DePaul Law Review

Volume 24
Issue 2 *Winter 1975*

Article 3

Foreseeability and Duty Issues in Illinois Torts; Constitutional Limitations to Defamation Suits under Gertz

Richard C. Turkington

FORESEEABILITY AND DUTY ISSUES IN ILLINOIS TORTS; CONSTITUTIONAL LIMITATIONS TO DEFAMATION SUITS UNDER *GERTZ*

*Richard C. Turkington**

In his third contribution to the Survey of Illinois Law, *Professor Turkington discusses the impact on Illinois law of a recent Unitted States Supreme Court decision examining defamation suits brought by private individuals. He also focuses upon three recent Illinois Supreme Court decisions delineating the applicability of foreseeability to Illinois law—two of the rulings interpret the concept of duty towards others, while the third decision involves strict products liability. Additionally, the author analyzes recent Illinois Supreme Court rulings that deal with the anticipation of the criminal conduct of others and the doctrine of res ipsa loquitur in medical malpractice cases.*

INTRODUCTION

DRAMATIC developments at the high state and federal appellate court level characterized torts in the 1973-74 term. Most importantly, the United States Supreme Court found substantial portions of Illinois defamation law unconstitutional in *Gertz v. Robert Welch, Inc.*[1] This landmark decision might well stimulate increased use of the private defamation suit in the state. At the state court level, an important case of first impression was decided by the Illinois Supreme Court. In *Edgar County Bank and Trust Co. v. Paris Hospital, Inc.*,[2] the court held for the first time that res ipsa loquitor may be used to establish a prima facie case of negligence against a physician.

---

* Professor, DePaul University College of Law.

1. 94 S. Ct. 2997 (1974).

2. 57 Ill. 2d 298, 312 N.E.2d 259 (1974). This case is discussed at text accompanying notes 93-101 *infra*. Another case of significance to the Illinois torts lawyer is Murphy v. Martin Oil Co., 56 Ill.2d 423, 308 N.E.2d 583 (1974), which held that pain and suffering was recoverable under the survival statute for death directly related to the original injury. *See* Note, *Death of Abatement Doctrine*—Murphy v. Martin Oil Co., *1973-1974 Survey of Illinois Law*, 24 DEPAUL L. REV. 608 (1975).

Several additional Illinois Supreme Court cases of considerable significance to litigators and litigants also were decided. In no less than six negligence and products liability cases[3] the state supreme court struggled with the role foreseeability is to play in Illinois tort policy. Four of these six cases resulted in decisions against plaintiffs in which Justice Goldenhersh dissented.[4] It is startling for the high court in this age of no fault, to devote this much of its limited resources to the sufficiency of plaintiff's theory of negligence or strict liability on the basis of foreseeability of injury. The concept of negligence and strict liability embodied in these decisions will have considerable consequences on the direction of tort law in Illinois. Because of this development, extended analysis of the foreseeability cases of this term follows.[5]

FROM *New York Times Co. v. Sullivan* TO *Gertz v. Robert Welch, Inc.*

In *New York Times Co. v. Sullivan*,[6] the United States Supreme Court for the first time firmly granted constitutional protection for defamatory utterances by deciding that libelous statements were speech within the meaning of the first amendment. Prior to this decision, dictum in several Supreme Court cases supported the view that libel, like obscenity and profanity, was not constitutionally protected speech.[7] Although all nine Justices in *New York Times* were in accord as to the principle that libel was first amendment speech,

3. Winnett v. Winnett, 57 Ill. 2d 7, 310 N.E.2d 1 (1974); Cunis v. Brennan, 56 Ill. 2d 372, 308 N.E.2d 617 (1974); Boyd v. Racine Currency Exch., Inc., 56 Ill. 2d 95, 306 N.E.2d 39 (1974); Ray v. Cock Robin, Inc., 57 Ill. 2d 19, 310 N.E.2d 9 (1974); Lewis v. Stran Steel Corp., 57 Ill. 2d 94, 311 N.E.2d 128 (1974); Barnes v. Washington, 56 Ill.2d 22, 305 N.E.2d 535 (1973).

4. Winnett v. Winnett, 57 Ill. 2d 7, 310 N.E.2d 1 (1974); Cunis v. Brennan, 56 Ill. 2d 372, 308 N.E.2d 617 (1974); Boyd v. Racine Currency Exch., Inc., 56 Ill. 2d 95, 306 N.E.2d 39 (1974), Barnes v. Washington, 56 Ill. 2d 22, 305 N.E.2d 535 (1973).

5. *See* text accompanying notes 33-79 *infra*.

6. 376 U.S. 254 (1964).

7. *See generally* Roth v. United States, 354 U.S. 476 (1957); Beauharnais v. Illinois, 343 U.S. 250 (1952); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Near v. Minnesota, 283 U.S. 697 (1931); T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 518 (1970). The proposition that profane speech is not constitutionally protected speech has been seriously undermined by recent Supreme Court decisions. *See, e.g.*, Cohen v. California, 403 U.S. 15 (1971).

there was disagreement amongst the Court on the scope of constitutional protection. Justices Black, Douglas, and Goldberg felt that the first amendment absolutely protected criticism of public officials.[8] The remaining six Justices, in an opinion written by Justice Brennan, adopted the view that money damages could be assessed constitutionally against the New York Times only if the plaintiff showed that the defamatory statement was published with malice. Malice was defined as reckless disregard for the truth or knowledge that the statement was false. The malice requirement was employed by the majority in *New York Times* as a device which determined the balance between the constitutional interest in free expression and the tort interest in integrity of reputation.

The ten years that have passed since *New York Times*[9] have witnessed a nearly unending stream of state appellate court decisions involving the scope of constitutional limits on tort judgments for defamation.[10] During this period of time, the division in the Court manifested in *New York Times* concerning the appropriate approach broadened.[11] In *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*,[12] involving judgments against the press for defaming public figures, only Chief Justice Warren, Justice Brennan, and Justice White agreed that malice was the device that ought to be employed for providing the constitutional balance. Justices Harlan, Clark, Stewart, and Fortas felt that the first amendment required only a showing that defendant's publication of the defamatory utterance

8. Justices Black and Douglas also expressed a broader view of first amendment protection in taking the position that the press had the unconditional right to say what it pleased about public officials.

9. In a case decided shortly after *New York Times Co. v. Sullivan*, the Supreme Court extended the malice requirement to criminal libel. *See* Garrison v. Lousiana, 379 U.S. 64 (1964).

10. *See, e.g.*, Noonan v. Rousselot, 239 Cal. App. 2d 447, 48 Cal. Rptr. 817 (1966); Rose v. Koch, 278 Minn. 235, 154 N.W.2d 409 (1967); Reaves v. Foster, 200 So. 2d 453 (Miss. 1967); Powell v. Monitor Publishing Co., 107 N.H. 83, 217 A.2d 193 (1966); Gilligan v. King, 48 Misc. 2d 212, 264 N.Y.S.2d 309 (Sup. Ct. 1965); Dempsey v. Time, Inc., 43 Misc. 2d 754, 252 N.Y.S. 2d 186 (Sup. Ct. 1964).

11. *E.g.*, the Supreme Court in Rosenblatt v. Baer, 383 U.S. 75 (1966), reversed and remanded a libel judgment on behalf of Baer, a supervisor of a state recreation center and ski resort. Six separate opinions were written in the case. *See also* Time, Inc. v. Hill, 385 U.S. 374 (1967), where the malice requirement was applied to a privacy action based upon false representations where the publication was a matter of public interest.

12. 388 U.S. 130 (1967).

was "highly unreasonable conduct."[13] Justices Black and Douglas reaffirmed their view that no defamation judgment based upon statements in the press was constitutional.

Further disagreement on the Court manifested itself in 1970 when the Court dealt with a libel judgment won by a private individual in *Rosenbloom v. Metromedia, Inc.*[14] Four separate views were expressed in the opinion. Justices Burger, Blackman, and Brennan preserved the malice requirement in defamation cases involving private individuals but would require proof of malice only when the subject of the publication was a matter of public interest. Justice White said malice was constitutionally required because the publication concerned actions of public officials. Three Justices, Harlan, Marshall, and Stewart, rejected malice altogether in cases involving private individuals and instead found that the first amendment limited recovery in a defamation suit to actual injury. Justice Black again said that the Constitution absolutely prohibited assessment of a money judgment against the press for published defamatory statements. Justice Douglas did not participate in the decision.

This considerable disagreement among the members of the Court on the concept that should be employed in considering the application of the first amendment in defamation suits was the backdrop for a very important recent Supreme Court decision arising under Illinois defamation law.

In *Gertz v. Robert Welch, Inc.*,[15] the Supreme Court again decided a case involving application of the first amendment to defamation judgments won by private individuals (hereafter referred to as private defamation). *American Opinion*, an outlet for the views of the John Birch Society, printed a story which falsely said that the plaintiff, a Chicago attorney, had rigged a murder trial, had been an official of a Marxist organization, and was a "Leninist" and "Communist fronter." The story also said that the plaintiff had an arrest record and was an officer of the National Lawyers Guild which had

13. *Id.* at 155. This view was based upon a balancing of interest analysis which assigned a higher value to the interest in reputation part of the balance because public figures do not have access to the media or rebuttal as readily as public officials do. Thus a slightly less burdensome requirement was imposed on the plaintiff.

14. 403 U.S. 29 (1971).

15. 94 S. Ct. 2997 (1974).

planned the "Communist attack on the Chicago police during the 1968 Democratic convention."[16]

The plaintiff brought a diversity action against the publisher of *American Opinion* for defamation in the United States District Court for the Northern District of Illinois. After the jury had awarded a $50,000 judgment, the trial judge entered a judgment for Welch, holding that malice was a constitutional requirement for the plaintiff's case and had not been proved. On appeal the seventh circuit, relying primarily on *Rosenbloom v. Metromedia, Inc.*, affirmed. The Supreme Court reversed with Justice Blackmun changing his position from *Rosenbloom* and joining with Justices Powell, Rehnquist, Stewart, and Marshall to adopt a bare majority view that recovery in private defamation suits is constitutionally limited to actual injury and malice need not be proved. Chief Justice Burger and Justices Douglas, Brennan, and White dissented.

The consensus that emerges from *Gertz* by virtue of five justices agreeing on an approach in private defamation suits is:

1. In defamation actions brought by public figures or public officials, malice in the *New York Times* sense (knowledge of the falsity of the statement or reckless disregard for the truth) must be proved as part of the plaintiff's prima facie case.
2. In private defamation suits, as long as liability is not imposed without fault, a state has autonomy in defining liability standards.
3. In private defamation libel suits, the first amendment and due process clause of the fourteenth amendment prohibit recovery for presumed or punitive damages; only actual injury to reputation is recoverable.

Rejection of Malice in Private Defamation Suits and Illinois Law

Under the holding in *Gertz*, a state may constitutionally impose liability for defamation of a private individual if the defendant was at least negligent in publishing the defamatory utterance. *Gertz* thus effectively overrules an aspect of the holding in *Farnsworth v.*

16. *Id.* at 3000. The Court noted that Gertz had been a member of the National Lawyers Guild in the late fifties and noted that the record was barren of any evidence that the Guild had taken any part in planning the 1968 Chicago demonstrations.

Tribune Co.,[17] decided by the Illinois Supreme Court in a decision which predates *Rosenbloom v. Metromedia, Inc.* In *Farnsworth* the Supreme Court of Illinois affirmed a judgment entered by the trial court for the defendant partially on the basis that malice was required under the first and fourteenth amendment even in private individual defamation suits whenever the subject matter of the publication is in an area of "critical public concern." As previously noted, *Gertz* would require malice only when the plaintiff was a public official or public figure within a restricted sense of the concept—a limitation which would not apply to a person like the plaintiff in *Farnsworth*.[18] Several Illinois appellate court and federal district court decisions have followed *Farnsworth* and *Rosenbloom v. Metromedia, Inc.* in extending the malice requirement to private defamation suits.[19] These decisions are no longer valid precedent after *Gertz v. Robert Welch, Inc.*

A second and important aspect of the holding in *Farnsworth* concerning the constitutionality of section 4 of article II of the Illinois Constitution also remains clouded by *Gertz*. *Farnsworth* involved a series of three articles published by the Chicago Tribune in which the plaintiff, a licensed osteopath, was referred to as a "quack." The supreme court affirmed a trial court judgment against plaintiff. On appeal the plaintiff argued that section 4 of article II of the Illinois Constitution, which says that "Truth is a defense in a libel action only when published with good motives and for justifiable ends," requires that an instruction to that effect be given to the jury and that the instructions given violated the above provision because they required plaintiff to prove that the utterances were false. Both contentions were rejected by the court. In so doing, the court held that instructions pursuant to section 4 of article II violated the first amendment and that *New York Times Co. v. Sullivan* required the plaintiff to prove that the publication was false and that it was made

17. 43 Ill. 2d 286, 253 N.E.2d 408 (1969).

18. Plaintiff's attorney in *Farnsworth* was Elmer Gertz, the plaintiff in *Gertz v. Robert Welch, Inc.* Attorney Gertz also was on the committee of the Illinois Constitutional Convention which debated and drafted section 4 of article II of the constitution, which played an important role in the decision in *Farnsworth*.

19. *See* Alpine Construction Co. v. Demaris, 358 F. Supp. 422 (N.D. Ill. 1973); Novel v. Garrison, 338 F. Supp. 977 (N.D. Ill. 1971); Snead v. Forbes, Inc., 2 Ill. App. 3d 22, 275 N.E.2d 746 (1st Dist. 1971).

with malice. Since the court's analysis of section 4 of article II is inextricably tied to the constitutional requirement of malice and since *Gertz v. Robert Welch, Inc.* would not require malice in a suit on the facts of *Farnsworth*, the constitutionality of section 4 is still an open question.[20]

Public Officials and Public Figures

The majority in *Gertz* limited the malice requirement to public officials and public figures. Public figure was confined by the majority to *two* limited senses. Justice Powell responded to the argument that Gertz, by his service on city committees and his stature as an attorney, was a public figure:

> Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life. It is preferable to reduce the public figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation.
>
> In this context it is plain that petitioner was not a public figure. . . . He plainly did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome.[21]

This language suggests that a party is a public figure for purposes of the malice requirement if (a) the person is a celebrity (household name) or (b) the person received considerable notoriety as a result of active participation in the controversy giving rise to the defamation. No Illinois case appears to be directly affected by the concept of public figure established by the Court in *Gertz*. The concept of public officials has been interpreted expansively in Illinois to include (1) police sergeants,[22] (2) former police patrolmen,[23] (3) a city at-

---

20. The United States Supreme Court has granted certiorari this term on the constitutionality of the imposition of a criminal sanction for publishing true statements (the name of a rape victim). Thus an important United States Supreme Court case relating to the constitutionality provision may be forthcoming. *See* Cox Broadcasting Corp. v. Cohn, 231 Ga. 60, 200 S.E.2d 127 (1973), *prob. juris. post.*, 94 S. Ct. 1406 (1974).

21. 94 S. Ct. at 3013.

22. Suchomel v. Suburban Life Newspapers, Inc., 84 Ill. App. 2d 239, 228 N.E.2d 172 (1st Dist. 1967), *aff'd*, 40 Ill. 2d 32, 240 N.E.2d 1 (1968).

23. Coursey v. Greater Niles Township Publishing Corp., 40 Ill. 2d 257, 239 N.E.2d 837 (1968).

torney,[24] (4) an administrator of a private nursing home,[25] and (5) an architect procurring furnishings for a public office.[26] Nothing in *Gertz v. Robert Welch, Inc.* or other United States Supreme Court decisions interpreting the concept of public officials significantly affects the precedential value of these decisions.[27]

The Actual Injury Limitation on Damage Judgments

In libel suits brought by private individuals, the Court in *Gertz* held that recovery is limited to actual injury. This aspect of the holding in *Gertz* will significantly affect Illinois defamation law. In Illinois, a presumption of damages operates in cases where the utterance is not only defamatory on its face but also imputes to the plaintiff (1) the commission of a criminal offense, (2) some contagious disease which would exclude a person from society, (3) unfitness to perform duties of an office or employment, or (4) words which prejudice the plaintiff in his profession or trade.[28]

In libel actions brought by private individuals on the basis of publication of a statement which is defamatory on its face and which falls within one of the above four categories, a damage judgment assessed on the basis of a presumption of injury would be unconstitutional. *Gertz* does not say whether a similar limitation would apply in defamation suits grounded on slander, which in Illinois involve a presumption of damages if the previous stated conditions are present. The reasoning of *Gertz* would support a distinction be-

24. Tunnell v. Edwardsville Intelligencer, Inc., 99 Ill. App. 2d 1, 241 N.E.2d 28 (5th Dist. 1968), *rev'd on other grounds*, 43 Ill. 2d 239, 252 N.E.2d 538 (1969).

25. Doctors Convalescent Center, Inc. v. East Shore Newspapers, Inc., 104 Ill. App. 2d 271, 244 N.E.2d 373 (5th Dist. 1968).

26. Turley v. W.T.A.X., Inc., 94 Ill. App. 2d 377, 236 N.E.2d 778 (4th Dist. 1968).

27. *Cf.* Rosenblatt v. Baer, 383 U.S. 75 (1966).

28. Special damages need to be established as part of a prima facie case in Illinois in every defamation case except where the libel or slander is (1) defamation on its face and (2) falls within the four common law per se categories noted in the text. If the plaintiff needs to plead innuendo in Illinois, then special damages also must be proved. *See generally* Coursey v. Greater Niles Township Publishing Corp., 82 Ill. App. 2d 76, 227 N.E.2d 164 (1st Dist. 1967); Mitchell v. Peoria Journal-Star, Inc., 76 Ill. App. 2d 154, 221 N.E.2d 516 (3d Dist. 1966); Whitby v. Associates Discount Corp., 59 Ill. App. 2d 337, 207 N.E.2d 482 (3d Dist. 1965).

tween slander and libel suits in terms of the injury limitation, but it remains an open question.[29]

If a libel suit is brought by a private individual in Illinois after *Gertz* and constitutionally permissible recovery is limited to "actual injury," what proof of injury must the plaintiff offer and how much can the plaintiff recover? Unfortunately, a satisfactory answer is not found in the opinion. Addressing the scope of actual injury, Justice Powell stated:

> We need not define "actual injury," as trial courts have wide experience in framing appropriate jury instructions in tort action. Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury.[30]

This language clearly establishes that the plaintiff is not constitutionally required to show out-of-pocket loss (special damages) to prove actual injury. Direct testimony of loss of esteem or standing in the community and emotional distress and/or humiliation experienced by the plaintiff is clearly sufficient to establish actual injury. Instructions to the jury limiting the damage award to a dollar value based upon the plaintiff's introduction of competent evidence of injury are required. Beyond that, however, the language provides state and federal courts with little guidance.

The majority in *Gertz* seems also to contemplate judicial review of the amount of the damage award in terms of the relationship between the evidence introduced by the plaintiff and the money judgment. But what criteria is to be used in evaluating the excessiveness of the money judgment in terms of the first amendment? The Court chooses to leave that answer for a later day after state and federal courts have struggled with implementing the constitutional requirements of the decision.

It is most likely that the actual injury concept of *Gertz* will prove

29. Justice Powell's opinion in *Gertz* applies in part a balancing of interest test. This test arguably could support the view that a limitation to actual injury is not required in slander suits because verbal utterances ought not be assigned the same first amendment value that printed material is.

30. 94 S. Ct. 2997, 3012 (1974).

to be a strong focal point of criticism. Virtually every state defamation rule structure will be effected by the decision, and the open textured nature of the concept as set down in the opinion guarantees a stream of litigation at the federal and state level involving judicial review of damage awards. The strain on federal court resources may over the next few years cause a member of the majority to reassess their view.

It is supremely ironical that Justice Blackmun decided to change from his support of the malice-public interest approach in private libel suits in *Rosenbloom v. Metromedia, Inc.* to the actual injury approach in *Gertz* on the basis that a majority consensus was needed to eliminate the "unsureness engendered by *Rosenbloom's* diversity."[31] Despite the fact that five Justices have agreed on a rationale in *Gertz*, the decision leaves the scope of the constitutional dimensions in private libel suits at least as uncertain as it was in *Rosenbloom.* Moreover, in view of the extensive common law privileges operating in most states,[32] *Gertz* and the actual injury limitation developed therein will alter defamation law to a more significant extent than its most famous predecessor, *New York Times Co. v. Sullivan.*

Time, of course, will judge whether the actual injury approach of the Supreme Court in *Gertz v. Robert Welch, Inc.* provides adequate protection for the first amendment in this most sensitive area of constitutional balance. Negligence in the publication of a defamatory utterance is a great deal easier to establish than that the utterance was published with malice in the *New York Times* sense. Moreover, proof of actual injury by direct testimony of damage to reputation or emotional harm is considerably less difficult than proof of out-of-pocket loss. For an attorney like plaintiff Gertz, numerous witnesses supporting damage to reputation or emotional harm might be easily accessible. These factors ought to provide considerable incentive to litigate in private defamation suits.

It would seem also that the Supreme Court's reliance on the self-restraint of juries and the supervision of state appellate courts in ap-

31. *Id.* at 3014 (concurring opinion).

32. A summary of the various qualified privileges of common law which gave the defendant a defense of "good faith" may be found in W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 115 (4th ed. 1971).

plication of the actual injury standard overlooks the considerable abuse of damage judgments in defamation cases which have reached the Supreme Court. In *New York Times Co. v. Sullivan*, for example, the commissioner of police in Montgomery, Alabama received a $500,000 judgment in the case where malice was initially employed by the Court. It would not be surprising to see, within a reasonably short time, significant increases in private defamation suits as a result of *Gertz*. The decision, in this author's view, will significantly undermine freedom of the press.

FORESEEABILITY AND THE DUTY ISSUE IN ILLINOIS

During this term an unusual number of cases with factual patterns of general interest were decided by the Illinois Supreme Court. Quite unexpectedly, the court in three of these cases ruled against the plaintiff as a matter of law on the ground that the harm caused to the plaintiff was outside the zone of foreseeability of the defendant's actions.[33] In each of these, Justice Goldenhersh vigorously dissented. Collectively, these three cases represent a startling development in Illinois tort law whose importance would be difficult to overstate.

Since these decisions were grounded on defendant's lack of duty toward the plaintiff, they raise questions of general negligence theory that are found more frequently in dialogues in law classrooms than in appellate court opinions. One of these cases, *Cunis v. Brennan*,[34] looks surprisingly like *Palsgraf v. Long Island Railroad Co.*,[35] a case familiar to law students and lawyers mostly because of law teachers' penchant for exploring every nook and cranny of the peculiar facts and theories expressed in the case.

In tort litigation based upon negligence claims the appellate court judge plays an important role in declaring Illinois tort policy. This judicial law-declaring role is primarily accomplished through judicial rulings on the existence and scope of a defendant's duty toward the plaintiff. In a negligence case, the plaintiff is required to establish

33. *See* Winnett v. Winnett, 57 Ill. 2d 7, 310 N.E.2d 1 (1974); Cunis v. Brennan, 56 Ill. 2d 372, 308 N.E.2d 617 (1974); Barnes v. Washington, 56 Ill. 2d 22, 305 N.E.2d 535 (1973).

34. 56 Ill. 2d 372, 308 N.E.2d 617 (1974).

35. 248 N.Y. 339, 162 N.E. 99 (1928).

that the defendant owed a duty to conform to a legal standard of conduct for the protection of the plaintiff against injury. The issue of duty from defendant to plaintiff is threshold and precedes issues of breach of duty or cause. Thus a trial or appellate court can take a case from the trier of fact or set aside a jury verdict if the court determines that no duty was owed by the defendant to the particular plaintiff in the case.

In determining the scope of defendant's duty a variety of factors are taken into account. Some of these factors are:

(1) the social, economic, and safety value of the activity which produced the injury,
(2) the gravity of the harm likely to occur by the activity,
(3) the burden on the defendant and consequences to the community in imposing liability,
(4) the burden on the administration of the court system in imposing liability,
(5) the availability, cost, and prevalence of insurance whereby persons in the position of the defendant can adequately acquire means of protection against such risks, and
(6) the foreseeability of harm.[36]

As what has been just stated suggests, foreseeability is but one of the facts that is taken into account in the duty analysis. The role that foreseeability ought to play in the duty analysis is one of the recurring themes of tort literature.[37] Even assuming, however, that foreseeability has a role to play in the duty question, several additional considerations still remain. Foreseeability is an elastic concept in tort law which is used in at least two senses. Harm may be foreseeable in the narrow sense that both the exact person injured and the precise manner in which the injury happened could reasonably have been anticipated. In a more general sense, harm may be foreseen only in that the actor's conduct creates a foreseeable risk that the general type of injury would be foreseen to a general class

36. *See generally* Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014 (1928); *cf.* Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959).

37. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 286-89 (4th ed. 1971); Green, *Foreseeability in Negligence Law*, 61 COLUM. L. REV. 1401 (1961).

of persons of which the plaintiff is part. Whether the general or narrow sense of foreseeability ought to be employed in the duty analysis is also often written about in tort literature.[38] *Cunis v. Brennan*,[39] probably the most significant of this term's decisions, addressed itself to both of the above problems.

Reasonable Foreseeability: Cunis v. Brennan

In *Cunis v. Brennan*,[40] a negligence action was brought against the Village of La Grange and others by a minor seeking damages for amputation of his leg. The plaintiff alleged that he was thrown thirty feet out of an automobile as a result of a collision and landed upon the remains of an exposed drain pipe which impaled his leg and necessitated its amputation. Count V of the plaintiff's complaint alleged that the defendant village "was under a duty to maintain its parkways in a safe condition and that it had 'failed in its duty toward the plaintiff' by permitting a dangerous and broken drain pipe to remain on the parkway."[41] The trial court granted defendant's motion to dismiss Count V. The first district appellate court reversed. The supreme court reversed the well-reasoned appellate court decision in an opinion written by Justice Ward and held that, on the basis of allegations in Count V, no duty was owed by the Village of La Grange to the plaintiff.

The first question responded to by Justice Ward was whether foreseeability is to be the exclusive factor in the duty analysis. To this question, Justice Ward responded with the often quoted language of Professor Green:

> However valuable the foreseeability formula may be in aiding a jury or judge to reach a decision on the negligence issue, it is altogether inadequate for use by the judge as a basis of determining the duty issue and its scope. The duty issue, being one of law, is broad in its implication; the negligence issue is confined to the particular case and has no implications for other

38. *See generally* Harper, *The Foreseeability Factor in the Law of Torts*, 7 NOTRE DAME LAW. 468 (1932); Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1 (1953); Seavey, *Principles of Torts*, 56 HARV. L. REV. 72 (1942).

39. 56 Ill. 2d 372, 308 N.E.2d 617 (1974), *rev'g* 7 Ill. App. 3d 204, 287 N.E.2d 207 (1st Dist. 1972).

40. *Id.*

41. *Id.* at 374, 308 N.E.2d at 618.

> cases. There are many factors other than foreseeability that may condition a judge's imposing or not imposing a duty in the particular case.[42]

Justice Ward then proceeded to unpack the concept of foreseeability that was to apply to duty analysis in Illinois and employ it in the case before the court. Several points were made. First, Justice Ward stated that "reasonable foreseeability" and not simple forseeability was the Illinois standard; second, reasonable foreseeability is to be determined from the point of view of the alleged negligent act and not the "hindsight" of the plaintiff's injury. Then applying the foreseeability standard to the allegations in Count V of plaintiff's complaint, Justice Ward concluded, "We hold that the remote possibility of the occurence did not give rise to a legal duty on the part of the Village to the plaintiff to provide against his injury."[43]

The majority position in *Cunis* relies primarily upon *Palsgraf v. Long Island Railroad Co.*,[44] and an article written by Prosser[45] on the case as well as on *Mieher v. Brown*,[46] decided by the Illinois Supreme Court last term. However, *Palsgraf v. Long Island Railroad Co.*,[47] is sufficiently distinguishable to be of little guidance to the court in *Cunis*. *Palsgraf*, a law professor's dream (and a law student's nightmare), has become an analytic model for the instruc-

---

42. *Id.* at 375, 308 N.E.2d at 618-19, *citing* Green, *Foreseeability in Negligence Law*, 61 COLUM. L. REV. 1401, 1417-18 (1961).

43. 56 Ill. 2d at 377-78, 308 N.E.2d at 620.

44. 248 N.Y. 339, 162 N.E. 99 (1928).

45. *See* Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1 (1953). Justice Ward's reliance on Professor Prosser's analysis of *Palsgraf* in a 1953 law review article is inappropriate. The primary thrust of that article is to denigrate foreseeability as a rationale for denying recovery in the case. Prosser finds the result in *Palsgraf* satisfactory because of the "freakish, fantastic, cockeyed and far-fetched" combination of events that were necessary to bring about the injury—a passenger hurrying to board a train with firecrackers in an innocent brown bag, the agent knocking the package out of the passenger's possession, the explosion, and a scale falling on the plaintiff's foot 25 feet away. Surely there is a significant difference in the scope of the zone of danger created by leaving a jagged pipe exposed above the ground four and one-half feet from a busy intersection and the scope of the zone of danger created by helping a passenger with an innocuous brown bag under his arm onto a train. The sentence in Prosser's article following the quoted language used by the majority in *Cunis* suggests that he would say that *Cunis* was different from *Palsgraf* because in *Cunis* there was a "reasonably close connection between the harm threatened [personal injury to persons coming in contact with the pipe] and the harm done [mutilation of the minor plaintiff's leg]." *Id.* at 32.

46. 54 Ill. 2d 539, 301 N.E.2d 307 (1973).

47. 248 N.Y. 339, 162 N.E. 99 (1928).

tion of general negligence theory. The unusual factual situation presented to the New York Court of Appeals in *Palsgraf* marks it a rare occasion when a "pure *Palsgraf*" case appears before a state appellate court. In *Palsgraf*, the agent of a railroad was sued in negligence for injury caused to the plaintiff while she was standing on a platform when a scale fell on the plaintiff's foot. In helping a passenger onto the train, some twenty-five to thirty feet from the accident, the agent had caused a package to jar loose which contained fire crackers. Upon impact, the package exploded, causing the scale to fall.[48] Under general negligence theory the duty of the agent would be determined by looking at the injury from the point of view of the allegedly negligent act—the helping of the passenger onto the train. Viewed from that point, no duty was owed to the injured plaintiff because one can say with certainty that no foreseeable risk of injury to a person twenty-five feet away is created by helping a person carrying an innocuous package onto a train. In short, as Justice Cardozo said in *Palsgraf*, the injured party was an unforeseeable plaintiff to whom no duty was owed. It is of considerable importance that foreseeability was used by Justice Cardozo in the general sense.

Justice Andrews in dissent constructed a theory upon which liability would be extended to the defendant. Since the defendant owed a duty to the passenger helped onto the train, he owed a duty to the whole world, which of course included the injured plaintiff. However, foreseeability was introduced into the case by Justice Andrews in the proximate cause analysis. Proximate cause was to be determined by asking whether a foreseeable risk of injury to the plaintiff was created at the time of the impact of the defendant's conduct. From the time of the explosion, a foreseeable risk of injury to the plaintiff did exist, and therefore a cause of action was properly stated.

Cunis does not involve the same factual pattern as *Palsgraf*. The plaintiff in *Cunis* is not an unforeseeable plaintiff as was the plaintiff in *Palsgraf*. Surely there is a significant difference in the scope of

48. Although the case was decided on appeal on the basis of these facts, Prosser, after examining the record, concludes that the scale fell as a result of the crowd stampeding after the explosion. *See* Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 3 n.9 (1953).

the zone of danger created by leaving a jagged pipe exposed above the ground four and one-half feet from a busy intersection and the scope of the zone of danger created by helping a passenger with an innocuous brown bag under his arm onto a train. If the general sense of foreseeability is applied to the facts of *Cunis*, then the plaintiff is within the zone of danger created by defendant's allegedly negligent act. If duty is looked at from the failure of the village to remove a rusty drain pipe located four and one-half feet from a busy highway, then the plaintiff, a user of that highway, is a foreseeable plaintiff. A rusty jagged pipe exposed above the ground within five feet of a busy highway surely creates a general risk of injury not only to users of the highway who stop for any reason that requires that they leave the car but also to property thrown from a truck traveling on the highway and to pedestrians or workers walking on the parkway near the road, especially at night. Moreover, there is no impact in *Cunis* analagous to the firecracker explosion in *Palsgraf*. Without duty to a foreseeable plaintiff, impact and injury to an unforeseeable plaintiff, Justice Andrews' theory has no application.

Justice Goldenhersh dissents vigorously in *Cunis* in an opinion which contains his full position on the sense and role of foreseeability in the duty analysis. Justice Goldenhersh discusses precedent which is not dealt with in the majority opinion and which is most relevant to the facts before the court, namely, cases involving the duty of municipalities to exercise care in respect to artificial conditions on streets, sidewalks, and parkways where such conditions create a risk of injury to users of the streets, sidewalks, or parkways.[49] In these cases, appellate courts use foreseeability in the general sense in the duty analysis.[50] To the majority's characterization of the injury to plaintiff as unique or bizarre, Justice Goldenhersh cited analysis of the authors of the *Restatement of Torts*:

---

49. *See* Storen v. City of Chicago, 373 Ill. 530, 27 N.E.2d 53 (1940); Kubala v. Dudlow, 17 Ill. App. 2d 463, 150 N.E.2d 643 (3rd Dist. 1958).

50. *See, e.g.*, Scarpaci v. Chicago, 329 Ill. App. 434, 69 N.E.2d 100 (1st Dist. 1946); Ferguson v. Springfield, 311 Ill. App. 655, 37 N.E.2d 563 (3d Dist. 1941); Caruso v. Chicago, 278 Ill. App. 247 (1st Dist. 1934); Potter v. Coffeyville, 142 Kan. 183, 45 P.2d 844 (1935); Jablonski v. Bay City, 248 Mich. 306, 226 N.W. 865 (1929); Harms v. Beatrice, 142 Neb. 219, 5 N.W.2d 287 (1942); Muskogee v. Roberts, 193 Okla. 61, 141 P.2d 100 (1943); Tulsa v. Ensign, 189 Okla. 507, 117 P.2d 1013 (1941); Schaut v. St. Mary's, 141 Pa. Super. 388, 14 A.2d 583 (1940).

> A possessor of land who creates or permits to remain thereon an excavation or other artificial condition so near an existing highway that he realizes or should realize that it involves an unreasonable risk to others accidentally brought into contact with such condition while traveling with reasonable care upon the highway, is subject to liability for physical harm thereby caused to persons who
>
> (a) are traveling on the highway, or
>
> (b) foreseeably deviate from it in the ordinary course of travel.[51]

Plaintiff's statistics showing the percentage of accidents at intersections and persons thrown from vehicles would seem to clearly satisfy the general sense of foreseeability required in section 368.[52] In *Kubala v. Dudlow*,[53] the appellate court cited section 368 with approval in facts analogous to *Cunis*. Neither the *Restatement* nor *Kubala v. Dudlow* were mentioned in the majority opinion.

Risk of Some Injury to the Plaintiff Versus Risk of the Precise Injury that Plaintiff Incurred

Foreseeability as it is used by the court in *Cunis* may be better understood by noting the distinction between the general and narrow sense of the concept. Foreseeability in the general sense refers to activity or omissions which create a foreseeable risk of the general type of injury to a class of persons of which the plaintiff is part. Foreseeability in the narrow sense is used to mean that the defendant's activity or omission creates a foreseeable risk of the specific injury which actually occurred to the plaintiff.

It is foreseeability in the latter narrow sense which Justice Ward is employing when he concludes in *Cunis* that the plaintiff's injury is too remote an occurrence to give rise to a legal duty of the Village of La Grange. Foreseeability in the narrow sense of foresight of the plaintiff's actual injury was employed by the supreme court last term in *Mieher v. Brown*.[54] Last year's analysis of torts published in this *Review* contained an extensive examination of *Mieher* which need not be restated here.[55] Suffice to say that *Mieher* is the pred-

51. RESTATEMENT OF TORTS (SECOND) § 368 (1965).

52. 56 Ill. 2d 372, 375, 308 N.E.2d 617, 618 (1974).

53. 17 Ill. App. 2d 463, 150 N.E.2d 643 (3d Dist. 1958).

54. 54 Ill. 2d 539, 301 N.E.2d 307 (1973).

55. *See generally* Turkington, *Torts, 1972-1973 Survey of Illinois Law*, 23 DEPAUL L. REV. 464 (1973) for the author's analysis and position on *Mieher*.

ecessor of *Cunis* and was principally relied upon by Justice Ward in the decision.

In *Mieher v. Brown*,[56] the representatives of a person allegedly killed after a collision with a truck manufactured without a bumper proceeded against the defendant manufacturer on the theory that the truck had been negligently designed. On appeal from an appellate court decision upholding the sufficiency of the plaintiff's complaint, the supreme court reversed. In so doing, the court held that the manufacturer owed no duty to prevent injuries to the plaintiff resulting from the "extraordinary occurrences" of that case. The narrow sense of foreseeability employed in *Mieher* and *Cunis* appeared in two other supreme court cases this term as the primary ground for ruling against the plaintiff in the pleadings.

Barnes v. Washington

Barnes v. Washington[57] reached the Illinois Supreme Court after years of litigation at the lower court level. The case was decided on the basis of the following facts and theory of liability. Jessie Barnes, a 37 year old mental incompetent, became intoxicated after visiting a tavern on the southside of Chicago. After leaving the tavern with persons he had met, he was left early in the morning on the street adjacent to railroad tracks owned by the defendant, Illinois Central Railroad Company. Barnes reached a boxcar of the defendant's through a hole in a fence maintained by the railroad. For three days he was locked in the boxcar. He was found in a switch shanty in the railroad yards in Decatur, Illinois, 175 miles south of Chicago. His extremities were frozen to the extent that amputations were required. The negligence theory against defendant was based upon the railroad's failure (1) to properly mend a hole in the fence through which the plaintiff reached the boxcar and (2) to inspect their cars for children or incompetents before locking them.

The first district appellate court upheld plaintiff's theory of liability by holding that the railroad owed the same duty to the plaintiff

56. 54 Ill. 2d 539, 301 N.E.2d 307 (1973).

57. 56 Ill. 2d 22, 305 N.E.2d 535 (1973), *rev'g* 4 Ill. App. 3d 513, 281 N.E.2d 380 (1st Dist. 1972).

as was owed to a child trespasser. Justice McNamara reasoned that the policies behind the child trespasser rule applied equally to an adult whose mental deficiency significantly affected his ability to appreciate the risk of injury present in artificial conditions on the property.

In reversing the appellate court, the supreme court rejected the proposition that the railroad owed the same duty to the injured plaintiff as would be owed to a child. In this analysis, foreseeability in the narrow sense played an important role:

> For instance, an adult incompetent may have no difficulty in raising himself into an open box car from the ground, whereas it would be difficult, if not impossible, for an immature child to do so. For this reason we must reject the plaintiff's contention and the general holding of the appellate court that a mentally incompetent adult should be afforded the same protection as a child of tender years.[58]

To the plaintiff's proof that children and adults had entered the defendant's property through the holes in the fence for a number of years, had used the railroad's property as a shortcut and had played on the embankment adjacent to the tracks, Justice Ward responded:

> [W]e conclude that the defendant would have no reason to believe or know, even if children did play on the embankment and use it for a shortcut, that someone, at 1:30 A.M., would be likely to board one of its cars and be injured.[59]

Finally, the court concluded that the likelihood of the injury to the plaintiff under the circumstances was too minimal to impose a duty under the circumstances on the railroad even to a child trespasser, and thus the defendant owed no duty to the plaintiff.

Justice Goldenhersh, joined by Justice Kluczynski, found that the allegations were sufficient to impute knowledge of trespassers to the defendant and impose a duty from the defendant to the plaintiff on that basis.

Epilogue

Although the role of foreseeability on the negligence issue continues to be disputed in literature, use of the narrow sense of foreseeability by the Illinois Supreme Court is clearly contrary to the mainstream of judicial thinking when the question before the court

58. *Id.* at 28, 305 N.E.2d at 538.
59. *Id.* at 29, 305 N.E.2d at 539.

is whether a sufficient relationship between the parties exists to submit breach of duty and/or cause to the jury. It is not incorrect, for example, to suggest that it is an established rule that if some risk of personal injury to the plaintiff is created by the defendant's actions (general foreseeability), the fact that the injury actually incurred was brought about by unforeseeable means does not negate the existence of a *duty* running from the defendant to the plaintiff.[60]

A preliminary analysis of general foreseeability on the duty issue is probably desirable as a gesture of fidelity toward both a familiar language structure and the risk or fault theory of negligence. This theory, based as it is upon reasonable appreciation and response to dangers incident to activity, demands at least that the plaintiff be within a general zone of danger created by what the defendant was doing or failed to do.[61]

Beyond this, courts generally leave the question of foreseeability in its other almost unlimited senses to the jury as it considers breach of duty and/or cause. Indeed, such is the policy in Illinois where foreseeability of injury is an essential component of the proximate cause question.[62] In fact, it might be said of *Cunis* and *Barnes* that the supreme court's use of foreseeability in the duty question is superfluous because it simply restates Illinois policy on the cause question.

Several reasons for the general reluctance of courts to let foreseeability of plaintiff's precise injury be a dominant factor in the duty analysis can be identified. Foremost of these is the imprecise, elas-

60. *See, e.g.*, Munsey v. Webb, 231 U.S. 150 (1913); Washington & Georgetown R.R. v. Hickey, 166 U.S. 521 (1897); Johnson v. Kosmos Portland Cement Co., 64 F.2d 193 (6th Cir. 1933); Gibson v. Garcia, 96 Cal. App. 2d 681, 216 P.2d 119 (1950); Carroll v. Central Counties Gas Co., 74 Cal. App. 303, 240 P. 53 (1925); Van Cleef v. City of Chicago, 240 Ill. 318, 88 N.E. 815 (1909); Teasdale v. Beacon Oil Co., 266 Mass. 25, 164 N.E. 612 (1929); Dalton v. Great Atlantic & Pacific Tea Co., 241 Mass. 400, 135 N.E. 318 (1922); Salisbury v. Herchenroder, 106 Mass. 458, 8 Am. R. 354 (1871); McDowell v. Village of Preston, 104 Minn. 263, 116 N.W. 470 (1908); Moore v. Townsend, 76 Minn. 64, 78 N.W. 880 (1899); Derosier v. New England Tel. & Tel. Co., 81 N.H. 451, 130 A. 145 (1925); Riley v. Standard Oil Co. v. Indiana, 214 Wis. 15, 252 N.W. 183 (1934).

61. *See generally* Harper, *The Foreseeability Factor in the Law of Torts*, 7 NOTRE DAME LAW. 468 (1932).

62. *See* Ney v. Yellow Cab Co., 2 Ill. 2d 74, 117 N.E.2d 74 (1954); Hays v. Place, 350 Ill. App. 504, 113 N.E.2d 178 (4th Dist. 1953); Mahan v. Richardson, 284 Ill. App. 493, 1 N.E.2d 100 (1st Dist. 1936).

tic, open-ended nature of the concept. Dean Prosser has written a great deal about this, and what he has said would be difficult to improve upon.[63] Whether harm to the plaintiff is foreseeable will depend in part upon what point in time the injury is looked at. Looking at the foreseeability of the injury with the hindsight of the knowledge of the precise events which came together to cause the harm, almost everything seems foreseeable. From the point in time of the negligent act, the scope of foreseeability is somewhat more restricted. Indeed, Dean Prosser has even suggested that Mrs. Palsgraf was a foreseeable plaintiff if the duty of the railroad is viewed in terms of its leaving a scale which could easily topple on a platform frequented with passengers.[64] Foreseeability will also depend in part on the personal experiences of the person using the concept. I have found significant disagreement in a law classroom as to whether injury posed in various hypothetical factual situations is foreseeable. Surely, there will also be considerable disagreement regarding the court's conclusion that the injury to the plaintiff in *Barnes* or *Cunis* is unforeseeable. Is it not, for example, patent nonsense to conclude, as the court did in *Barnes v. Washington*, that the physical size of children makes it unforeseeable that trespassing children will climb into open railroad cars?

The uncertain nature of the concept of foreseeability makes it particularly inappropriate as a major device for an appellate court to employ in exercising its law-declaring role. The force of precedent and the demands for certainty for purposes of economic planning cast the appellate court judge in the role of a law-declarer when that judge determines the existence and scope of the defendant's duty toward the plaintiff. Moreover, we also demand that appellate judges publish good reasons in an opinion and parade them for all to see so that courts have some degree of accountability to the public. Strong public disagreement over judge-made policy can, after all, sometimes produce changes through the legislature.

The narrow concept of foreseeability employed by all of the justices of the Illinois Supreme Court except Justice Goldenhersh in *Cunis* and *Barnes* frustrates the law-declaring role of the court. Un-

63. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 267 (4th ed. 1971); Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1 (1953).

64. *See* Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 7 (1953).

doubtedly, foreseeability as used by the majority of the court in these cases masks inarticulated policy. It hardly need be stated that inarticulated policy is no policy at all. Perhaps the Illinois Supreme Court in *Mieher*, *Cunis*, and *Barnes* is really saying that plaintiffs' attorneys and juries have gone too far and that the extension of a duty to the plaintiffs in each of these cases would produce a floodgate of litigation that would tax the administration of the already burdened court system in Illinois beyond its limits. It might even be that the court is really saying that the injured mental incompetent in *Barnes* and the injured minor in *Cunis* are in a better position, given the availability of insurance, to pay for the cost of protecting against the risk than the Illinois Central Railroad or the Village of La Grange. Lawyers, legislators, manufacturers, villages, municipalities, users of highways, and citizens generally expect courts to respond to these and other questions presented by the duty question on the facts of the two cases that have been discussed in this section. Instead of such response, they get an ad hoc judicial dropping of the buck.

FORESEEABILITY AND STRICT PRODUCTS LIABILITY: *Winnett v. Winnett*

Since strict liability in tort for product defects is principally based upon economic policy factors, foreseeability has played an even less important role in defective products litigation based upon strict liability than in negligence litigation. In a strict liability products case, foreseeability considerations are primarily promoted through the intended use doctrine which limits a manufacturer's liability to injuries incurred from an intended use of the product.[65] Foreseeability is used in the general sense in the intended use doctrine. In *Winnett v. Winnett*,[66] the Illinois Supreme Court again built from the narrow sense of foreseeability developed in *Mieher* and found against the plaintiff on the pleadings in a strict liability defective products case brought against the manufacturer of a forage wagon. In *Winnett*,

65. *See also, e.g.*, Phillips v. Ogle Aluminum Furniture, Inc., 106 Cal. App. 2d 650, 235 P.2d 857 (1951); *cf.* Ringstad v. I. Magnin & Co., 39 Wash. 2d 923, 239 P.2d 848 (1952).

66. 57 Ill. 2d 7, 310 N.E.2d 1 (1974), *rev'g* 9 Ill. App. 3d 644, 292 N.E.2d 524 (4th Dist. 1973).

a suit was brought on behalf of a four year old girl for injuries incurred by her when she placed her hand on a moving conveyor belt or screen on a forage wagon which was then being operated on her grandfather's farm. Recovery was sought against the grandfather for negligence and against the manufacturer of the forage wagon in strict liability. The trial court dismissed the cause of action against the manufacturer. The fourth district appellate court reversed. On appeal to the Illinois Supreme Court, the appellate court decision was reversed and the circuit court opinion affirmed.

In reversing the appellate court, Chief Justice Underwood, speaking for all the court except Justice Goldenhersh, stated:

> In our judgment the liability of a manufacturer properly encompasses only those individuals to whom injury from a defective product may reasonably be foreseen and only those situations where the product is being used for the purpose for which it was intended or for which it is reasonably foreseeable that it may be used.[67]

Reasonable foreseeability as applied to the case, continued Justice Underwood, depends upon whether "it can be fairly said that [the child's] conduct in placing her fingers in the moving screen or belt of the forage wagon was reasonably foreseeable."[68] Then the justice concluded that it was not.

If the adult driver of the farm wagon or an adult helper had been injured by placing a hand on the conveyor belt, it would be startling for an appellate court in a strict products liability case to find the injury not reasonably foreseeable. Yet the Illinois Supreme Court finds such an injury in regard to a child not reasonably foreseeable. If there are policy reasons for distinguishing between the sufficiency of a four year old child's complaint and an adult's complaint in a strict liability case based upon the essential facts of *Winnett*, they are not apparent to this writer. Policy considerations in Illinois and elsewhere as expressed in the special duties imposed upon defendants in regard to child trespassers would support favoring the child and not the adult in cases like *Winnett*.

Surprisingly, the above quoted language and reasoning of the court in *Winnett* suggests that in a products case in Illinois based upon strict liability both the plaintiff's injury and the use of the

67. *Id.* at 11, 310 N.E.2d at 4.
68. *Id.* at 12-13, 310 N.E.2d at 4-5.

product must be foreseeable. Something of the unique nature of Justice Underwood's reasoning can be gleaned by Justice Goldenhersh's response in dissent:

> The majority correctly notes that every authority which it cites supports a result contrary to that achieved by its opinion and then without the aid of either precedent or reasoning proceeds to hold that the occurrence alleged in plaintiff's second amended complaint was not "objectively reasonable to expect."[69]

The assault on the doctrine of privity and economic policy considerations supporting the strict liability standard has produced an extension of liability in products cases to the nonuser by most jurisdictions which recognize the tort. As discussed later in this Article, the Supreme Court of Illinois assumed that liability was extended to the nonuser in 1965 when it introduced the tort of strict liability for product defect in *Suvada v. White Motor Co.*[70] As long as the product was being used in a way that was intended, the fact that the injured party was a nonuser of the product or a bystander has not been controlling even in cases where the injury was remote. Foreseeability in such cases has been limited to the intended use aspect of the problem.[71] In *Piecefield v. Remington Arms Co.*,[72] for example, the Supreme Court of Michigan found the manufacturer of a shotgun shell liable for injuries caused to a person who suffered injuries when the barrel of a shotgun his brother was using exploded as a result of a defect in the shell. The manufacturer of an automobile engine which blew up was held liable for injuries to a person who was in a chain collision caused by a cloud of steam and gas restricting the visibility of other drivers by the Missouri Supreme Court in *Giberson v. Ford Motor Co.*[73] An eighth circuit federal appeals court in a diversity suit involving Iowa tort law extended the duty of the manufacturer of hubcaps to a person who was thrown off a motorcycle and injured as a result of hubcap pro-

---

69. *Id.* at 13, 310 N.E.2d at 5.

70. 32 Ill. 2d 612, 210 N.E.2d 182 (1965). *See* text accompanying note 78 *infra.*

71. California, perhaps the leading jurisdiction in development of strict liability in tort, very recently recognized the role of foreseeability in a products case as limited to the intended use aspect of the problem in Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153 (1972).

72. 375 Mich. 85, 133 N.W.2d 129 (1965).

73. 504 S.W.2d 8 (Mo. 1974).

trusions in *Passwaters v. General Motors Corp.*[74] A further dramatic example of this trend in products liability suits is *Sills v. Massey-Ferguson, Inc.*,[75] decided by a federal court in 1969, and involving interpretation of Indiana law where the manufacturer of a lawnmower was denied his motion to dismiss where the plaintiff's alleged injuries were caused by a bolt thrown 180 feet by a lawnmower. Several other cases could be added to this list.[76] In none of the above cases is there even a suggestion that both the use of the product and the precise injury to the plaintiff must be foreseen for a duty to be imposed upon the manufacturer of the product.

The Supreme Court of Wisconsin recognized the overriding economic policy considerations underlying the theory of strict products liability in tort and expressly rejected the use of foreseeability to limit recovery by injured parties who are neither users nor consumers in *Howes v. Hansen.*[77]

Nearly a decade ago the Illinois Supreme Court firmly embraced the "deep pockets economic policy" rationale for strict liability tort recovery in defective products cases:

> Without extended discussion, it seems obvious that public interest in human life and health, the invitations and solicitations to purchase the product and the justice of imposing the loss on the one creating the risk and reaping the profit are present and as compelling in cases involving motor vehicles and other products, where the defective condition makes them unreasonably dangerous to the user, as they are in food cases.[78]

In the nine years since *Suvada* was decided, Illinois appellate courts have experienced difficulty implementing the policy of strict liability enunciated in *Suvada.* A dramatic example of this can be found in the confusion over whether assumption of the risk or contributory negligence is to be a defense in such suits.[79] The products liability philosophy of the Illinois Supreme Court in *Winnett* is a world apart from the products liability view of the court in *Suvada.* Use of fore-

74. 454 F.2d 1270 (8th Cir. 1972).

75. 296 F. Supp. 776 (N.D. Ind. 1969).

76. *See, e.g.*, Elmore v. American Motors Corp., 75 Cal. Rptr. 652, 451 P.2d 84 (1969); Howes v. Hansen, 56 Wis. 2d 247, 201 N.W.2d 825 (1972).

77. 56 Wis. 2d 247, 201 N.W.2d 825 (1972).

78. Suvada v. White Motor Co., 32 Ill. 2d 612, 619, 210 N.E.2d 182, 186 (1965).

79. *See* Williams v. Brown Mfg. Co., 45 Ill.2d 418, 261 N.E.2d 305 (1970). *Compare* Sweeney v. Matthews, 94 Ill. App. 2d 6, 236 N.E.2d 439 (1st Dist. 1968).

seeability in any sense outside the intended use doctrine is as out of place in a strict products liability suit as is the defense of contributory negligence. Contributory negligence and foreseeability are both essential components of the fault negligence dialogue. Interjection of them into a strict liability product suit operates at cross purposes with the dominant deep pockets economic policy basis of the tort. *Winnett v. Winnett* is a dramatic example of the injustice that may be produced from the misuse of fault concepts in a strict products liability case.

DUTY TO ANTICIPATE CRIMINAL CONDUCT OF OTHERS

The scope of liability in negligence for activities or omissions which combine with another person's criminal conduct to cause injury to the plaintiff has proved to be a particularly troublesome area of tort law. Sometimes it is dealt with in the proximate cause dialogue as a question of foreseeable, superceding, efficient, or intervening force.[80] Mostly it is dealt with as a duty question.[81] A central plank of the duty analysis in such cases is the principle that a reasonable person is not expected to anticipate that persons will commit criminal acts. In many situations, however, it is reasonable to anticipate intentional misconduct, and when this is so, a person may be required to take reasonable steps to minimize the risk of criminal conduct to third parties.[82] Perhaps the most common example is where the likelihood of an intervening act is increased by the activity or omission of the defendant. If, for example, the borrower of an automobile leaves keys in the ignition of a vehicle and it is stolen, a duty is extended to the owner of the vehicle for damage to the property from the intervening criminal act. Sometimes in such cases the duty is even extended to persons injured as a result of the negli-

80. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 282-84 (4th ed. 1971).

81. *See, e.g., id.* at 173-74. *See also* Schuster v. City of New York, 5 N.Y.2d 75, 154 N.E.2d 534 (1958).

82. Much of this area is affected by policy related in part to special legal relations existing between the parties. *See, e.g.*, McFadden v. Bancroft Hotel Corp., 313 Mass. 56, 46 N.E.2d 573 (1943) (guest and innkeeper); David v. Missouri Pac. R.R., 328 Mo. 437, 41 S.W.2d 179 (1932) (employee and employer); McLeod v. Grant County School Dist., 42 Wash. 2d 316, 255 P.2d 360 (1953) (pupil and school district).

gence of the thief.[83] Whether it is reasonable to anticipate criminal conduct will many times turn upon the particular facts of a case. Past criminal activity, for example, may impose a duty on the owner or occupier of property to take reasonable steps to protect others where no duty would generally exist.[84]

When an actual crime is taking place with the knowledge of a person, the question of duty in respect to that criminal conduct of course does not involve considerations of the foreseeability of criminal conduct. The duty analysis in such cases becomes a pure matter of policy involving some of the most difficult choice of values that an appellate court has to make. This term, the Illinois Supreme Court was faced with this most difficult task in a case arising from tragic facts.

In *Boyd v. Racine Currency Exchange, Inc.*,[85] the supreme court reversed a first district appellate court decision which had reversed the trial court in dismissing a wrongful death action brought by a person killed in a currency exchange by an armed robber. The deceased was present in the currency exchange for the purpose of transacting business. While he was there, a robber entered and placed a pistol to his head and told the teller to open the door and give him money or he would kill Boyd. The teller did not comply with the demand but instead fell to the floor behind a bulletproof window and partition. Boyd was then shot in the head and died. Several allegations of negligence on the part of the currency exchange in the hiring and training of personnel to deal with criminal conduct were contained in the complaint. In rejecting the plaintiff's claim that a duty was owed by the defendant, the supreme court speaking through Justice Ryan characterized the plaintiff's theory as based on a business proprietor's duty to honor criminal demands when failure to do so would suggest an invitation to unreasonable risk. Justice Ryan noted that the New Jersey and Pennsylvania courts were divided as to whether to extend a duty to the business

83. *See* Mellish v. Cooney, 23 Conn. Supp. 350, 183 A.2d 753 (1962); *cf.* Meihost v. Meihost, 29 Wis. 2d 537, 139 N.W.2d 116 (1966). This may not be the case in Illinois. *See generally* Lorang v. Heinz, 108 Ill. App. 2d 451, 248 N.E.2d 785 (2d Dist. 1969).

84. *See* Neering v. Illinois Cent. R.R., 383 Ill. 366, 50 N.E.2d 497 (1943).

85. 56 Ill. 2d 95, 306 N.E.2d 39 (1973), *rev'g* 8 Ill. App. 3d 140, 289 N.E.2d 218 (1st Dist. 1972).

owner in similar circumstances. The imposition of such a duty must, according to Justice Ryan, be rejected because it would only benefit the criminal and encourage use of hostages:

> If a duty is imposed on the Currency Exchange to comply with such a demand the same would only inure to the benefit of the criminal without affording the desired degree of assurance that compliance with the demand will reduce the risk to the invitee. . . . In this particular case the result may appear to be harsh and unjust, but, for the protection of future business invitees, we cannot afford to extend to the criminal another weapon in his arsenal[86]

Justice Goldenhersh dissented in *Boyd*, taking the position that the currency exchange owed a duty to the plaintiff and the case should have been submitted to the jury.

The New Jersey Superior Court has adopted a position similar to that expressed by Justice Goldenhersh. In *Genovay v. Fox*,[87] the appellate court held that a cause of action was stated in a case brought against the proprietor of a bar by an injured patron who was shot by a robber after the proprietor had failed to comply with the robbers demand. The balance according to the New Jersey court was somewhat different:

> The value of human life and of the interest of the individual in freedom from serious bodily injury weighs sufficiently heavily on the judicial scales to preclude a determination as a matter of law that they may be disregarded simply because the defendant's activities serve to frustrate the successful accomplishment of a felonious act and to save his property from loss.[88]

Reasonable persons will differ as to whether the choice of values of the appellate court in *Genovay* or the armchair behaviorism of the supreme court in *Boyd* is more desirable. Maybe prospective criminals know of and rely on Illinois Supreme Court decisions and maybe they do not. Moreover, it is little solace to the family of the deceased to say that no recovery is to be given so that future customers of the currency exchange will not be subjected to unreasonable risk. But it is precisely this kind of responsibility that the legal system has assigned to the highest appellate court of a state. At least the policy has been articulated and the court is accountable. If there is a pressing need to change Illinois policy, the legislature may do so.

---

86. *Id.* at 100, 306 N.E.2d at 42.

87. 50 N.J. Super. 538, 143 A.2d 229 (1958), *rev'd on other grounds*, 29 N.J. 436, 149 A.2d 212 (1959).

88. *Id.* at 558, 143 A.2d at 239.

Two appellate court cases involving somewhat different facts from *Boyd* upheld the imposition of a duty on the part of the business owner where the plaintiff's injury was caused by criminal activity. Perhaps the most dramatic of the two, *Fancil v. Q.S.E. Foods, Inc.*,[89] involved a negligence suit brought against a foodstore owner for the death of a policeman who was killed by a criminal while making a security check at the defendant's business. The fifth district reversed the dismissal of plaintiff's complaint in an opinion written by Justice Moran. *Jacobsma v. Goldberg's Fashion Forum*,[90] decided by the first district appellate court, sustained the sufficiency of a complaint of negligence against a store owner for injuries received by a customer who, in response to a request by the storeowner, attempted to stop a fleeing shoplifter. The supreme court decision in *Boyd v. Racine Currency Exchange, Inc.* does not require a different result in either *Fancil* or *Jacobsma* for the rather obvious reason that the policy reason which *Boyd* was primarily grounded upon is not applicable to the facts of either case. Moreover, since in the circumstances of each case it was reasonable to anticipate the criminal conduct, the duty analysis is consistent with *Neering v. Illinois Central Railroad Co.*,[91] an Illinois Supreme Court case controlling on the imposition of a duty toward owners or occupiers to take reasonable steps to protect third persons from the criminal activities of others.

USE OF RES IPSA LOQUITUR TO PROVE MALPRACTICE IN ILLINOIS

When a claim is pressed against a physician or other professional for negligence in the care of a patient, the doctor in Illinois[92] and elsewhere[93] enjoys the benefit of a special standard of care which is based upon how a reasonable person of good standing in the profession would have acted. A corollary of this subjective standard of care for physicians is the general requirement that expert testi-

89. 19 Ill. App. 3d 414, 311 N.E.2d 745 (5th Dist. 1974).

90. 14 Ill. App. 3d 710, 303 N.E.2d 226 (1st Dist. 1973).

91. 383 Ill. 366, 50 N.E.2d 497 (1943).

92. Schireson v. Walsh, 354 Ill. 40, 187 N.E. 921 (1934).

93. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 161-66 (4th ed. 1971).

mony be offered by the plaintiff to establish a prima facie case of negligence.[94] The subjective standard of care and expert testimony rule has also been the primary consideration leading to the general refusal of appellate courts to allow the plaintiff to use res ipsa loquitor to establish a prima facie case in a malpractice suit. Dictum in *Graham v. St. Luke's Hospital*,[95] a first district appellate court decision, rejected the doctrine as applicable to malpractice suits.

There are at least two situations where injury to a patient is so obviously the result of negligence that courts have suspended the expert testimony requirement and allowed res ipsa loquitor to establish negligence in a malpractice suit. One such case is where an item is left inside the patient.[96] The second is where there is injury to a part of the patient's body outside the area of the operation which was healthy before the operation.[97] Thirty years ago, the California Supreme Court in *Ybarra v. Spangard*,[98] a case involving the latter exception, allowed res ipsa loquitor to establish negligence. *Ybarra* was a particularly important decision because the court allowed res ipsa loquitor against all of the professionals having control of the operation because the plaintiff was unconscious and unable to show exactly which person had controlled the instrumentality causing the injury.

In *Edgar County Bank and Trust Co. v. Paris Hospital, Inc.*,[99] decided this term, the Supreme Court of Illinois for the first time held that in limited cases res ipsa loquitor may be used to establish a prima facie case of negligence against a physician. The plaintiff sought recovery for paralysis allegedly caused by the administration of a hypodermic in the buttock by agents of defendant's hospital. In Count IV of the plaintiff's complaint res ipsa loquitor was pleaded to establish a prima facie case. The count alleged that a registered nurse and physician employed in the emergency room by the hospi-

94. *Id.* at 164.

95. 46 Ill. App. 2d 147, 196 N.E.2d 355 (1st Dist. 1964).

96. *See, e.g.*, Easterling v. Walton, 208 Va. 214, 156 S.E.2d 787 (1967).

97. *See, e.g.*, Brown v. Shortlidge, 98 Cal App. 352, 277 P. 134 (1929); Evans v. Roberts, 172 Iowa 653, 154 N.W. 923 (1915); *cf.* Pederson v. Dumouchel, 72 Wash. 2d 73, 431 P.2d 973 (1967).

98. 25 Cal. 2d 486, 154 P.2d 687 (1944).

99. 57 Ill. 2d 298, 312 N.E.2d 259 (1974), *rev'g in part* 10 Ill. App. 3d 465, 294 N.E.2d 319 (4th Dist. 1973).

tal administered an intramuscular injection in the buttock of a seventeen month old child and that the injection was the proximate cause of injury to the child's foot, calf, hip, and knee. The trial judge dismissed Count IV of plaintiff's complaint and was affirmed by the appellate court. In reversing, the Illinois Supreme Court, speaking through Justice Goldenhersh, held that res ipsa loquitor was applicable to the intramuscular injection injury in the case.

With factual allegations like those in *Edgar*, it is fairly certain that someone was negligent. Additional problems, however, are presented in respect to the application of res ipsa loquitor because more than one person was in control of the activity which caused the injury and knowledge as to what actually happened is in the possession of the defendant. The plaintiff cannot establish that any person had exclusive control of the instrumentality that caused the injury. Thus the purely evidence role of res ipsa loquitor is not satisfied because it does not necessarily follow that any particular person was negligent. When the defendants have superior or exclusive knowledge of evidence as to what actually happened, res ipsa loquitor is used to smoke out the evidence by causing the defendant to come forth with an explanation for the injury. *Ybarra v. Spangard*,[100] the landmark California case noted earlier, extended res ipsa loquitor to multiple defendants primarily to promote the policy of smoking out evidence in possession of the defendants. Likewise, Justice Goldenhersh in the instant case supported use of res ipsa loquitor to promote such a policy in Illinois.[101]

Edgar County Bank and Trust Co. v. Paris Hospital, Inc. represents a significant development in medical malpractice law in Illinois. By approving the use of res ipsa loquitor in the case, the Illinois Supreme Court has taken a considerable step toward breaking down some of the excessive restrictions of the expert testimony rule in malpractice suits.

---

100. 25 Cal. 2d 486, 154 P.2d 687 (1944).

101. Justice Goldenhersh relied particularly on policy expressed by the court in Metz v. Central Ill. Elec. & Gas Co., 32 Ill. 2d 446, 207 N.E.2d 305 (1965).