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Rowe v. State Bank of Lombard: The Key to Unlocking a Landlord's Duty to Provide Security, 23 J. Marshall L. Rev. 131 (1989)

Jeffrey Fowler

CASENOTE

*ROWE V. STATE BANK OF LOMBARD**: THE KEY TO UNLOCKING A LANDLORD'S DUTY TO PROVIDE SECURITY

The modern trend in landlord and tenant law is toward holding a landlord liable for the intentional criminal act of a third party.[1] This trend represents a drastic change from the common law.[2] Until

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* 125 Ill. 2d 203, 531 N.E.2d 1358 (1988).

1. For a discussion of the landlord's liability in various states, see Lesar, *Tort Liability of Illinois Landlords for Crimes of Third Persons*, 1983 S. ILL. L. REV. 415 (Illinois); Moore, *The Landlord's Liability to His Tenants for Injuries Criminally Inflicted by Third Persons*, 17 AKRON L. REV. 395 (1984); O'Donnel, *Landlord Liability for Crime to Florida Tenants—The New Duty to Protect From Foreseeable Attack*, 11 FLA. ST. U.L. REV. 979 (1984) (Florida); Wilcox, *A Lawyer's Guide to the South Carolina Residential Landlord and Tenant Act*, 39 S.C.L. REV. 493 (1988) (South Carolina); Note, *Landlord Liability for the Criminal Acts of Third Parties: Recent Developments in Conecticut*, 14 CONN. L. REV. 843 (1982) (Connecticut); Comment, *Landlord Liability for Criminal Acts Perpetrated Against Tenants: The Pennsylvania Approach*, 91 DICK. L. REV. 779 (1986) (Pennsylvania); Note, *"Warranty of Security" in New York: A Landlord's Duty to Provide Security Precautions in Residential Buildings Under the Implied Warranty of Habitability*, 16 FORDHAM URB. L.J. 487 (1987/88) (New York); Note, *Landlord Liability for Criminal Acts on Residential Premises: What Future for Tennessee*, 10 MEM. ST. U.L. REV. 724 (1980) (Tennessee); Note, *California Landlords' Duty to Protect Tenants From Criminals*, 20 SAN DIEGO L. REV. 859 (1983) (California); Note, *Landlord And Tenant—Application of Implied Warranty of Habitability Expanded to Encompass Tenant Security*, 11 SETON HALL 576 (1981) (New Jersey); Note, *Landlord and Tenant—Landlord Has Duty to Employ Reasonable Security Measures to Avoid Foreseeable Criminal Attacks on Tenants*, 8 U. ARK. LITTLE ROCK L.J. 735 (1985) (Arkansas); Note, *Landlord Liability for Crimes Committed by Third Parties Against Tenants*, 21 U. RICH. L. REV. 181 (1986) (Virginia). *But see* Reskin, *Landlord Need Not Protect Tenants From Criminals*, 71 A.B.A. J. 114 (April 1985). For a listing of the jurisdictions that have adopted a common law duty upon landlords to protect against the foreseeable criminal acts of third parties, see *infra* note 45.

2. The common law rule was that an intentional criminal act was a superseding intervening cause which cut off any liability for the negligent actor. *See, e.g.*, Ney v. Yellow Cab Co., 2 Ill. 2d 74, 79-80, 117 N.E.2d 74, 78 (1954) (thief took cab and crashed into parked car after engine left running). *See also* Davis v. Thornton, 384 Mich. 138, 180 N.W.2d 11 (1970) (minors took car when keys were left in ignition and injured plaintiff). In *Ney*, the defendant's cab was stolen when he left it parked on the street with the engine running. The stolen cab collided with the plaintiff's car. *Ney*, 2 Ill. 2d at 76, 117 N.E.2d at 76. The court recognized that the common law rule was innappropriate and decided that a negligent actor is still liable for harm caused

modern times, a landlord owed no general duty to the tenant. In instances where there was a duty, the negligent actor was released from liability when the resulting harm was caused by a superseding intervening force, such as a third party's criminal act.[3] In *Rowe v. Lombard State Bank*, the Illinois Supreme Court considered whether a commercial landlord[4] was liable for an intruder's violent attack upon the tenant's employees when the landlord knew that the door locks were not preventing intruders from entering the premises.[5] In finding for the tenant's employees, the court held that landlords have a duty to take reasonable steps to prevent a known risk of foreseeable harm.[6] The court's holding extended to commercial landlords a duty which Illinois courts had only previously imposed on residential landlords.[7] Unfortunately, however, the court limited the landlord's duty by requiring plaintiffs to prove that the

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by the criminal act of a third party if the criminal act is reasonably foreseeable. *Id.* at 80, 117 N.E.2d at 78.

3. One of the most litigated issues in American law is the connection between the negligent act and the resulting injury. W. KEETON, PROSSER AND KEETON ON TORTS §43 (5th ed. 1984). The actor is responsible for the foreseeable result of his act. *Id.* This presents an even greater problem because:

> [i]n one sense, almost nothing is entirely unforeseeable, since there is a very slight mathematical chance, recognizable in advance, that even the most freakish accident which is possible will occur, particularly if it has ever happened in history before. In another, no event whatever is entirely foreseeable, since the exact details of a sequence never can be predicted with complete omniscience and accuracy.

Id. at 297. To settle the problem the law has established a proximate cause rule. *Id.* at 298.

A different problem results when the actual harm is caused by a force other than that initiated by the negligent actor. These forces are called superseding, or intervening, causes. *Id.* at 301. An intervening cause is one which comes about after the negligent act. *Id.* It must come in between the negligent act of the actor and the resulting harm, shifting the responsibility for the harm to the intervening act. *Id.* If the actual harm is caused by an intervening cause, the negligent actor is absolved from liability. *Id.* at 302. *See also* RESTATEMENT (SECOND) OF TORTS §448 (1965) (imposes liability only when intervening cause foreseeable). An exception, however, exists when the intervening cause was specifically foreseeable. W. KEETON, *supra*, at 303. An exception also exists when the negligent act created the opportunity for the intervening cause. RESTATEMENT (SECOND) OF TORTS §448 (1965).

4. Most of the decisions regarding a landlord's liability to tenants for crime on the property have concerned residential property. Many commentators feel that commercial property should not be treated similarly. *See* Annotation, *Landlord's Obligation to Protect Tenant Against Criminal Activities of Third Persons*, 43 A.L.R. 3d 331, 339 (1972) (argument may be made landlord of residential property owes a greater duty).

5. Rowe v. Lombard State Bank, 125 Ill. 2d 203, 531 N.E.2d 1358 (1988).

6. *Id.* at 223, 531 N.E.2d at 1368.

7. *See* Duncavage v. Allen, 147 Ill. App. 3d 88, 497 N.E.2d 433 (1st Dist. 1986), *appeal denied*, 113 Ill. 2d 571, 505 N.E.2d 352 (1986). *See also* Stribling v. Chicago Housing Authority, 34 Ill. App. 3d 551, 340 N.E.2d 47 (1st Dist. 1975) (landlord who knew of past burglaries liable for not securing point of burglars entrance); Trice v. Chicago Housing Authority, 14 Ill. App. 3d 97, 302 N.E.2d 207 (1st Dist. 1973) (landlord not liable for television thrown from window).

landlord actually knew of the risk.[8]

The *Rowe* case revolved around a lease of office space in a multi-office complex. The builder[9] of the complex had incorporated a master key system[10] which allowed him to issue individual keys to each door, while retaining master keys[11] to all of the doors in the complex. Apparently,[12] the builder did not properly control[13] the master keys,[14] and the lease between the landlord and the tenant prohibited the tenant from installing additional security devices without the consent of the landlord.[15] The builder subsequently sold the complex to Paramount Group, Inc.[16]

After the sale to Paramount, a maintenance engineer warned Fennessey, Paramount's managing agent, of the possibility of out-

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8. For a discussion of the extent of a landlord's duty resulting from this decision, see *infra* notes 87-91 and accompanying text.

9. Leland Stahelin developed and operated the office park for some time before selling it to Paramount. *Rowe*, 125 Ill. 2d at 210, 531 N.E.2d at 1361. Stahelin was an original defendant to this action. *Id.* at 208-09, 531 N.E.2d at 1360. The trial court granted summary judgment in Stahelin's favor because he did not own or manage the office park at the time of Free's attack. *Id.* at 211, 531 N.E.2d at 1362. The Illinois Supreme Court held that Paramount's notice of the defects existing on the property relieved Stahelin of liability and that the summary judgment in his favor was properly granted. *Id.* at 229, 531 N.E.2d at 1370. This casenote is concerned with the trend developing liability of landlords for the foreseeable criminal acts of third parties; therefore, a full discussion of the propriety of releasing Stahelin is beyond the scope of this discussion.

10. The landlord could re-key an individual door, or several different doors, as often as he liked, without affecting the master keys. *See id.* at 210, 531 N.E.2d at 1361. To re-key the lock, the lock core was removed and replaced with a new core. *Id.* The new core required a new key for that core, but the system's grandmaster keys and master keys would still unlock the new core and thereby open the door. *Id.*

11. The system allowed for the existence of two levels of master keys. *Id.* "Grandmaster" keys would open virtually all of the doors in the complex, while "master" keys would open the doors to a particular building. *Id.* For purposes of this article, the term master key shall include both types.

12. A maintenance man, Robert Davis, testified that the builder had not maintained control over the keys. *Id.* For the purposes of the summary judgment, the court was required to accept all facts well-pleaded as true. *Id.* at 214, 531 N.E.2d at 1363. However, irrespective of the procedural requirement, the court seemed to accept the allegation as factual. *See id.* at 223, 531 N.E.2d at 1368 (failed to take reasonable precautions to prevent unauthorized access).

13. Davis had told Stahelin, the developer and prior owner, that he thought that there were master keys missing. *Id.* at 210, 531 N.E.2d at 1361. Stahelin instructed Davis to order the replacement materials to change the locks in the complex. *Id.* After the materials arrived, Stahelin changed his mind and told Davis not to install the new locks. *Id.* at 211, 531 N.E.2d at 1362. When Stahelin sold the complex to Paramount, Stahelin took the lock replacement material. *Id.*

14. Davis said that he saw Free with master keys in 1972 or 1973. Brief for Appellee at 7, Rowe v. Lombard State Bank, 125 Ill. 2d 203, 531 N.E.2d 1358 (1988) (No. 65167). At that time Free worked for Stahelin at the complex. *Id.*

15. Brief for Appellant at appendix p.20, Rowe v. Lombard State Bank, 125 Ill. 2d 203, 531 N.E.2d 1358 (1988) (No. 65167). Additionally, the lease prohibited the tenant from making copies of the office keys. *Id.* Any additional keys required were to be furnished by the landlord. *Id.*

16. *Rowe*, 125 Ill. 2d at 207, 531 N.E.2d at 1360.

standing master keys.[17] During the next two years the police investigated several crimes[18] at the office park and advised Paramount to change the locks.[19] However, due to the cost, Paramount decided not to change the lock system.[20]

On the evening of April 23, 1978, a tenant saw James Free inside the complex after Free had apparently gained entry by using an outstanding master key.[21] The tenant called the landlord but the landlord did not find Free on the complex.[22] At about 4 a.m. the next morning Free entered the locked[23] offices leased by J-Mar and shot two of J-Mar's employees, Bonnie Serpico and Lori Rowe, while attempting to rape them.[24]

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17. The record does not indicate a basis for Davis' opinion that there were master keys outstanding. In his deposition, Davis admitted that he was not responsible for the master keys. Brief for Appellee at 5, Rowe v. Lombard State Bank, 125 Ill. 2d 203, 531 N.E.2d 1358 (1988) (No. 65167).

18. Most of the crimes that the police investigated were minor and either occurred in the parking lot or in public areas of the buildings. Brief for Appellee at 9-11, Rowe v. Lombard State Bank, 125 Ill. 2d 203, 531 N.E.2d 1358 (1988) (No. 65167). None involved violence or Building #1, the building where J-Mar's office was located. *Id.* Of the crimes reported, eight were burglaries. *Id.* Of these, the police could not find signs of forced entry in five out of the eight. *Id.* The items taken during these burglaries were twenty dollars in cash, a jacket, a calculator, and twenty five dollars worth of postage from an office postage machine. *Id.* The postage theft was during the course of two burglaries on consecutive nights. *Id.* In the postage burglaries the police report indicated that the employees were the best suspects. *Id.* In another incident, the master key would not open the door to the office. *Id.* In the fourth, a coworker or janitor was suspected. *Id.* Finally, the door locks were inoperative at the scene of the fifth burglary. *Id.*

19. *Rowe*, 125 Ill. 2d at 211, 531 N.E.2d at 1362. Although the police suggested changing the "locks," it was the lock system that created the risk. It is uncertain whether either the police or Paramount recognized this. The police may have been suggesting that individual locks be changed, or Paramount could have interpreted their suggestion as such. The court apparently decided that the police intended to refer to the lock system and that Paramount understood that. *See id.* (detective advised "the locks on the buildings . . . should be changed").

20. The cost of changing all of the locks in the complex was estimated at $2,500.00. *Id.*

21. A witness testified that she saw James Free standing inside a door in building #4. *Id.* at 212, 531 N.E.2d at 1362. The witness stated that she had previously used her own key to open the building door and the door automatically locked behind her. *Id.* The witness added that when she saw Free just inside the doorway, he had keys in his hand. *Id.* The implication is that Free was in possession of a master key.

22. When Free was seen inside the building, Free told the occupants that he was there to clean the carpets. *Id.* at 211, 531 N.E.2d at 1362. The occupants called Fennessey, who came to the building; however, Fennessey was unable to locate Free on the premises. *Id.* It is not known whether Free hid himself on the property from that point until the attack, or if he left and came back later.

23. Rowe testified that the door Free came in was commonly left unlocked and was often left propped open for ventilation. Brief for Appellee at 1, Rowe v. Lombard State Bank, 125 Ill. 2d 203, 531 N.E.2d 1358 (1988) (No. 65167). Rowe said that earlier on the night of the attack the door had been left open, but that at the time of the attack it had been locked. Brief for Appellee at 11, Rowe v. Lombard State Bank, 125 Ill.2d 203, 531 N.E.2d 1358 (1988) (No. 65167).

24. People v. Free, 94 Ill. 2d 378, 447 N.E.2d 218 (1983), *cert. denied*, 464 U.S. 865 (1983). On April 24, 1978, shortly before 4 a.m., Lori Rowe looked up from her

Ms. Rowe, and Ms. Serpico's husband and minor children brought an action against the landlord[25] alleging that the landlord breached a duty[26] to protect them from the acts of Free. The trial court found that the landlord did not have a duty[27] to the tenant, and granted summary judgment in favor of all defendants.[28] The ap-

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desk and saw James Free standing inside the door, holding a gun and carrying a cloth bag in his hands. *Id.* at 388, 447 N.E.2d at 223. Free forced Rowe and Serpico into the lunchroom and told them to take off their clothes because he wanted to rape them. *Id.* at 389, 447 N.E.2d at 223. Free tied Rowe with twine he had brought in the cloth bag, then led Serpico into another room. *Id.* While Free and Serpico were out of the room, Rowe began to struggle out of her bonds. *Id.* When Free came back to check on Rowe, Free saw that she had loosened the rope. *Id.* While Free was attending to Rowe, Serpico got up from the other room and ran. *Id.* Free ran after Serpico and shot her. *Id.* Free then returned to the room where Rowe lay tied, and shot her while she was tied on the floor. *Id.* Free then fled. *Id.* Rowe recovered from her wound, but Serpico died. *Id.*

Free was arrested the next morning. *Id.* at 390, 447 N.E.2d at 223. Pursuant to a search warrant, the police found the cloth bag, the twine and the gun. *Id.* at 393-94, 531 N.E.2d at 225. The police searched for a key to the Office Park but did not find one. Telephone interview with Walter P. Maksym, attorney for Lori Rowe, *et al.* (February 22, 1989).

Free was convicted of murder, attempted murder, and attempted rape, and sentenced to death. *Free*, 94 Ill. 2d at 387, 447 N.E.2d at 222. Free has exhausted his appeals to the Illinois Supreme Court and filed a writ of habeus corpus in the federal court on March 27, 1989. Telephone interview with Kenneth Fedinets, Illinois Attorney General's Office (August 24, 1989). The matter is now pending before Judge Aspen in the Northern District of Illinois. *Id.*

25. The original defendants in this case were James Free, J-Mar, Leland Stahelin, Paramount, Todd Fennessey and the Lombard State Bank. *Rowe*, 125 Ill. 2d at 207, 531 N.E.2d at 1361. The bank was dismissed because, as trustee, it held only legal title to the property and was not otherwise involved. *Id.* at 211, 531 N.E.2d at 1362. J-Mar is not involved in this appeal, but was dismissed after the settlement of a workman's compensation claim. Telephone conversation with Walter P. Maksym, attorney for Lori Rowe, *et. al.* (February 22, 1989). James Free did not cooperate in the lawsuit and was found liable in abstentia. *Id.*

26. For examples of theories imposing a duty upon landlords to protect against crime, see *infra* note 52 and accompanying text.

27. In general, whether there is a duty to another person is a question of law to be decided by the court. *See generally* W. KEETON, *supra* note 3, at 236. Whether the duty was breached is a question to be decided by the trier of fact. *See id.*

28. The original motion for summary judgment was denied. *Rowe*, 125 Ill. 2d at 211, 531 N.E.2d at 1362. After a change of judges for administrative reasons, the defendants submitted a second motion for summary judgment, which was granted. *Id.* at 213, 531 N.E.2d at 1363. The plaintiffs first argument, citing Balciunas v. Duff, 94 Ill. 2d 176, 446 N.E.2d 242 (1983), was that the trial court judge erred in granting the summary judgment because it reversed an interlocutory order of another judge. *Id.* at 213, 531 N.E.2d at 1363.

In *Balciunas*, the defendants filed a written motion for a protective order, but the motion was denied. *Balciunas*, 94 Ill. 2d at 180, 446 N.E.2d at 244. After an administrative rotation of judges, the protective order sought by the defendants was granted. *Id.* at 182, 446 N.E.2d at 245. The court decided that a successor judge should only revise or modify previous rulings if there is a change of circumstances or if there are additional facts which warrant the action. *Id.* at 188, 446 N.E.2d at 247.

The *Rowe* court reiterated its disapproval of a judge reviewing interlocutory orders entered by another judge where there is evidence of bad faith or judge shopping, but found no such evidence in this case. *Rowe*, 125 Ill. 2d at 214, 531 N.E.2d at 1363. *See also* People ex rel. Phillips Co. v. Gitchoff, 65 Ill. 2d 249, 357 N.E.2d 534 (1976)

pellate court affirmed, finding that the attack was unforeseeable because there were no previous violent crimes at the complex.[29] Therefore, the appellate court opined, the extent of the injuries was unforeseeable[30] even if the landlord was not in control of all the master keys.[31]

The Illinois Supreme Court granted leave to appeal in order to determine whether the lower courts properly applied Illinois law in granting and affirming the summary judgment.[32] The court first considered whether the landlord had a general duty[33] to prevent the attack[34] based on either a "special relationship"[35] or through a gen-

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(railroad explosion cases filed in different jurisdictions); People ex rel. Kelly, Ketting, Furth, Inc. v. Epstein, 61 Ill. 2d 229, 335 N.E.2d 430 (1974) (defendant lost writ of mandamus motion and sought order from different judge instead of appealing); People ex rel. East Side Levee & Sanitary District v. Madison County Levee & Sanitary District, 54 Ill. 2d 442, 298 N.E.2d 177 (1973) (court should have declined action since it was pending in another court).

29. Rowe v. State Bank of Lombard, 153 Ill. App. 3d 788, 796, 505 N.E.2d 1380, 1386 (1987), *rev'd*, 125 Ill. 2d 203, 531 N.E.2d 1358 (1988).

30. In *Rowe*, the issue was: At the time Paramount became aware that there might be master keys unaccounted for, was it foreseeable (probable) that if Paramount did not take some action to prevent it, someone would be killed? The appellate court answered the question negatively, holding that the murder was unforeseeable. *Rowe*, 153 Ill. App. 3d at 797, 505 N.E.2d at 1389. Since foreseeability is a jury question, the appellate court's holding encompassed the belief that no reasonable person could foresee that a death would result. The Illinois Supreme Court disagreed. *Rowe*, 125 Ill. 2d at 226, 531 N.E.2d at 1369.

31. *Rowe*, 153 Ill. App. 3d at 797, 505 N.E.2d at 1387.

32. For a discussion on the court's analysis of the summary judgment issue, see *supra* note 28.

33. At common law a tenant received only a right to possession of the property he leased. C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 76 (2d ed. 1988). The landlord made no other commitments. *Id.* Modern courts and legislatures have recognized that the lease of an apartment in a high rise building in a city should not be treated the same as a long term lease of a farm. *Id.* Because of the changes in the types of leases, the courts and legislatures created a promise, implicit in most leases, that the premises are fit and habitable. *Id.* at 77. *See also* Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C.L. REV. 503 (1982) (discussion of implied warranty of habitability). The implied warranty of habitability covers the physical condition of the premises and all "facilities vital to the use of the premises for residential purposes." Trentacost v. Brussel, 82 N.J. 214, 412 A.2d 436 (1980). The warranty includes sufficient heat, ventilation, light, plumbing, sanitation, security and maintenance for the building to be habitable. *Id.* at 219, 412 A.2d at 442.

An issue which the *Rowe* court saw no need to discuss was whether the implied warranty of habitability applies to a particular lease. Most jurisdictions give broad scope to the warranty, applying it to all dwellings, whether multiple or single family. C. MOYNIHAN, *supra*, at 78. *See also* CUNNINGHAM, STOEBUCK AND WHITMAN, THE LAW OF PROPERTY §6.38 (1984) (discussion of implied warranty of habitability). The warranty has not been extended beyond residential leases. *Cf.* C. MOYNIHAN, *supra*, at 78 (commercial property excluded from discussion of implied warranty of habitability).

34. The court made no distinction between tenants and people on the premises with the tenants' consent, such as employees of a tenant, or business invitees of a tenant. *Rowe*, 125 Ill. 2d 203, 531 N.E.2d 1358. Illinois law suggests this result. *See* ILL. ANN. STAT. ch. 80, ¶ 302 (Smith-Hurd 1987).

35. See *infra* notes 97-99 and accompanying text for a discussion of the special relationship exception.

eral foreseeability rule.[36] Finding no such general duty, the court considered whether Paramount had assumed a duty through a voluntarily undertaken action; providing a security system, retaining control over a portion of the property or maintaining control over the master keys.[37] The court found that while a voluntary undertaking can create a duty, if such a duty was created in this case, the landlord did not breach it.[38] The court decided the case by holding that when knowledge of foreseeable harm is combined with the landlord's sole ability to guard against it, without undue burden, the landlord has the duty to take reasonable steps to guard against that harm.[39] The court concluded by finding that the criminal act of a third party is not a superseding cause[40] which cuts off liability if the landlord's negligence[41] facilitates the criminal act.[42]

In its analysis, the court first noted the general rule that a landlord is not an insurer of the tenants' safety[43] and is not liable for the harm which a third party's criminal act causes to tenants. Although noting that an exception to this general rule exists when there is a

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36. *See infra* note 45 (duty arising from foreseeability).

37. *See infra* note 54 (duty arising from a voluntary undertaking).

38. *Rowe*, 125 Ill. 2d at 221, 531 N.E.2d at 1367.

39. *Id.* at 223, 531 N.E.2d at 1367-68.

40. Courts have historically been reluctant to impose a duty to protect others from crime. J. PAGE, THE LAW OF PREMISES LIABILITY (2d ed. 1988). *See also* RESTATEMENT (SECOND) OF TORTS §314 (1965) (no general duty to act for the protection of others). This stems from the concept that under ordinary and normal circumstances, one may expect others to obey the criminal law. W. KEETON, *supra* note 3, at 200. This expectation does not apply where crime is known, or should be known, to be imminent. *Id. See also* RESTATEMENT (SECOND) OF TORTS §448 (1965) (intentionally tortious or criminal acts done under opportunity afforded by actor's negligence). If an actor increases the risk of harm, even if the harm is the result of a criminal act of a third party, the actor may be liable. RESTATEMENT (SECOND) OF TORTS §302A (1965).

Additionally, where the duty is directly related to protecting against the criminal act of a third party, the criminal act of the third party would not be a superseding intervening cause. RESTATEMENT (SECOND) OF TORTS §449 (1965).

41. "The best definition of negligence is the faillure [sic] to observe, for the protection of the interest of another person, that degree of care, precaution and vigilance which the circumstances justly demand, whereby such other person suffers injury." 65 C.J.S. *Negligence* §1(2) (1966). Negligence alone is not actionable. W. KEETON, *supra* note 3, at § 30. A cause of action in negligence requires 1) a legal duty; 2) a breach of that duty; 3) an injury to another; and 4) a reasonably close causal connection between the breach of the duty and the injury. *Id.*

42. Rowe v. Lombard State Bank, 125 Ill. 2d 203, 224, 531 N.E.2d 1358, 1368 (1988).

43. A number of jurisdictions have expanded the implied warranty of habitability to include security, and therefore, to a degree the landlords are insurers of tenants' safety. *See, e.g.*, Kline v. 1500 Massachusetts Avenue Apartment Corp., 439 F.2d 477 (D.C. App. 1970); Flood v. Wisconsin Real Estate Inv. Trust, 503 F. Supp. 1157 (D. Kansas 1980) (applying Kansas law); Holley v. Mount Zion Terrace Apartments, Inc., 382 So. 2d 98 (Fla. Dist. Ct. App. 1980); Trentacost v. Brussel, 82 N.J. 214, 412 A.2d 436 (1980); Brownstein v. Edison, 103 Misc. 2d 316, 425 N.Y.S.2d 773 (1980). *But see* Duncavage v. Allen, 147 Ill. App. 3d 88, 497 N.E.2d 433 (1986), *appeal denied*, 113 Ill. 2d 571, 505 N.E.2d 352 (1986).

special relationship between the parties, the court found that no Illinois court has found that a simple[44] landlord and tenant relationship is such a special relationship. While the court recognized that a number of jurisdictions[45] have adopted a general duty[46] based strictly[47] upon the foreseeability[48] of harm, the court declined to ex-

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44. The *Rowe* court used the phrase "simple relationship between the landlord and tenant" in referring to the special relationship exception. *Rowe*, 125 Ill. 2d at 216, 531 N.E.2d at 1364. This is not an accurate depiction of the modern relationships. For a discussion of the differences between modern leases and historical leases, see *infra* notes 101-103 and accompanying text.

45. Several jurisdictions currently recognize some form of the foreseeability rule, which imposes upon a landlord the duty to take reasonable precautions to prevent harm to his tenants when that harm is foreseeable. *See* Kline v. 1500 Mass. Ave. Apartment Corp., 439 F.2d 477 (D.C. App. 1970); Jackson v. Warner Holdings, Ltd., 617 F. Supp. 646 (W.D. Ark. 1985) (applying Arkansas law); Isaacs v. Huntington Mem. Hosp., 38 Cal. 3d 112, 695 P.2d 653, 211 Cal. Rptr. 356 (1985); Jardel Co. v. Hughes, 523 A.2d 518 (Del. 1987); Graham v. M & J Corp., 424 A.2d 103 (D.C. 1980); Holley v. Mount Zion Terrace Apartments, Inc., 382 So. 2d 98 (Fla. Dist. Ct. App. 1980); Ten Associates v. McCutchen, 398 So. 2d 860 (Fla. Dist. Ct. App. 1981); Smith v. General Apartment Co., 133 Ga. App. 927, 213 S.E.2d 74 (1975); Galloway v. Bankers Trust Co., 420 N.W.2d 437 (Iowa 1988); Center Management Corp. v. Bowman, 526 N.E.2d 228 (Ind. Ct. App. 1988); Samson v. Saginaw Professional Bldg., Inc., 393 Mich. 393, 224 N.W.2d 843 (1975); Hilligoss v. Cross Co., 228 N.W.2d 585 (Minn. 1975); Aaron v. Havens, 758 S.W.2d 446 (Mo. 1988) (en banc); Trentacost v. Brussel, 82 N.J. 214, 412 A.2d 436 (1980); Foster v. Winston-Salem Joint Venture, 303 N.C. 636, 281 S.E.2d 36 (1981); Nallan v. Helmsley-Spear, Inc., 50 N.Y.2d 507, 407 N.E.2d 451 (1980); Cornpropst v. Sloan, 528 S.W.2d 188 (Tenn. 1975); Knapp v. Wilson, 535 S.W.2d 369 (Tex. Ct. App. 1976); Gulf Reston, Inc. v. Rogers, 215 Va. 155, 207 S.E.2d 841 (1974).

46. For a practical discussion of the application of the foreseeability rule to future projects, see Henszey, *What is the Landlord's Responsibility for Criminal Acts Committed on the Premises* 6 REAL EST. L.J. 104 (1977).

47. There is a major problem with a rule that imposes a duty strictly through foreseeability of harm. Duty is a matter for the court. *See, e.g.*, Fancil v. Q.S.E. Foods, 60 Ill. 2d 552, 328 N.E.2d 538 (1975) (police officer shot by burglar in grocery store). Yet, foreseeability is a matter for the trier of fact. *See, e.g.*, Graham v. M & J Corp., 424 A.2d 103 (D.C. 1980) (arsonist set fire in unlocked foyer). Thus, theoretically, a judge must dismiss a case unless there is a duty, but there is no duty unless a jury finds that the particular injury was foreseeable. The practical result is that in a case where a plaintiff alleges duty based on foreseeability, the court is precluded from summary judgment unless the probability of harm is either so great, or so minute that, as a matter of law, reasonable men may not differ. This result fosters nuisance suits because plaintiffs are virtually assured of being able to force landlords into incurring trial expenses, or a settlement in lieu of a trial.

48. The seminal case on a foreseeability-based duty is *Kline v. 1500 Mass. Ave. Apartment Corp.*, where the plaintiff was assaulted and robbed in the common hallway of her apartment building. *Kline*, 439 F.2d 477 (D.C. Cir. 1970). Prior to this attack, the defendant landlord had been aware of a series of attacks on the tenants. *Id.* at 479 n.2. Before this case, the general rule was that a landlord did not have a duty to protect another from a criminal act by a third person. *Id.* at 481. The reasons for this rule were:

> judicial reluctance to tamper with the traditional common law concept of the landlord-tenant relationship; the notion that the act of a third person in committing an intentional tort or crime is a superseding cause of the harm to another resulting therefrom; the oftentimes difficult problem of determining foreseeability of criminal acts; the vagueness of the standard which the landlord must meet; the economic consequences of the imposition of the duty; and con-

tend that general duty to Illinois[49] landlords.[50]

The *Rowe* court then considered whether a landlord can assume a duty to protect against the criminal acts of third parties by providing lighting, locks and keys,[51] or by investigating reports of intruders.[52] The court cited the *Restatement (Second) of Torts*[53] and

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flict with the public policy allocating the duty of protecting citizens from criminal acts to the government rather than the private sector.

Id. at 481. The court decided that the reasons for this general rule did not apply to modern day urban living conditions or the contract-like relationship of modern leases. *Id.* The court held that where the risk of harm is foreseeable and the landlord is the only one in the position to prevent the harm, the landlord has the duty to do so. *Id.*

49. Several jurisdictions do not currently follow any rule adopting duty through foreseeability. *See, e.g.*, King v. Ilikai Properties, Inc., 2 Haw. App. 359, 632 P.2d 657 (1981); Scott v. Watson, 278 Md. 160, 359 A.2d 548 (1976).

50. Rowe v. Lombard State Bank, 125 Ill. 2d 203, 217, 531 N.E.2d 1358, 1364 (1988). The court did not specify why it declined to extend the foreseeability rule to Illinois landlords, but it did cite several sources for support. *Id.* The court referred to PROSSER AND KEETON ON TORTS which states that duty rests upon foreseeability and preventability. *Rowe*, at 216, 531 N.E.2d at 1364 W. KEETON, PROSSER AND KEETON ON TORTS § 43 (5th ed. 1984)). In Feld v. Merriam, 506 Pa. 383, 485 A.2d 742 (1984), the court said that duty rests upon foreseeability, an act voluntarily but carelessly undertaken, and reliance. In Gulf Reston, Inc. v. Rogers, 215 Va. 155, 207 S.E.2d 841 (1974), the court required that the landlord know, or should know, of the danger before it would impose a duty. In Scott v. Watson, 278 Md. 160, 359 A.2d 548 (Md. App. 1976), the court combined the know or should know standard with the availability of reasonable measures to prevent the danger. The principle drawn from these sources is that foreseeability alone is insufficient.

51. *Rowe*, 125 Ill. 2d at 217, 531 N.E.2d at 1364. A number of jurisdictions have imposed a duty upon landlords to protect tenants when the landlords provide locks or keys. *See, e.g.*, Spar v. Obwoya, 369 A.2d 173 (D.C. 1977); Paterson v. Deeb, 472 So. 2d 1210 (Fla. Dist. Ct. App. 1985); Smith v. General Apartment Co., 133 Ga. App. 927, 213 S.E.2d 74 (1975); Brichacek v. Hiskey, 401 N.W.2d 44 (Iowa 1987); Center Management Corp. v. Bowman, 526 N.E.2d 228 (Ind. Ct. App. 1988); Kraaz v. La Quinta Motor Inns, Inc., 410 So. 2d 1048 (La. 1982); Johnston v. Harris, 387 Mich. 569, 198 N.W.2d 409 (1972); Hilligoss v. Cross Co., 304 Minn. 546, 228 N.W.2d 585 (1975); Jacobs v. Helmsley-Spear, Inc., 121 Misc. 2d 910, 469 N.Y.S.2d 555 (1983); Shepard v. Drucker & Falk, 63 N.C. App. 667, 306 S.E.2d 199 (1983); Reider v. Martin, 359 Pa. Super. 586, 519 A.2d 507 (1987); Knapp v. Wilson, 535 S.W.2d 369 (Tex. Civ. App. 1976).

52. *Rowe*, 125 Ill. 2d at 217, 531 N.E.2d at 1364. American courts have looked to a variety of circumstances in creating a duty upon landlords to protect tenants from crime. *See, e.g.*, Ramsay v. Morrissette, 252 A.2d 509 (D.C. 1969) (failed to replace manager, call police, provide lock on door and prevent loitering of unsavory people); Smith v. General Apartment Co., 133 Ga. App. 927, 213 S.E.2d 74 (1975) (intruder gained entrance using passkey); Phillips v. Chicago Housing Auth., 89 Ill. 2d 122, 431 N.E.2d 1038 (1982) (duty based on providing inneffective security program); Duncavage v. Allen, 147 Ill. App. 3d 88, 497 N.E.2d 433 (1st Dist. 1986) (failed to provide locks on windows or secure a ladder which provided means of entry), *appeal denied*, 113 Ill. 2d 571, 505 N.E.2d 352 (1986); Johnston v. Harris, 387 Mich. 569, 198 N.W.2d 409 (1972) (failing to maintain adequate locks or lights); Feld v. Merriam, 506 Pa. 383, 485 A.2d 742 (1984) (failing to maintain a specific level of security). *But see* Pippin v. Chicago Housing Auth., 78 Ill. 2d 204, 399 N.E.2d 596 (1979) (duty to provide security program did not extend to liability for crimes to tenants); Gant v. Flint-Goodgridge Hosp. of Dillard Univ., 359 So. 2d 279 (La. App. 1978), *appeal denied*, 362 So. 2d 581 (1978) (no liability for decreasing security).

53. THE RESTATEMENT (SECOND) OF TORTS §324A which states:

[o]ne who undertakes, gratuitously or for consideration, to render services to

several prior decisions[54] in upholding the rule that a landlord is liable for the criminal acts of third parties when the landlord voluntarily provides security measures,[55] but does so negligently. The principle found in the Restatement is that such actions induce a tenant to forgo other remedies or precautions against the risk.[56] Applying this principle, the court found that Paramount did not assume[57] the

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another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

(a) his failure to exercise reasonable care increases the risk of such harm, or

(b) he has undertaken to perform a duty owed by the other to the third person, or

(c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

RESTATEMENT (SECOND) OF TORTS § 324(A) (1965).

54. *See* Phillips v. Chicago Housing Auth., 89 Ill. 2d 122, 431 N.E.2d 1038 (1982) (liability related to landlord's failure to close off vacant floors of building); Cross v. Wells Fargo Alarm Services, 82 Ill. 2d 213, 412 N.E.2d 472 (1980) (landlord increased danger when hired guard service only part time); Pippin v. Chicago Housing Auth. 78 Ill. 2d 204, 399 N.E.2d 596 (1979) (landlord's duty limited to choosing adequate security company).

For other cases discussing a landlord's liability, see Fancil v. Q.S.E. Foods, Inc., 60 Ill. 2d 552, 328 N.E.2d 538 (1975) (landlord not liable for dark areas inside building not generally open to public); Berry v. The Habitat Co., 152 Ill. App. 3d 78, 504 N.E.2d 153 (1st Dist. 1987) (landlord liable when has control of area), *appeal denied*, 125 Ill. 2d 535, 511 N.E.2d 425 (1987); Duncavage v. Allen, 147 Ill. App. 3d 88, 497 N.E.2d 433 (1st Dist. 1986) (landlord liable when acts contributed to danger), *appeal denied*, 113 Ill. 2d 571, 505 N.E.2d 352 (1986); Morgan v. Dalton Management Co., 117 Ill. App. 3d 815, 454 N.E.2d 57 (1st Dist. 1983) (no liablility for injury caused by criminal attack in common area); Carrigan v. New World Enterprises, Ltd., 112 Ill. App. 3d 970, 446 N.E.2d 265 (3d Dist. 1983) (landlord liable only for inoperable burglar alarm, not for rape); Taylor v. Hocker, 101 Ill. App. 3d 639, 428 N.E.2d 662 (5th Dist. 1981) (past, nonviolent crime does not make violent crime foreseeable); Kraustrunk v. Chicago Housing Auth., 95 Ill. App. 3d 529, 420 N.E.2d 429 (1st Dist. 1981) (act did not increase risk of harm to victim); Martin v. Usher, 55 Ill. App. 3d 409, 371 N.E.2d 69 (1st Dist. 1977) (no duty to maintain security devices); Stribling v. Chicago Housing Auth., 34 Ill. App. 3d 551, 340 N.E.2d 47 (1st Dist. 1975) (duty to guard against recurring burglaries); Trice v. Chicago Housing Auth., 14 Ill. App. 3d 97, 302 N.E.2d 207 (1st Dist. 1973) (landlord not liable for injury caused by item dropped over railing).

55. However, a court will not recognize all matters that have an impact upon security as being security matters. *See, e.g.*, *Rowe*, 125 Ill. 2d at 222, 531 N.E.2d 1367 (lights).

56. *Id.* at 219, 531 N.E.2d at 1365.

57. The court referred to an exculpatory clause in the lease as evidence that the landlord did not voluntarily assume a duty to protect the tenant. *Id.* at 219-20, 531 N.E.2d at 1366. An exculpatory clause is an express term in a contract excusing a party from liability. *See* BLACK'S LAW DICTIONARY 508 (5th ed. 1979). While most jurisdictions uphold the validity of these clauses, the clauses are interpreted strictly. J. PAGE, *supra* note 40, at §9.31. *See also* Scott & Fetzer Co. v. Montgomery Ward & Co., 112 Ill. 2d 378, 493 N.E.2d 1022 (1986) (clause did not cover third-party action relating to spread of fire). The clauses are invalid where the landlord's conduct is wilful or wanton. *See, e.g.*, Smith v. General Apartment Co., 133 Ga. App. 927, 213 S.E.2d 74 (1975) (tenant raped in her apartment by intruder who gained entry by using passkey). In Illinois, exculpatory clauses as part of a lease of real property are

responsibility of protecting its tenants by maintaining the door locks and key system or investigating a report of an intruder. The court also noted that even if Paramount had assumed a duty, its duty was limited to the extent of its undertaking:[58] maintaining the locks[59] and keys[60] and investigating the report of an intruder. The court found that Paramount had not performed these tasks negligently.[61]

The court decided the case by holding that a landlord's awareness of a risk will create a duty to guard against it if the landlord is the only party in a position to do so.[62] The risk that the court found in this case was the risk of illegal entry resulting from unauthorized possession of master keys.[63] Since this landlord made no effort to reduce the risk of which he had actual knowledge, the court found that the landlord breached his duty.[64]

Finally, the court decided that while generally a negligent person is released from liability when the harm is caused by a superseding intervening cause, such as the intentional criminal act of a third

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void as against public policy and unenforceable. ILL. REV. STAT. ch. 80, ¶ 91 (1987).

58. *E.g.*, Pippin v. Chicago Housing Auth., 78 Ill. 2d 204, 210, 399 N.E.2d 596, 599 (1979) (landlord liable for hiring security guards but not for injuries to a visitor stabbed by tenant in presence of security guard). In *Rowe*, the court said that there was no evidence that Paramount maintained the locks or keys negligently, but that the evidence indicated that the former owner had been negligent in key control. *Rowe*, 125 Ill. 2d at 221, 531 N.E.2d at 1366-67.

59. The court doubted that either party had control over the door locks, and that even if Paramount had control over the door locks, "the record shows that the door locks to J-Mar's offices were functioning properly on the night of the assault." *Id.* This is not correct. "Functioning" is the proper action and nature of a thing. BLACK'S LAW DICTIONARY 605-06 (5th ed. 1979). No party argued that the lock was not operational. The function of a lock on a door is to keep out intruders. Whether the lock was effective at keeping out an intruder was one of the questions at the base of this lawsuit.

Additionally, the *Rowe* court misapplied the principle by holding that the tenant and landlord shared control over the locks. *Rowe*, 125 Ill. 2d at 221, 531 N.E.2d at 1366. The lease prohibited the tenant from acting unilaterally. *Id.* The tenant must have first obtained the landlord's written permission to affect the office security, and the landlord had the power to refuse to grant written permission. Brief for Appellant at appendix p.20, Rowe v. Lombard State Bank, 125 Ill. 2d 203, 531 N.E.2d 1358 (1988) (No. 65167). Control is the power to manage, direct, restrict or regulate. BLACK'S LAW DICTIONARY 298 (5th ed. 1979). The landlord had the power to manage, direct, restrict or regulate, but the tenant had no such power. This cannot be considered joint control. A party that does not have control over something has no authority over it; therefore, the party has no ability to change or modify it. The law will not impose liability upon one who has no ability to affect the liability. *Rowe*, 125 Ill. 2d at 215, 531 N.E.2d at 1364.

60. The court found that even though Paramount had retained exclusive control over the keys, there was no evidence that it did not use reasonable care in maintaining them. *Id.* at 223, 531 N.E.2d at 1367.

61. *Id.*

62. The court required the landlord to take reasonable precautions, including warning the tenants of the danger. *Id.* at 223, 531 N.E.2d at 1368.

63. *Id.* at 221-22, 531 N.E.2d at 1367.

64. *Id.* at 227, 531 N.E.2d at 1369.

party,[65] an exception exists when the criminal act is foreseeable. Applying this principle to the case at bar, the court found that it was foreseeable that an intruder in possession of a master key would commit a crime.[66] The court reasoned that it is foreseeable that persons committing a crime using a master key will be caught in the act;[67] that people caught in the act of crime may resort to violence; and, if a criminal resorts to violence, death may result.[68] Using this reasoning,[69] the court concluded that Ms. Serpico's murder was a foreseeable result of Paramount's negligence. Consequently, the intentional criminal act of Free did not release Paramount from liability.[70]

The *Rowe* court justifiably concluded that a landlord could be liable for the shooting of the tenant's employees.[71] Although the result was correct, the court's decision was flawed for three reasons. First, by improperly focusing on the foreseeability of a particular crime, the court needlessly muddled the issue of whether a landlord is liable for the resulting harm. Second, by requiring actual knowledge of foreseeable harm,[72] the decision will lead to an overall de-

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65. *See, e.g.*, W. KEETON, *supra* note 3, at 313.

66. *Rowe*, 125 Ill. 2d at 226, 531 N.E.2d at 1369.

67. See *infra* text accompanying notes 78-80 (discussion of stacking inferences and foreseeability).

68. *Rowe*, 125 Ill. 2d at 227, 531 N.E.2d at 1369. The North Eastern Reporter does not contain a quote and citation to which the official reporter referred. *See id.* The quote is, "[I]t is well within the realm of reason to foresee a situation in which catching or witnessing a vandal or a burglar in the act, could lead to violence against that witness/resident." *See id., citing*, Olar v. Schroit, 202 Cal. Rptr. 457, 155 Cal. App. 3d 861 (1984).

69. The court's reasoning requires that each step is a virtual certainty. It is very doubtful that each of these steps can be considered near certain. As each step becomes less certain, the ultimate result becomes increasingly less likely. For example, for illustrative purposes only, assume that statistically 75% of people with an unauthorized master key will use that key to commit a burglary; 75% of burglars that use a master key are caught in the act; 75% of these burglars caught in the act resort to violence; and that in 75% of these cases of violence, someone is killed. The possibility of death would be 31%. While this is sufficient to create a duty in other contexts, 31% does not constitute probability, which is the synonym for foreseeability in this context. *See* Cunis v. Brennan, 56 Ill. 2d 372, 308 N.E.2d 617 (1974) (the occurence must be "reasonably foreseeable," not "simply foreseeable"). However, applying a mathematical method of analysis to a legal problem is inherently dangerous. *See* Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329 (1971).

70. *See Rowe*, 125 Ill. 2d at 228, 531 N.E.2d at 1369.

71. *Id.*

72. A significant part of the court's holding was that where a landlord knows of a risk, a duty exists. *Id.* at 223, 531 N.E.2d at 1367-68. This signifies a subjective knowledge requirement; however, the other parts of the decision could mean that the court did not intend that result. The risk that the court contemplated was the risk of a murder, not the risk of a crime. *See id.* The landlord was shown to be aware of the risk of a crime, but he was not shown to have been aware of the risk of a murder. *Id.* Additionally, the court cites cases for support that have applied a "know or should know" standard for knowledge. *Id.* Thus, the court may have intended to hold that the knowledge factor is an objective standard: would the risk have been foreseeable to

cline in the safety of tenants. Finally, the court did not give adequate consideration[73] to the relationship between the parties being a "special relationship"[74] and, therefore, an exception to the no-general-duty rule.

First, the *Rowe* decision is inadequate because it needlessly muddles foreseeability. The court used foreseeability in a way that changes its meaning from probability to mere possibility. The court also used foreseeability for two separate arguments, where, for both the arguments to have meaning, the word must have a different meaning for each argument. Yet, it is not clear that the court intended two different meanings, or if it did, what those meanings are.

An event is foreseeable if a reasonable person, looking forward in time, can reasonably conclude that the event will probably occur.[75] Generally, a party has no duty to prevent a harm if that harm is not foreseeable.[76] Additionally, even if a harm was foreseeable, if an unforeseeable source causes the actual harm, such as an intentional criminal act of a third party, that unforeseeable source is a superseding intervening cause and eliminates the liability of a previously negligent act.[77]

The court used the forseeability of the attack to create a duty to prevent the attack. To conclude that the attack was foreseeable[78] the court linked several inferences[79] together, thereby attenuating the certainty of each inference.[80] This reasoning changed the standard for foreseeability from whether the crimes will probably occur to simply whether such a crime is possible. This is a radical depar-

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a reasonable person in the position of the landlord? This interpretation would go far in alleviating the harshness of the decision because the disincentive would be eliminated. However, since there is still no obligation to become aware of foreseeable risks, landlords can limit their liability simply by avoiding situations where they would be expected to learn of foreseeable risks. A better rule would consider the foreseeability of the risk to a reasonable landlord. This is analagous to the position of the RESTATEMENT (SECOND) OF PROPERTY, which states, in other contexts, a landlord may be liable "for conditions of which he is aware, or of which he could have known in the exercise of reasonable care." RESTATEMENT (SECOND) OF PROPERTY §17.6 comment c (1977). *See also* Lesar, *Tort Liability of Illinois Landlords for Crimes of Third Parties*, 1983 S. ILL. L. REV. 415, 432 (trends in Illinois landlord-tenant law).

73. The court simply looked at the landlord and tenant relationship as a class and noted that this relationship has never been considered a "special relationship." *See Rowe*, 125 Ill. 2d at 215-16, 531 N.E.2d at 1364. For a discussion of what constitutes a "special relationship," see *infra* notes 97-106 and accompanying text.

74. *See Rowe*, 125 Ill. 2d at 216, 531 N.E.2d at 1364.

75. W. KEETON, *supra* note 3, at §31.

76. RESTATEMENT (SECOND) OF TORTS §302 (1965).

77. W. KEETON, *supra* note 3, at §44.

78. Determining foreseeability is a matter for the trier of fact. *See, e.g.*, Graham v. M & J Corp., 424 A.2d 103, 105 (D.C. 1980).

79. See *supra* note 68 and accompanying text for the inferences that the court used.

80. Rowe v. Lombard State Bank, 125 Ill. 2d 203, 227, 531 N.E.2d 1358, 1369 (1988).

ture from the current law because in all other respects forseeability requires probability, not merely possibility.[81]

The court also used the foreseeability of the attack to declare that the attack itself was not a superseding cause which would eliminate liability.[82] If foreseeability has the same meaning for both arguments, it would be impossible for the criminal act to be foreseeable in forming a duty, and yet simultaneously unforeseeable, thereby becoming a superseding cause which cuts off liability. Thus, if the meaning of foreseeability does not change, one of the court's arguments was superfluous. For the entire decision to have meaning, the court must have intended foreseeability to mean different things for each argument; yet, the court did not specify that the word should have different meanings in each context. Moreover, if the court did intend that foreseeability should have different meanings in each context, it is unclear from the opinion what those meanings are.

To impose a duty, the court should have applied the rule that a crime is foreseeable based upon the totality of the circumstances.[83] By focusing on what a lock is intended to do, the court would have avoided the foreseeability problem. The purpose of a lock is to prevent crimes against people and property. If a lock is ineffective, a

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81. By requiring that the crime be foreseeable, the courts are requiring that the crime be probable, and not just possible. *E.g.*, Cunis v. Brennan, 56 Ill. 2d 372, 308 N.E.2d 617 (1974) (unforeseeable that car accident victim would land on drain pipe on parkway). This line between possible and probable has been very difficult to define. Henszey & Weisman, *What is the Landlord's Responsibility for Criminal Acts Committed on the Premises?* 6 REAL EST. L.J. 104, 113 (1977).

82. See *supra* note 3 for a discussion of superseding cause.

83. *See, e.g.*, Samson v. Saginaw Professional Building, Inc., 393 Mich. 393, 224 N.W.2d 843 (1975) (landlord liable for attack of mental patient when landlord leased office space to state mental clinic).

Some courts, however, use the "prior similars" rule, which requires that the plaintiff show that the landlord knew, or should have known of the occurrence of the same crime on the premises, before the injury in question. *See, e.g.*, Dwyer v. Erie Investment Co., 138 N.J. Super. 93, 350 A.2d 268 (App. Div. 1975) (burglary was foreseeable, shooting was not). Initially, the "prior similars" rule had wide acceptance; however, higher courts in many jurisdictions have modified it. Many courts have applied a modified rule in which evidence of prior similar crime is not necessary, but that evidence of some prior criminal activity is used. *See, e.g.*, Isaacs v. Huntington Mem. Hosp., 38 Cal. 3d 112, 695 P.2d 653, 211 Cal. Rptr. 356 (1985) (doctor shot in hospital parking lot); Jardel Co. Inc. v. Hughes, 523 A.2d 518 (Del. 1987) (employee of tenant abducted from parking lot and raped); Paterson v. Deeb, 472 So. 2d 1210 (Fla. Dist. Ct. App. 1985) (landlords' actual or constructive knowledge of prior similar criminal acts committed on the premises not required); Galloway v. Bankers Trust Co., 420 N.W.2d 437 (Iowa 1988) (crimes in general were similar acts for purposes of showing foreseeability of homosexual rape in restroom); Scott v. Watson, 278 Md. 160, 359 A.2d 548 (1976) (general criminal activity in apartment complex common areas); Advance Rental Centers, Inc. v. Brown, 729 S.W.2d 644 (Mo. Ct. App. 1987) (landlord not liable for leaving window open unless knew of prior criminal activity); Nallan v. Helmsley-Spear, Inc., 50 N.Y.2d 507, 407 N.E.2d 451 (1980) (criminal activities of third persons in office building and lobby could lead to foreseeable risk of harm); Murphy v. Penn Fruit Co., 274 Pa. Super. 427, 418 A.2d 480 (1980) (no need to be aware of exact type of criminal act that might occur).

crime is the likely result. If a crime is the likely result, the fact that the perpetrator is a third party is irrelevant.[84] When a landlord's duty is breached, the landlord is liable for the likely result; in this case the result was a violent attack.

The more serious problem with this decision is that the court's actual knowledge requirement threatens the general safety of tenants. All of the jurisdictions currently imposing a duty based upon any form of forseeability use a "knew or should have known" standard.[85] Like Illinois, several jurisdictions initially adopted an actual knowledge requirement, but in each case the higher courts modified the requirement to include the "should have known" standard. Part of the *Rowe* court's decision limits the duty to actual knowledge of danger. This court did not include the "knew or should have known" standard.

Absent a "knew or should have known" standard, if an Illinois landlord learns of a danger, the law imposes a duty.[86] If he does nothing, he is in breach of this duty and is liable for the result. If he takes action, he runs the risk of the court considering his action inadequate.[87] If a landlord takes all the steps necessary to insure that the courts will not consider his action inadequate, he may incur a substantial burden.[88] Compared to the landlord that never actually

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84. *See* RESTATEMENT (SECOND) OF TORTS §302B (1965).

85. *Compare* Advance Rental Centers, Inc. v. Brown, 729 S.W.2d 644 (Mo. Ct. App. 1987) (duty requires knowledge of criminal activity) *with* Aaron v. Havens, 758 S.W.2d 446 (Mo. 1988) (duty present because landlord knew or should have known of dangerous condition).

86. In *Rowe*, the danger came from the loose key control of the prior owner. Rowe v. Lombard State Bank, 125 Ill. 2d 203, 227, 531 N.E.2d 1358, 1369 (1988). The landlord knew of the danger and did nothing, thus the danger became reality. If the landlord had never learned of the danger, he still would not have done anything because there would have been no reason to act and the danger would also have become reality.

87. The duty is to take reasonable steps to avoid the harm. *Id.* If reasonable steps are not taken, the duty is breached. *Id.* However, the landlord can also be in breach under the theory that he undertook to perform an act and did so negligently. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS §324 (1965). These are alternate theories, thereby giving plaintiffs additional opportunities to prevail.

88. A landlord is required to take reasonable precautions against the foreseeable harm. *Rowe*, 125 Ill. 2d at 224, 531 N.E.2d at 1368. The difficulty is in defining "reasonable" as it applies to a particular instance. Even judges are not expected to be able to do this, which is why foreseeability is a jury question. *See* W. KEETON, *supra* note 3, § 31. Our system defines reasonable as whatever a jury decides, which means that reasonable men may differ. *Id.* at Sec. 32. If reasonable men may differ, reasonable landlords will take precautions they deem adequate, which a jury may later decide were not adequate. The only way a landlord can truly protect himself is to take such extreme precautions that a judge may determine, as a matter of law, that reasonable men may not differ. *See* Graham v. M & J Corp., 424 A.2d 103, 107 (D.C. 1980). This point is more difficult for an individual landlord to find than defining what "reasonable" is in that instance. *See, e.g.*, Johnston v. Harris, 387 Mich. 569, 198 N.W.2d 409 (1972) (Brennan, J., dissenting) (tenant attacked in vestibule of apartment building).

learned of a risk,[89] the landlord making the conscientious effort to reduce the risk is in a far worse position[90] because he incurs a burden and potential liability, while his counterpart incurs neither.

The net effect of the *Rowe* court's decision will discourage landlords from looking for unsafe conditions, from making improvements to increase safety, and from being accessable to tenant reports of unsafe conditions. Landlords will have a strong disincentive to look[91] for problems if they are only liable when they find problems.[92] Similarly, making improvements to a dangerous condition constitutes recognition that a dangerous condition existed,[93] thus inviting liability. The landlord then becomes liable if the improvements are insufficient. Additionally, since landlords can only assume a duty by actually being aware of a problem, landlords may discourage tenants from reporting unsafe conditions.[94] Thus, since

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89. The landlord that never learned of the risk will not be held liable for not taking action to prevent it. *See supra* note 72 and accompanying text (discussion of actual knowledge requirement). Nor will this landlord incur expense or inconvenience.

90. It is possible that a landlord who is held to a stricter standard will benefit through an increased value of his property. This will result in higher rental income. However, this result is far from certain.

91. Many landlords regularly inspect their property. Their inspections serve many purposes: they look for unsafe conditions in order to prevent injury or potential liability; they look for damage so that it can be repaired and reimbursed promptly; and they look for ways to improve the property and make it more valuable.

92. The disincentive applies when a problem is never effectively reported to the landlord, or the harm occurs before it is effectively reported. If it is reported, the disincentive is eliminated.

93. *Cf.* FED. R. EVID. 407. That rule states:

> [w]hen, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of sebsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

Id. This rule was enacted to allow landowners to repair harmful conditions, without thereby incurring liability, because the social policy of preventing harm is greater than the social policy of assigning fault. *See* Falknor, *Extrinsic Policies Affecting Admissibility*, 10 RUTGERS L. REV. 574, 590-91 (1956). The rule cannot be applied to this instance because the rule is only concerned with repairs which occurred after the harm occurred. *See* FED. R. EVID. 407. Here the repair would be made before the event occurred.

94. Discouragement might come in many forms. At one extreme the landlord can make himself virtually unavailable. For example, the landlord could arrange for rent to be paid into a bank account, or to be paid in a lump sum. At the other extreme landlords might evict tenants that make complaints, even though this practice, known as retaliatory eviction, is probably illegal. *See, e.g.*, Seidelman v. Kouvavus, 57 Ill. App. 3d 350, 373 N.E.2d 53 (1978) (tenant evicted for circulating a petition to rescind landlord's rules); Sheppard v. Drucker & Falk, 63 N.C. App. 667, 306 S.E.2d 199 (1983) (exclusion of testimony regarding landlord's reaction to report of crimes not reversable error). *See also* Dickhut v. Norton, 45 Wis. 2d 389, 173 N.W.2d 297 (1970) (action for retaliatory eviction allowed if landlord knew that tenant accurately reported a violation of the housing code and such knowledge was the sole purpose of the eviction).

the law will not impute knowledge to the landlord through the "should have known standard", one element[95] of finding a duty requires that the landlord actually know of the danger. If the landlord never learns of the danger, it will not be prevented and will most likely occur. Consequently, the effect of the *Rowe* decision is to discourage preventable dangers from being prevented, leading to needless injuries.

Finally, the *Rowe* court incorrectly disregarded the applicability of the "special relationship" exception in this case. When a special relationship exists, the general no duty rule does not apply, and a party has the duty to take reasonable precautions against foreseeable criminal acts of third parties.[96] The common thread running through the special relationships[97] is that one party relinquishes part of his autonomy,[98] or his ability to control his environment,[99] in favor of a dominant party.[100]

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95. The court's requirement for establishing a duty consists of two parts: knowledge of foreseeable harm and being the only party in a position to prevent it. Rowe v. Lombard State Bank, 125 Ill. 2d 203, 223, 531 N.E.2d 1358, 1368 (1988). Only the landlord could change the locks on the complex, or warn tenants of the possibility of outstanding master keys. *Id.* This holding is unfortunate because it ignores the liklihood of drastic imbalances between the parties. A better rule would consider the economic and social relationships between the parties and require a landlord to act when he is in a better position to do so. If preventing a particular harm would be highly inconvenient or expensive for the tenant, but not for the landlord, the duty should rest upon the landlord.

96. *See, e.g.*, W. KEETON, *supra* note 3, at 202 (discussion of foreseeability).

97. The most common examples of the special relationship exception cases are: carrier and passenger; innkeeper and guest; and, business and business invitee. *Id. But see* Meadows v. Friedman R.R. Salvage Warehouse, 655 S.W.2d 718 (Mo. App. 1983) (no special relationship between business and invitee). However, the courts have been expanding the application of the exception. *See, e.g.*, Kline v. 1500 Massachusetts Avenue Apartment Corp., 439 F.2d 477 (D.C. Cir. 1970) (landlord and tenant); Liberty Nat. Life Ins. Co. v. Weldon, 267 Ala. 171, 100 So. 2d 696 (1958) (insurer and insured); Parness v. City of Tempe, 123 Ariz. 460, 600 P.2d 764 (1979) (city and park patron); Schuster v. City of New York, 5 N.Y.2d 75, 180 N.Y.S.2d 265, 154 N.E.2d 534 (1958) (police and informant); Mike v. Borough of Aliquippa, 279 Pa. Super. 382, 421 A.2d 251 (1980) (employer and employee); Mcleod v. Grant County School Dist. No. 128, 42 Wash. 2d 316, 255 P.2d 360 (1953) (school and student).

98. As used here, "autonomy" means the ability to decide for oneself how to act. RANDOM HOUSE COLLEGE DICTIONARY 92 (1982). No individual is truly autonomous; society imposes certain constraints on everyone. The choices that a person is entitled to make, within the law, denote his degree of autonomy. If a part of this autonomy is relinquished to another, a special relationship exists.

99. The ability to control one's environment is the authority to regulate one's surroundings. This includes many factors, such as lighting, sound, climate and other people. For example, a hotel patron has no authority to regulate who else may occupy the building, or even an adjacent room; yet a farmer leasing a farm may force others to maintain a great distance from the farmhouse. This is distinguished from autonomy because autonomous things usually concern only oneself, while the ability to control one's environment includes the potential for regulating the conduct of other people.

100. If the parties ability to reduce the risk is equal, there is little justification for shifting the responsibility to one who will not otherwise be affected.

Historically, this principle did not apply to a typical landlord-tenant relationship.[101] In pre-industrial age leases,[102] tenants did not usually relinquish their autonomy, or their ability to control their surroundings.[103] A typical tenant had full control over the land, including his own actions on the land. Thus, these relationships were properly excluded from the special relationships.

Changes in society have caused modern leases to differ from those in the past.[104] The hotel and guest relationship was one of the first to be considered special, yet in some instances modern leases are more restrictive upon the tenants than if the tenants were guests in a hotel.[105] Courts extended the special relationship to hotels[106] because the reasons for the rule were present; guests had no autonomy or ability to control their surroundings. Likewise, the exception should be applied to those modern leases where the reasons for the rule exist, such as when the tenant gives up his autonomy[107] or his ability to control his surroundings,[108] in favor of the dominant landlord.

Applying this rule to the facts in *Rowe*, when the tenant signed the lease the tenant relinquished to the landlord exclusive control over the keys to the office,[109] control[110] over the building's security devices,[111] and control over the areas outside the office.[112] According

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101. In a typical lease of the 1700's, the occupant was probably just as capable of repairing things that needed repaired as the landlord. *See* C. MOYNIHAN, *supra* note 33, at 78 (history of property leases). Additionally, tenants were in a far better position to safeguard the property. *See id.* The tenants were usually on the scene, while the landlords usually were not. *Id.*

102. For a discussion of the historical basis of leases, see *id.*

103. For a discussion of the changes in leases over the years, see McGovern, *The Historical Conception of a Lease For Years*, 23 UCLA L. REV. 501 (1976).

104. *E.g.*, Trentacost v. Brussel, 82 N.J. 214, 412 A.2d 436 (1980) (tenant mugged in stairwell of apartment building).

105. A lease is very much like a contract. *See* Hicks, *The Contractual Nature of Real Property Leases*, 24 BAYLOR L. REV. 443 (1972). As such, the parties can insert almost any provisions they choose. Since the parties to a contract often have unequal bargaining positions, terms are included that are restrictive upon the weaker party. In a lease, such terms can include, for example, restrictions on: use of the premises, guests, and noise.

106. *See, e.g.*, Fortney v. Hotel Hancroft, 5 Ill. App. 2d 327, 125 N.E.2d 544 (1955) (hotel required to explain how attacker gained entry into victim's room).

107. See *supra* note 98 for a discussion of autonomy.

108. See *supra* note 99 for a discussion on the ability to control one's environment.

109. Brief for Appellant at Appendix 20, Rowe v. Lombard State Bank, 125 Ill. 2d 203, 531 N.E.2d 1358 (1988) (No.65167).

110. See *supra* note 59 for a discussion of the control over an item.

111. Brief for Appellant at Appendix 20, Rowe v. Lombard State Bank, 125 Ill. 2d 203, 531 N.E.2d 1358 (1988) (No.65167).

112. J-Mar's office was in one building of an eight building complex. Rowe v. Lombard State Bank, 125 Ill. 2d 203, 208, 531 N.E.2d 1358, 1360 (1988). As such, J-Mar had no authority over the areas adjacent to the office which were not within the leased area. *See id.* These areas were under the control of the landlord who allowed

to the rationale behind the rule, these factors are sufficient to create the existence of a special relationship. Because the special relationship exception applies, Paramount had the duty to use reasonable care to prevent the foreseeable criminal acts of third parties. Paramount breached this duty when it took no action, and it is therefore liable for the injuries proximately caused by the breach of its duty: the shooting of Lori Rowe and Bonnie Serpico.

In conclusion, the *Rowe* court's decision properly found this landlord liable, but its precedential value will be limited to the particular facts. Illinois attorneys must now litigate a foreseeability issue in order for the court to clarify itself. Additionally, Illinois plaintiffs must now prove that the landlord was actually aware[113] of the risk of the particular harm. This result is regressive and violates the public policy of encouraging safety[114] because it discourages landlords from correcting unsafe conditions. The court should have noted the change in society since the inception of the special relationship exception, and recognized that modern leases are different from their historical counterparts. The court would then have expanded the special relationship to those landlord and tenant relationships[115] that merit[116] its application. Thus, while *Rowe* provides

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all of the tenants to use them. *See id.* This is markedly different from the lease of a farm and farmhouse where the farm tenant has the authority to prevent people from entering the property, let alone approaching the house. In the business office instance a tenant generally has no authority over someone standing within arms reach of the office door, regardless of that person's intent.

113. For a discussion of the requirement that duty requires actual knowledge of a foreseeable harm, see *supra* notes 85 - 89 and accompanying text.

114. See *supra* notes 91 - 96 and accompanying notes for a discussion of the inherent danger in discouraging repairs.

115. Some commentators would have the courts make a distinction between commercial and residential landlord and tenant relationships. *See, e.g.*, Annotation, *Landlord's Obligation to Protect Tenants Against Criminal Activities of Third Parties*, 43 A.L.R. 3d 331, 363 (1972). This article states:

> For example, an argument may be made that a landlord of residential property owes a greater duty to his tenants than does a landlord of business property to provide security against criminal acts. It may be argued, for instance, that crimes against business tenants ordinarily are directed against property, and may be adequately insured against, the cost of such insurance being treated as a cost of doing business, while offenses involving residential property often are directed against the person and involve losses not easily remediable; that a residential landlord is better able to control access to his property than is a landlord of property generally open to the public; and that the analogy to the innkeeper-guest relationship, supporting recovery in some recent cases, is more clearly applicable to residential than to business leases.

Id. at 339 (footnote omitted). Such a broad characterization is as misplaced as the exclusion of all landlord and tenant relationships from the special relationship exception. The correct approach would be to examine the specific relationship in light of all the factors, including the type of the lease, but not exclusively whether it is commercial or residential. *See* Samson v. Saginaw Professional Bldg., Inc., 393 Mich. 393, 224 N.W.2d 843 (1975). *But see* Royal Neckwear Co., Inc., v. Century City, Inc., 205 Cal. App. 3d 1146, 252 Cal. Rptr. 810 (1988); Richmond Medical Supply Co., Inc. v. Clifton, 235 Va. 584, 369 S.E.2d 407 (1988).

Illinois tenants with the key, it is certainly not a master key, and now plaintiff attorneys must search for the door that the key unlocks.

Jeffrey Fowler

116. There are a number of factors that courts should consider in deciding whether a special relationship exists. *See* Kline v. 1500 Massachusetts Avenue Apartment Corp., 439 F.2d 477 (D.C. Cir 1970) (control over the property, whether only one party in a relationship has the ability to perform the necessary acts); Isaacs v. Huntington Mem. Hosp., 38 Cal. 3d 112, 695 P.2d 653, 211 Cal. Rptr. 356 (1985) (foreseeability and certainty of harm, the morality of inaction, the consequences of imposing the relationship, the insurability of the risk); Samson v. Saginaw Professional Bldg., Inc., 393 Mich. 393, 224 N.W.2d 843 (1975) (a relationship between the parties which society views as sufficiently strong to require more than mere observation of the events which unfold); ILL. ANN. STAT. ch. 80, ¶ 302 (Smith-Hurd 1987) (the type of lease); J. PAGE, THE LAW OF PREMISES LIABILITY (2d ed. 1988) (social policy); RESTATEMENT (SECOND) OF TORTS §324A(c) (1965) (the degree of reliance customary between the parties).