TORT LAW — INVITEES — REASONABLE CARE AND INDEPENDENT CRIMINAL
CONDUCT ON THE PREMISES — Boyd v. Racine Currency Exchange, Inc.,

YOUR MONEY OR HIS LIFE

On April 27, 1970, John Boyd entered the Racine Currency Ex-
change. A gunman followed and placed a pistol against Boyd's head,
ordering the teller working behind a bullet-proof glass partition to
open the access door, threatening Boyd with death if she refused.
The teller dropped to the floor and the gunman shot Boyd.

Boyd's administrator initiated a wrongful death action, alleging
that wrongful acts of the Exchange proximately caused Boyd's death.
The trial court dismissed the suit for failure to state a cause of action.
The Appellate Court of Illinois reversed, holding that plaintiff's
petition presented jury questions concerning reasonable care and
proximate cause. In determining that the Exchange owed a duty of
reasonable care to its invitee-customer, the court adopted the Heav-
ren v. Pender test for the existence of duty, finding also that the
relationship between the Exchange and Boyd gave rise to a duty
which extended to protection against third-party criminal attacks,
and prevented the Exchange from using any measure possible to
frustrate the robbery. The case is now before the Supreme Court
of Illinois.

THE EXISTENCE OF DUTY

Duty involves whether the defendant is under any obligation to
act for the benefit of a particular plaintiff or to avoid creating an
unreasonable risk of harm. Determination of duty is no great aid to
analysis, but rather a conclusion determining whether the plaintiff's
interests are entitled to legal protection.

In absence of any special relationship, the law has refused to

2. 11 Q.B.D. 503, 509 (1883):
   [Whenever] one person is by circumstances placed in such a
   position with regard to another that everyone of ordinary sense
   who did think would at once recognize that if he did not use or-
   dinary care and skill in his own conduct with regard to those cir-
   cumstances he would cause danger of injury to the person or
   property of the other, a duty arises to use ordinary care and skill
   to avoid such danger.
3. 8 Ill. App. 3d at 221.
recognize a duty to protect another from criminal assault. When a special relationship exists, a duty of ordinary care arises, which may include the duty to prevent criminal assault. The duty of the owner of land to exercise reasonable care for the safety of invitees on his premises may extend to protection from independent acts of third parties over whom he has control. Two rationales provide justification for this rule: the economic benefit accruing to the owner from the presence of the invitee and the implied invitation held out to the public.

Since the owner owes a duty of reasonable care to invitees, cases involving third party attacks on invitees should logically hinge on whether the owner has satisfied reasonable care considering the particular circumstances. Where the owner has actual or constructive knowledge of previous incidents or special circumstances, reasonable care demands that he anticipate the danger.

The premise of this casenote is that the problem centers not around the existence of duty, but around reasonable care. Some duty necessarily arises by virtue of the owner-invitee relationship. Once duty has been established, the focus turns to the defendant's exercise or non-exercise of reasonable care. Furthermore, the concepts of duty and reasonableness coalesce once the case departs from the realm of nonfeasance.

12. P. Atiyah, ACCIDENTS, COMPENSATION AND THE LAW 47 (1970): [The] concept of the duty of care adds nothing to the concept of the tort of negligence itself. There are some circumstances in which a person is liable for negligently causing damages to another, and there are some circumstances in which a person is not so liable. If his conduct falls within the first category we say that he owes a duty of care and has committed the tort of negligence; if his conduct falls within the second category we say he owes no duty of care and has not committed the tort. So the concept of the duty of care is simply co-extensive with the boundaries of liability once negligence in fact and damages in fact have been shown.
Reasonable care probably does not necessitate a warning of the possibility of criminal attack. There is no duty to warn against dangers which are, or should be, obvious to all. The chance that a commercial establishment will be the site of an attempted robbery is a possibility about which both the owner and his customer are equally cognizant.

Is it reasonable to expect the Exchange to post a warning that its money will be protected over the lives of its customers? The plaintiff argued that the defendant was negligent for failing to give such warning, assuming a pre-determined conscious policy of the Exchange and pleading a legal conclusion — that the teller's acts were motivated by a desire to protect her employer's money at the expense of Boyd's safety. But the apparent instinctiveness of her response militates against such an assumption. If such a warning were required, it could discourage entry of prospective customers. If customers continued to enter the Exchange, the warning would be ineffective in mitigating the hazard, since once inside the Exchange, a customer could do little or nothing to prevent a sudden criminal attack. Perhaps the reasonable expectation of customers provides the strongest argument against the necessity of such precautions. Businesses exist for the protection and advancement of monetary interests — not to save lives. It is predictable that they will resist the surrender of those interests when confronted with criminal demands.

A more difficult question is whether the scope of reasonable care includes the adoption of precautions to prevent criminal entrance. Lack of foreseeability of criminal attach has been advanced to justify a determination that no such duty exists. A wiser approach would be an analysis of whether reasonable care necessitates such precautions. In Genovay v. Fox,* a customer sued a bowling alley proprietor for injuries sustained during a struggle with an armed robber. The robber had entered through an unlocked door during an after-hours party. The plaintiff sought recovery on grounds of the proprietor's failure to take adequate precautions against criminal entrance and failure to act reasonably once the criminal had entered. Despite holding that the defendant was not negligent in failing to provide adequate precautions against the robber's entry, the court conceded the weakness of the foreseeability argument, recognizing that it is foreseeable that any commercial estab-

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lishment could be the site of an attempted robbery. The court based its holding on the excessive burden such precautions would entail for the average business concern.

Language in Genovay indicates that negligence may exist where past experience indicates the likelihood of criminal conduct. In Boyd, the fact that large amounts of money were kept on the premises coupled with the fact that the money’s inaccessibility provided possible encouragement for the use of hostages suggests the need for some security precautions. Several alternatives were possible: the posting of security guards in the public section of the Exchange; the utilization of a strategically located camera and a warning at the entrance that the Exchange was protected by such a device; or the use of some other screening process to prevent criminals from gaining entrance.

Adoption of such measures would be both burdensome and arguably ineffective. Like other commercial establishments, a currency exchange depends on customers for its existence. There is simply no foolproof way of distinguishing an ordinary customer from a dangerous robber.

REASONABLE CARE AFTER CRIMINAL ENTRANCE

Any attempt to formulate a standard of reasonableness following the entry and assault must confront three alternatives: (1) doing nothing, (2) doing something short of handing over the money, or (3) simply handing over the money. Although in bystander cases there is generally no duty to do anything, Terre Haute, Indianapolis & Eastern Traction Co. v. Scott indicates that abandonment may be unreasonable where a special relationship exists. In that case, after highwaymen boarded a train, a passenger attempted to wrestle the weapon from one of the robbers. The passenger yelled for help to a nearby conductor. Instead of aiding the passenger, the conductor jumped from the train with his collected fares and the passenger was shot. The court held that the evidence was sufficient to support a finding that the defendant breached a duty to exercise reasonable care for the protection of its passengers. Abandonment fell outside the ambit of reasonable care.

15. 29 N. J. at 149 A.2d at 236.
16. Id. at 149 A.2d at 236.
17. Id. at 149 A.2d at 236 (dicta); see also Restatement (Second) of Torts, Explanatory Notes § 344, comment f at 225-26 (1965).
18. The probable ineffectiveness of security precautions has furnished a basis for a finding of non-liability in several cases. See Annot., 10 A.L.R.3d 619, 654 (1966).
20. Id. at 170 N.E. at 343.
If something must be tried to mitigate the hazard, the problem of what constitutes reasonable care becomes more complex. Reasonable care might then include the necessity of a warning to the endangered invitee. In \textit{Sinn v. Farmers' Deposit Savings Bank},\footnote{300 Pa. 85, 150 A. 163 (1930).} a customer sued the defendant bank when injured by dynamite ignited by a bank robber whose demand for cash had been refused. Since the explosion occurred some forty-five minutes after the robber first entered, the court held that the bank owed a duty to warn incoming customers of the impending danger.\footnote{Id. at _, 150 A. at 164.} But where the confrontation is sudden and immediate, as in \textit{Boyd} circumstances preclude the possibility of effective warning and a "duty to do something" involves different considerations.

It must first be recognized that the defendant should not be allowed to take just any affirmative action it chooses, since some courses of action (i.e., forcing a gun battle) would naturally tend to precipitate rather than mitigate the chances of serious harm.\footnote{See, e.g., Genovay v. Fox, 50 N. J. Super. 538, ___, 143 A.2d 229, 239 (1958).} Nevertheless, in \textit{Boyd} there existed several alternative courses of action which the teller might have tried in order to mitigate the hazard to Boyd. Verbal dissuasion—a warning that the gunman had been identified—or an indication of the impossibility of success might have been attempted. Or the teller might have handed over a money sack of predominantly small bills with a few larger bills on top; or emptied part or all of her cash drawer, claiming that she had no access to any other money.

But requiring the exercise of any of these alternatives suffers from at least two defects: (1) to say that doing something short of handing over the money is more desirable than doing nothing might be an unwarranted extension of the presumption of control. Central to a finding that the actions of the teller were a proximate cause of the shooting is the premise that it was more probable than not that this action (dropping to the floor) altered the response of the gunman. But in discussing any alternative short of handing over the money, would any of these alternatives have altered the response of the gunman, considering his unmistakable declaration that only money would have appeased him? (2) These alternatives assume a high degree of composure on the part of the teller, an unrealistic expectation under the circumstances. Despite the fact that she was safe behind an impregnable partition, the suddenness and gravity of the situation suggest the unreasonableness of requiring a course of action dependent largely upon mental alertness and ingenuity. The reason-
able man thrust into a robbery situation would not likely weigh dispassionately the utility of various courses of conduct.

Perhaps the only reasonable alternative was simply to hand over the money. Assuming there is a causal connection between the response of the teller and subsequent activity of the gunman, this alternative would seem the one most likely to remove the customer's danger. The importance which the law attaches to the value of human life certainly weighs heavily in favor of a standard of conduct designed best to protect life. But this alternative also embodied the most disutility from the Exchange's standpoint. In addition, the defendant in Boyd argued that a valuable deterrent effect resulted from refusing the gunman's demands. The robbery was frustrated and the future use of hostages in robberies arguably discouraged. The persuasiveness of this is questionable. Although a property crime was frustrated, a more serious crime resulted.

PRIVILEGE

The issue of privilege arises if it is assumed that the teller's conduct was motivated by a need to protect the defendant's money. One who acts to prevent a threatened harm from a source independent of the plaintiff is considered to be acting out of necessity. Although this privilege is similar to self-defense or defense of property, the privileges are not completely analogous. Unlike self-defense or defense of property, the plaintiff is not the wrongdoer. In necessity cases, the defendant is injuring an innocent interest in order to avoid harm from another source.

Although the defendant might point to the deterrent value of its actions as a justification for its conduct, it is clear that at the time of the crime, if motivated by any conscious policy at all, that policy was to protect its own private monetary interests. The necessity privilege is restricted where the interest is a private one and will be applied only conditionally. Thus in Vincent v. Lake Erie Transportation Co., the defendant, taking refuge from a storm, moored at the plaintiff's dock and caused it substantial damage, was required to compensate the plaintiff. This decision has met with some accept-

24. Petition of Defendants for Leave to Appeal to the Supreme Court of Illinois at 5-6.
25. PROSSER ON TORTS at 124.
26. Id. at 125.
28. 100 Minn. 456, 124 N.W. 221 (1910).
29. Id. at ____, 124 N.W. at 222.
fundamental fairness would seem to dictate that the obligation to compensate should also extend to the Boyd situation — where the defendant's private interests are protected at the expense of increasing the risk of bodily harm to an innocent party.\footnote{30}

In opting for the conditional application of the necessity privilege, Boyd's executor might also argue that the imbalance of equities is even more apparent where: (1) the low incidence of successful bank robberies indicates that the money probably would have been returned; (2) the money was insured pursuant to Illinois law.\footnote{31} That one party was insured should not dictate that it bear the burden of compensation,\footnote{32} thereby punishing a socially responsible defendant. However, where all defendants in the same class are required to insure against a known risk, fairness might dictate that such defendant should compensate an innocent victim injured by virtue of the defendant's protection of his insured property.

Implicit in the foregoing discussion is the primacy of reasonableness of defendant's conduct. Some duty was necessarily owed to John Boyd. The degree of care required hinges on the reasonableness of various possible responses to the gunman's demands. Adding substance to the contours of reasonableness in turn depends on balancing the competing risks and utilities involved in each possible response.\footnote{33} The value of Boyd's life, the extent of the risk to his life, the social and private justifications for not relinquishing the money, the possible existence of alternative responses and the fact that the money was necessarily insured all have been considered as bearing on justification for the teller's response. We now focus on whether or not her response was excusable.

\section*{EMERGENCY}

Although it is certainly possible that the teller's response resulted from a conscious desire to protect her employer's money, it is more probable that her action resulted from a mistaken need for immediate cover. If so, the reasonableness of her conduct takes on entirely different dimensions. No longer need there be any discussion of the

\footnotesize{30. Prosser on Torts at 126. 
33. See Prosser, Assault on the Citadel (Strict Liability to the Consumer), 69 Yale L. J. 1099, 1121 (1959-60):
What insurance can do, of course, is to distribute losses proportionately among a group who are to bear them. What it cannot and should not do is to determine whether the group shall bear them in the first instance . . . .
34. United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947); Restatement (Second) of Torts § 291 (1965).}
utility of her response — whether the private and social interests advanced as justification for non-compliance were sufficient to outweigh the risk of harm to Boyd. The sole question becomes: if the teller panicked, was it reasonable for her to do so?

The doctrine of emergency rests on the premise that where sudden, unexpected circumstances leave the actor no time for thought, he cannot be held to the same standard of conduct as one who has sufficient time for thought. The defendant argues that the most reasonable course when confronted with the hostile use of firearms is to take cover. The weaknesses of this argument when applied to the facts of this case are manifest: the teller was already safe and the use of firearms was not directed at her. Application of the emergency doctrine here, then, would seem to stretch the parameters of reasonableness to their outermost limits. For even though the situation necessitates less than perfect judgment, it seems hardly unreasonable to charge the teller with at least a basic awareness of her surroundings and therefore with a realization of her own safety.

Furthermore, some emergencies can and must be anticipated. A robbery attempt is a foreseeable risk; similarly, it is foreseeable that if safeguards are not taken, such a robbery could endanger the lives of customers and employees alike. Failure to take precautions, such as instructing employees concerning the proper course of conduct during a robbery attempt, might be deemed negligent, although the issue of negligence, here as elsewhere, is properly one for the trier of fact.

PROXIMATE CAUSE

The proximate cause question in Boyd centers around the issue of what caused the gunman to shoot. The defendant argues that since the acts of criminals are largely irrational it is impossible to determine what caused him to shoot. Although it was quite possible that dropping to the floor would cause the gunman to pull the trigger, the defendant argues that it would be just as reasonable to assume he would not shoot his hostage under any circumstances, or alternatively, that he would have shot Boyd in any event to eliminate a prime witness.

This argument lacks persuasiveness for two reasons. First, it judges speculative hypotheses as more trustworthy than the declared intent of the gunman. Second, it places an unreasonable burden of

36. Brief for Appellee at 12.
proof on the plaintiff, requiring him to prove a negative: to elimi-
nate all possibility that the teller's response could not have caused
the gunman to shoot. The plaintiff should properly have the burden
of proving only that it was more probable than not that the teller's
response caused the gunman to shoot. Hence, proximate cause
poses no significant obstacle to recovery.

CONCLUSION

Imposition of duty does no violence to traditional tort principles;
resting a decision on the absence of duty is simply a way of avoiding
the harder questions concerning the scope of the defendant's respon-
sibility to its customer. Therefore, the main thrust of this casenote
has been directed toward the issue of reasonableness of the defen-
dant's conduct. In an attempt to address the concept of reasonableness,
the risks and utilities of various courses of conduct were
balanced and analyzed against a backdrop of privilege and emergency.
No easy answers were found. What was found was that the
myriad of conflicting policy arguments and the cloud of speculation
surrounding most issues make any determination of liability as a
matter of law highly difficult.

The jury is best equipped to render a decision "because their
decision is thought most likely to accord with commonly accepted
standards, real or fancied." Perhaps in this case there are no
commonly accepted standards and the jury's verdict will offend our
sensibilities. But we can take solace in the certainty that we will
not be one of the twelve called upon to render a verdict in this diffi-
cult case.

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38. See Restatement (Second) of Torts, Explanatory Notes § 433(B), com-
ment b at 443 (1965).
39. Id.
40. Conway v. O'Brien, 111 F.2d 611, 612 (2d Cir. 1940), rev'd on other grounds,
317 U.S. 492 (1941).
41. While this article was being published, the Supreme Court of Illinois reversed
the decision of the Appellate Court of Illinois, affirming the judgment of the Circuit
Court of Cook County. Boyd v. Racine Currency Exchange, Inc., No. 45557 (Ill.,
Nov. 30, 1973). The court held as a matter of law that no duty to accede to criminal
demands should be imposed under these circumstances. Buttressing this conclusion
was the court's belief that "nothing would have prevented the injury to decedent
except a complete acquiescence in the robber's demands, and whether acquiescence
would have spared the decedent is, at best, speculative." Also, the court felt that if
duty were imposed, the upshot would be the encouragement of hostage-taking in
similar cases. The court felt that the "only persons who will clearly benefit from the
imposition of such a duty are the criminals."