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## Tort Law - Merchant's Duty to Protect Invitees from Third-Party Criminal Acts

John W. Watson Jr.

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## NOTES

**TORT LAW—MERCHANT'S DUTY TO PROTECT INVITEES FROM THIRD-PARTY CRIMINAL ACTS—*Foster v. Winston-Salem Joint Venture*, 303 N.C. 636, 281 S.E.2d 36 (1981).**

### INTRODUCTION

During the rush of the Christmas season, a shopper enters a shopping mall. As she returns to her car in the mall parking lot, she is assaulted. Although a variety of criminal incidents have been reported at the mall previously, only one security guard patrols the premises. The incident "costs" the shopper her injuries, her medical expenses and, perhaps, absence from work. Should the patron alone bear the costs of her attack? Or does the shopping mall, as an invitor, owe a duty to its patron, the invitee, to secure its premises against foreseeable criminal conduct? It has been held that whether such a duty should be placed on the landlord or occupant is a question of fairness, and certainly policy issues abound.<sup>1</sup> If such a duty is imposed, what level or pattern of criminal activity must occur to put the invitor on notice? When is the likelihood of criminal conduct so foreseeable that a duty of protection arises? And, if the landlord-occupant knows of the risk of criminal attack, what preventive measures will be adequate?

Historically, the rule in North Carolina has been that one is not liable for his negligence where the injury flows from the intervening criminal or intentional acts of third parties.<sup>2</sup> Underlying this rule is the rationale that such acts by third parties are unpredictable and the burden of taking precautions outweighs the apparent risk.<sup>3</sup> It has been generally held that unless special circumstances exist, there is no duty to protect another from criminal attack.<sup>4</sup> More recently, North Carolina courts and courts of other states have recognized that a landowner or occupier of premises

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1. *Goldberg v. Housing Auth. of Newark*, 38 N.J. 578, 186 A.2d 291 (1962). See *infra* text accompanying notes 32-34.

2. *Ward v. Southern Ry. Co.*, 206 N.C. 530, 174 S.E. 443 (1934).

3. W. PROSSER, *THE LAW OF TORTS*, § 33, at 173-174, (4th ed. 1971).

4. Annot., 10 A.L.R.3d 619 (1966).

may be liable for injuries suffered by visitors on the premises as a result of foreseeable hazards created by third parties.<sup>5</sup>

The Supreme Court of North Carolina's decision in *Foster v. Winston-Salem Joint Venture* joins a limited number of decisions in which courts have allowed liability for injuries sustained through third party criminal activity because of the foreseeable nature of this activity.<sup>6</sup> While applying existing caselaw, the Supreme Court of North Carolina adopted the position of the Restatement (Second) of Torts, § 344.<sup>7</sup> The Court held that where an invitee alleges that he was on business premises for the purpose of doing

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5. See *infra* text accompanying notes 23-31, 48-52.

6. 303 N.C. 636, 281 S.E.2d 36 (1981). Cases generally discussing the duty to protect against criminal attack by third parties have discussed such factors as the existence of an appropriate relationship upon which to predicate a duty; proximate cause and intervening cause; foreseeability; the economic relationship between the parties; and the defending party's ability to comply with the duty to protect. Annot., 10 A.L.R.3d 619 (1966). More recent cases, discussing the duty owed by the shopping center or shopkeeper have noted such factors as foreseeability of criminal attack on and off the premises; the character of the business and past experience; the landowner's ability to deter criminal conduct and the reasonableness of precautions. Annot., 93 A.L.R.2d 999 (1979). The scope of this note, however, will be limited to factors relating to foreseeability and the adequacy of precautions.

7. RESTATEMENT (SECOND) OF TORTS § 344 (1965) provides:

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.

Comment f to § 344 further provides:

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 the 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).

business, and that while there he sustained injuries caused by the the criminal acts of third parties, that these acts were foreseeable and could have been prevented by the exercise of ordinary care, then the invitee has stated a cause of action in negligence.<sup>8</sup> Finding it unnecessary that the defendant foresee the precise nature of the harm that occurred, the court also held that evidence of at least twenty-nine assorted criminal incidents in the preceding year was sufficient to establish a question of fact for the jury.<sup>9</sup>

### THE CASE

In *Foster*, the plaintiff went to shop at the shopping mall owned and operated by the defendants. Although the plaintiff parked near the entrance to a department store, she was beaten and robbed by unidentified assailants as she returned to her car. The mall included a parking lot of nearly seventy-six acres, but only one security guard was assigned to patrol the lot at the time of the plaintiff's assault. Evidence submitted by the plaintiff and defendants revealed more than thirty criminal incidents had occurred on the mall premises during the preceding year. Most of these were automobile larcenies, but four or five were assault-type crimes. The plaintiff brought this action, claiming that the defendants, owners of the mall, were negligent by failing to provide adequate security for patrons in the mall parking lot. The defendants contended that the plaintiff's evidence failed to show the foreseeability of criminal acts at the mall or the inadequacy of security measures at the mall. In the defendant's view, for a duty to arise, the foreseeability required was notice of imminent attack and the adequacy of measures to deter crime was a matter of speculation.<sup>10</sup>

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8. *Foster v. Winston-Salem Joint Venture*, 303 N.C. 636, 640, 281 S.E.2d 36, 39 (1981).

9. *Id.* at 641, 281 S.E.2d at 39. Discrepancies in the number of criminal incidents and assaults contained in this note reflect discrepancies in the various *Foster* opinions. The Supreme Court found the plaintiff had alleged at least twenty-nine criminal incidents preceded her assault, of which four or five were also assaults. Additionally, the opinion notes that defendants acknowledged thirty-one incidents in interrogatories. *Id.* at 641-642, 281 S.E.2d at 39-40. In dissent, Justice Carlton noted thirty-seven incidents and six or seven assaults. *Id.* at 646-647, 281 S.E.2d at 42-43. The Court of Appeals noted the plaintiff had alleged twenty-eight criminal incidents although defendant's evidence disclosed thirty-six. Of the latter, the Court found six or seven were assaults. *Foster v. Winston-Salem Joint Venture*, 50 N.C. App. 516, 519, 274 S.E.2d 265, 267 (1981).

10. Brief for Appellee at 3-20, *Foster v. Winston-Salem Joint Venture*, 50 N.C. App. 516, 274 S.E.2d 265 (1981).

Before trial, the Davie County Superior Court granted defendant's motion for summary judgment and dismissed the case. Although the Court of Appeals found that the plaintiff had stated a cause of action if the facts alleged could have been proven, the Court upheld defendants' summary judgment.<sup>11</sup> Prior North Carolina decisions had held that in order for the landowners' duty to protect patrons to arise, it must appear that the owner knew of the danger of injury or that the danger must have had existed long enough for the landowner to discover the danger.<sup>12</sup> Because only six or seven of the reported prior criminal incidents were assaults, the Court of Appeals held that the defendants did not have sufficient notice that the dangerous condition, with respect to assault, existed. Thus, summary judgment was proper.<sup>13</sup> Before the North Carolina Supreme Court, the plaintiff presented two issues: (1) whether the plaintiff had stated a cause of action in negligence against the defendants for their alleged failure to provide adequate security in the mall parking lot; and, (2) if so, whether she presented sufficient evidence to withstand the defendants' motion for summary judgment.<sup>14</sup>

#### BACKGROUND

Before *Foster*, North Carolina's position with respect to civil liability for injuries resulting from the criminal conduct of third parties was summarized in *Ward v. Southern Railway Company*.<sup>15</sup> There, the plaintiff's intestate, a railroad employee, was killed when thieves threw coal from a passing train. Evidence at the trial disclosed that thieves had plagued trains at the place of the decedent's injury for over thirty years. The plaintiff contended that the railroad's negligence in allowing thieves to steal its property proximately caused the injured employee's death. The Supreme Court of North Carolina noted that an employer is liable for all foreseeable consequences of his negligence when he permits a dangerous custom to exist in the operation of his business. The Court held,

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11. *Foster v. Winston-Salem Joint Venture*, 50 N.C. App. 516, 517, 274 S.E.2d 265, 266 (1981).

12. *Id.* at 518, 274 S.E.2d at 267; citing *Aaser v. Charlotte*, 265 N.C. 494, 144 S.E.2d 610 (1965). See *infra* text accompanying notes 46-47.

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

14. *Foster v. Winston-Salem Joint Venture*, 303 N.C. 636, 638, 281 S.E.2d 36, 37 (1981).

15. 206 N.C. 530, 174 S.E.443 (1934).

however, that foreseeable consequences did not include intervening criminal acts of third persons:

Assuming, but not deciding, that the defendant was negligent in not taking proper precaution against the coal thieves, nevertheless the general rule of law is that if between the negligence and the injury there is the intervening crime or wilfull and malicious act of a third person producing the injury but that such was not intended by the defendant, and could not have been reasonably foreseen by it, "the causal chain between the original negligence and accident is broken." (Citations omitted.)<sup>16</sup>

Subsequent cases involving liability for third party criminal acts adopted the view expressed in *Ward*, if not the opinion's precise language. In *Ross v. Atlantic Greyhound Corporation*,<sup>17</sup> the Supreme Court of North Carolina found the bus company was not liable for negligence when a disembarking passenger was struck by a drunken driver. Applying the identical analysis, the Court in *Williams v. Mickens*,<sup>18</sup> found that a cab driver was not liable for injuries resulting from the theft of his cab merely because the cab driver had left his keys in the ignition. In both cases, the defendants' liability was barred by the unforeseeable criminal acts of third parties.

The common characteristic of *Ward* and the cases which followed was that all rather woodenly declared intentional-criminal acts of third parties unforeseeable. Hence, no proximate cause. The pronouncements in *Ward*, however, were diluted in cases which addressed the invitor's duty to maintain safe premises for the use of invitees. These cases extended the scope of this duty both with respect to geographical areas on the premises and with respect to dangerous activities on the premises. In determining whether dangerous conditions had existed long enough on the premises to give the invitor notice, courts in these cases also reached the issue of foreseeability.

In *Sledge v. Wagoner*,<sup>19</sup> the Supreme Court of North Carolina described the basic duty owed by the invitor to his invitee. The invitor is not an insurer of the safety of business visitors while on

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16. *Id.* at 532, 174 S.E. at 444.

17. 223 N.C. 239, 25 S.E.2d 852 (1943).

18. 247 N.C. 262, 100 S.E.2d 511 (1957).

19. 248 N.C. 631, 104 S.E.2d 195 (1958). In *Wagoner*, the plaintiff was injured when his trouser leg caught a portion of the restaurant magazine rack causing him to fall.

the premises, but the invitor is required to exercise ordinary care to keep the premises and all parts thereof where patrons may lawfully go in a safe condition and to warn of all dangerous conditions which are reasonably ascertainable.<sup>20</sup> The test in determining proximate cause, said the Court, is not whether the tortfeasor should foresee the specific injury that occurred, but whether, "in 'the exercise of reasonable care, the defendant might have foreseen that some injury would result . . . or that consequences of a generally injurious nature might have been expected.'" [Citations omitted].<sup>21</sup> In *Game v. Charles Stores Company, Inc.*,<sup>22</sup> the Court extended the invitor's duty to guard against dangerous conditions on the premises to include the parking lot.

With respect to hazards on the premises caused by third parties, the Supreme Court of North Carolina outlined the plaintiff's burden in *Long v. National Food Stores, Inc.*<sup>23</sup> In dicta, the Court stated that in order for an invitee to recover for his injuries proximately caused by dangerous conditions created by third parties on the premises, he must show that the invitor knew of the dangerous condition or that the condition had existed for so long that the invitor should have known of its existence.<sup>24</sup> Although *Long* involved a passive condition on the premises—slippery grape peels—the dictum was applied in *Aaser v. City of Charlotte*<sup>25</sup> and *Manganello v. Permastone, Inc.*,<sup>26</sup> involving dangerous activities on the premises. In *Aaser*, the plaintiff suffered a broken ankle when youths playing in a corridor struck her with a hockey puck during a Charlotte hockey match. The Court held that the owner's duty of care extended to activities on the premises as well as to physical conditions.<sup>27</sup> The degree of care, noted the Court, de-

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20. *Id.* at 635, 104 S.E.2d at 198.

21. *Id.* at 636, 104 S.E.2d at 199.

22. 268 N.C. 676, 151 S.E.2d 560 (1966). In *Game*, the plaintiff was injured when an incoming motorist ran over a bottle in the parking lot, causing it to strike the plaintiff. Although the injury involved the act of a third party, the Court held the store was negligent in maintaining its parking lot.

23. 262 N.C. 57, 136 S.E.2d 275 (1964).

24. *Id.* at 60, 136 S.E.2d at 278.

25. 265 N.C. 494, 144 S.E.2d 610 (1965).

26. 291 N.C. 666, 231 S.E.2d 678 (1977).

27. The Court stated:

The duty of the owner extends to the physical condition of the premises, themselves, and to contemplated and foreseeable activities thereon by the owner and his employees, the contestants and the spectators. The amount of care required varies, but the basis of liability for injury to the

pendent on the probability of injury and the degree of injury reasonably foreseeable.<sup>28</sup> The Court denied the plaintiff's claim, however, because it found that the plaintiff's evidence did not establish when or how long the horseplay had continued, nor did it establish that the precautions taken by the defendants were inadequate.<sup>29</sup> The plaintiff in *Manganello* sought to recover from the owners of a public swimming pool after he was injured by the activities of other swimmers.<sup>30</sup> Finding that the dangerous activities had continued for some twenty minutes prior to the plaintiff's injury, and, also noting the disparity between the defendant's precautions and those prescribed in safety codes, the Court held that the plaintiff's claims were proper for a jury to consider.<sup>31</sup>

Although the North Carolina cases elaborated upon the invitor's duty to provide safe premises, no cases had dealt with the shopkeeper's, specifically the shopping center's, liability for injuries caused by criminal conduct on the premises. Cases in other jurisdictions which discuss foreseeability as a determinant of liability may be roughly divided into those cases which expressly reject foreseeability and those which adopt a broader or narrower scope of foreseeability. In a case where the plaintiff was assaulted in a housing project, the Court, in *Goldberg v. Housing Authority of Newark*,<sup>32</sup> rejected foreseeability as the determinant of a landlord's duty to secure his premises against criminal attack. The commission of crime can be foreseen anywhere. But, "whether a duty exists is ultimately a question of fairness . . . [involving] a weighing of the relationship of the parties, the nature of the risk, and the public interest in the proposed solution."<sup>33</sup> The Court found the potential deployment of private police forces violated the public policy of New Jersey. But, more importantly, the Court objected to a duty based on foreseeability because of its "vagueness." How, pondered the Court, would a landowner determine when a duty to

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invitee from any of these sources is the same—the failure of the owner to use reasonable care under the circumstances.

265 N.C. at 499, 144 S.E.2d at 614-615.

28. *Id.* at 499, 144 S.E.2d at 615.

29. *Id.* at 500, 144 S.E.2d at 616.

30. In *Manganello*, several men were jumping from each others' shoulders when one landed on the plaintiff's neck. 291 N.C. 666, 668, 231 S.E.2d 678, 679 (1977).

31. *Id.* at 672-673, 231 S.E.2d at 681-682.

32. 38 N.J. 578, 186 A.2d 291 (1962).

33. *Id.* at 583, 186 A.2d at 293.



protect against third party criminal acts arose and by what standard would the adequacy of his measures be judged?<sup>34</sup>

The fairness test articulated in *Goldberg* provided a broad theoretical basis for determining liability for third party criminal acts. As developed in *Atamian v. Supermarket General Corp.*,<sup>35</sup> the New Jersey court held that the defendant supermarket did owe a duty to a plaintiff who was raped and beaten in its parking lot. Although five rapes had previously occurred in the lot, no security guards were employed on the night of the assault and lighting was poor. The Court noted the economic benefit which the shopper conferred on the defendant, the customary security at the store and the poor illumination. Most significantly, it held that it was neither vague nor unfair to require protection in a parking lot where five previous assaults had occurred. In language suggesting a broader scope of foreseeability, the Court stated that the fact that a criminal act intervenes the negligence of the defendant will not relieve his liability if the continued likelihood of attack exists.<sup>36</sup>

Unlike *Atamian*, other cases applying the *Goldberg* fairness test have not considered the factors articulated in *Goldberg*. Instead, the courts have simply stated that the landowner's duty to protect his patrons from criminal activities is a question of fairness, but have found that "fairness" requires no such duty. In *Cook v. Safeway Stores, Inc.*<sup>37</sup> for example, the invitee was injured as she attempted to recover her wallet from a thief. The Court noted that the general incidence of crime was predictable in the area. It commented, however, that it was not foreseeable that the plaintiff would be assaulted, nor that she would react as she did.<sup>38</sup>

With North Carolina's traditional view that foreseeability is an element of proximate cause, it is unlikely that a North Carolina court would sidestep the issue of foreseeability as the *Goldberg* court did. Decisions from other jurisdictions demonstrate that the scope of foreseeability is an adequate vehicle for defining policy. In determining whether the invitor owed a duty to secure his premises against criminal attack, some courts have required that the

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34. "It is an easy matter to know whether a stairway is defective and what repairs will put it in order . . . but how can one know what measures will protect against the thug, the narcotic addict, the degenerate, the psychopath and the psychotic." *Id.* at 589, 186 A.2d at 297.

35. 146 N.J. Super. 149, 369 A.2d 38 (1976).

36. *Id.* at 158-59, 369 A.2d at 43.

37. 354 A.2d 507 (D.C. App. 1976).

38. *Id.* at 509; *See also* Cornpropst v. Sloan, 528 S.W.2d 188 (Tenn. 1975).

likelihood of a specific incident—the one which occurred—be foreseeable.<sup>39</sup> Other courts have adopted the less stringent foreseeability of the Restatement,<sup>40</sup> requiring only that a sufficient incidence of crime be shown to impose the duty.<sup>41</sup>

The Tennessee Supreme Court in *Cornpropst v. Sloan*,<sup>42</sup> expressly rejected the broader view of foreseeability and the view of § 344 of the Restatement (Second) of Torts. Following her assault in defendants' shopping center parking lot, the plaintiff alleged “. . . there had been committed various crimes, assaults, and other acts of violence, either on the premises or in the immediate area” of the shopping center which rendered it unsafe for shoppers at night.<sup>43</sup> The Court held that owners or operators of a shopping center, and shopkeepers in general, do not have a duty to guard against criminal acts of third parties unless they know or have reason to know of acts occurring or about to occur on the premises which pose an imminent probability of harm to an invitee.<sup>44</sup> In its reasoning, the Court rejected foreseeability based on the occurrence of numerous criminal acts.<sup>45</sup> The Tennessee Court indicated that for a duty to arise the *imminent* probability of the act by the specific offender must be foreseeable. The Court found nothing in the plaintiff's allegations which would have given notice of impending assault before her attack.<sup>46</sup> Assuming she had stated a cause of action, the Court found her allegations established that the assailant's acts were an unforeseen, intervening cause of her injuries.<sup>47</sup>

In *O'Brien v. Colonial Village, Inc.*,<sup>48</sup> and *Morgan v. Bucks Associates*,<sup>49</sup> the courts adopted the broader view of foreseeability

39. See *infra* text accompanying notes 42-47.

40. RESTATEMENT (SECOND) OF TORTS § 344 (1965); see *supra* note 7.

41. See *infra* text accompanying notes 48-52.

42. 528 S.W.2d 188 (Tenn. 1975).

43. *Id.* at 190.

44. *Id.* at 198.

45. *Id.* at 197.

46. *Id.* The Court reasoned:

We are concerned in this case with the liability of the business establishments in Eastgate Shopping Center for the sudden criminal act of a temporarily or permanently depraved person, who according to the affirmative allegations contained in the complaint gave no notice by word, act, dress or deed prior to the commission of the attack that would have indicated to anyone an intention or purpose to commit an assault.

47. *Id.* at 198.

48. 119 Ill. App. 2d 105, 255 N.E.2d 205 (1970).

49. 428 F. Supp. 546 (E.D. Pa. 1977).

advocated in the Restatement. Both cases arose after the plaintiffs were assaulted in shopping center parking lots. In *O'Brien*,<sup>50</sup> the Illinois court recognized that a cause of action would exist, but found that plaintiff had failed to allege sufficient facts from which a jury could determine the defendants' knowledge. In *Morgan*,<sup>51</sup> however, the plaintiff produced evidence showing seventy-seven prior car thefts in the parking lot where her assault occurred. Her evidence also indicated that not more than one security guard patrolled defendants' one hundred-forty acre parking lot once each hour. The Court in *Morgan* held that evidence of the numerous crimes committed in defendants' parking lot was sufficient for a jury to find that the defendant knew or had reason to know of the likelihood of injury caused by the conduct of third persons.<sup>52</sup>

In summary, prior to *Foster*, North Carolina followed the general rule that one does not owe another a duty to protect him from criminal acts because of the unforeseeability of such acts.<sup>53</sup> Nevertheless, the Supreme Court's decisions in *Aaser* and *Manganello* suggested that those who hold their premises open to the public owe a duty to guard against the injurious conduct, though not the crimes, of third parties on the premises if the injurious nature of the conduct is foreseeable.<sup>54</sup> With respect to hazards on the premises caused by criminal conduct, decisions from other jurisdictions offered the Court a number of options. Among these, the Court might have rejected a duty to guard against criminal acts on policy grounds, as the *Goldberg* Court did.<sup>55</sup> Otherwise, the Court might have tailored the duty by adopting a restrictive scope of foreseeability as in *Cornpropst*,<sup>56</sup> or by adopting the broader scope of foreseeability advanced in *Morgan* and the Restatement.<sup>57</sup>

50. In *O'Brien*, the plaintiff had alleged a series of specific incidents in her original complaint, but these were omitted following amendment. 119 Ill. App. 2d 105, 106, 255 N.E.2d 205, 206 (1970).

51. 428 F. Supp. 546 (E.D. Pa. 1977).

52. *Id.* at 548. Although defendants provided evidence that they hired two to five security guards for peak hours, the plaintiff had not seen a security guard in the five months she worked at the mall. On the night of the assault, police officers found no security guards in the lot.

53. See *supra* text accompanying notes 2-4, 15-18.

54. 265 N.C. 494, 144 S.E.2d 610 (1965); 291 N.C. 666, 231 S.E.2d 678 (1978); see *supra* text accompanying notes 25-31.

55. 38 N.J. 578, 186 A.2d 291 (1962); see *supra* text accompanying notes 32-34.

56. 528 S.W.2d 188 (Tenn. 1975); see *supra* text accompanying notes 42-47.

57. See *supra* text accompanying notes 48-52; RESTATEMENT (SECOND) OF

## ANALYSIS

In holding that the plaintiff had presented a claim for relief in negligence against the shopping mall owners, the majority in *Foster* adopted the position of the Restatement (Second) of Torts, § 344.<sup>58</sup> As the Court of Appeals had noted, this did not represent a "pioneering step."<sup>59</sup> A respectable body of North Carolina caselaw supported the majority's view.<sup>60</sup> Quoting the Court's opinion in *Aaser v. City of Charlotte*,<sup>61</sup> the majority noted:

In the place of amusement or exhibition, just as in the store, when 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.<sup>62</sup>

After comparing the similarity between *Aaser* and other North Carolina cases and the Restatement position, the majority declared that foreseeability was the test for determining the extent of a landowner's duty to his invitees.<sup>63</sup>

In support of its holding, the majority also relied on similar cases from other jurisdictions, most notably *Morgan v. Bucks Associates*<sup>64</sup> and *O'Brien v. Colonial Village Inc.*<sup>65</sup> Both cases recognized the existence of a negligence action against shopping center owners. In reviewing the plaintiff's allegations, the majority found that the plaintiff had alleged at least twenty-nine criminal incidents had occurred at Hanes Mall in the year preceding her assault.<sup>66</sup> The plaintiff's allegations were sufficient to state a cause of

TORTS § 344, *supra* note 7; 428 F. Supp. 546 (E.D. Pa. 1977).

58. RESTATEMENT (SECOND) OF TORTS § 344, *supra* note 7.

59. 50 N.C. App. 516, 518, 274 S.E.2d 265, 267 (1981).

60. *See supra* text accompanying notes 19-31.

61. 265 N.C. 494, 499, 144 S.E.2d 610, 615 (1965).

62. *Foster v. Winston-Salem Joint Venture*, 303 N.C. 636, 639, 281 S.E.2d 36, 38 (1981).

63. *Id.* at 638-640, 281 S.E.2d at 38-39.

64. 428 F. Supp. 546 (E.D. Pa. 1977); *See supra* text accompanying notes 49, 51-52.

65. 119 Ill. App. 2d 105, 255 N.E.2d 705 (1970); *See supra* text accompanying notes 48, 50.

66. *Foster v. Winston-Salem Joint Venture*, 303 N.C. 636, 641, 281 S.E.2d 36, 39 (1981).

action in negligence.<sup>67</sup>

In support of their motion for summary judgment, the defendants had claimed that the plaintiff failed to present sufficient evidence of the foreseeability of criminal activity to establish defendants' duty. They also contended that the plaintiff had failed to present evidence of the inadequacy of defendants' security precautions. The majority ruled, however, that defendants' answer to the plaintiff's interrogatories, acknowledging thirty-one previous criminal incidents, was sufficient to establish foreseeability.<sup>68</sup> The deposition of the mall manager, in which he stated that only one security guard patrolled the mall parking lot on the date of plaintiff's assault, similarly rebutted the defendants' second contention.<sup>69</sup>

In dissent, Justice Carlton expressed concern that the majority had created a duty of "potentially limitless scope."<sup>70</sup> Noting language in *Cook v. Safeway Stores, Inc.*,<sup>71</sup> the Justice criticized foreseeability of criminal conduct as a basis for the landowners' duty.<sup>72</sup> Criminal activity could be foreseen by almost anyone at almost any place. Theoretically, this would produce a wide-spread duty to provide armed protection.<sup>73</sup> Adopting the view of *Goldberg v. Housing Authority of Newark*,<sup>74</sup> the dissent stated that whether a duty exists is a question of fairness.<sup>75</sup> In determining what is "fair" the court should consider the relationship of the parties, the nature of the risk and the public interest. But, according to Justice Carlton, fairness also requires that one be able to determine his duty in advance and that he know what measures are adequate. But how can one know what measures will prevent criminal conduct and by what standards can the landowner's efforts be gauged?<sup>76</sup> Like the Court in *Goldberg*, Justice Carlton also objected to the prospect of private security forces becoming, in effect, private police forces.<sup>77</sup>

67. *Id.*

68. *Id.* at 642, 281 S.E.2d at 40.

69. *Id.* at 643, 281 S.E.2d at 40.

70. *Id.* at 643, 281 S.E.2d at 41 (Carlton, J., dissenting).

71. 354 A.2d 507 (D.C. 1976). See *supra* accompanying notes 37-38.

72. *Foster v. Winston-Salem Joint Venture*, 303 N.C. 636, 643, 281 S.E.2d 36, 41 (1981) (Carlton, J., dissenting).

73. *Id.*

74. 38 N.J. 578, 583, 186 A.2d 291, 293 (1962). See *supra* text accompanying notes 32-34.

75. *Foster v. Winston-Salem Joint Venture*, 303 N.C. 636, 644, 281 S.E.2d 36, 41 (1981) (Carlton, J., dissenting).

76. *Id.* at 644-654, 281 S.E.2d at 41-42.

77. *Id.* at 645, 281 S.E.2d at 42.

Even assuming that a landowners' duty to protect invitees from injury by third parties existed, the dissenting Justice did not believe a duty arose in *Foster*.<sup>78</sup> Noting that of nearly thirty-seven criminal incidents reported at the Hanes Mall, only six or seven had involved assaults, he questioned the foreseeability of assault. Foreseeability should be no broader than the type of criminal incident that had previously occurred.<sup>79</sup> Accordingly, frequent incidents of larceny could not make the risk of criminal assault foreseeable.<sup>80</sup>

Lastly, the Justice objected that the plaintiff did not allege facts sufficient to show that criminal assault was foreseeable. Her shortcoming was that she failed to allege that the incidence of criminal assault exceeded that found in the surrounding neighborhood.<sup>81</sup> According to the dissent, if the incidence of crime in the neighborhood equals that found in the shopping center, the shopper "was simply taking a *known* and accepted risk of venturing out."<sup>82</sup> Queried the dissent, "What right does a patron have to demand that the store premises be safer than the general area in which it is situated?"<sup>83</sup>

Although Justice Carlton's dissent adopted the language and the approach of *Goldberg*,<sup>84</sup> he did not specifically disparage the majority's foreseeability test for its "vagueness." Yet, one might argue that "vagueness", however else it is termed, is a shortcoming of the decision. The majority opinion provides no numerical guidelines for determining at what point injuries resulting from criminal assault become so foreseeable that a duty of protection falls on the landowner.<sup>85</sup> The opinion, also, does not define a reasonable stan-

78. *Id.* at 645-646, 281 S.E.2d at 42.

79. *Id.* at 646-647, 281 S.E.2d at 42-43.

80. *Id.*

81. *Id.* at 647, 281 S.E.2d at 43.

82. *Id.*

83. *Id.*

84. 38 N.J. 578, 186 A.2d 291 (1962); *See supra* text accompanying notes 32-34.

85. The Court stated:

We cannot 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. The issue of foreseeability should therefore be determined by the jury.

*Foster v. Winston-Salem Joint Venture*, 303 N.C. 636, 642, 281 S.W.2d 36, 40 (1981).

dard of precaution. In *Foster*, as well as *Morgan v. Bucks' Associates*<sup>86</sup> and *O'Brien v. Colonial Village, Inc.*,<sup>87</sup> relied on by the majority, one could characterize the level of precautions as grossly inadequate.<sup>88</sup> Again, how many and how often should security guards patrol a seventy-six acre parking lot?

The "vagueness", or perhaps flexibility, of the foreseeability test announced in *Foster*, however, is not a fault of the decision. Even if the decision is subsequently construed as establishing a form of strict liability, there is something positive to be said for this. Increasingly, legislatures have recognized that victims of crime are entitled to restitution or reparation.<sup>89</sup> In North Carolina, restitution or reparation may be imposed as a condition of probation, parole and plea bargaining negotiations.<sup>90</sup> Unfortunately, it is well known that many offenders are never caught and most lack the resources to adequately compensate their victims. *Foster*, then, holds out hope that victims of crime may receive fair compensation. It can be argued that it is unfair to saddle the business community with liability for societal crime.<sup>91</sup> But, has it ever been fair

86. 428 F. Supp. 546 (E.D. Pa. 1977). See *supra* text accompanying notes 49, 51-52.

87. 119 Ill. App. 2d 105, 555 N.E.2d 205 (1970). See *supra* text accompanying notes 48-50.

88. In *O'Brien*, the defendants provided no security. In *Morgan*, defendants provided security during peak times. But, several witnesses testified that they had seen guards in the parking lot only once every two or three weeks, despite the occurrence of seventy-seven car thefts in one year. In *Foster*, only one guard was on duty to patrol the entire seventy-six acre premises during the Christmas season.

89. Note, *Compensating Victims of Crime: Evolving Concept or Dying Theory?*, 82 W. VA. L. REV. 89, 90 (1979). (1979-1980). In 1979, twenty-two states had comprehensive, state-administered programs for compensating victims.

90. N.C. GEN. STAT. § 15A-1021(d) (Cum. Supp. 1981) sanctions reparation and restitution in plea bargaining; N.C. GEN. STAT. § 15A-1343(d) (Cum. Supp. 1981) provides for restitution as condition of probation; N.C. GEN. STAT. § 15A-1374(11a) (Cum. Supp. 1981) provides for restitution as condition of parole pursuant to N.C. GEN. STAT. § 148-57.1 (1978).

91. The Court in *Davis v. Allied Supermarkets, Inc.* 547 P.2d 963, 965 (Okla. 1976) stated:

In all cases of purse snatching, it could be said that there were not enough guards. If there had been enough guards, the offense would not have occurred. This being true, to sustain the appellants' position would for all practical purposes put the business owner in the position of an insurer. An insurer against what? Crime.

One may argue the social advantages of shifting or equalizing the burden of victims of crime, but aside from the question of propriety in

that the victims alone should bear these costs? The justification for business liability is that the business community can spread the costs of crime through insurance and pricing—something the individual cannot do. If one assumes that crime is a product of pervasive societal conditions, it is not unfair to require society to bear the ultimate costs to those injured.

Secondly, it has been asserted that placing the burden on the shopkeeper or landowner will result in the most effective deterrence of criminal activity.<sup>92</sup> Recent studies point out that crime occurs in a negative proportion to the risk of detection.<sup>93</sup> Through various means, the shopkeeper or landowner is more able to increase the risk of detection and reduce crime than the solitary shopper.<sup>94</sup> Presumably, those businesses where shoppers perceive that the premises are secure will benefit from increased patronage.

### CONCLUSION

Certainly, there is no absolute deterrent to an isolated criminal act. But, just as the decision in *Foster* recognizes that a cause of action may lie for the invitee who is assaulted on the invitor's premises, the decision also leaves open the two determinative ques-

this litigation, it does not seem that shifting the financial loss caused by crime from one innocent victim to another innocent victim is proper.

92. Bazylar, *The Duty To Provide Adequate Protection: Landowner's Liability for Failure to Protect Patrons from Criminal Attack*, 21 ARIZ. L. REV. 727 (1979).

93. *Id.* at 732-733. Citing J. CONCKLIN, *THE IMPACT OF CRIME 3* (1975) and the LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, U.S. DEPT. OF JUSTICE, *CRIMINAL VICTIMIZATION IN THE UNITED STATES: A COMPARISON OF 1973 AND 1974 FINDINGS* (1977), the author summarizes:

There has been a recognition that of all the things an individual, a business, or the community can do to reduce crime, the most direct approach is to eliminate the obvious opportunities for criminals . . . . If the risk of being apprehended is large, many potential attackers and intruders will not commit the crime.

94. *Id.* at 747-748.

First, of 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. . . . 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.



tions of fact. What pattern or incidence of criminal activity must occur on the premises before the likelihood of injury becomes foreseeable and imposes a duty on the invitor? Secondly, what security measures adopted by an invitor are adequate in the exercise of reasonable care? Under the rule announced in *Foster*, both are questions of fact for the jury. Despite the occurrence of isolated crimes, it is possible that shoppers, the invitees, may generally view the invitor's premises as well protected. An isolated crime is not conclusive of a breach; *Foster v. Winston-Salem Joint Venture* does not mandate absolute deterrence.

The Court's decision in *Foster* presents hard questions which it does not answer. Yet, the recognition of the invitor's duty to secure his premises against foreseeable criminal activities, and a corresponding cause of action in negligence should advance socially desirable objectives. In some instances, it will enable compensation for the victims of crime. But, more importantly, *Foster* should stir an economically significant awareness of crime as well as the economic incentive to deter it. In this latter respect, the "vagueness" of *Foster's* foreseeability test may prove to be its greatest benefit.

*John W. Watson, Jr.*