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# Negligence Liability for the Criminal Acts of Another, 15 J. Marshall L. Rev. 459 (1982)

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# NEGLIGENCE LIABILITY FOR THE CRIMINAL ACTS OF ANOTHER

## INTRODUCTION

Society's need to deter crime is spurring a new trend in tort liability.[1] Whether fueled by the recent surge of moralist movements, the general litigious nature of contemporary Americans,[2] or the self-serving pragmatism generated by human experience,[3] "victims' rights litigation"[4] is establishing legal duties in a

1. *See generally* Carrington, *Victims' Rights Litigation: A Wave of the Future?*, 11 U. RICH. L. REV. 447 (1977) [hereinafter cited as *Victims' Rights*]; Rottenberg, *Crime Victims Fighting Back*, PARADE MAGAZINE, Mar. 16, 1980, at 21; Barbash, *Victim's Rights: New Legal Weapon*, Washington Post, Dec. 17, 1979, at 1, col. 1.

2. Carrington, *Victims' Rights: A New Tort?*, TRIAL, June, 1978, at 40 [hereinafter cited as *New Tort*].

3. Tort law is the major "battleground of social theory" and is essentially a process of balancing the interests of the plaintiff, the defendant, and the public. Since common law is based on a system of precedent, under which rules are followed for unlimited periods of time until justly overturned, there is good reason to reach desirable social results in every case. When public interest swings the balance in favor of one party over another, the result is a form of "social engineering" reflecting human experience. W. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 3, at 14-16 (4th ed. 1971) [hereinafter cited as PROSSER].

As crime increases so does the fear of those parties affected by crime. Ultimately, society itself must suffer. Therefore, corrective action must be taken because as society increasingly fails to protect its members from crime, a corresponding loss of faith in government develops. DEWOLF, CRIME AND JUSTICE IN AMERICA 3 (1975).

4. "Victims' rights litigation" is not a topic heading used by the major law publishers, but a term made popular by the Crime Victims Legal Advocacy Institute, Inc., and adopted by modern commentators. The term is often used to describe a classification of cases where a crime victim-plaintiff initiates a civil suit against the criminal or a negligent third party whose unreasonable acts allegedly caused the victimization. *Victims' Rights*, *supra* note 1, at 454. The general classification, however, can be divided into three subclasses: perpetrator against victim; victim against perpetrator; and victim against negligent third parties. Carrington, *The Crime Victims Legal Advocacy Institute: A Victims' Legal Rights Organization is Formed in Virginia*, 6 VA. B.A.J. 4, 4 (1980) [hereinafter cited as Carrington].

As the preceeding subdivision indicates, there have been occasions where the victim of a crime has been sued for damages by the perpetrator. This type of suit is rare and often simply an instrument of harassment used by guilty perpetrators. *See, e.g.*, Jones v. Bales, 58 F.R.D. 453 (N.D. Ga. 1972) (case dismissed on grounds that action was malicious or frivolous). However, when a victim makes a good faith identification of an alleged attacker and no conviction ensues, the alleged criminal may bring an action against the victim for false imprisonment or some other applicable tort. *See, e.g.*, Shires v. Cobb, 271 Or. 769, 534 P.2d 188 (1975) (defendant made good faith but mistaken identification of plaintiff as man who robbed her). Public pol-

manner practically nonexistent twenty years ago.[5] The new trend involves the crime victim as civil litigant against a third party rather than the criminal perpetrator. Plaintiffs are using traditional negligence standards[6] innovatively in alleging that

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icy considerations promoting crime reporting usually will aid the victim-defendant who in good faith mistakenly identifies his attacker. *Id.* at 770, 534 P.2d at 189.

Civil suits by the crime victim against the perpetrator present no special conceptual problems. Traditional common law tort remedies are readily available to the plaintiff. Even if there is no criminal conviction, a civil suit may still be successful because of the difference in criminal and civil burdens of proof. Carrington, *supra* note 4, at 6. For a summary of the distinction between a tort and a crime, *see* PROSSER, *supra* note 3, § 2, at 7-9.

Although the establishment of civil liability in victim versus perpetrator suits may be relatively easy, the suits are often ineffective due to collection problems. Most violent crimes are not committed by the wealthy. Carrington, *supra* note 4, at 7. *See* Schultz, *The Violated: A Proposal to Compensate Victims of Violent Crime*, 10 ST. LOUIS U.L.J. 238, 243 (1975). If the perpetrator is indigent, an action for monetary redress is likely to be of no practical consequence. Collection becomes even more problematic if the indigent is sentenced to prison. Thus, victims began to sue more affluent third-party defendants who allegedly were in a position to prevent the crime. Carrington, *supra* note 4, at 7.

In third-party litigation, the victim elects to sue a more financially stable third party whose negligence aided the criminal, thus proximately causing the harm. Compensation in a third-party suit depends on the victim's ability to establish a legal duty and prove that a breach thereof caused his injuries. Boyd v. Racine Currency Exch., Inc., 56 Ill. 2d 95, 306 N.E.2d 39 (1973); Lindquist v. Highland Park Hosp. Found., 40 Ill. App. 3d 722, 353 N.E.2d 156 (1976). *See infra* note 6. The duty to protect the victim often arises from a special relationship between the third party and the victim or the criminal. *See infra* note 19. When such a relationship is absent, duty may be premised on the foreseeability of harm or public interest. *See, e.g., infra* notes 46-48 and accompanying text. The apprehension or conviction of the suspected criminal plays no part in the litigation. Moreover, the third-party defendant may be either the government or a private person. Carrington, *supra* note 4, at 8.

5. *New Tort*, *supra* note 2, at 40.

6. The traditional fashion of pleading a negligence cause of action is to allege five components: (1) a duty requiring the actor to conform to a certain standard of conduct for the protection of others against unreasonable risks; (2) breach of that duty, or failure to conform to the required standard; (3) breach as the actual cause of the plaintiff's injury; (4) breach as the proximate cause of the plaintiff's injury, i.e., a reasonably close causal link between the defendant's breach of duty and the resulting harm to the plaintiff; and (5) actual injury or damage to the plaintiff. PROSSER, *supra* note 3, § 30, at 143. The elements of duty and proximate cause receive prime consideration by the courts because they are questions of law rather than fact. *Id.* § 53, at 324. Further, the question of duty and proximate cause are sometimes the same. *Id.* §§ 42, 53, at 244-45, 325-26. *See* Tarasoff v. Regents of the Univ. of Cal., 17 Cal. 3d 425, 433, 551 P.2d 334, 342, 131 Cal. Rptr. 14, 22 (1976) (all persons foreseeably endangered by defendant's conduct are owed a duty of care with respect to any risk making the conduct unreasonably dangerous). Commentators disagree on the meaning of proximate cause. As a general rule, however, it can be said that proximate cause represents a determination that a defendant should be held legally responsible for the consequences of his negligent act or omission. PROSSER, *supra* note 3, § 41, at 236. *See generally* L. GREEN, RATIONALE OF PROXIMATE CAUSE

the unreasonable acts[7] of the third party set the stage for the resulting crime. Liability is predicated upon the theory that the crime was committed against a particular victim due to the breach of a third party's duty to protect him. The duty to provide occupants with proper building security[8] and the duty to supervise or confine criminals properly[9] typify the protective obligations involved.

With relatively little case law available,[10] victims' rights litigators are testing courts to ascertain the bounds of third-party liability if, for instance: a bus driver negligently allows a stranger to criminally assault a passenger;[11] a landlord negligently allows building security to deteriorate and a tenant is attacked;[12] a psychologist negligently fails to warn of his patient's stated intent to harm a particular individual;[13] or a corrections officer negligently allows a prisoner to escape and the escapee subsequently kills someone.[14] Regardless of the specific factual setting, the result of the original negligence is the criminal victimization of an unreasonably vulnerable plaintiff.[15] By focusing attention on the rights of innocent victims, courts are concerning themselves with rights once largely ignored.[16] Previ-

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(1927); Beale, *The Proximate Consequences of an Act*, 33 HARV. L. REV. 633 (1920); Campbell, *Duty, Fault and Legal Cause*, 1938 WIS. L. REV. 402; Gregory, *Proximate Cause in Negligence—A Retreat from Rationalization*, 6 U. CHI. L. REV. (1938).

7. Negligence has been defined as " 'conduct which involves an unreasonably great risk of causing damage,' or, more fully, conduct 'which falls below the standard established by law for the protection of others against unreasonably great risks of harm.' " PROSSER, *supra* note 3, § 31, at 145 (citations omitted).

8. *See, e.g.*, Gaizilli v. Howard Johnson Motor Lodge, Inc., 419 F. Supp. 1210 (E.D.N.Y. 1976) (motel owner held to owe occupant duty to provide adequate locks on easily accessible patio doors).

9. *See, e.g.*, Grimm v. Arizona Bd. of Pardons & Paroles, 115 Ariz. 260, 564 P.2d 1227 (1977) (parole board owed duty of protection to man murdered by foreseeably dangerous parolee).

10. Carrington, *supra* note 4, at 4; *New Tort*, *supra* note 2, at 40.

11. Smith v. West Suburban Transit Lines, 27 Ill. App. 3d 220, 326 N.E.2d 449 (1975).

12. Kline v. 1500 Mass. Ave. Corp., 439 F.2d 447 (D.C. Cir. 1970).

13. Tarasoff v. Regents of the Univ. of Cal., 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).

14. Taylor v. State, No. 211-130 (Super. Ct., Pierce County, Wash., Sept. 10, 1973).

15. The plaintiff is considered unreasonably vulnerable because, theoretically, circumstances have placed a significant degree of control over his protection in the hands of another. *See infra* notes 68-69 and accompanying text.

16. *See* Donenberg, *Compensation for the Victims of Crime: Justice for the Victim as well as the Criminal*, 1970 INS. L.J. 628; Inbau, *Forward* to Carrington, *Victim's Rights Litigation: A Wave of the Future?*, 11 U. RICH. L. REV. 447 (1977); Comment, *Compensation for Victims of Violent Crimes*, 26 KAN. L. REV. 227 (1978) for articles alleging the legal system's lack of con-

ously, most attention was directed toward victim compensation through the interpretation of insurance contracts, restitution, and state-funded compensation programs.[17] Victims, however, are now enjoying significant success in suits against third parties for the intervening acts[18] of criminals.

To establish liability, the victim-plaintiff usually must plead and prove that a *special relationship* existed between the defendant-third party and the victim or the criminal.[19] Because there is no general duty requiring a private person to protect another from criminal attack,[20] courts create exceptions, often

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cern with adequate victim compensation. *See generally* F. CARRINGTON, THE VICTIMS (1975). In a speech to the American Bar Assocation, Chief Justice Warren Burger called for reversal of the trend favoring the accused in the criminal justice system. Washington Post, Feb. 4, 1980, § A, at 5, col. 3.

17. *See* Harland, *Compensating the Victims of Crime*, 14 CRIM. L. BULL. 203 (1978); Lamborn, *Remedies for the Victims of Crime*, 43 S. CAL. L. REV. 22 (1970); McAdam, *Emerging Issue: An Analysis of Victim Compensation*, 8 URB. L. 346 (1976). About one-third of the states have legislation providing for some type of compensation for the victims of crime. Comment, *The Use of Civil Liability to Aid Crime Victims*, 70 J. CRIM. L. & C. 57, 57 (1979). *See, e.g.*, the Illinois Crime Victims Compensation Act ILL. REV. STAT. ch. 70, §§ 71--90 (1973) for an example of a typical statutory program designed to provide redress for victims who have cooperated with the police.

18. The question of intervening acts in negligence actions involves the determination of a defendant's liability for an injury to which he has significantly contributed, when the actual harm is caused by an independent source for which the defendant is not directly responsible. PROSSER, *supra* note 3, § 44, at 270. An intervening cause is a force taking effect after the defendant's negligence, which adds to that negligence in causing the plaintiff's injury. RESTATEMENT (SECOND) OF TORTS § 441(1) (1965). Some intervening acts are such that they prevent a finding that the original negligence was the proximate cause of the harm. Such intervening acts are often referred to as "superseding" because they cancel the defendant's liability. *Id.* at § 440.

19. PROSSER, *supra* note 3, § 33, at 174. *See* Tarasoff v. Regents of the Univ. of Cal., 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976), explaining the role of special relationships:

> As a general principle, a "defendant owes no duty of care to all persons who are foreseeably endangered by his conduct." . . . [H]owever, when the avoidance of foreseeable harm requires a defendant to control the conduct of another person, or to warn of such conduct, the common law has traditionally imposed liability only if the defendant bears some special relationship to the dangerous person or to the potential victim.

*Id.* at 434-35, 551 P.2d at 342-43, 131 Cal. Rptr. at 22-23.

20. *See, e.g.*, Altepeter v. Virgil State Bank, 345 Ill. App. 585, 104 N.E.2d 334 (1952) (defendant did not assume duty to protect plaintiff from being shot by robber on defendant's premises). *See also* PROSSER, *supra* note 3, §§ 33, 56, at 173-76, 340-41; RESTATEMENT (SECOND) OF TORTS § 315 (1965):

> There is no duty to control the conduct of a third person as to prevent him from causing physical harm to another unless
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> (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
>
> (b) a special relation exists between the actor and the other which gives to the other the right to protection.

attaching the duty to a defendant via a relationship between the parties.[21] This type of special relationship has been found to exist, for example, between a carrier and passenger,[22] an innkeeper and guest,[23] an employer and employee,[24] and a landlord and tenant.[25]

The problem with victims' litigation lies in the judiciary's inconsistent recognition of the duty to protect.[26] The irregular application of the special relationship rule, the failure of courts to announce exactly what makes a relationship special, and the role of policy considerations in the judicial analysis of negligence[27] have led to inconsistent and sometimes unjust results.[28] Consequently, a strain has been placed on the traditional notion of duty in suits against third parties for the failure to protect against the criminal acts of another.

Concurrent with the trend of increasing liability, modern courts frequently place less emphasis on relationships and more on policy when considering the duty to protect.[29] Employment of broadly defined public interest rationale[30] allows courts to create exceptions to the general rule of nonliability in a wider variety of factual settings than in the past.[31] Tradition has not

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*Id.*; Harper & Kline, *The Duty to Control the Conduct of Another*, 43 YALE L.J. 886, 887 (1934). *See generally* Eldredge, *Culpable Intervention as Superseding Cause*, 86 U. PA. L. REV. 121 (1937); Feezer, *Intervening Crime and Liability for Negligence*, 24 MINN. L. REV. 635 (1940); Annot., 10 A.L.R. 3d 619 (1966).

21. PROSSER, *supra* note 3, § 33, at 174. *See Victims' Rights*, *supra* note 1, at 459-67 for a compilation and discussion of various special relationships.

22. *E.g.*, Hanback v. Seaboard Coastline R.R., 396 F. Supp. 80 (D. S.C. 1975).

23. *E.g.*, Tobin v. Slutsky, 506 F.2d 1097 (2d Cir. 1974).

24. *E.g.*, Lillie v. Thompson, 332 U.S. 459 (1947).

25. *E.g.*, Ramsay v. Morrissette, 252 A.2d 509 (D.C. 1969).

26. Whether there is a duty to protect is a question of law. 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).

27. Comment, *Victims' Suits Against Government Entities and Officials for Reckless Release*, 29 AM. U. L. REV. 595, 597 (1980) [hereinafter cited as *Reckless Release*]. *See* PROSSER, *supra* note 3, § 42, at 244 (imposition of duty and proximate cause is essentially a conclusion of policy considerations).

28. *See infra* notes 72-74 and accompanying text.

29. *See infra* notes 86-101 and accompanying text.

30. *See infra* note 87 and accompanying text.

31. Third-party suits involving the government are a good example of the spread of liability. Victims increasingly are finding that they can establish a cause of action against government entities for the failure to perform a protective function properly. *Reckless Release*, *supra* note 27, at 595. This is significant because in addition to the difficulties of proving the elements of third-party negligence, the obstacle of sovereign immunity must be overcome in actions against the government. For a complete discussion of immunity in third-party victims suits against the government, *see id.* at 598-

yet been buried, but the judiciary may be signaling that the exceptions will soon become the general rule. The reasonable man in today's society is no longer entitled to assume automatically that third persons will not commit crimes. Crime is considered so predictable in certain situations that the foreseeability of its occurrence is often used as the basis for imposing the burden of anticipating and preventing criminal acts.[32]

Victims' rights litigation encompasses cases in which victims of crimes, usually violent crimes against the person, utilize civil courts to recover from either the actual perpetrator or from third parties whose negligence caused the victimization.[33] The topic under consideration in this comment does not include criminal or civil actions against the perpetrator or such legislatively created victims' programs as restitution and state-funded compensation. Instead, consideration will be given to the distinctive problems created by the class of cases where a plaintiff seeks to hold a defendant-third party liable for the conscious, willful acts of another.

## THE DUTY TO ANTICIPATE AND PREVENT CRIMINAL ACTS

Courts historically have been reluctant to hold an individual responsible for the willful and malicious acts of others.[34] The law of negligence, however, is based on the idea that the reasonable man occasionally is required to anticipate the conduct of others.[35] This is because an individual of normal experience knows of the traits and habits of others and is expected to act accordingly. For example, one may be required to anticipate that a drugged person can wander unknowingly into a place of danger.[36]

Along with reasonable conduct, the prudent person is re-

614. Prison wardens, parole and probation boards are among the immune executive branch officials. Some jurisdictions, however, use policy considerations to conclude that, in some circumstances, certain government entities are only entitled to limited immunity. Carrington, *supra* note 4, at 9. *See, e.g.*, Grimm v. Arizona Bd. of Pardons & Paroles, 115 Ariz. 260, 267, 564 P.2d 1227, 1234 (1977) (Arizona Supreme Court held previously immune parole board officials could be sued for gross negligence in the release of dangerous criminals). *But see* Martinez v. California, 444 U.S. 277 (1980) (survivors of murder victim had no right under Constitution or Civil Rights Act to sue state parole board for gross negligence in releasing murderer).

32. *See, e.g.*, Tarasoff v. Regents of the Univ. of Cal., 17 Cal. 3d 425, 433, 551 P.2d 334, 342, 131 Cal. Rptr. 14, 22 (1976) (foreseeability is the most critical factor in establishing the duty to protect).

33. Carrington, *supra* note 4, at 4.

34. PROSSER, *supra* note 3, § 33, at 173.

35. *Id.* at 170.

36. *Id.*

quired to expect a certain amount of negligence from others.[37] People are sure to act unreasonably from time to time. In such a case, the imposition of liability customarily has hinged upon the weighing of the gravity of the risk involved against the utility that would result from the burden of avoiding the risk.[38] Thus, one may be required to anticipate the possibility of negligence by others. Generally, this will occur only if the likelihood of injury is high or if the magnitude of the injury is substantial.

The prudent person also knows that crime is sure to occur. Unlike the situation involving the anticipation of negligence, however, the reasonable man normally is not required to anticipate the criminal acts of others.[39] Therefore, limits are placed on the possible extent of liability for the failure to anticipate the independent criminal acts of another. In a negligence action, the element of duty limits the type of conduct for which a defendant must account.

A duty is an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.[40] There is no common law duty to anticipate criminal activity.[41] Thus, the law ordinarily does not require the prudent person to expect the criminal activity of others.

Since duty is essentially a recognition of an obligation imposed as a response to human experience, a conflict has arisen due to the significant increase in crime in the last four decades. Human experience generated by modern living has revealed that there are situations where criminal activity can be predicted with a significant degree of probability. Simultaneously, experience also shows that the occurrence of crime is still so unpredictable that the burden of requiring individuals to conform their conduct so as to protect *all* others from crime would be too costly. As a result, the duty to protect is expressed as an exception to the general rule.

The victim's theory in pleading for an exception is generally that the circumstances placed control of the situation in the hands of a third party.[42] As a result, only the defendant-third party had the power to prevent the crime. Therefore, it is in the public's interest for the person in control to afford a reasonable degree of protection to the dependent or controlled party.[43]

37. *Id.* at 171.
38. Bohlen, *Fifty Years of Torts*, 50 HARV. L. REV. 1225, 1225-26 (1937).
39. PROSSER, *supra* note 3, § 33, at 173.
40. *Id.* § 53, at 324.
41. *See supra* note 20.
42. Carrington, *supra* note 4, at 10.
43. *Id.*

There is liability only if the defendant is negligent in not taking precautions against the possible crime.[44] A finding of negligence must be based on the reasonable foreseeability of the crime and the unreasonableness of the foreseeable risk involved as compared to the burden of guarding against the possible crime.[45]

The major problem with the current use of exceptions to the general rule is that a universal workable basis for a duty to protect has yet to be found.[46] Since a single workable approach to duty has not been adopted by the various jurisdictions, a third-party victims' suit can turn on any number of factors. Among the factors consistently emphasized by the courts are: the degree of control inherent in the relationship between the parties;[47] foreseeability;[48] the public's interest in safety from violent assault;[49] the victim's expectation and reliance on the defendant for protection;[50] and the economic aspects of the relationship between the plaintiff and the defendant.[51]

### *The Special Relationship Rule*

A legal duty to protect must be established to recover against a third party who did not commit the crime, but whose negligence aided the criminal in his activities. Once duty is established, the plaintiff must prove that a breach of that duty caused his injuries. Theoretically, liability arises because the third party knew or should have known that his negligence was setting the stage for a foreseeable crime.[52] A general duty to

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44. PROSSER, *supra* note 3, § 33, at 175-76.

45. *Id.* at 176.

46. *Compare* Tarasoff v. Regents of the Univ. of Cal., 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976) (public policy) *with* Fancil v. Q. S. E. Foods, Inc., 60 Ill. 2d 552, 328 N.E.2d 538 (1975) (special relationship) *with* Neering v. Illinois Cent. R.R. Co., 383 Ill. 366, 50 N.E.2d 497 (1943) (foreseeability).

47. *E.g.*, Kline v. 1500 Mass. Ave. Corp., 439 F.2d 477, 481 (D.C. Cir. 1970) (landlord's exclusive power to take preventive action provides rationale for the duty to protect his tenants).

48. *E.g.*, Neering v. Illinois Cent. R.R. Co., 383 Ill. 366, 50 N.E.2d 497, 503 (knowledge leading to the reasonable anticipation of crime imposes the duty of vigilance and the adoption of protective measures).

49. *E.g.*, Beauchene v. Synanon Found., Inc., 88 Cal. App. 3d 342, 151 Cal. Rptr. 796, 798-99 (1979) (when considering the duty to prevent inmate escapes, the policy favoring rehabilitation must be balanced against public interest in safety from assault).

50. *E.g.*, Kline v. 1500 Mass. Ave. Corp., 439 F.2d 447, 485 (D.C. Cir. 1970) (tenant entitled to expect landlord's maintenance of protective measures in effect at beginning of lease and such expectations deserve legal protection).

51. *E.g.*, *id.* at 488 (increased costs from providing protection will ultimately be passed from the landlord to the tenant).

52. Note, *California's Approach to Third Party Liability for Criminal Violence*, 13 LOY. L.A.L. REV. 535, 545 (1980).

protect has not evolved because of the difficulties of setting standards unselfishly to aid those in peril,[53] the inability to devise a workable rule to cover all possible situations,[54] and the individualistic philosophy of the common law.[55] Hence, exceptions are employed instead of establishing a general duty to protect another.

There is generally less reason to anticipate that others will act in an intentionally damaging rather than merely negligent manner.[56] There is even less reason to anticipate the criminal acts of others.[57] Courts historically have reasoned that even though crimes do occur, often with a degree of predictability or regularity, they are still so unlikely to occur in any particular instance that the burden of continual precautions exceeds the apparent risk.[58] Thus, it is generally reasonable to risk criminal intervention without taking precautions to prevent it.

Traditionally, courts have required a special relationship between the victim or criminal and the third party[59] to establish the duty to protect. The special-relationship requirement evolved from the persistent refusal of courts to recognize either nonfeasance or any moral obligation[60] to come to the aid of the endangered as a basis of liability.[61] A special relationship can be recognized in circumstances where either a special responsibility for the defendant to protect the plaintiff or the defendant's creation of some special temptation requires him to take precau-

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53. Prosser states that a rule encompassing moral standards might unfairly cause innocent bystanders to be liable. Any tendency to depart from using special relationships as the basis for the creation of a duty to aid one in peril is limited by "the difficulties . . . of making any workable rule to cover possible situations where fifty people might fail to rescue one . . . ." PROSSER, *supra* note 3, § 56, at 341.

54. *Id.*

55. 2 F. HARPER & F. JAMES, THE LAW OF TORTS, § 18.6, at 1046 [hereinafter cited as HARPER & JAMES].

56. PROSSER, *supra* note 3, § 33, at 173.

57. *Id.*

58. *Id.* at 174.

59. The special relationship can exist between the victim and the third party, as in the case of the common carrier and its passenger. *See, e.g.*, McCoy v. Chicago Transit Auth., 69 Ill. 2d 280, 371 N.E.2d 625 (1977) (common carrier held liable for breach of its duty to prevent an assault on a passenger by a fellow passenger). The requisite relationship can also exist between the third party and the criminal, as in cases involving employer liability for employee activities. *See, e.g.*, Food Fair Stores, Inc. v. Morgan, 338 So. 2d 89 (Fla. Dist. Ct. App. 1977) (employer is liable for criminal acts of employees, if such acts are in the course and scope of employee's responsibilities). *See generally* RESTATEMENT (SECOND) OF TORTS §§ 315—320 (1965).

60. As a result, an adult capable of saving a small child may watch the child drown without fearing liability. HARPER & JAMES, *supra* note 55, § 18.6, at 1046.

61. PROSSER, *supra* note 3, § 56, at 340.

tions against foreseeable criminal activity.[62] Correspondingly, courts have identified certain classes of individuals and placed a duty on them to protect others from criminal attack.[63] The common law rule is not rejected. Instead special relationship exceptions to the general rule precluding liability are created. These exceptions give rise to a duty to protect another from a foreseeable risk of criminal victimization.[64]

As a guideline, the Second Restatement of Torts has classified certain relationships as special.[65] The Restatement specifically indicates, however, that other relationships may create a duty to protect.[66] According to the Restatement, special relationships exist between: common carrier and passenger; innkeeper and guest; possessor of land holding it open to the public and those responding to his invitation; and a custodian and his charge.[67]

The Second Restatement of Torts uses the control aspect of the relationship between the parties as rationale for calling the relationship special and, consequently, finding a duty.[68] Either the law has required[69] or the victim voluntarily has placed himself under the control and protection of another. Hence, a duty arises to protect the prospective victim from attack.

Control has been referred to as the singular justification for labeling a relationship special.[70] The problem is that courts have not always approached the classification of relationships

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62. *Id.*

63. *See supra* notes 22-25 and accompanying text.

64. RESTATEMENT (SECOND) OF TORTS § 314(a) (1965). The California Supreme Court recently suggested that expansion of the list of special-relationship exceptions, rather than departure from the common law rule precluding liability, is the proper approach in establishing a duty to protect another from criminal violence. Tarasoff v. Regents of the Univ. of Cal., 17 Cal. 3d 425, 435 n.5, 551 P.2d 334, 343 n.5, 131 Cal. Rptr. 14, 23 n.5 (1976).

65. RESTATEMENT (SECOND) OF TORTS § 314(a) (1965).

66. *Id.*

67. *Id.* at §§ 302 B, Comment (e), 314(a), 315, 320.

68. RESTATEMENT (SECOND) OF TORTS § 320 (1965) formulates this rationale by providing that one who takes custody of another under circumstances that deprive the other of his normal power of self-protection, or that subject him to association with persons likely to harm him, is under a duty to exercise reasonable care in controlling the conduct of third persons so as to prevent them from intentionally harming him.

69. For example, the law may require that an individual be put in the custody of a prison official.

70. Bazyler, *The Duty to Provide Adequate Protection: Landowners' Liability for Failure to Protect Patrons from Criminal Attack*, 21 ARIZ. L. REV. 727, 736 (1979). *But see* Note, *California's Approach to Third Party Liability for Criminal Violence*, 13 LOY. L.A.L. REV. 535, 551 (1980) (liability for negligence premised on duty of care arising from "professional status" of specially related party).

by merely considering the aspect of control.[71] Another problem with the special relationship approach to duty is that the absence of a traditionally recognized relation can arbitrarily prevent recovery[72] or lead to results that are inequitable. For example, the common carrier-passenger relation traditionally has been used to justify the imposition of the duty to protect. If a carrier's negligence leads to an assault on a passenger at a train station, the passenger can recover from the carrier.[73] Simultaneously, if the passenger's spouse accompanied her, not as a fellow passenger but simply to see her off, he could be a victim of the same crime, yet be barred from recovery due to the lack of the requisite special relationship status.[74]

Current confusion in the landlord-tenant area is further evidence of the shortcomings of merely adding to the list of special relations. Traditionally, landlords had no duty to protect tenants from criminal harm on or around the leased premises.[75] The principle was uprooted, however, in 1970 by a federal court in *Kline v. 1500 Massachusetts Avenue*.[76] The *Kline* court held a landlord liable for the assault of a tenant in a common hallway of an apartment building. The duty to protect the tenant was founded partially on the landlord's knowledge of repeated criminal activities on the premises.[77] Another key factor in *Kline* was the landlord's control over the common areas of the building, thus giving him the exclusive power to act in a preventive

71. *See, e.g.*, Kline v. 1500 Mass. Ave. Corp., 439 F.2d 477, 482 (D.C. Cir. 1970) (finding of special relationship based partially on analogy between contractual obligations of the modern landlord and the common-law era innkeeper).

72. A guest can recover from an innkeeper, but some jurisdictions will not recognize the creation of the same duty in the seemingly analogous relationship between a landlord and tenant. *See, e.g.*, Trice v. Chicago Housing Auth., 14 Ill. App. 3d 97, 302 N.E.2d 207 (1973) (duty held too vague to impose on landlords); Goldberg v. Housing Auth., 38 N.J. 578, 186 A.2d 291 (1962) (unfair to hold landlord responsible for all criminal activity on premises).

73. *See, e.g.*, Kenny v. Southeastern Penn. Transp. Auth., 581 F.2d 351 (3d Cir. 1978) (common carrier held liable for the rape of a woman on a station platform located in an area of increasing crime).

74. *E.g.*, Houston v. Texas Cent. R.R. v. Phillio, 96 Tex. 18, 69 S.W. 994 (1902). *See also* Totten v. Moore Oakland Residential Hous., 63 Cal. App. 3d 538, 546, 134 Cal. Rptr. 29, 35-36 (1976) (landlord under duty to protect tenant, but not guest of tenant).

75. *See generally* Annot., 43 A.L.R.3d 331 (1972).

76. 439 F.2d 477 (D.C. Cir. 1970).

77. The *Kline* court emphasized the fact that the landlord had both actual and constructive notice that the building was undergoing "a rising wave of crime." *Id.* at 483. Thus, the court stated that "the landlord here was aware of conditions which created a likelihood . . . that further criminal attacks upon tenants would occur." *Id.*

manner.[78]

Conversely, in *Trice v. Chicago Housing Authority*[79] an Illinois appellate court held that the landlord, though in control of the premises and aware of the risk, had no duty to protect his tenant from the criminal acts of another tenant.[80] The *Trice* court held that such a duty would be too vague and could result in landlord liability for criminal harm whenever some notice of possible harm was proved.[81] Thus, the special relationship approach as currently applied is unable to set forth clearly a universal or pivotal factor giving rise to the duty to protect. Moreover, the approach is not adjustable to varying factual settings involving the same purported special relationship.

The duty arising from a special relationship requires the defendant to protect reasonably foreseeable victims from criminal harm.[82] Courts routinely state, without analysis, that a special relationship creates the duty to protect another. Once the statement is made, however, some courts actually premise the duty on other factors. For instance, in *Semler v. Psychiatric Institute of Washington*,[83] a federal appellate court began its opinion by stating that a special relationship created by a probation order created a duty to protect.[84] The duty required the institute to afford a reasonable degree of protection to the public against the risk of harm at the hands of a patient. Conversely, near the end of the opinion, the court held that the duty was imposed "because [the] danger was reasonably foreseeable."[85]

### *Duty Created by Policy*

Although special relationships undoubtedly have played key roles in permitting victims' suits, it has been said that the basic question of determining responsibility for intervening crime is one of policy.[86] Thus, courts are free to create exceptions to nonliability based on a number of considerations other than relationships. Principal policy considerations have been

78. *Id.* at 482-83.

79. 14 Ill. App. 3d 97, 302 N.E.2d 207 (1973) (action to recover against landlord after tenant killed by television allegedly thrown from above by another tenant).

80. *Id.* at 100, 302 N.E.2d at 209-10.

81. *Id.*

82. RESTATEMENT (SECOND) OF TORTS § 315 (1965).

83. 538 F.2d 121 (4th Cir. 1976).

84. *Id.* at 125.

85. *Id.* at 126. *See* HARPER & JAMES, *supra* note 55, § 18.6, at 1046 for a discussion of the role of foreseeability in the existence *vel non* of a duty.

86. Feezer, *Intervening Crime and Liability for Negligence*, 24 MINN. L. REV. 635, 642 (1940).

held to include foreseeability of harm, certainty of the plaintiff's injury, proximity of the defendant's conduct to the plaintiff's injury, moral blame, deterrence of future crime, burden on the defendant, and consequences to the community.[87] If the duty to protect another from crime is viewed strictly from a policy standpoint, inconsistency and *ad hoc* decision making will result. Exceptions to the no duty rule based on varying policy considerations do not insure that appropriate consideration is given to traditional third party negligence standards. Courts are more prone to agree on the results than the reasoning used to obtain them and confusion is inevitable.

One problem is that judicially created policy considerations are not always based on public sentiment or legislative input.[88] Another difficulty lies in the unstructured use of a wide range of factors. This can easily lead to a misinterpretation of the actual basis of liability.[89]

### *The Role of Foreseeability*

The practice of determining the scope of duty by foreseeability took firm root in the landmark case of *Palsgraf v. Long Island Railroad Co.*[90] *Palsgraf* held that if harm to the plaintiff is foreseeable, the defendant owes him a duty of care and is liable even if the injury occurs in a peculiar fashion. Modern courts apply the *Palsgraf* test not only to determine the scope, but also the existence of a duty.[91]

Just as the use of special relationships without more does not lead to a workable rule defining duty in third-party victims' litigation, the use of foreseeability alone does not provide a real solution. The concept is difficult to define precisely and is subject to varying interpretations by different courts. For example, using foreseeability as the basis of duty is notable in cases where the theft of an automobile is facilitated when the owner negligently leaves the keys in the ignition. This represents a re-

87. *See, e.g.*, Tarasoff v. Regents of the Univ. of Cal., 17 Cal. 3d 425, 551 P.2d 334, 342, 131 Cal. Rptr. 14, 22 (1976).

88. Note, *California's Approach to Third Party Liability for Criminal Violence*, 13 LOY. L.A.L. REV. 535, 547 (1980).

89. *Id.*

90. 248 N.Y. 339, 162 N.E. 99 (1928).

91. *See, e.g.*, Ney v. Yellow Cab Co., 2 Ill. 2d 74, 117 N.E.2d 74 (1954) (duty founded on a statute prohibiting leaving keys in a car, due to the foreseeability of the probable consequences); Zinck v. Whelan, 120 N.J. Super. 432, 294 A.2d 727 (1972) (duty imposed because leaving keys in a car overnight created special circumstances, where a motorist could or should have foreseen the danger of theft and the gravity of potential harm).

versal of tradition;[92] courts are finding a duty to protect others from the negligent driving of a thief when the automobile owner could or should have foreseen the danger of theft and the gravity of the potential harm.[93]

Foreseeability was also a critical factor in establishing the duty to protect in *Kline*.[94] Realizing the problems involved when foreseeability enters into the determination of duty, the *Kline* court attempted to define the requisite foresight. *Kline* stated that foreseeability with respect to the criminal acts of third parties meant more than the possibility of harm.[95] The court held that the crime must be probable or predictable.[96] Other courts have attempted to define further this measure of foreseeability needed to create the duty to protect,[97] but distinguishing a possible from a probable crime is difficult.

Further illustration of the conceptual difficulties inherent in a foreseeability standard to determine duty is provided by the decision in *Goldberg v. Housing Authority of Newark*.[98] The *Goldberg* court held that the owner of multi-family structures had no duty to provide police protection for his tenants.[99] The court reasoned that "[e]veryone can foresee the commission of crime virtually anywhere and at any time."[100] Therefore, "[t]he question whether a private party must provide protection for another is not solved by recourse to 'foreseeability.' "[101] As a result, foreseeability cannot be universally used as the sole criterion to determine duty in victims' suits against private third parties.

### Duty Premised on Fairness

Determination of the factors relevant to the imposition of a duty in tort law is one of the most difficult responsibilities of the

92. Traditionally, a common law duty to protect injured plaintiffs has not been placed on car owners whose negligence facilitated the theft and the consequent negligent driving of the thief. *See, e.g.*, Lorang v. Heinz, 108 Ill. App. 2d 451, 248 N.E.2d 785 (1969) (leaving the keys in the ignition, at most, increases the risk of theft and has no bearing on the thief's driving).

93. Zinck v. Whelan, 120 N.J. Super. 432, 294 A.2d 727 (1972).

94. Kline v. 1500 Mass. Ave. Corp., 439 F.2d 477, 483 (D.C. Cir. 1970). *See generally supra* notes 76-78 and accompanying text.

95. 439 F.2d at 483.

96. *Id.*

97. *See, e.g.*, Samson v. Saginaw Professional Bldg., Inc., 393 Mich. 393, 224 N.W.2d 843, 851 (1975) ("when the landlord is informed by his tenants that a possible dangerous condition exists in the building, he has a duty to investigate and take available preventive measures").

98. 38 N.J. 578, 186 A.2d 291 (1962).

99. 186 A.2d at 296.

100. 186 A.2d at 293.

101. *Id.*

legal system.[102] Since different relationships can involve different degrees of control and risk at a given time, the solitary use of special relationships as a basis for duty in third party victims' suits is insufficient. Likewise, the use of foreseeability or other policy considerations alone affords an inadequate premise for the imposition of the duty to protect another.

One aspect of the dilemma is that courts and commentators are eager to find one central principle upon which the imposition of the duty owed a crime victim will turn in all cases. The goal is admirable, but, coupled with the traditional complications involved in suits against negligent third parties, the quest to break new ground is adding to the existing confusion. Consequently, the varying approaches used in different jurisdictions, and sometimes within the same one,[103] are making the possibility of uniform reasoning even more remote.

Courts consider many factors before imposing duties of care among individuals[104] but, in essence, a court generally will find a duty where reasonable men would recognize it and agree that it exists.[105] If a duty is the result of reasonable recognition and agreement, then the determination of duty in third party victims' suits should begin by recognizing what already has been made clear: there is no one pivotal principle applicable to all situations. Instead, three factors dominate cases where a third party has been held liable for the criminal acts of another. The keys to liability are the defendant's control of a situation and corresponding power to take precautions, the foreseeability of harm, and the public's interest in the prevention of crime. The problem is that all three factors seldom are actually considered in the same case. The determination of duty in the context of the victims' rights suit against a third party should be made by a *weighing* of the degree of control that makes the relationship of the parties special, the foreseeability of criminal harm, and the public interest in creation of the duty. Thus, the existence of a duty to protect can be viewed as a determination of the reasonableness and fairness of holding a person liable for the independent criminal acts of another.

Looking to the reasonableness or fairness of the proposed duty was suggested in *Goldberg v. Housing Authority of New-*

102. Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014, 1025-26 (1928).

103. *See supra* note 43.

104. Administrative convenience, the capacity of the parties to withstand the loss, the deterrence of crime, and moral blame are frequently considered. PROSSER, *supra* note 3, § 54, at 326-27. *See generally* Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014 (1928).

105. PROSSER, *supra* note 3, § 54, at 327.

*ark*.[106] In *Goldberg* a milkman, who was not a tenant, was assaulted and robbed on a common elevator. The trial court ruled for the plaintiff based on the defendant's negligence in not supplying police protection. The Supreme Court of New Jersey reversed the lower court and held that whether a duty to guard against criminal attack exists is "ultimately a question of fairness."[107] The court stated that "the inquiry involves a weighing of the relationship of the parties, the nature of the risk, and the public interest in the proposed solution."[108]

Under the *Goldberg* fairness approach, it would be erroneous for a court to hold, as did the court in *Kline*,[109] that all landlords owe a duty of protection from foreseeable crime to their tenants. The duty would arise only in situations where its existence would be fair. That courts apply the fairness approach without specifically calling it by name can be seen in the Illinois treatment of the landlords' obligation to protect his tenants from criminal activities.[110] Illinois courts have placed no general duty of protection from crime on the landlord.[111] Landlords, however, have been held liable for the failure to do so under certain circumstances.[112]

In *Trice v. Chicago Housing Authority*[113] an Illinois appellate court held that a landlord did not have a duty to protect tenants from the intentional or criminally reckless acts of other tenants or third persons. Instead, the existence of duty depends on "the likelihood of injury, the magnitude of the burden of guarding against it, and the consequences of placing the burden on the defendant."[114] Thus, the stated approach to the question of the duty is similar to that announced in *Goldberg*.[115]

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106. 38 N.J. 578, 186 A.2d 291 (1962).

107. 186 A.2d at 293.

108. *Id.*

109. 439 F.2d 447 (1970). *See supra* notes 97-99 and accompanying text.

110. *See generally* Stalmack, *The Illinois Landlord's Obligation to Protect Persons on His Premises Against the Criminal Activities of Third Persons*, 1980 ILL. BAR. J. 668.

111. *See, e.g.*, Pippin v. Chicago Hous. Auth., 78 Ill. 2d 204, 399 N.E.2d 596, 598 (1979), *rev'g* 58 Ill. App. 3d 1029, 374 N.E.2d 1055 (1978) ("landlord does not owe a tenant or social guest . . . a duty to protect the latter from criminal acts").

112. *See, e.g.*, Cross v. Chicago Hous. Auth., 74 Ill. App. 3d 921, 393 N.E.2d 580 (1979) (landlord assumed the duty by providing security guards); Stribling v. Chicago Hous. Auth., 34 Ill. App. 3d 551, 340 N.E.2d 47 (1975) (criminal activity eminently foreseeable direct result of the physical condition of the premises); Mims v. New York Life Ins. Co., 133 Ill. App. 2d 283, 273 N.E.2d 186 (1971) (criminal activity direct result of landlord's affirmative act).

113. 14 Ill. App. 3d 97, 302 N.E.2d 207 (1973).

114. *Id.* at 100, 302 N.E.2d at 209.

115. Recently, Illinois extended the *Goldberg* fairness approach to a factual setting involving the owner of a business who holds the structure open

A close reading of *Trice* reveals that the holding was actually based on the overall fairness of imposing such a duty on all landlords.[116] The *Trice* court recognized the inequity of finding a duty based on foreseeability alone.[117] The court then considered a lessor's control over the premises and the traditional obligations associated with his retained power.[118] *Trice* reasoned that the recognition of a duty to protect under the circumstances in effect would make the landlord an insurer against the criminal acts of third persons.[119] The court also expressed its uneasiness at the prospect of imposing a duty on residential landlords that eventually would be interpreted as one also owed by commercial and industrial landlords.[120] Finally, *Trice* concluded that a "duty to protect tenants from injuries caused by criminally reckless acts would be vague in that landlords would have no standard by which to determine which criminally reckless acts would come within this duty."[121]

Although no specific doctrine of fairness was mentioned, the reasoning used by *Trice* in precluding liability indicates the court did so to prevent the unfairness that would otherwise have occurred.[122] On the other hand, fairness has required that Illinois landlords account for the acts of criminals in certain situations. Consequently, Illinois courts have held, for example, that if a landlord takes some affirmative action that sets the stage for a crime, he can be held accountable for ensuing criminal

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to the public for business purposes. In Bence v. Crowford Sav. & Loan Ass'n, 80 Ill. App. 3d 491, 400 N.E.2d 39 (1980), an action for wrongful death and negligence was initiated against a bank for not preventing the fatal shooting of a customer by a robber. A robber allegedly panicked and shot the customer when the defendant failed to activate a door lock which would have allowed the thieves to exit. The *Bence* court held in favor of the defendant calling *Goldberg* pertinent in stating that it would be unfair to impose liability on the bank owner. *Id.* at 495, 400 N.E.2d at 42.

116. 14 Ill. App. 3d 97, 100-01, 302 N.E.2d 207, 210 (1973).

117. *Id.* at 100, 302 N.E.2d at 209-10.

118. *Id.* at 100, 302 N.E.2d at 209.

119. *Id.* at 100, 302 N.E.2d at 210.

120. *Id.*

121. *Id.* at 101, 302 N.E.2d at 210.

122. The conclusion that *Trice* was based on fairness is strengthened by the holding of another Illinois appellate court in Smith v. Chicago Hous. Auth., 36 Ill. App. 3d 967, 344 N.E.2d 536 (1976). In *Smith* a suit was brought against a landlord for the fatal shooting of a tenant by a third party. Ruling to affirm a lower court's application of *Trice* in holding for the defendant, the *Smith* court noted that the condition of the building did not contribute to the crime. *Id.* at 970, 344 N.E.2d at 540. The foreseeability of crime due to numerous acts of violence in the locale was significant in *Smith*. In spite of this, the court held that "[t]o impose liability . . . would *unjustly* place upon [the] defendant as a property owner a legal duty which is impossible of performance." *Id.* (emphasis added).

victimization.[123]

The fairness approach to the determination of duty is more workable than others currently in use because it compels the simultaneous consideration of contemporary views on the foreseeability of crime and the public interest in preventing crime as well as the relationship between the parties. Thus, the pitfalls of basing duty on any one of these factors without considering the others would be eliminated. Moreover, as evidenced by the Illinois decisions, only the fairness doctrine can place sensible restrictions on the extent of liability.

## CONCLUSION

Rules concerning a defendant's liability for criminal acts committed by another are currently in a state of confusion. Courts have imposed liability by premising the duty to protect on a variety of factors. One common theme, however, underlies all the cases—the urgent need to clarify the law in this area. The question of the liability of a negligent tortfeasor for damages caused in part by an intervening criminal is not one that can be analyzed exclusively in terms of special relationships, foreseeability, or public policy considerations. Instead all of these factors should be weighed in every case.

With the degree of interaction that takes place in today's society, new and more complicated business and social relationships are continuously encountered. Unfortunately, not all of the relations are pleasant. Crime is on the rise as is the resulting outcry for judicial response. In turn the elastic principles of tort law have been stretched to account for society's reaction to the side effects of evolving relationships.

The loosening of rules precluding liability in third party victims' suits, however, has not been controlled by a general guiding principle. As a result, the traditional negligence standards have been distorted, rather than gradually stretched to insure the retention of characteristics shaped by centuries of human experience. Some courts have recognized the problem and effectively used fairness as the limiting device needed to preserve orderly change and consistent decision making. Because it requires case by case consideration of relationships, foreseeability, and the public's interest in preventing crime, the fairness approach to duty in third party victims' rights litigation is en-

123. *E.g.*, Mims v. New York Life Ins. Co., 133 Ill. App. 2d 283, 273 N.E.2d 186 (1971) (leaving apartment door unlocked, unguarded and open during inspection in tenant's absence held a failure to conform conduct to standards imposed by law).

dorsed as a means of limiting confusion by adding conformity to modern analysis.

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