1975

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TORT LIABILITY—*Cunis v. Brennan*, A Defendant Has No Duty To Protect A Plaintiff Injured by Defendant’s Negligent Conduct Where Plaintiff’s Injury Was Not Reasonably Foreseeable under the Circumstances

The recent decision of the Supreme Court of Illinois in *Cunis v. Brennan* should have an appreciable effect upon negligence law in this state. The decision dealt with a so-called “unforeseeable plaintiff” and the nature and extent of the duty owing to such a plaintiff from a defendant. Characteristically, the unforeseeable plaintiff is injured as a result of the defendant’s negligence but in an unusual and unexpected manner. Just as characteristically, the resolution of the unforeseeable plaintiff’s case revolves around two legal concepts: duty and proximate cause. These two concepts are closely related and at times merge into each other. Generally, the determination of both the duty and proximate cause issues depends on the foreseeability of the injury the plaintiff suffered. Because of this similarity these two concepts have often been confused and subjected to misinterpretations by the courts. Indeed, some courts have treated identical negligence cases differently by deciding one on the duty issue and the other on the proximate cause issue. Prior to *Cunis*, Illinois courts had interpreted duty broadly. Thus, most prior Illinois cases involving unforeseeable accidents were decided on the proximate cause issue. *Cunis*, however, was decided on the basis of duty; it restricts the scope of duty and is a break with prior case law. *Cunis*’ impact on future cases involving unusual and unexpected accidents will be to remove the plaintiff’s case from jury consideration and to exculpate from liability a class of defendants whose negligence causes unforeseeable injuries.

This article will forward the proposition that negligence cases involving the duty issue and unforeseeable accidents are decided to a

great extent on policy considerations. The question usually asked is: Whether the policy of the law will extend so far as to impose liability for the unusual consequences which have occurred, under the facts and circumstances of the particular case. The competing policies comprising the answer to this question shall be weighed, and the Cunis decision shall be reviewed in the light thereof.

THE Cunis DECISION

On December 15, 1967, Frank Cunis was a passenger in an automobile involved in an intersection collision in the Village of La Grange, Illinois. Upon impact, Cunis was thrown from the vehicle approximately 30 feet to the parkway where his leg was impaled upon the protruding remains of a drain pipe. The injury necessitated the amputation of the leg.

Cunis, through his father as his next friend, sued, inter alios, James Brennan, the driver of the other vehicle, and the Village of La Grange. Count V of his complaint alleged that the defendant Village was under a duty to maintain its parkways in a safe condition and that it had failed in its duty toward the plaintiff by permitting a dangerous, broken drain pipe to remain on the parkway. Count V further alleged that the plaintiff sustained his injury as a proximate result of the negligence of the Village. On motion by defendant Village, the trial court dismissed Count V for failure to state a cause of action. The appellate court reversed, but the supreme court, in turn, reversed, sustaining the ruling of the trial court.

The appellate court, in finding favorably toward the plaintiff, ruled upon two distinct questions of law. First, it determined, as a matter of law, that defendant Village owed a duty of due care to the plaintiff. It recited the well-known maxim that a defendant municipality is under a duty to exercise ordinary care to keep its streets and other public ways reasonably safe for persons using them. From this

2. An area between the sidewalk and the curb.
3. The pipe was described as sharp and rusty and either the remains of a gas or water drain pipe. 7 Ill. App. 3d 204, 205, 287 N.E.2d 207, 208 (1972).
4. The other defendants were Waldo, Inc., d/b/a Waldo’s, Waldo R. Koehler, Alex Bodel, d/b/a Big Al’s, and O. Schneider.
5. 56 Ill. 2d at 374, 308 N.E.2d at 618.
6. Id.
8. Id. at 206-08, 287 N.E.2d at 209-10.
9. Id. at 206, 287 N.E.2d at 209. As the court noted, the municipal duty to maintain public ways in a safe condition applies to parkways as well as streets and sidewalks.
starting point the court held it would be "too rigid an application of the concept of foreseeability" to hold, as a matter of law, that defendant owed no duty to plaintiff merely because the latter's injury was "uncharacteristic or unforeseeable."\textsuperscript{10} The court listed several examples containing hypothetical plaintiffs whose injuries were distinctly probable and who therefore could recover as a result of the defendant's negligence. The court reasoned that since a duty of care was owed to certain plaintiffs, there was no good reason to deny that such a duty was owed to the instant plaintiff. The court rejected the defendant's contention that the municipality's only obligation was to maintain its public ways in a safe condition for pedestrian travel, and not as a "safe landing place" for ejected automobile occupants.\textsuperscript{11}

Second, the appellate court determined that a jury question was presented concerning whether defendant Village's negligence was the proximate cause of plaintiff's injury.\textsuperscript{12} Regarding defendant's liability, the court pointed out that more than one inference could be drawn from the facts presented. Since reasonable minds could differ, the court could not hold as a matter of law that defendant's negligence in allowing the drain pipe to dangerously protrude from the ground was not the proximate cause of plaintiff's injury.\textsuperscript{13} This was a factual question within the province of a jury; therefore, the case was remanded for trial.

On appeal, the supreme court based its decision solely on the issue of duty. Taking this approach, the court had no need to address itself to the proximate cause issue. The court held, as a matter of law, that defendant Village owed no duty of due care to plaintiff because his injury, although tragic, was so bizarre as to be unforeseeable.\textsuperscript{14} The plaintiff had strenuously argued that an accident of this sort was indeed foreseeable and, to demonstrate this point, he introduced various statistics showing the high probability of a passenger being ejected from an automobile upon impact with another vehicle.\textsuperscript{15} The court, however, relying upon the authority of Dean Leon Green,\textsuperscript{16} pointed out that plaintiff was using the wrong foreseeability formula. The court distinguished the foreseeability formula em-

\textsuperscript{10} Id. at 207, 287 N.E.2d at 209.
\textsuperscript{11} Id. at 206-07, 287 N.E.2d at 209.
\textsuperscript{12} Id. at 208-09, 287 N.E.2d at 210-11.
\textsuperscript{14} 56 Ill. 2d at 377-78, 308 N.E.2d at 620.
\textsuperscript{15} Id. at 375, 308 N.E.2d at 618.
\textsuperscript{16} Id. Mr. Green is a noted jurist and prolific writer. The supreme court cited his article, \textit{Foreseeability in Negligence Law}, 61 COLUM. L. REV. 1401 (1961).
ployed by the jury to determine proximate cause from the foreseeability formula employed by the judge to determine the existence of legal duty. The proximate cause foreseeability formula dictates that the jury merely take the position of the reasonable man and, looking forward from the event ask only whether injury was likely to occur. The duty foreseeability formula, on the other hand, requires the judge to weigh other factors such as the gravity of the possible injury and the cost of minimizing the risk of such injury, in addition to the foreseeability of that injury. Plaintiff's statistics may have satisfied the proximate cause foreseeability standard if the case had been allowed to go to the jury, but they failed to satisfy the duty foreseeability standard—the threshold which had to be crossed if the case were ever to reach the jury.

In further support of its position, the court relied on the Restatement (Second) of Torts as applied in *Mieher v. Brown*. There, as in *Cunis*, the court was faced with a situation where the injury plaintiff suffered was unforeseeable in relation to the risk defendant created. In determining the issue presented, the court, quoting from the Restatement, said: “looking back from the harm to the actor's negligent conduct, it appears to the court highly extraordinary that it should have brought about the harm for which recovery is now sought.”

Justice Goldenhersh dissented. He claimed the majority had confused the questions of duty and foreseeability. In his opinion, the three questions whether the defendant had exercised ordinary care, whether the failure to do so would cause injury, and whether such

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17. In a negligence action, plaintiff must show the existence of a duty owed by defendant to plaintiff, a breach of that duty, and injury proximately resulting from that breach. Furthermore, the duty issue, being a question of law, is decided by the judge; but the negligence and proximate cause issues, being questions of fact, are decided by the jury. W. PROSSER, HANDBOOK OF THE LAW OF TORTS, p. 143, § 30; p. 289, § 45 (4th ed. 1971) [hereinafter cited as PROSSER].
18. 56 Ill. 2d at 375, 308 N.E.2d at 619. See also Conway v. O'Brien, 111 F.2d 611, 612 (2d Cir. 1940).
19. 54 Ill. 2d 539, 544, 301 N.E.2d 307, 310 (1973). Section 435(2) of the Restatement (Second) provides:

The actor's conduct may be held not to be a legal cause of harm to another when after the event and looking back from the harm to the actor's negligent conduct, it appears to the court highly extraordinary that it should have brought about the harm.
20. The defendant's position was that, whereas it may have been foreseeable that a pedestrian might have strayed from the sidewalk, tripped and injured himself on the drainpipe, it was unforeseeable that plaintiff would be thrown many feet from a car upon the pipe.
22. Id. at 379, 308 N.E.2d at 621.
failure was the proximate cause of the plaintiff's injury were all ques-
tions of fact.\textsuperscript{23} Thus, he would have denied defendant Village's
motion and allowed the case to have gone to the jury. Moreover, in
addressing himself to the duty issue, Justice Goldenhersh took an op-
posite view from the majority. Duty was not to be limited to a
particular class of plaintiffs. It rather extended to all persons who
might be injured by a defendant's negligence even if they be unfore-
seen and unknown.\textsuperscript{24} Since Justice Goldenhersh took as his starting
point the position that defendant Village owed a duty to the world
at large to prevent injury resulting from its protruding drain pipe,
he considered proximate cause to be the determinative issue.\textsuperscript{25}

The legal problem involved in \textit{Cunis} is familiar, but its resolution
by the courts has been difficult. In a case involving an unforeseen
plaintiff, defendant's conduct threatens harm, which a reasonable man
would foresee, to A, but instead harm results to B, who was in no way
threatened and who stood outside the zone of all apparent danger.\textsuperscript{26}

Two schools of thought have developed concerning how to handle this
thorny problem, both of which can be traced to the famous \textit{Palsgraf v.
Long Island Railroad Co.} case.\textsuperscript{27} In \textit{Palsgraf}, the railroad com-
pany's guard pushed a passenger aboard a train, but in so doing, dis-
lodged a package from the passenger's arms. In fact, the pack-

\textsuperscript{23.} Id. at 382, 308 N.E.2d at 622.
\textsuperscript{24.} Id. at 379-80, 308 N.E.2d at 621.
\textsuperscript{25.} Justice Goldenhersh also offered an alternative theory upon which to dispose of
the case in plaintiff's favor. He cited (56 Ill. 2d at 381, 308 N.E.2d at 622) section
368 of the \textit{RESTATEMENT (SECOND) OF TORTS} which provides:

\begin{quote}
A possessor of land who creates or permits to remain thereon an excavation
or other \textit{artificial condition} so near an existing highway that he realizes or
should realize that it involves an unreasonable risk to others \textit{accidently}

\textsuperscript{26.} PROSSER, p. 254, § 43.
\textsuperscript{27.} 248 N.Y. 339, 162 N.E. 99 (1928). The literature on this case is voluminous.
For a list of articles concerning \textit{Palsgraf} see PROSSER, p. 254, § 43 n.50.
was negligent toward someone else; thus, Mrs. Palsgraf was the unforeseeable plaintiff.\textsuperscript{28} In this manner, Judge Cardozo limited a defendant's liability for his negligent conduct. Judge Andrews, in dissent, took a different view. He argued that each member of society has a duty to protect others from harm. Once the risk of harm has been created, the defendant must respond in damages to the one in fact injured, whether or not injury to such person was foreseeable.\textsuperscript{29}

The conflict underlying the irreconcilable views expressed in these two opinions, has never been resolved, and, indeed, the controversy in Illinois has been revived by \textit{Cunis}. This decision, at least in theory, appears to align Illinois with Judge Cardozo and the \textit{Palsgraf} majority. \textit{Cunis} is Illinois' \textit{Palsgraf}. In order to fully comprehend the impact of \textit{Cunis}, a brief analysis of the nature and utility of duty and proximate cause is warranted.

**Duty and Proximate Cause**

The legal formula for negligence includes three fundamental concepts: (1) the existence of a duty owed by the defendant to the plaintiff; (2) a breach of that duty; and (3) injury proximately resulting from the breach.\textsuperscript{30} The absence of any one of these elements is fatal to plaintiff's cause of action.\textsuperscript{31} The first component of the negligence formula outlined above is generally termed the duty question; the second, the negligence question; and the third, the proximate cause question.\textsuperscript{32} The duty and proximate cause questions are of primary importance in cases such as \textit{Cunis} and \textit{Palsgraf} involving unforeseeable plaintiffs. These two questions are important because a court must rely on one or the other in making its decision. It should be noted that in the unforeseeable plaintiff's case, the second component of the negligence formula is usually not at issue because in these cases some type of negligent act has been committed.

**Duty**

Negligence involves a breach of duty, and where there is no duty or breach thereof, there can be no negligence.\textsuperscript{33} Generally, all per-

\begin{itemize}
  \item \textsuperscript{28} \textit{Id.} at 344, 162 N.E. at 101.
  \item \textsuperscript{29} \textit{Id.} at 349-50, 162 N.E. at 102.
  \item \textsuperscript{31} Lasko v. Meier, 394 Ill. 71, 67 N.E.2d 162 (1946); Miller v. S.S. Kreske Co., 306 Ill. 104, 137 N.E. 385 (1922); Bahr v. National Safe Deposit Co., 234 Ill. 101, 84 N.E. 717 (1908).
  \item \textsuperscript{32} See Green, \textit{Foreseeability in Negligence Law}, 61 COLUM. L. REV. 1401 (1961).
  \item \textsuperscript{33} Walters v. Christy, 5 Ill. App. 2d 68, 124 N.E.2d 658 (1955); Rokicki v. Polish Polish
\end{itemize}
sons owe to others a duty to exercise care to guard against injury which may naturally flow as a reasonably probable and foreseeable consequence of their conduct. Concomitantly, there is no duty to anticipate a consequence which cannot reasonably be foreseen. Whether or not such a duty exists is a question of law to be determined by the judge. The cases amply illustrate these general principles.

In Walters v. Christy, defendants were contractors employed to make alterations to the interior of a building. Plaintiff was the owner of an adjoining building. As was customary when interior alterations were being made, the windows were boarded up and a temporary solid wooded front was constructed preventing observation of what was transpiring inside. Apparently, a burglar crept into the building during working hours, hid there until nightfall, then broke through the wall of the building being altered and into plaintiff's building, and stole valuable property. Plaintiff sought to hold defendant liable on the theory that the defendant's negligence in boarding up the windows, so that no one could see into the building after working hours, was the cause of plaintiff's loss. Defendant filed a motion to dismiss on the ground that plaintiff's complaint alleged no duty owing from defendant to plaintiff. The court affirmed the trial judge's granting of the motion. It did so on fundamental policy grounds considering the nature of the construction business at hand. The court pointed out that defendant's duty was to maintain the building upon which he was working in a safe condition so as not to injure plaintiff or his property. This duty defendant did not breach. Furthermore, the law did not impose upon contractors a duty to provide police protection for adjoining properties. To extend liability that far would be beyond the scope of public policy.

In Cronin v. Brownlie, plaintiff slipped and fell on the icy sidewalk outside of the apartment building in which she resided. She brought an action against her landlord and recovered at trial.

References:
- This is the Cunis holding.
- Id. at 71-72, 124 N.E.2d at 660.
The appellate court, due to lack of precedent, considered as analogous cases involving municipalities as parties defendant.\footnote{Id. at 452-53, 109 N.E.2d at 354-55.} In those cases, the law was well settled that a city is not liable for injuries resulting from the hazardous conditions of its streets and sidewalks caused by the presence of ice and snow accumulated as a result of natural causes. This rule was based on the sound policy that it is unreasonable and impractical to compel a city in the cold northern climate to perform the labor necessary constantly to remove ice and snow from its streets and sidewalks. Obviously, the costs involved to Illinois municipalities in doing such work would be prohibitive and furthermore, the liability resulting from such accidents would impose an awesome burden upon local governmental units. With this policy firmly established, the court extended the protection afforded to municipalities, in ice and snow, trip and fall cases, to landlords whose tenants had been injured under such circumstances.\footnote{Id. at 456-57, 109 N.E.2d at 356.}

Policy considerations weighed heavily in the analyses and determinations made by the \textit{Walters} and \textit{Cronin} courts. This should be expected; basically, whether a defendant will be held liable in a duty case is, in the final analysis, "essentially a question of whether the policy of the law will extend the responsibility for the conduct to the consequences which have in fact occurred."\footnote{Prosser, p. 244, § 42.} The outcome in \textit{Walters} and \textit{Cronin} would probably differ if the defendant were a commercial establishment which maintained its premises in a dangerous condition. Clearly, in such a case, the defendant would owe a duty to its invitees to make the premises safe. In such a case the policy of the law is better served by imposing a duty, and so the policy dictates the result. In summary, the parameters governing duty are logically coextensive with public policy considerations.

\textit{Proximate Cause}

Succinctly stated, proximate cause is that cause which directly produces the injury or damage complained of.\footnote{Seith v. Commonwealth Electric Co., 241 Ill. 252, 89 N.E. 425 (1909); Kerby v. Chicago Motor Coach Co., 28 Ill. App. 2d 259, 171 N.E.2d 412 (1960); Hartnett v. Boston Store of Chicago, 185 Ill. App. 332 (1914).} It is defined as that which causes the injury or damage through a natural and continuous sequence of events unbroken by any effective intervening cause.\footnote{McClure v. Hoopeston Gas & Electric Co., 303 Ill. 89, 135 N.E. 43 (1922); Kinsch v. Di Vito Const. Co., 54 Ill. App. 2d 149, 203 N.E.2d 621 (1964); Chapman v. Baltimore & Ohio R.R., 340 Ill. App. 475, 92 N.E.2d 466 (1950).} The
issue of proximate cause in certain cases may be resolved in a sim-
ple manner, while in other instances the question may be more subtle
and the solution more enigmatic. In *Ney v. Yellow Cab Co.*, the
court was called upon to apply the rules of proximate cause to a
difficult factual situation. The defendant taxi cab company's em-
ployee negligently permitted his cab to remain unattended and un-
locked on a Chicago street with the motor running. A thief pro-
ceeded to take advantage of the situation presented. He stole the
taxi cab and, while in flight from the authorities, collided with plain-
tiff's vehicle. Since thieves are notoriously unpromising defendants in
civil actions, plaintiff sought recompense from the taxi cab com-
pany.

The determinative question in *Ney* was whether defendant's negli-
gence in allowing its car to remain unattended in the street was the
proximate cause of the injury which in fact occurred. In addressing
itself to this issue, the court took notice of the fact that there had
been many recent incidents of property damage and personal injury
caused by stolen motor vehicles. With this foundation laid, the
court gave its answer. The intervening act of the thief, which was the
immediate cause of the damage complained of, was not an unfore-
seeable consequence of the taxi cab company's original negligence.
Thus, defendant was liable. Its negligence was, in legal contempla-
tion, the proximate, even though not the immediate cause of plaintiff's
injury. The intervening act, because it was foreseeable, was not, by
itself, sufficient to take the defendant's negligence out of the se-
quence of causation.

*Ney* is an example of proximate cause being utilized to extend a de-
fendant's liability. Proximate cause, however, is not merely a plain-
tiff's weapon. Defendants employ the same concept to preclude in-
finite liability as a result of a negligent act or omission. In *Driscoll
v. C. Rasmussen Corp.*, the defendant construction company allowed
a trash pile to accumulate at the work site. Among the scraps dis-
carded onto that pile were partially empty cans of paint. Plaintiff, a
7-year old boy, was severely burned while playing on the trash pile
when the paint ignited. The evidence showed that plaintiff's play-
mates caused the fire by taking embers from a nearby pile of burning

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45. 2 Ill. 2d 74, 117 N.E.2d 74 (1954).
46. Id. at 82, 117 N.E.2d 79.
47. Id. at 82-83, 117 N.E.2d at 79-80.
leaves and throwing them on the paint cans. Plaintiff sued on the theory that the trash pile was in the possession and control of the defendant, that it was a dangerous condition attractive to young children, and that this dangerous condition was the proximate cause of plaintiff's injury. The court, however, did not permit recovery. It pointed out that paint, although combustable, is not inherently dangerous. The children's conduct in igniting the trash pile was extraordinary and unexpected. In legal contemplation, the children's acts were unforeseeable and, therefore, defendant's acts could not be considered the proximate cause of plaintiff's injury. Even if defendant's acts were negligent, the unforeseeable acts of the children broke the chain of causation thereby relieving defendant from liability.

SUBSTITUTION OF CONCEPTS IN DECISIONMAKING

Duty and proximate cause are not interchangeable modes of decisionmaking in the sense that they are equivalent. But they are substitutional modes of decisionmaking in that a court may utilize either in its determination of liability vel non. Prosser maintains that in many cases, despite the varying language of the courts, duty and proximate cause address themselves to "identical questions." As an example, suppose defendant is operating a crane constructing a bridge and the boom of the crane accidently comes into contact with high tension wires strung overhead, causing a current of electricity to travel underground and burn a hole in a gas main, which, in turn, causes a gas leak in a building many feet away, which finally causes an explosion in that building which injures plaintiff. Given this factual context, it is immaterial to the ultimate resolution of the case whether the court in giving its verdict for the defendant holds that the injury was not proximately caused by the original negligence or that defendant's duty could not extend so far to such an unforeseen plaintiff. This is necessarily true so long as the premise is accepted that it is not proper for the defendant to be held liable for such a far-fetched and improbable injury.

In a case involving the unforeseeable plaintiff, the duty question must initially be determined. If defendant is found to owe no duty to plaintiff, as was the holding in Palsgraf and Cunis, then defend-

49.

50. PROSSER, p. 245, § 42.

51. This hypothetical situation was inspired by Radigan v. W.J. Halloran Co., 97 R.I. 122, 196 A.2d 160 (1963).
ant cannot be liable to plaintiff and the action must be dismissed. On the other hand, if the duty question is determined adversely to the defendant, the court must proceed to the proximate cause issue. It should be noted that proximate cause, as a legal concept, limits what could otherwise result in infinite liability imposed upon a defendant once it has been determined that he owed a duty to plaintiff and that he breached that duty.\(^5\) The unforeseeable plaintiff’s case concludes when the question whether defendant’s negligence was the proximate cause of plaintiff’s injury has been answered. Liability or non-liability is fixed by this final determination.

The significant difference between duty and proximate cause is that the former is a question of law to be determined by a judge, whereas the latter is a question of fact to be determined by a jury.\(^5\) Thus, in any negligence case the trial judge decides whether a duty was owing from defendant to plaintiff, while the jury decides whether plaintiff’s injury was proximately caused by defendant’s negligence. This distinction is of no slight importance in cases involving unforeseeable plaintiffs, given that the trial judge can either terminate the litigation at any stage by ruling on the duty issue in defendant’s favor or can allow the case to be resolved by the jury on the proximate cause issue. In a very real sense deciding whether the case will go to the jury can be determinative of the litigation’s outcome.\(^5\) Moreover, many courts have held that in cases involving unforeseeable plaintiffs, the jury should always be allowed to resolve the dispute under the rules of proximate cause rather than having the trial judge nonsuit the plaintiff on a point of law.\(^5\) These courts believe that such

\(^{52}\) 7 Ill. App. 3d at 208, 287 N.E.2d at 210.

\(^{53}\) PROSSER, p. 289, § 45.

\(^{54}\) The fact that cases decided on proximate cause have liberally extended liability in many instances may have been a factor in the restrictive nature of the Cunis decision. The court may have feared that to allow the case to go to a sympathetic jury would have been tantamount to imposing liability on the defendant. One case, City of Mt. Carmel v. Howell, 36 Ill. App. 68 (1890), shows that a rather unusual result can be reached when the case is allowed to go to the jury. There plaintiff’s decedent was riding in an express wagon when it was driven into an open excavation in the street. The jolt, occasioned thereby, caused decedent to be injured in the small of her back. The injury itself was apparently not serious, but unfortunately it led to spinal meningitis of which the decedent eventually died. Despite the fact that such a consequence was only remotely possible, the court traced the line of causation, linking the excavation to the death, and held the defendant liable based on the jury verdict. The court made this decision in spite of a questionable understanding of the medical facts involved. The Mt. Carmel case, although of little precedential value today, stands as an example of how far a defendant’s liability may be stretched under the concept of proximate cause. See also Dellwo v. Pearson, 259 Minn. 452, 107 N.W.2d 859 (1961); Lynch v. Fisher, 34 So. 2d 513 (La. App. 1947); Ramsey v. Carolina-Tennessee Power Co., 195 N.C. 788, 143 S.E. 861 (1928).

\(^{55}\) Pfeifer v. Standard Gateway Theatre, 262 Wis. 229, 55 N.W.2d 29 (1952); Jack-
cases present difficult determinations and that therefore the ultimate decisionmaking properly resides in the province of the jury. The most significant aspect of *Cunis* is that it denies all plaintiffs whose injuries are unexpected and unforeseeable the right to present their claims to a jury.

The substitutional nature of duty and proximate cause as modes of decisionmaking is illustrated by three Pennsylvania Supreme Court cases all involving the same factual pattern. In the first of these, *Wood v. Pennsylvania R.R.*, plaintiff was injured when he was struck by a body which was hurled many feet through the air when hit by defendant's speeding locomotive. The court held for defendant, basing its decision on proximate cause. The court said that the plaintiff's injury was so remote that it was unforeseeable.

In the second case, *Mellon v. Lehigh Valley R.R.*, plaintiff was injured when defendant's negligently operated locomotive collided with a taxi cab at a grade crossing causing the taxi cab to be hurled against a signal post which in turn fell on plaintiff standing nearby. Again deciding on the basis of proximate cause, the Pennsylvania Supreme Court held for plaintiff; *Wood* was distinguished. The court maintained that the pedestrian's injury was foreseeable. The court said:

> The natural result of negligently running the train over the crossing was a collision with a passing vehicle, not only to the peril of its occupants but also of others at or near the crossing.

The quoted passage all but overruled *Wood* despite the similarity of the factual situations. *Mellon* effectuated a change in Pennsylvania case law and probably a change in the ability of the unforeseeable plaintiff to recover for his injury.

Finally, in *Dahlstrom v. Shrum*, plaintiff and decedent both alighted from a bus. They then walked behind the bus and attempted to cross the street. Decedent, at a point halfway across the road, was struck and killed by an oncoming vehicle and plaintiff was injured while standing at the curb when decedent's body, which had been hurled through the air, landed forceably upon her. This time,
basing its decision on the concept of duty, the Pennsylvania Supreme Court held for defendant.\footnote{Id. at 428, 84 A.2d at 292.}

\textit{Dahlstrom} returned Pennsylvania to the \textit{Wood} result, if not to the \textit{Wood} rule. As a practical matter \textit{Wood} presented a hurdle to recovery in any case involving an unforeseeable accident. In the aftermath of \textit{Mellon}, however, this hurdle was to a large extent removed. \textit{Mellon} expanded the scope of proximate cause, thereby affording plaintiff a much better chance of recovery in the trial court. The \textit{Mellon} result certainly favors a class of plaintiffs who theretofore had been constrained under the \textit{Wood} precedent. \textit{Dahlstrom} reconstructed the \textit{Wood} hurdle, but did so by employing a different rationale. These cases indicate that the nature of proximate cause and duty allows one to be substituted for the other where a court chooses to reach a desired result.

Why the Pennsylvania Supreme Court decided \textit{Mellon} and \textit{Dahlstrom} in the manner it did, rather than simply twice reaffirming \textit{Wood}, is difficult, if not impossible to answer. Yet, entering the field of conjecture, the Pennsylvania Supreme Court may have been attempting to achieve two goals. First, it may have been trying to attain justice among the litigants. If this were true, then the equities among the parties would have figured more prominently in the court's decision than would have adherence to prior case law. Possibly, the gravity of the various plaintiffs' injuries, their financial ability to bear the same, the relative blameworthiness of the various defendants, their ability to pay, and other non-legal factors entered into the court's determinations.

The second possibility is that the court in each case may have been looking toward the future with an eye to the impact each decision would have as precedent. This follows from the premise that courts, especially appellate courts, function not only as decisionmakers, determining controversies among individual litigants, but also as lawmakers, creating precedents which will control litigation in the future. Viewed in this light, one could speculate that the \textit{Mellon} court desired to allow recovery to an entire class of plaintiffs, \textit{i.e.} unforeseeable plaintiffs theretofore impeded under the \textit{Wood} precedent, whereas, the \textit{Dahlstrom} court desired to protect a class of defendants theretofore vulnerable under the \textit{Mellon} precedent.\footnote{The theory that the Pennsylvania Supreme Court may have been motivated by one of these goals is suggested by Roscoe Pound's analysis of the nature of judicial de-}
The above analysis is as aforewarned conjecture, but it does form a basis for an elementary proposition. Courts of law, in cases involving unforeseeable accidents, can and do base their determinations on extra-legal factors. Indeed, Dean Prosser in his discussion of duty and proximate cause, states:

Once it is established that the defendant's conduct has in fact been one of the causes of the plaintiff's injury, there remains the question whether the defendant should be legally responsible for what he has caused. . . . It is sometimes said to be a question of whether the conduct has been so significant and important a cause that the defendant should be legally responsible. But both significance and importance turn upon conclusions in terms of legal policy, so that this becomes essentially a question of whether the policy of the law will extend the responsibility for the conduct to the consequences which have in fact occurred.63

Prosser's reflection is of fundamental consideration because, as will be discussed herein, the Cunis court largely formulated its decision upon its interpretation of the requirements of public policy.64 However, before any ultimate conclusions regarding the Cunis decision and its effect can be drawn, it is necessary to take an excursion through prior Illinois cases dealing with unforeseeable accidents.

PRIOR ILLINOIS CASE LAW

In Cunis, the supreme court relied upon only one prior Illinois case in making its decision: Meifer v. Brown.65 The reason for the absence of other precedents is plain; Cunis is clearly a break with prior Illinois case law. For example, Wintersteen v. National Cooperage & Woodenware Co.,66 relied on by Justice Goldenhersh in his dissent, contains language difficult to reconcile with Cunis. In Wintersteen a railroad improperly loaded a freight car carrying a consigned shipment of barrels. A barrel fell and seriously injured plaintiff, an employee of the consignee, when he opened the freight car door to unload the shipment. The defendant railroad contended it owed no duty of care to the plaintiff because there was no privity of contract between plaintiff and defendant. In response, the court said:

It is axiomatic that every person owes a duty to all persons to ex-

63. PROSSER, p. 244, § 42 (emphasis added).
64. See pp. 499-501 infra.
65. 54 Ill. 2d 539, 301 N.E.2d 307 (1973).
66. 361 Ill. 93, 197 N.E. 578 (1935).
exercise ordinary care to guard against any injury which may naturally flow as a reasonably probable and foreseeable consequence of his act, and the law is presumed to furnish a remedy for the redress of every wrong. This duty to exercise ordinary care to avoid injury to another does not depend upon contract, privity of interest, or the proximity of relationship between the parties. It extends to remote and unknown persons.\textsuperscript{67}

Clearly, the scope of duty as enunciated in \textit{Wintersteen} and other prior Illinois cases\textsuperscript{68} is much broader than that announced in \textit{Cunis}. Indeed, the underlying principles in \textit{Wintersteen} are in accord with Judge Andrews' rationale in \textit{Palsgraf}.

In general, however, \textit{Wintersteen} notwithstanding, the issue in prior Illinois cases dealing with situations like that in \textit{Cunis} has been phrased in terms of proximate cause rather than duty.\textsuperscript{69} For example, in \textit{City of Rock Falls v. Wells},\textsuperscript{70} plaintiff, riding in a horse drawn sleigh, was travelling east on a public thoroughfare when she was confronted by a runaway horse and buggy coming west on the same side of the street. In order to avoid the impending harm, plaintiff attempted to cross to the other side of the street, but her sleigh caught on a raised portion of unused railway tracks. Being unable to move, plaintiff was struck and injured by the runaway. The defendant municipality admitted that the tracks were an obstruction to travel, but maintained that their negligence was not the proximate cause of plaintiff's injury. In holding against the municipality, the court said:

[I]f a plaintiff, while observing due care for his personal safety, was injured by the combined result of an accident and the negligence of a city or village, and without such negligence the injury would not have occurred, the city or village will be held liable, although the accident be the primary cause of the injury, if the

\textsuperscript{67} \textit{Id.} at 103, 197 N.E. at 582 (emphasis added).
\textsuperscript{68} See, e.g., Kahn \textit{v.} James Burton Co., 5 Ill. 2d 614, 126 N.E.2d 836 (1955), where a lumber company was held liable for injuries to children playing on a construction site when lumber which the company had negligently piled fell and injured the children. The appellate court had held as a matter of law that the defendant was not guilty of negligence because it had no duty to guard or protect the construction site of which it was not in possession or control. The supreme court reversed, quoting from \textit{Wintersteen}. Accord, Bangert \textit{v.} Nolan, 130 Ill. App. 2d 860, 265 N.E.2d 199 (1970); Rodgers \textit{v.} Meyers & Smith, Inc., 57 Ill. App. 2d 200, 206 N.E.2d 845 (1965); Garrett \textit{v.} S.N. Neilson Co., 49 Ill. App. 2d 422, 200 N.E.2d 81 (1964).

\textsuperscript{69} As Prosser points out, the \textit{Palsgraf-Cunis} type problem has been dealt with many times before with some courts analyzing in terms of duty and others in terms of proximate cause. PROSSER, p. 254, § 43. Compare \textit{Wood v. Pennsylvania R.R.}, 177 Pa. 306, 35 A. 699 (1896) \textit{with} Dahlstrom \textit{v.} Shrum, 368 Pa. 423, 84 A.2d 289 (1951). See pp. 493-94 supra.

\textsuperscript{70} 169 Ill. 224, 48 N.E. 440 (1897).
consequences could, with common prudence and sagacity, have been seen and provided against by such city or village.\footnote{Id. at 227, 48 N.E. at 440. Moreover, in a passage applicable to Cunis, the court said:}

\textit{Rock Falls}, unlike \textit{Cunis}, held the municipality liable for permitting a dangerous condition to persist on its streets. The municipality was viewed as the original wrongdoer whose obligation was to respond to the one injured even though the negligence of a third party had intervened.\footnote{169 Ill. at 227, 48 N.E. at 442.}

The court in \textit{Neering v. Illinois Central R.R.}\footnote{Another case with facts similar to \textit{Cunis} but holding for plaintiff is \textit{Weick v. Lander}, 75 Ill. 93 (1874). There, a contractor had obstructed a public street by piling thereon a large lot of bricks. Because of this obstruction, an accident ensued causing the death of plaintiff's intestate. The defendant argued that the accident was caused by the negligence of one of the drivers of the wagons involved in the collision. The court flatly rejected this view and focused on the original obstruction of the street by defendant, holding that to be an unlawful act in itself. The court then said: We understand the rule to be, that where an act done is unlawful in itself, the wrongdoer will be held responsible, although other causes may have subsequently arisen and contributed in producing the injury; that where an act unlawful in itself is done, from which a injury may reasonably and naturally be expected to result, the injury, when it occurs, will be traced back and visited upon the original wrongdoer. \textit{Id.} at 96.} addressed itself to the foreseeability of a plaintiff's injury. Plaintiff, a young woman, was assaulted and molested by a vagrant while waiting for a train at defendant's railroad station. The station was within the vicinity of a so-called "hobo jungle" where idle and dissolute people congregated. At the trial, the evidence showed that tramps and hoboes were often seen loitering at or near the railroad station. Defendant railroad contended that it had no notice or knowledge that plaintiff might be assaulted, and that it could not be required to guard against injuries resulting from such unusual occurrences which could not have been reasonably anticipated. The court, however, rejected this argument holding that the assault was foreseeable since unsavory characters were known to frequent the vicinity of the station.\footnote{383 Ill. 366, 50 N.E.2d 497 (1943).}

Having formulated a liberal foreseeability test, the court employed it to defeat another of defendant's contentions. That contention was that the criminal act of the tramp was an intervening cause breaking the chain of causation, and that therefore defendant's negligence was not the proximate cause of plaintiff's injury. The court said that if the

\footnote{Id. at 376-77, 50 N.E.2d at 502.}
intervening cause could reasonably have been anticipated, the first negligent act would be considered the proximate cause of the injury.\textsuperscript{75}

Distinct from \textit{Wintersteen, Wells,} and \textit{Neering} is \textit{Mieher v. Brown,}\textsuperscript{76} the one case relied on by the supreme court in deciding \textit{Cunis}. The facts in \textit{Mieher} were not analogous to those of \textit{Cunis}, but in this case the duty issue also was paramount. Kathryn Mieher was killed when the automobile she was driving collided with the right rear corner of a large truck. Her administrator sued the manufacturer of the truck, alleging it had been negligently designed because there were no bumper guards or shield on the rear of the truck. In its decision the court addressed itself to the duty issue only. It held the defendant manufacturer not liable because the alleged defective design created no unreasonable risk of injury. Plaintiff's injury was unforeseeable and defendant had no duty to guard against it. Thus, plaintiff's case was not allowed to go to the jury because the complaint failed to state a cause of action.

In deciding \textit{Mieher}, the supreme court was faced with two conflicting lines of cases involving so called "second accident" injuries. Such injuries occur when a victim is thrown against the interior of the passenger compartment after his vehicle has first collided with an external object. These cases have caused a split in the federal circuits and varying results in the state courts.\textsuperscript{77} It should be noted that the factual situations involved in the second collision cases have little or no resemblance to \textit{Cunis}. Invariably, the second accident

\textsuperscript{75} \textit{Id. at} 381, 50 N.E.2d at 504.
\textsuperscript{76} 54 Ill. 2d 539, 301 N.E.2d 307 (1973).
\textsuperscript{77} 391 F.2d 495 (8th Cir. 1968); Mickle v. Blackmon, 252 S.C. 202, 166 S.E.2d 173 (1969). The leading case in the area from the defendant manufacturer's point of view is \textit{Evans}. In that case plaintiff's decedent was killed when his car was broadsided by another vehicle at an intersection. The car in which decedent was riding was constructed with an "X" frame rather than a "perimeter" frame used in other vehicles. Plaintiff's theory was that defendant manufacturer had breached its duty to the user of its product because it realized that the "X" frame was not as safe as the alternative model. The court rejected this argument, holding instead that a manufacturer is under no duty to make his vehicle accident-proof, nor must he render the vehicle more safe where the danger to be avoided is obvious to all. A key to the holding was that there was no allegation that decedent's death would have been avoided even if defendant had constructed its product using the perimeter frame. A contrary position was taken in \textit{Larsen}. In that case plaintiff was injured in a head-on collision when the steering mechanism which was allegedly negligently designed was thrust into plaintiff's head. The \textit{Larsen} court, unlike \textit{Evans}, held that automobile collisions are an "inevitable contingency of normal automobile use" and that "where the manufacturer's negligence in design causes an unreasonable risk to be imposed upon the user of its product, the manufacturer should be liable for the injury caused by its failure to exercise reasonable care in the design." 391 F.2d at 502.
cases involve the defective designs of vehicle interiors—an issue not at all present in Cunis. On the other hand, injuries resulting from hitting the interior of a car are more foreseeable than those sustained by being thrown through the air and hitting a pipe. This fact tends to support the court's reliance on Mieher. On balance, Mieher is not a convincing precedent upon which to rest the Cunis holding due to its factual dissimilarities.

Mieher, however, did take the plaintiff's case from the jury. Indeed the common denominator or Mieher and Cunis is that both employ the duty concept to deny plaintiff a jury trial. Wintersteen and its progeny had interpreted duty broadly. Had the Cunis court employed the Wintersteen rationale, an opposite result would have been reached. By not following Wintersteen the supreme court is indicating that it is taking a new approach to the duty question in negligence cases. Mieher and Cunis, when taken together, manifest the proposition that in the future the supreme court will take a circumspect view of injury claims made by plaintiffs whose accidents were unexpected and bizarre.

THE PUBLIC POLICY ASPECT

Roscoe Pound, the noted jurist, maintained that courts of law perform two functions. They decide individual cases between litigants and they create precedent for future decisionmaking. In performing these functions, courts can draw on a wide range of legal precepts and rules. In any but the very simplest of controversies, a court will have a choice to base its determination on one of two or more of these, in effect, competing rules. The Cunis case provides an example of this common component of judicial decisionmaking. The supreme court could have made its decision on the grounds of proximate cause or duty. A court will often choose one rule over another in order to promote a larger public policy which lies hidden by the legal rule employed in the court's opinion. In these circumstances, the public policy is the overriding basis for the decision.

Public policy played an important role in Cunis. The court had to determine whether it would extend liability in the unforeseeable plaintiff's case to the injuries which in fact occurred. In making this determination, the court's consideration of public policy was a paramount factor. As stated by Justice McGloon at the appellate level,

78. Pound, supra note 62, at 941, 945.
the word “duty is not sacred. It is simply a word by which we state a conclusion as to whether or not the plaintiff’s interests are to be afforded protection against the defendant’s negligence.”

Prosser concurs with this analysis when he says the duty question is “one of the fundamental policy of the law, as to whether the defendant’s responsibility should extend to such results.”

A close reading of the court’s opinion in Cunis reveals an intention to eliminate recoveries obtained by a class of plaintiffs whose injuries, in the court’s view, just do not merit recompense, i.e. those plaintiffs whose injuries are bizarre or unexpected. This is the underlying policy of the decision.

“Public policy and the social requirements do not require that a duty be placed upon [the defendant]. . . .” The circumstance here of plaintiff’s being thrown 30 feet upon the collision with a third person’s automobile and having his leg impaled upon the pipe was tragically bizarre and may be unique. We hold that the remote possibility of the occurrence did not give rise to a legal duty on the part of the Village to the plaintiff to provide against his injury.

This holding has erected an effective barrier between an injured plaintiff and a sympathetic jury. That barrier is the scrutinizing eye of a trial judge who, under the rubric of duty, shall determine whether plaintiff’s case will go to the jury at all. It would be naive to think that the Cunis court was unaware of the effect that its decision will have as precedent. Certainly it will result in more dismissals of actions prior to trial.

That policy should weigh so heavily in Cunis and many of the other tort cases considered in this article rather than strict adherence to legal rules and precedent should not be surprising. Negligence law is unlike commercial or real property law. In these latter areas, fixed rules and principles guide many decisions. For example, in determining whether an instrument is negotiable, a court will merely have to inquire whether the instrument meets the requirements of negotiability outlined in the Uniform Commercial Code. In the law of conveyancing, when a grantee seeks to hold his grantor for breach of warranty, whether the action can be maintained merely depends on whether the deed contains the talismanic covenant of warranty with-

79. 7 Ill. App. 3d at 207, 287 N.E.2d at 210.
80. PROSSER, p. 250, § 43.
81. 56 Ill. 2d at 377, 308 N.E.2d at 620.
82. Pound, supra note 62, at 952.
83. ILL. REV. STAT. ch. 26, § 3-104 (1973).
out which at common law one may not hold his grantor. Commercial and real property law operates in this fashion since such law forms the basis for all economic transactions which demand rules authoritatively prescribed in advance and mechanically applied. Negligence law, on the other hand, requires the application of rules, not to economic transactions, but to human conduct. In negligence cases, judges and juries are given the widest latitude in which to make their decisions. The making of a just decision is more important than conformity to rules. Facts rather than legal precepts are important in the negligence case. If the facts indicate that it is appropriate for the plaintiff to recover then he ought to be compensated. Legal principles in many tort cases serve only as an afterthought which rationalizes the original decision of the judge made on moral, ethical or policy grounds. By its policy decision in the Cunis case, the Supreme Court of Illinois has diminished the power of juries to award plaintiffs verdicts.

**CRITICISM**

*Cunis* is not to be criticized because the supreme court changed prior case law, and certainly not because it allows a trial judge wide discretion, for these are both important components of a viable judicial system. However, the decision is open to criticism on two public policy grounds.

First, cases similar to *Palsgraf* and *Cunis* which the supreme court terms “freakish and fantastic,” seldom reoccur. No hard and fast legal rule should be imposed on the parties in these unique fact situations. To do so would chafe justice. Two famous “stop, look, and listen cases” which were presented to the United States Supreme Court demonstrated how the imposition of an unmalleable legal rule can lead to unjust results. *Baltimore & Ohio Ry. v. Goodman* was the first of these cases. There plaintiff’s decedent was killed when the truck he was driving was crushed by defendant’s locomotive at a grade crossing. The supreme court overturned a jury verdict for

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86. *In Bessler v. Laughlin*, 168 Ind. 38, 41, 79 N.E. 1033, 1034 (1907), a negligence action, the court said:

> The law is practical, and courts do not indulge in refinements and subtleties as to causation if they tend to defeat the claims of natural justice.

87. 56 Ill. 2d at 378, 308 N.E.2d at 620.
88. 275 U.S. 66 (1927).
plaintiff and held that decedent had been contributorily negligent as a matter of law. The court observed that decedent had failed to stop, look, and listen before proceeding over the tracks. The Court went so far as to say, "In such circumstances it seems to us that if a driver cannot be sure otherwise whether a train is dangerously near he must stop and get out of his vehicle. . . ."89 Furthermore, the Court admitted it was setting down a rule to apply in all future railroad crossing accident cases. "It is true . . . that the question of due care very generally is left to the jury. But we are dealing with a standard of conduct, and when the standard is clear it should be laid down once and for all by the courts."90

The Goodman decision caused much controversy and led to unjust results. Plaintiffs would be nonsuited anytime the evidence showed they had failed to leave their vehicles and reconnoiter,91 even if to have done so would have been dangerous under the circumstances. In the second case, Pokora v. Wabash Ry.,92 the court was faced with a situation where it would have been extremely perilous for the plaintiff to have left his vehicle and reconnoitered for approaching trains. Under the circumstances, to hold that the plaintiff was contributorily negligent as a matter of law would have been most unjust. Thus, the Pokora court limited the Goodman precedent and said that in railroad crossing accident cases, it was a jury question whether plaintiff was exercising due care for his safety at the time of injury.

Illustrations [of injustice] bear witness to the need for caution in framing standards of behavior that amount to rules of law. The need is more urgent when there is no background of experience out of which the standards have emerged. . . . Extraordinary situations may not wisely or fairly be subjected to tests or regulations that are fitting for the commonplace or normal. In the default of the guide of customary conduct, what is suitable for the traveler caught in a mesh where the ordinary safeguards fail him is for the judgment of a jury.93

Thus, in the light of Pokora, the better view is to allow the case to go to the jury in situations involving unforeseeable accidents. This

89. Id. at 70.
90. Id.
92. 292 U.S. 98 (1934).
93. Id. at 105-06 (emphasis added).
view would bypass the duty issue in most cases and decide the case on proximate cause grounds. Duty would of necessity be broadly interpreted. *Jackson v. B. Lowenstein & Bros.*\(^9^4\) provides the proper analysis:

> These [Palsgraf type] cases, by virtue of the sharp difference of opinion of the judges, should be a warning to appellate courts not lightly to assume the primary duty of determining liability or non-liability, in actions of tort, but to leave the duty where the Constitution has placed it, with the jury, as the trier of facts, and if they act capriciously and arbitrarily, to supervise their action.\(^9^8\)

It is to be noted that if the jury does act capriciously or arbitrarily the court can always overturn the verdict on a motion for a judgment notwithstanding the verdict. Furthermore, if the jury's award of damages is excessive, a remittitur can reduce it to a more reasonable level. Thus, even when the case does go to the jury, the trial judge retains final control of the matter through his supervisory powers.

The Illinois Supreme Court echoed the sentiment of the *Jackson* court in the *Ney* case. As discussed above,\(^9^6\) defendant taxi cab company had left its car unattended in the street with the motor running. Whether such an omission constituted actionable negligence when the car was subsequently stolen and caused injury was a question which had divided the opinions of jurists of other states.\(^9^7\) The court demonstrated its awareness of the difficulty inherent in the problem and prescribed the solution when it said:

> Questions of negligence, due care and proximate cause are ordinarily questions of fact for a jury to decide. The right of trial by jury is recognized in the Magna Charta, our Declaration of Independence and both our State and Federal constitutions. It is a fundamental right in our democratic judicial system. Questions which are comprised of such qualities sufficient to cause reasonable men to arrive at different results should never be determined as matters of law. The debatable quality of issues such as negligence and proximate cause, the fact that fair minded men might reach different conclusions, emphasize the appropriateness and necessity of leaving such questions to a fact-finding body. The jury is the tribunal under our legal system to decide that type of

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\(^9^4\) 175 Tenn. 535, 136 S.W.2d 495 (1940).

\(^9^5\) Id. at 538, 136 S.W.2d at 496.

\(^9^6\) See p. 490 supra.

issue. To withdraw such questions from the jury is to usurp its function.98

Cunis was no less difficult than Ney to decide; surely, more than one inference concerning the municipality's liability was available from the facts. Indeed, the appellate court held a jury trial was mandated by the evidence.99 The writer feels the supreme court should have allowed Cunis to present his case to the jury. The Cunis case standing as a precedent will be persuasive authority for lower courts to deny a plaintiff a full trial whenever defendant's counsel can convince the court that plaintiff's injury was in some manner unforeseeable. The real fear is that Cunis, like Goodman, will have the effect of denying meritorious claims of plaintiffs whose injuries deserve recompense.

The second policy consideration militating against the Cunis result can be phrased as a normative question. Who should shoulder the economic burden of loss in the unforeseeable accident case—the negligent defendant or the innocent plaintiff? Prosser states that in duty cases involving unforeseeable plaintiffs "the real problem, and the one to which attention should be directed, would seem to be one of social policy: whether the defendants in such cases should bear the heavy negligence losses of a complex civilization, rather than the individual plaintiff."100 Generally, when the choice is between placing the burden of loss on a negligent defendant or an innocent plaintiff, equity favors the latter. Two examples will suffice.

In the "stop, look, and listen" cases the courts have rejected an earlier view which placed the risk of loss on the injured plaintiff. Today, a much broader view is taken of the scope of a railroad's liability. A railroad, which is operated for profit, is in a much better position to eliminate the risk of injury at crossings. Furthermore, it is more capable, financially, of bearing the risk of loss which it has occasioned. The earlier view can be said to have been the product of a bygone era in which the courts were willing to protect an emerging industry.101 Again, in motorist-pedestrian accident cases, the courts have imposed the risk of loss on the motorist unless it was clear that the plaintiff pedestrian was not exercising due care for his own safety at the time of the accident.102 Accident insurance which is readily

98. 2 Ill. 2d at 84, 117 N.E.2d at 80.
99. 7 Ill. App. 3d at 208-09, 287 N.E.2d at 210-11.
100. PROSSER, p. 257, § 43.
101. Green, supra note 85, at 275.
102. Id. at 277.
available to most motorists is the major factor for the imposition of such liability.

In the instant case, the supreme court misplaced the burden of loss. The defendant Village's conduct in allowing the pipe to protrude on a public parkway was negligent. Indeed, in oral argument at the appellate level, the defendant admitted it would be liable to certain classes of plaintiffs. This was the type of negligent omission which can be expected as an inevitable consequence of attempting to maintain a large network of streets and other public ways. This being so, the liability imposed upon the municipality for resulting injuries can be considered as a constituent cost of operating and maintaining such public ways.

Viewed from yet another angle, the defendant, being a governmental body, was better able to bear the economic burden of loss since through taxes it could distribute the loss to the general public. This "deep pocket" theory of liability can be objected to because it requires the general public to pay for the plaintiff's injury. It means that people who were in no way culpable will be made to bear the loss. But this is not unusual. When insurance companies pay for injuries and damages caused by their insureds, are they not distributing such payments to the insurance purchasing public in the form of premiums? And when manufacturers and industrialists are forced to pay negligence losses occasioned by their activities, do they not distribute the payments to the general public in the form of increased prices or alternatively decreased dividends?

In considering the public policy aspect, the fact that the defendant was a municipality becomes important. The supreme court, although not mentioning it, may have been influenced by the policy supporting the Local Governmental and Governmental Employees Tort Immunity Act. In general, this Act grants immunity from suit to many functions of municipal corporations and their employees. It

103. 7 Ill. App. 3d at 207, 287 N.E.2d at 209-10.
104. See generally Note, Loss Shifting and Quasi-Negligence: A New Interpretation of the Palsgraf Case, 8 U. CHI. L. REV. 729 (1941).
105. ILL. REV. STAT. ch. 85, §§ 1-101 to 10-102 (1973). Section 3-102(a) states:

Except as otherwise provided in this Article, a local public entity has the duty to exercise ordinary care to maintain its property in a reasonably safe condition for the use in the exercise of ordinary care of people whom the entity intended and permitted to use the property in a manner in which and at such times as it was reasonably foreseeable that it would be used, and shall not be liable for injury unless it is proven that it has actual or constructive notice of the existence of such a condition that is not reasonably safe in sufficient time prior to an injury to have taken measures to remedy or protect against such condition.
has been suggested\(^\text{106}\) that the Illinois legislature, in passing this Act, was motivated by a desire to safeguard tax funds from tort judgments. Certainly the Act keeps the cost of government down by reducing the number of claims that can be made against local governmental entities. In this vein, it has been proposed that satisfying injury claims is not a proper use of tax revenues.

Taxes are raised for certain specific governmental purposes; and if they could be diverted to the payment of damage claims, the more important work of government, which every municipality must perform regardless of its other relations, would be seriously impaired if not totally destroyed.\(^\text{107}\)

The aforementioned policy, no doubt, has laudable aspects. However, that policy should not be applicable in the \textit{Cunis} situation for two reasons. First, the Act does not extend immunity to a municipality's negligence in the repair and maintenance of streets and public ways.\(^\text{108}\) Second, a local public entity may contract for insurance against any loss or liability occasioned by its negligence. In \textit{Cunis}, liability could have been predicated under section 3-102 of the Act which imposes a duty upon a local public entity "to maintain its property in a reasonably safe condition . . . ."\(^\text{109}\) The availability of liability insurance affords a local governmental entity an opportunity to shift the burden of compensating personal injury claims to an insurance company which has contracted for such responsibility. Thus tax monies can be saved for the important governmental


The above rationale was employed in Reeves \textit{v. City of Springfield}, 5 Ill. App. 3d 880, 284 N.E.2d 373 (1972). There plaintiff, a 5-year old child, was injured when he was struck in the eye by a discarded license plate thrown by a playmate. The license plate had been found by the children lying in a public alley. The plaintiff's theory was that defendant municipality was liable because it had allowed a potentially dangerous instrumentality to remain on a public way. Plaintiff further stressed that the injury suffered was a foreseeable consequence of the neglect to remove the license plate. The court rejected these theories. It held that the injury was not foreseeable because a discarded license plate, itself, is not dangerous.

Almost any object can become an instrumentality of injury when improperly used. To require the City to devote sufficient manpower and funds to continually remove from its alleys every stick, piece of wire, tin can lid, etc., would be to place upon it a task impossible to accomplish, and an economic burden which the law does not impose. The "magnitude of the burden" must be taken into account. . . . In addition this requirement would be tantamount to making the city an insurer of the child's safety, a duty which the law does not place upon it.

\textit{Id.} at 883, 284 N.E.2d at 376.

\(^{108}\) See note 105 supra.

\(^{109}\) \textit{Id.}
services for which they were collected. If the fear is that sympathetic juries will allow tax revenues to be depleted in injury suits, the remedy should not be to deny recovery for all claims whether valid or not. Rather, each plaintiff should be allowed to go to trial and, if his claim is found valid, to satisfy his verdict from insurance funds. The interest in permitting valid claims of injured plaintiffs to be satisfied, in the final analysis, outweighs any interest in absolving a negligent municipality from liability for the injuries it has caused.

_Baran v. City of Chicago Heights_\textsuperscript{110} supports the proposition that the policy underlying the Tort Immunity Act should not apply to negligence actions such as _Cunis_. In _Baran_, plaintiff was injured when, at night, his vehicle ran off a dead-end street and struck a tree. The defendant municipality had failed to properly illuminate the dead-end so as to make it visible during the night. Furthermore, it had failed to erect any barriers or signs warning of the dead-end. The court rejected the argument that the municipality was immune from suit in the present action. In affirming the jury award for plaintiff, the supreme court said:

> [W]hen a city creates a hazardous condition and someone is injured as a consequence it must respond in damages, just as others are required to do. . . . A municipal corporation like an individual or a private corporation, is required to exercise its rights and powers with such precautions as shall not subject others to injury. The rule which protects it in the exercise of its governmental functions should not be construed to relieve from liability when the plan devised, if put in operation, leaves the city's streets in a dangerous condition for public use.\textsuperscript{111}

In summary, Illinois law places the duty to repair and maintain public streets and ways squarely on the municipality.\textsuperscript{112} In _Cunis_, the Village of LaGrange allowed a dangerous broken pipe to remain on a public parkway. It was that pipe, not the collision of the two cars, which caused plaintiff to lose his leg. Faced with the choice of holding for the innocent plaintiff or the culpable defendant, the supreme court held for the latter. In this light, the rubric of duty and reasonable foreseeability are meaningless. Unquestionably, the defendant imposed the risk; why should it not bear the consequent loss?

_THADDEUS J. HUBERT III_

\textsuperscript{110} 43 Ill. 2d 177, 251 N.E.2d 227 (1969).

\textsuperscript{111} Id. at 181, 251 N.E.2d at 229.

\textsuperscript{112} City of Elmhurst v. Buettgen, 394 Ill. 248, 68 N.E.2d 278 (1946); Koch v. City of Chicago, 297 Ill. App. 103, 17 N.E.2d 411 (1938).