysis. This analysis is not alien to the law of torts; it is implicit in Learned Hand's classic formulation of the factors determining the existence of the duty,⁵⁵ and various courts have accepted this analysis.⁵⁶ The public interest is served only if the costs of imposing the duty are less than or equal to the benefits received.⁵⁷ The desired result of the imposition of a duty is to reduce the overall costs to society of a particular activity. While the various unknown contingencies involved in these circumstances make a quantitative cost-benefit analysis impossible, the qualitative aspects of this duty can be scrutinized.

Cost-benefit analysis requires that the desired economic and social policies be taken into consideration and assigned their appropriate weight.⁵⁸ Though not articulated by the supreme court, the public policy rationale implicit in the *Foster* decision was expressed by the court of appeals when it

53. See notes 58 & 59 *infra*.

54. *Dillon v. Legg*, 68 Cal. 2d 728, 734, 441 P.2d 912, 916, 69 Cal. Rptr. 72, 76 (1968) ("[D]uty" is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.") (quoting W. Prosser, *Handbook of the Law of Torts* § 53, at 333 (3d ed. 1964)).

55. "[T]he owner's duty . . . to provide against resulting injuries is a function of three variables: (1) The probability [of harm]; (2) the gravity of the resulting injury, if [it occurs]; (3) the burden of adequate precautions." *United States v. Carroll Towing Co., Inc.*, 159 F.2d 169, 173 (2d Cir. 1947).

56. See, e.g., *Raymond v. Paradise Unified School Dist.*, 218 Cal. App. 2d 1, 8, 31 Cal. Rptr. 847, 851-52 (1963):

An affirmative declaration of duty simply amounts to a statement that two parties stand in such relationship that the law will impose on one a responsibility for the exercise of care toward the other. Inherent in this simple description are various and sometimes delicate policy judgments. The social utility of the activity out of which the injury arises, compared with the risks involved in its conduct; the kind of person with whom the actor is dealing; the workability of a rule of care, especially in terms of the parties' relative ability to adopt practical means of preventing injury; the relative ability of the parties to bear the financial burden of injury and the availability of means by which the loss may be shifted or spread; the body of statutes and judicial precedents which color the parties' relationship; the prophylactic effect of a rule of liability; in the case of a public agency defendant, the extent of its powers, the role imposed upon it by law and the limitations imposed upon it by budget; and finally, the moral imperatives which judges share with their fellow citizens—such are the factors which play a role in the determination of duty.

See also *Phillips v. Croy*, 173 Ind. App. 401, 405, 363 N.E.2d 1283, 1285 (1977) ("[T]he quantum of care exercised must be proportionate to the danger to be avoided and the fatal consequences involved in its neglect compared to the importance of the right the claimant is seeking to advance.").

57. See generally Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 *Yale L.J.* 499 (1961); Posner, *A Theory of Negligence*, 1 *J. Legal Stud.* 29, 33-48 (1972).

58. See Bazylar, *The Duty to Provide Adequate Protection: Landowners' Liability for Failure to Protect Patrons from Criminal Attack*, 21 *Ariz. L. Rev.* 727, 737-54 (1979).

noted that the very nature of the activity generated by the modern shopping mall required that general rules of tort liability should be reevaluated.⁵⁹ The court thus determined that the special conditions found in the mall setting which might aid, abet or entice criminal activity require that a particular type of responsibility be imposed on mall owners.

Other social and economic goals should be noted. Along with affording plaintiff Foster the opportunity to prove and recover damages,⁶⁰ the court's decision requires the private sector to take steps to deter criminal activity.⁶¹ Additionally, the court imposed the duty upon the party best able to prevent the loss⁶² and efficiently allocated the costs of deterrent measures among the members of society.⁶³ While the result will of course lead to greater expense for all mall patrons, the court implicitly determined that it is more cost effec-

59. 50 N.C. App. at 518, 274 S.E.2d at 266. See note 11 supra. See also *Cornpropst v. Sloan*, 528 S.W.2d 188, 199 (Tenn. 1975) (Henry, J., dissenting) ("Having thus caused enormous congregations of potential and actual shoppers in relatively compact areas, certain duties devolve upon the inviters for the benefit and protection of the invitees.").

60. The general purpose of tort law is to compensate an injured party and make him whole for the injuries he has suffered. W. Prosser, supra note 35, § 2, at 7. However, in these circumstances, recovery is not had from the criminal, but from the owner of the premises upon which the injury occurred. As a consequence, some observers question the propriety of "shifting the financial loss caused by crime from one innocent victim to another innocent victim." *Davis v. Allied Supermarkets, Inc.*, 547 P.2d 963, 965 (Okla. 1976).

61. In dissent, Justice Carlton questioned the propriety of obligating the mall owner to create a private police force to patrol its parking area. In his opinion, "the creation of myriad private police forces and the shift of law enforcement duties to the private sector amounts to taking the law into one's own hands and contravenes public policy." 303 N.C. at 645, 281 S.E.2d at 42 (Carlton, J., dissenting). These feelings are echoed by the insurance industry, which recommended that its defense attorneys "emphasize . . . that the defendant is not an insurer and that society has vested in the government the responsibility for protecting the public from criminal attack. The fact that government and law enforcement authorities cannot prevent criminal attacks does not justify transferring such responsibility to business proprietors." *Fager, Liability of Business Proprietors for Criminal Acts of Third Persons*, 29 Fed'n Ins. Couns. Q. 29, 33 (1978).

However, "in the fight against crime the police are not expected to do it all; every segment of society has obligations to aid in law enforcement and to minimize the opportunities for crime." *Kline v. 1500 Mass. Ave. Apt. Corp.*, 439 F.2d 477, 484 (D.C. Cir. 1970) (footnotes omitted). Courts have recognized this obligation and have not been hesitant to require certain private parties to provide police protection for another. See, e.g., *Dilley v. Baltimore Transit Co.*, 183 Md. 557, 562, 39 A.2d 469, 471 (1944) ("[C]arrier is required to furnish sufficient police force to protect its passengers from the assaults or violence of other passengers or strangers which might reasonably be expected . . .") (quoting *Maryland Dredging & Contracting Co. v. Hines*, 269 F. 781, 782 (4th Cir. 1920)); *Dean v. Hotel Greenwich Corp.*, 21 Misc. 702, 193 N.Y.S.2d 712 (1959).

62. [O]f all the involved parties, the cost of crime reduction is cheapest to the landowner. For the criminal, imposing civil liability on him in addition to existing criminal sanctions does not deter him from committing the crime. Imposing duty on the patron, so that he must protect and compensate himself, may result in crime reduction, but only at the expensive cost of the patron staying home. While the patron can prevent crime by not going out at night, the price of staying home is high not only for him but also for society in general. As opposed to the transient patron, who has little information about the crime problem on the landowner's premises and little ability to directly influence it, the landowner can be much more effective in dealing with the problem. While the patron holds just one expensive option, staying home, the landowner holds many options, ranging from installation of better lighting, fences, or guard service, to even varying hours of operation. All of these options should be less expensive and much more effective in deterring crime than the patron's sole choice of staying home.

Bazyler, supra note 58, at 747-48 (footnotes omitted).

63. The mall owner can distribute the costs of deterrence equitably to all mall patrons through the pricing mechanism.

tive for the consuming public to share the costs of security measures than to allow patrons such as plaintiff Foster to bear their losses individually.

While the imposition of this duty may be cost effective in the factual setting of *Foster*, unless this duty is further refined and limited to circumstances similar to a mall setting, the costs of performing the duty may outweigh the benefits society receives from its imposition.

The court's holding requires that an injured business invitee allege and prove two elements of the cause of action: (1) "the criminal acts of a third person . . . were reasonably foreseeable," and (2) these acts "could have been prevented by the exercise of ordinary care."⁶⁴ Thus, the parameters of the duty are the foreseeability of the criminal act and the probability that this act could have been deterred.

As noted above,⁶⁵ using foreseeability as a construct in determining the extent of the business invitor's duty is entirely consistent with fundamental tort doctrine. Thus, an inquiry into the foreseeability of criminal conduct will proceed along traditional lines of analysis. The difficulty inherent in the *Foster* holding lies with the deterrence and causation issues presented. Deterrence and causation problems are necessarily intertwined, for plaintiff must allege and prove that her "injuries were sustained from the criminal acts of a third person, . . . which [acts] could have been prevented by the exercise of ordinary care."⁶⁶ In other words, the issue is whether defendant's failure to provide security measures was the actual and proximate cause of plaintiff's injury. This issue presents much conceptual difficulty, creating the potential that liability will be found in inappropriate circumstances, with a subsequent misallocation of resources.⁶⁷

Once plaintiff has proved defendant's negligence, she must then prove that this negligence was the actual⁶⁸ as well as proximate cause⁶⁹ of the injury complained of. The usual test of actual causation is the "but for" test: if plaintiff's injury would not have occurred but for defendant's negligence, actual causation exists.⁷⁰ Plaintiff need not prove that the defendant absolutely and beyond a doubt caused her injuries, rather, she must demonstrate that it is

64. 303 N.C. at 640, 281 S.E.2d at 39.

65. See text accompanying notes 39-41 *supra*.

66. 303 N.C. at 640, 281 S.E.2d at 39.

67. Due to plaintiff's difficulties in proving causation, there is some concern that liability will be automatically imposed if prior criminal acts on or near the premises suffice to give the owner notice of a foreseeable danger. This concern is expressed in the amicus curiae brief filed by the North Carolina Merchants Association. The Association believed that in those jurisdictions where liability has been recognized, "the results appear to be founded more upon strict liability than traditional notions of negligence." Amicus Curiae Brief (N.C. Merchants Ass'n) at 5, *Foster v. Winston-Salem Joint Venture*, 303 N.C. 636, 281 S.E.2d 36 (1981).

68. See, e.g., *Battley v. Seaboard Airline Ry.*, 1 N.C. App. 384, 161 S.E.2d 750 (1968).

69. See, e.g., *Tyndall v. United States*, 306 F. Supp. 266 (E.D.N.C. 1969), *aff'd*, 430 F.2d 1180 (4th Cir. 1970); *Meyer v. McCarley & Co.*, 288 N.C. 62, 215 S.E.2d 583 (1975); *Clarke v. Holman*, 274 N.C. 425, 163 S.E.2d 783 (1968).

70. See, e.g., *Hoyle v. Southern Bell Tel. & Tel. Co.*, 474 F. Supp. 1350 (W.D.N.C. 1979), *aff'd*, 631 F.2d 728 (4th Cir. 1980); *Kanoy v. Hinshaw*, 273 N.C. 418, 160 S.E.2d 296 (1968); *Barefoot v. Joyner*, 270 N.C. 388, 154 S.E.2d 543 (1967); *Ratliff v. Duke Power Co.*, 268 N.C. 605, 151 S.E.2d 641 (1966).

more probable than not that the injuries were caused by defendant's conduct.⁷¹ When other causes have contributed to plaintiff's injury, the court has indicated that defendant's conduct will not be insulated so long as it "played a substantial and proximate part in plaintiff's injury."⁷² Therefore, plaintiff must present proof that the lack of security played a substantial role in giving her unknown assailants the motivation and opportunity to assault her. Plaintiff must also demonstrate that these unknown parties probably would have been deterred by the presence of security measures. Yet these proofs rest upon the tenuous assumption that criminals are motivated or deterred by the same factors which drive noncriminal behavior.

On remand, the jury shall determine the causation issue. The court determined that the evidence presents an issue upon which reasonable men may differ.⁷³ The experience in other jurisdictions supports this conclusion. Courts that have considered the issue have reached various conclusions. Some find that it is difficult, if not impossible, to determine what precautions will deter unknown parties from often irrational criminal behavior. As a result, they find that as a matter of law, plaintiff has failed to prove actual causation.⁷⁴ Other courts have relied on these same considerations to find that the conduct of the third party was the superseding independent cause of plaintiff's injuries.⁷⁵ In contrast, a minority of courts have determined that "it is not unreasonable to infer that reasonable security measures would have served as a deterrent and that defendants' failure to take such measure [*sic*] constituted a substantial factor in the assault."⁷⁶

71. W. Prosser, *supra* note 35, § 41, at 242.

72. *Porter v. Pitt*, 261 N.C. 482, 483, 135 S.E.2d 42, 43 (1964). See, e.g., *Henderson v. Powell*, 221 N.C. 239, 243, 19 S.E.2d 876, 879 (1942). This test is to be distinguished from the "substantial factor" test often used when two causes coalesce to cause harm and neither acting alone would have caused the identical injury. See W. Prosser, *supra* note 35, § 41, at 239-40; Restatement (Second) of Torts §§ 431, 433 (1965).

73. Thus, the court has implicitly determined that the "legal cause" of plaintiff's injury is not so highly speculative as to take the matter from the jury. See, e.g., Restatement (Second) of Torts § 435(2) (1965) ("The actor's conduct may be held not to be a legal cause of harm to another where after the event and looking back from the harm to the actor's negligent conduct, it appears to the court highly extraordinary that it should have brought about the harm.").

74. See, e.g., *Shaner v. Tucson Airport Auth.*, 117 Ariz. 444, 448, 573 P.2d 518, 522 (1977) (patron abducted in parking lot of airport; issue of causation "left to sheer speculation"); *Goldberg v. Housing Auth.*, 38 N.J. 578, 590, 186 A.2d 291, 297 (1962) (deliveryman assaulted in elevator of housing project; court found "exceptional uncertainty with respect to the issue of causation. This is so because of the extraordinary speculation inherent in the subject of deterrence of men bent upon criminal ventures. It would be quite a guessing game to determine whether some unknown thug of unknowable character and mentality would have been deterred if the owner had furnished some additional policemen.").

75. See, e.g., *Cornprobst v. Sloan*, 528 S.W.2d 188 (Tenn. 1975) (patron assaulted in shopping center parking lot; defendants did not owe plaintiff duty to guard against third party's criminal act unless they knew or had reason to know such acts were occurring and would pose immediate harm to plaintiff; in any event, third party's attack was an efficient, intervening and unforeseeable cause of the injury); *Davis v. Allied Supermarkets, Inc.*, 547 P.2d 963 (Okla. 1976) (customer's purse snatched in supermarket parking lot; even if defendant were negligent in its failure to provide adequate lighting and personnel, plaintiff's injuries were caused by independent intervening criminal acts of third party).

76. *Atamian v. Supermarkets Gen. Corp.*, 146 N.J. Super. 149, 159, 369 A.2d 38, 43 (1976) (patron assaulted and raped in parking lot of supermarket). See also *Butler v. Acme Markets, Inc.*, 177 N.J. Super. 279, 287, 426 A.2d 521, 525 (1981) (patron attacked in supermarket parking lot; "It

Once the plaintiff has passed the barrier of the "substantial factor" test of actual causation, the issue of proximate cause presents little difficulty. Foreseeability is the test of proximate cause.⁷⁷ The defendant need not "foresee the precise injury; the particular consequences it produces; nor the exact manner in which it occurs. All that is required is that defendant 'in the exercise of . . . reasonable care . . . should have foreseen that some injury . . . or . . . consequences of a generally injurious nature should have been expected.'⁷⁸ Therefore, defendant's liability cannot go beyond that which was "unusual and unlikely to happen or . . . was only remotely and slightly probable."⁷⁹

The facts of *Foster* present a strong foreseeability issue for the jury. While the majority of prior criminal activity involved larceny of property, there were also a number of serious personal assaults reported in the year prior to the accident.⁸⁰ Even if the facts had indicated that a patron's property was the only interest threatened by defendant's alleged negligence, the fact that a different interest of the plaintiff was actually injured should not allow an exculpation from liability.⁸¹ It is for the jury to determine whether the harm

is a matter of common knowledge that the presence of security guards or similar personnel . . . will have a deterrent effect upon criminal activity."); *Slapin v. Los Angeles Int'l Airport*, 65 Cal. App. 3d 484, 135 Cal. Rptr. 296 (1976) (patron of airport parking lot assaulted; plaintiff could not recover from city for failure to provide adequate security as this is a discretionary decision by city, yet could recover for failure to provide adequate lighting if this created a foreseeable condition which allowed assaults to occur); *Morgan v. Bucks Assocs.*, 428 F. Supp. 546 (E.D. Pa. 1977) (employee of shopping center owned by defendant assaulted in parking lot after work; jury verdict for plaintiff sustained; reasonableness of defendant's security measures, defendant's actual or constructive knowledge of past criminal conduct and defendant's ability to anticipate future criminal conduct were issues for the jury).

In *Foster* defendant's mall manager indicated in his deposition that an increase in security measures would often reduce criminal activity. He stated:

As for robberies and/or larcenies in the parking lot, I would say we probably average somewhere between one to one and a half larcenies a month You might have a spurt of activity and you react to it and you stop it It is correct that when I say we react to it, that means we increase our security in the parking lot When I say you stop it, I mean that you cut it back. We never have stopped all crime in the parking lot. What I mean is, that if there is a pattern or something, sometimes you make an arrest and that will cease that particular activity.

Record at 21-22.

77. See, e.g., *Williams v. Carolina Power & Light Co.*, 296 N.C. 400, 403, 250 S.E.2d 255, 258 (1979) ("The test of proximate cause is whether the risk of injury, not necessarily in the precise form in which it actually occurs, is within the reasonable foresight of the defendant."); *McNair v. Boyette*, 282 N.C. 230, 236, 192 S.E.2d 457, 461 (1972) ("Foreseeability of injury is an essential element of proximate cause."); *Clarke v. Homan*, 274 N.C. 425, 429, 163 S.E.2d 783, 786 (1968) ("Reasonable foreseeability is an essential element of proximate cause").

78. *Partin v. Carolina Power & Light Co.*, 40 N.C. App. 630, 633, 253 S.E.2d 605, 609, cert. denied, 297 N.C. 611, 257 S.E.2d 219 (1979) (citations omitted) (quoting *Hamilton v. McCash*, 257 N.C. 611, 618-19, 127 S.E.2d 214, 219 (1962)). Therefore, Justice Carlton's opinion that the mall owner should be required to foresee criminal activity "only as broad as the type of criminal activity which had occurred in the past" has no support in the case law. See *Foster*, 303 N.C. at 646, 281 S.E.2d at 42 (Carlton, J., dissenting). See also note 81 infra.

79. *Phelps v. City of Winston-Salem*, 272 N.C. 24, 30, 157 S.E.2d 719, 723 (1967).

80. These included attempted armed robbery, various assaults and a kidnapping. Record at 36-38.

81. See W. Prosser, supra note 35, § 43; Restatement (Second) of Torts § 281, comment j (1965) ("[T]he fact that the interest to which harm results is a different interest, or a different kind of interest, from that which was threatened with harm, will not prevent the actor from being liable, so long as the interest in fact harmed is one entitled to legal protection against negli-

which in fact occurred was within the scope of the risk created by the mall's allegedly negligent conduct.

Because of the uncertain nexus between security measures and deterrence, the *Foster* court did not articulate a "standard of performance to which the owner may look for guidance,"⁸² other than the standard of "ordinary care."⁸³ Is this standard so vague that a merchant will know he has breached the duty only after the jury verdict against him?⁸⁴ Is this duty applicable to all merchants or only to those that are similar to a mall in size and mode of operation? Most small merchants do not have the financial resources to provide anything but the minimal security measures, such as lighting. A true cost-benefit analysis might exempt such small businesses from this positive duty if the cost of performing this duty threatens the very existence of the business. Yet the court's holding is not so limited, referring only to "a store owner."⁸⁵ Much finer distinctions must be drawn if the business owner and his attorney are to know with certainty the scope of this obligation.

Furthermore, the court required that only "ordinary care" be used in attempting to deter criminal activity. Ordinary care is defined as "such care as an ordinarily prudent person would exercise under the same or similar circumstances to avoid injury."⁸⁶ In the owner/invitee situation of *Foster*, ordinary care is the duty "to keep that portion of his premises designed for use by his invitees in a reasonably safe condition so as not to expose them unnecessarily to danger."⁸⁷

Thus, the business owner is not held to the higher degree of care imposed on certain other parties to anticipate and protect another from the criminal acts of third parties.⁸⁸ No extraordinary efforts are required to fulfill the duty. Whether ordinary care is sufficient to deter criminal conduct is problematical. If most criminal conduct is thwarted by only the most sophisticated security

gence"). These authorities were relied on by one court in rejecting "defendant's position . . . that its knowledge that car thefts were being committed obligated it to protect against cars being stolen from the Mall's parking lot but did not obligate it to protect against patrons being attacked on the parking lot." *Morgan v. Bucks Assocs.*, 428 F. Supp. 546, 550 (E.D. Pa. 1977).

82. *Goldberg v. Housing Auth.*, 38 N.J. 578, 590, 186 A.2d 291, 297 (1962).

83. 303 N.C. at 640, 281 S.E.2d at 39.

84. This concern is expressed in the amicus curiae brief filed by the North Carolina Merchants Association. Amicus Curiae Brief (N.C. Merchants Ass'n) at 2, *Foster v. Winston-Salem Joint Venture*, 303 N.C. 636, 281 S.E.2d 36 (1981). See also *Goldberg v. Housing Auth.*, 38 N.J. 578, 589, 186 A.2d 291, 297 (1962) ("Fairness ordinarily requires that a man be able to ascertain in advance of a jury's verdict whether the duty is his and whether he has performed it").

85. 303 N.C. at 640, 281 S.E.2d at 39.

86. *Smith v. Fiber Controls Corp.*, 300 N.C. 669, 673, 268 S.E.2d 504, 507 (1980) (quoting *Clark v. Roberts*, 263 N.C. 336, 343, 139 S.E.2d 593, 597 (1965)).

87. *Rappaport v. Days Inn of Am., Inc.*, 296 N.C. 382, 387, 250 S.E.2d 245, 249 (1979) (quoting *Wrenn v. Hillcrest Convalescent Home, Inc.*, 270 N.C. 447, 448, 154 S.E.2d 483, 484 (1967)).

88. Consider the various degrees of care imposed on the common carrier. *Mills v. Atlantic Coast Line Ry.*, 172 N.C. 266, 267, 90 S.E. 221, 221 (1916) ("high degree of care"); *Hollingsworth v. Skelding*, 142 N.C. 246, 249, 55 S.E. 212, 213 (1906) ("as far as human care and foresight could go"); *Daniel v. Petersberg R.R.*, 117 N.C. 592, 602, 23 S.E. 327, 327 (1895) ("the utmost human skill and foresight"). See generally *Wesley v. Greyhound Lines, Inc.*, 47 N.C. App. 680, 691-95, 268 S.E.2d 855, 863-64 (1980); Note, *Torts—Negligence—Common Carriers—Degree of Care Owed Passengers*, 17 N.C.L. Rev. 453 (1939).

measures, ordinary care would prevent few crime-related injuries. If the assault would have occurred even if defendant had exercised ordinary care, defendant's failure to provide ordinary care cannot be the actual or the proximate cause of the injury.⁸⁹

If the relation between security measures and deterrence is so tenuous, the imposition of this duty seems unjustified. Costs are exacted from the business owner on the uncertain assumption that benefits are received. On the other hand, by requiring the business owner to meet a standard of ordinary care, the court forces the owner to take certain minimum security measures. More likely than not these will be relatively inexpensive, highly visible deterrent measures which do not interfere with the normal conduct of business.⁹⁰ Though the evidence is inconclusive, it can reasonably be assumed that various environmental changes would affect criminal activity as well as patrons' fear of crime.⁹¹

In the final analysis, *Foster* presented a strong set of facts where the court would have found it difficult to avoid imposing the duty to protect another from the criminal acts of a third party. Once the duty is imposed, finding liability stretches the concept of causation to its outer limit. In spite of these problems, the imposition of the duty may further the important social goal of reducing crime. In response to the uncertain standard to which they will be held, business owners probably will institute the most economical and efficacious protective measures. Yet until the court further defines the standard to be met, there is a risk that in some cases, the burden of the duty will outweigh the potential benefit.⁹²

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89. See, e.g., *Holland v. Malpass*, 255 N.C. 395, 121 S.E.2d 576 (1961) (high rate of speed of defendant's car was not the cause of a collision that could not have been avoided even if defendant was driving at proper rate of speed); *Lane v. Eastern Carolina Drivers Ass'n*, 253 N.C. 764, 117 S.E.2d 737 (1961) (lack of protective barrier at race track was not actual cause of plaintiff's injury since barrier would have provided no protection when racecar left track at excessive speed). See generally Byrd, *Actual Causation in North Carolina Tort Law*, 50 N.C.L. Rev. 261, 263-65 (1972).

90. The court has recognized that a business owner should not be "required to take precautions for his invitees' safety such as will . . . destroy the attractiveness of his establishment." *Hendrick v. Tigniere*, 267 N.C. 62, 67, 147 S.E.2d 550, 554 (1966). See also *Aaser v. City of Charlotte*, 265 N.C. 494, 499, 144 S.E.2d 610, 614 (1965).

91. See, e.g., Nat'l Comm'n on the Causes and Prevention of Violence, *Crimes of Violence—A Staff Report 774-77* (1969); Nat'l Inst. of Law Enforcement and Criminal Justice, U.S. Dep't of Justice, No. 21 (Series A), *Street Lighting Projects 93* (1979).

92. As this Note went to press, *Foster* was settled out of court after two days of trial. Telephone conversation with Richard D. Ramsey, attorney for plaintiff (Mar. 24, 1982).