
Landlord's Duty to the Police - *Fancil v. Q.S.E. Foods, Inc.*

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NOTE

LANDLORD'S DUTY TO THE POLICE—*FANCIL V. Q.S.E. FOODS, INC.*

INTRODUCTION

Public employees historically have had difficulty recovering for injuries caused by negligent landowners. The primary source of this difficulty has been the uncertain status of public employees as occupiers of the premises. Many courts have treated them as mere licensees to whom landowners owe no duty to make their premises safe.¹ However, this classification has been criticized by commentators who have observed the incongruity of holding that a police officer on a landowner's premises is not an invitee because there has been no invitation, but that he is a licensee even though, in reality, the owner has not granted him permission to enter.² Some courts have added to the confusion by refusing to classify firemen or police officers as licensees or invitees, stating that they are *sui generis*.³

In 1961 the Illinois Supreme Court, in *Dini v. Naiditch*,⁴ attempted to resolve this confusion by granting firemen and police officers full invitee status. However, in *Fancil v. Q.S.E. Foods, Inc.*,⁵ the Illinois Supreme Court recently raised fresh doubts about the status of police officers and firemen as occupiers of another's premises while performing their duties. The issue in *Fancil* was whether a storeowner owes a legal duty to light his premises adequately when a police officer is making a routine security check. The court held that a storeowner owes no such duty even when it is foreseeable that burglars could conceal themselves on the darkened premises and enhance the likelihood of injury to the police officer.⁶

1. See, e.g., *Aldworth v. F.W. Woolworth Co.*, 295 Mass. 344, 3 N.E.2d 1008 (1936); *Mulcrone v. Wagner*, 212 Minn. 478, 4 N.W.2d 97 (1942); *Anderson v. Cinnamon*, 366 Mo. 304, 282 S.W.2d 445 (1955); *Wax v. Co-operative Refinery Ass'n*, 154 Neb. 805, 49 N.W.2d 707 (1951); *Scheurer v. Trustees of Open Bible Church*, 175 Ohio St. 163, 192 N.E.2d 38 (1963).

2. See Bohlen, *The Duty of a Landowner Towards Those Entering His Premises of Their Own Right*, 69 U. PA. L. REV. 340 (1921); Comment, *Torts—Are Firemen and Policemen Licensees or Invitees?* 35 MICH. L. REV. 1157, 1159 (1937).

3. See, e.g., *Buren v. Midwest Industries, Inc.*, 380 S.W.2d 96 (Ky. 1964); *Shypulski v. Waldorf Paper Products*, 232 Minn. 394, 45 N.W.2d 549 (1951); *Jackson v. Volveray Corp.*, 82 N.J. Super. 469, 198 A.2d 115 (App. Div. 1964).

4. 20 Ill.2d 406, 170 N.E.2d 881 (1960).

5. 60 Ill.2d 552, 328 N.E.2d 538 (1975).

6. *Id.* at 558, 328 N.E.2d at 541. The court declined to consider whether the failure to

On the evening of June 1, 1970, police officer Jack Fancil was murdered while inspecting the premises of Q.S.E. Foods, Inc. This store previously had been the subject of attempted burglaries.⁷ Consequently, the storeowner erected a mercury light to the rear and south side of the building. Officer Fancil had visited the Q.S.E. premises each night as part of his regular duties in order to protect the storeowner's property. The storeowner had actual knowledge of these security inspections; yet, on the night of the murder he disconnected the power to the mercury light.

In a wrongful death action filed by Mrs. Fancil, it was charged that the defendant-storeowner had wrongfully disconnected the exterior illumination with full knowledge of the past burglaries and of the frequent police patrols, thereby creating an unreasonably dangerous condition enabling the burglars to conceal themselves in the darkness and fatally attack the decedent.⁸ The Illinois circuit court dismissed the complaint, but the appellate court reversed, ruling that the allegations stated a cause of action.⁹ Relying on sections 448 and 449 of the Restatement of Torts¹⁰ and cases involving civilians,¹¹ the appellate court reasoned that

provide adequate lighting constituted a failure to exercise reasonable care after it found that no legal duty existed.

7. *Fancil v. Q.S.E. Foods, Inc.*, 19 Ill.App.3d 414, 415, 311 N.E.2d 745, 746 (5th Dist. 1974).

8. *Id.*

9. *Id.* at 418, 311 N.E.2d at 747.

10. The Restatement indicates:

The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.

RESTATEMENT (SECOND) OF TORTS §448 (1965).

If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act, whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby.

Id. at §449.

11. The appellate court cited *Johnston v. Harris*, 387 Mich. 569, 198 N.W.2d 409 (1972) and *Neering v. Illinois Cent. R.R.*, 383 Ill. 366, 50 N.E.2d 497 (1943). In *Johnston* a tenant was assaulted by a youth who was lurking in a poorly lit vestibule of the defendant's apartment building which was located in a high crime area. The court held that enhancing the likelihood of exposure to criminal assaults by failing to provide adequate lighting constituted negligence. In *Neering*, the Illinois Supreme Court held that a railroad company owed a duty to protect a passenger who was waiting on the defendant's train platform from those criminal assaults which reasonably could have been anticipated.

the defendant owed a duty to protect the patrolling officer against those criminal acts of third parties which were reasonably foreseeable.¹² On appeal to the Illinois Supreme Court, the decision of the circuit court was reinstated. The supreme court held that the appellate court improperly considered whether the criminal acts of the burglars were reasonably foreseeable without first considering if the relationship between the defendant as a landowner and the police officer as an invitee gave rise to any legal duty.¹³ The supreme court resolved this issue in favor of the defendant, imposing no duty on the landowner because the risk of being ambushed was one which was inherent in Officer Fancil's occupation.¹⁴

The purpose of this Note is to analyze and criticize the approach taken by the court in *Fancil*. Upon initial consideration, the court appears to be applying Section 343 of the Restatement of Torts. A closer reading reveals that the opinion simply follows prior public employee decisions refusing to impose a duty on a landlord based on the inherent risk doctrine. Because this assumption has been a major obstacle to recovery, the development and policies underlying the doctrine will be examined. An alternative approach, using the Restatement structure and suggesting new policy considerations, then will be discussed. This approach could be used by courts to impose a duty on landlords to protect police officers in situations like *Fancil*.

THE ILLINOIS SUPREME COURT APPROACH

Development of the Inherent Risk Doctrine

In *Fancil* the Illinois Supreme Court reaffirmed the holding of *Dini v. Naiditch*,¹⁵ granting invitee status to police officers, and then analyzed whether Officer Fancil had satisfied the invitee requirements of Section 343 of the Restatement of Torts.¹⁶ Under this section a court cannot impose a legal duty upon a landowner for failing to protect the

12. 19 Ill.App.3d at 414, 311 N.E.2d at 747.

13. 60 Ill.2d at 552, 328 N.E.2d at 538.

14. *Id.* at 558, 328 N.E.2d at 541.

15. 20 Ill.2d 406, 170 N.E.2d 881 (1960).

16. 60 Ill.2d at 557-58, 328 N.E.2d at 541. The Restatement provides:

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against the danger.

invitee from a dangerous condition unless: (1) the dangerous condition constitutes an unreasonable risk of harm and (2) the landowner should realize that the invitee will fail to protect himself against the danger. The court ruled that the plaintiff, Mrs. Fancil, could not meet these two requirements because Officer Fancil's knowledge of the potential danger and his special police training justified the defendant's assumption that Officer Fancil would protect himself from a criminal assault. Most importantly, the court held that the danger created by the defendant was not an unreasonable risk for a police officer since "the danger of being ambushed by criminals lurking in poorly illuminated areas is a risk inherent in the occupation."¹⁷

The court buttressed its interpretation of Section 343 by citing *Netherton v. Arends*¹⁸ and *Horcher v. Guerin*,¹⁹ two appellate court cases in which recovery was denied for injuries caused by inherent risks. The facts of *Netherton* and *Horcher* were substantially the same. In each case, the plaintiff was a fireman who was called to the defendant's premises to fight a blaze caused by the negligence of the defendant. Both of the plaintiffs suffered injuries as a result of fighting the fire.²⁰ Finally, in each case the plaintiff based the legal sufficiency of his complaint on the Illinois Supreme Court decision in *Dini v. Naiditch*.²¹

In *Dini*, the plaintiff, a fireman, was severely burned when a stairway on which he was standing collapsed while he was fighting a fire.²² The supreme court held that the plaintiff was an invitee and, therefore, the landowner owed the plaintiff a duty to make the premises safe for his reception.²³ The court found that the landowner breached this duty by creating a serious fire hazard "in close proximity to the inadequately constructed wooden stairway where the fire was located."²⁴ Given these facts, "the jury could have found that defendants failed to keep the premises in a reasonably safe condition and that the hazard of fire, and loss of life to fight it, was reasonably foreseeable."²⁵

It is arguable that the reference in *Dini* to the failure of the defendants to "keep the premises in a reasonably safe condition" related to both

17. 60 Ill.2d at 557-58, 328 N.E.2d at 541.

18. 81 Ill.App.2d 391, 225 N.E.2d 143 (4th Dist. 1967).

19. 94 Ill.App.2d 244, 236 N.E.2d 576 (2d Dist. 1968).

20. In *Netherton*, the plaintiff alleged that he was injured by the inhalation of noxious fumes and smoke produced by the fire. 81 Ill.App.2d at 339, 225 N.E.2d at 145. In *Horcher*, the plaintiff complained of injury to his eye which occurred when he broke a window to ventilate the building. 94 Ill.App.2d at 246, 236 N.E.2d at 578.

21. 20 Ill. 2d 406, 170 N.E.2d 881 (1960).

22. *Id.* at 412, 170 N.E.2d at 883.

23. *Id.* at 416-17, 170 N.E.2d at 886.

24. *Id.* at 417, 170 N.E.2d at 886.

25. *Id.*

the fire hazard, a risk inherent in the plaintiff's occupation, and the inadequately constructed stairway, a defect of the premises. If the landowner breached his duty to the plaintiff by failing to "keep the premises in a reasonably safe condition," and the unsafe condition referred to in *Dini* consisted only of the inadequately constructed stairway, there would have been no reason for the court to emphasize the seriousness of the fire hazard. Thus, it could be argued that *Dini* allowed recovery for injuries resulting from a fire which was negligently started by the landowner, a risk inherent in the plaintiff's occupation.

However, in *Netherton* and *Horcher*, the Illinois Appellate Court maintained that the negligence in *Dini* was the inadequate construction of the stairway.²⁶ Thus, those decisions held that a fireman, or by logical extension, a police officer could recover only for injuries caused by a defect of the premises, not for injuries caused by inherent risks.²⁷ This interpretation of *Dini* was expressly adopted by the Illinois Supreme Court in *Fancil*.²⁸

Policies Behind the Inherent Risk Doctrine

Although the appellate court found support in *Dini* for its holdings in *Netherton* and *Horcher*, both cases also relied upon matters of policy.²⁹ Essentially, there are two policies which undergird the inherent risk doctrine. Although courts have not always articulated both policies, both have always been applicable in inherent risk cases.

The first of these policies has its roots in a fact pattern common to inherent risk cases. Where firemen have been injured fighting fires ignited as a result of the landowner's negligence,³⁰ courts have refused to

26. *Horcher v. Guerin*, 94 Ill.App.2d 244, 247-48, 236 N.E.2d 576, 578-79 (2d Dist. 1968).
Netherton v. Arends, 81 Ill.App.2d 391, 394-95, 225 N.E.2d 143, 145-46 (4th Dist. 1967).

27. *Id.*

28. 60 Ill.2d at 558, 328 N.E.2d at 541-42.

29. In *Horcher*, the court stated:

As to the fire itself, it is the fireman's business to deal with this particular hazard. He is trained and paid for this. Undoubtedly, most fires can be attributed to negligence of some nature. Therefore, public policy dictates that a landowner does not owe a duty to firemen, upon which liability may be predicated, to exercise care that a fire does not occur on his premises. The exposure to liability which would result from such rule would impose an unreasonable burden upon a person who owned or occupied improved land.

94 Ill.App.2d at 248, 236 N.E.2d at 579. Denial of recovery was based on similar grounds in *Netherton*. 81 Ill.App.2d at 396, 225 N.E.2d at 146.

30. The fireman's cause of action is based on the theory that the landowner should have foreseen that his creation of the fire hazard would start a fire and require the fireman to come onto the premises, risking serious injury. See, e.g., *Erickson v. Toledo, P. & W. R.R.*, 21 Ill.App.3d 546, 315 N.E.2d 912 (1st Dist. 1974); *Horcher v. Guerin*, 94 Ill.App.2d 244, 236 N.E.2d 576 (2d Dist. 1968); *Netherton v. Arends*, 81 Ill.App.2d 391, 225 N.E.2d 143

impose liability on the landowners. The reason for this refusal was the fear that landowners might hesitate to summon the aid of firemen because of the possibility of a lawsuit in the event one of them should suffer an injury. Since fires constitute a threat to the public, it is clearly preferable that they be given attention by trained personnel as quickly as possible.³¹ Consequently, in order to eliminate hesitancy on the part of landowners to call for help, courts deny recovery as a matter of policy in spite of the relative carelessness of the landowner in creating the dangerous condition.³²

It is only when the landowner's negligence creates the need for the police officer or fireman to enter the premises that this first policy applies.³³ However, this fact was not present in *Fancil*. The negligence of the defendant did not create the need for Officer Fancil to enter the premises and confront the danger. Here, as the defendant knew, Officer Fancil entered the premises as part of his nightly inspections. Because of this fact, the defendant in *Fancil* was not suddenly faced with the dilemma whether to handle the burglars himself or summon the police and risk a possible lawsuit in the event of injury to an officer. As a result, there was no ground for applying a policy designed to encourage landowners to seek the aid of the police.

The second policy upon which the inherent risk doctrine is based might be termed assumption of the risk. In their decisions, including *Fancil v. Q.S.E. Foods, Inc.*, courts essentially are ruling that police officers and firemen assume the risks incidental to their respective professions.³⁴ The reasoning behind this policy is that no duty is owed to police officers and firemen for services for which they are paid and trained.³⁵

The policy of assumption of the risk is evident in *Fancil*. However, this policy may not be a sufficient basis for extending the inherent risk doctrine to *Fancil*-type cases. The inapplicability of the first policy underlying the traditional inherent risk doctrine should have prompted the Illinois Supreme Court to analyze the duty issue more cautiously. It is submitted that the court should have examined critically whether

(1st Dist. 1967); *Jackson v. Volveray*, 82 N.J. Super. 469, 198 A.2d 115 (1964).

31. See *Suttie v. Sun Oil Co.*, 15 Pa. D. & C. 3, 5-6 (Phila. Co. 1931).

32. *Id.*

33. See cases cited in notes 30 & 31 *supra*.

34. See, e.g., *Krauth v. Geller*, 31 N.J. 270, 273, 157 A.2d 129, 130-31 (1960), where the court stated: "it is quite generally agreed the owner or occupier is not liable to a paid fireman for negligence with respect to the creation of the fire The rationale of the prevailing rule is sometimes stated in terms of assumption of risk" See also *Horcher v. Guerin*, 94 Ill.App.2d 244, 248, 236 N.E.2d. 576, 579 (2d Dist. 1968); *Buren v. Midwest Industries, Inc.*, 380 S.W. 96, 98 (Ky. App. 1964).

35. *Krauth v. Geller*, 31 N.J. at 274, 157 A.2d. at 131.

all risks inherent in the occupation of police officers are reasonable. In addition, the court should have considered alternative public policies which warrant placing responsibility on a landlord in situations like *Fancil*.

THE ALTERNATIVE APPROACH

Are all inherent risks reasonable?

Following the traditional inherent risk analysis, the Illinois Supreme Court in *Fancil* concluded that police officers cannot recover for injuries caused by risks inherent in their occupation because such dangers are reasonable to them.³⁶ While the opinion explicitly referred to the reasonableness of inherent dangers, the court offered no factual basis for this conclusion. Admittedly, the court attempted to justify its position by stating that police officers are armed and trained to protect themselves against inherent dangers which they might confront while patrolling a darkened area.³⁷ Although these factors are relevant in evaluating whether a dangerous condition is reasonable, they are not determinative. Training is undoubtedly helpful in enabling a police officer to protect himself when he can see his adversary; it may be of no value when he cannot see the adversary. Thus, it is possible that no amount of training can protect a police officer from ambush by a criminal hidden under the cover of darkness. If this is true, then there is no justifiable basis for claiming that the risk is reasonable simply because apprehending burglars is part of the officer's job.

Consequently, the court should have determined whether the training received by Officer Fancil would have enabled the average police officer to protect himself before ruling that the danger of patrolling the darkened premises was reasonable. In fact, inquiring into the ability of an invitee to protect himself against a potential danger would seem to be the only way to determine whether a risk is reasonable or unreasonable.³⁸

36. 60 Ill.2d at 558, 328 N.E.2d at 541.

37. *Id.*

38. In the usual case, unlike the situation in *Fancil*, an invitee will only be able to recover against the landowner if the injury is caused by a hidden defect. PROSSER, HANDBOOK OF THE LAW OF TORTS 394 (4th ed. 1971). When the defect is not hidden the general rule is to dismiss the action since the invitee is usually free to avoid the obvious risk. RESTATEMENT (SECOND) OF TORTS § 343A. The reasonableness of the danger, measured by the ability of the invitee to protect himself, is rarely discussed since the hidden aspect of the danger is a sufficient basis for finding the danger unreasonable. In these cases the duty of the landowner to warn the invitee depends upon whether the landowner should have discovered the existence of the dangerous condition. See Appendix to RESTATEMENT (SECOND) OF TORTS § 343, containing annotated cases decided under section 343.

In situations such as *Fancil*, however, where the invitee is obligated to proceed against

It is the ability of the invitee to protect himself which, in large measure, determines the likelihood of harm; and it is the likelihood of harm which determines the magnitude of the risk. By failing to make such an inquiry, the court, in effect, held that inherent risks are reasonable *per se*.

The likelihood of harm, however, is not slight when a landowner knowingly fails to illuminate an area which previously has been burglarized. If, in fact, the court had inquired into the ability of Officer Fancil to protect himself, it would have discovered available evidence which indicates that the *Fancil*-type case is by no means rare. A recent Justice Department study shows that many of the circumstances which were present in *Fancil* are often present in fatal assaults on law enforcement officers, namely: (1) the fact that the assault took place on commercial premises, (2) that the suspect was engaged in the commission of a separate offense, (3) that the separate offense was burglary, and (4) that the

a known danger, the unreasonableness of the condition is not as apparent since the danger is not hidden. Here, the proper test for determining when the condition is unreasonably dangerous is an analysis of whether the invitee can be expected to protect himself in the specific situation. The distinction is developed by Harper and James in THE LAW OF TORTS:

People can hurt themselves on almost any condition of the premises. That is certainly true of an ordinary flight of stairs. But it takes more than this to make a condition unreasonably dangerous. If people who are likely to encounter a condition may be expected to take perfectly good care of themselves without further precaution, then the condition is not unreasonably dangerous because the likelihood of harm is slight.

HARPER & JAMES, THE LAW OF TORTS 1489-90 (1956). Conversely, if a person cannot be expected to take good care of himself, a likelihood of harm exists and the danger is unreasonable. This approach was expressly applied in *Dawson v. Payless for Drugs*, 248 Ore. 334, 340, 433 P.2d 1019, 1022 (1967), in favor of an invitee who slipped on icy steps. The situation is analogous to *Fancil* in that the invitee was under an obligation to walk the steps and encounter the known danger. The Oregon court reasoned that the danger constituted an unreasonable risk of harm by stating:

[I]t is pointed out that an ordinary flight of stairs in a common outdoor setting is not an unreasonably dangerous condition, whereas the same stairway covered with ice may be. In the latter circumstance, "the condition of danger is such that it can not be encountered with reasonable safety even if it is known and appreciated." (citation omitted)

Id.

For similar cases holding the landowner liable for the creation of slippery or icy conditions of the premises, see *Adams v. R. S. Bacon Veneer Co.*, 162 N.W.2d 470 (Ia. 1968); *Paterson v. W. T. Rawleigh Co.*, 274 Minn. 495, 144 N.W.2d 555 (1966), *Csizmádea v. P. Ballantine and Sons*, 287 F.2d 423 (2d Cir. 1961), *King Coopers, Inc. v. Mitchel*, 140 Colo. 119, 342 P.2d 1006 (1959).

In *Fancil*, therefore, the ability of the officer to protect himself is the important inquiry. A bald assertion of the officer's general training does not answer the question whether his training afforded him any protection against the hidden burglar on the night of his murder. For a discussion of a police officer's obligation to proceed against dangerous conditions, see note 53 *infra*.

attack came without warning.³⁹ Obviously, if police officers often are injured under these circumstances,⁴⁰ they may not be able to protect themselves very well. If the test for reasonableness of a particular risk is the ability of the invitee to protect himself against it, the risk in *Fancil* arguably was unreasonable.

In a different but analogous context, courts have allowed police officers to recover for injuries despite the fact that the officer was confronting a risk inherent in his job. Most notably, courts have allowed such recovery in cases where the officer was injured as a result of a high speed chase.⁴¹ They have frequently based their decisions on the fact that the officer not only has a legal right but a duty to pursue and attempt to apprehend the speeder. The performance of such a duty, it is reasoned, cannot constitute a defense against a suit for damage.⁴²

The California Court of Appeals discussed this issue in *McAllister v. Cummings*⁴³ in which the court sustained an action for injuries to a highway patrol officer whose motorcycle collided with the defendant's car, which had improperly entered the highway. The collision occurred while the officer was pursuing another traffic violator. The defendant requested the court to instruct the jury regarding assumption of risk, as he contended that highway patrol officers assume the risks of the road. The court refused to tender such an instruction, noting that an officer of the law, charged with the duty of pursuing traffic violators, does not assume the ordinary hazards of the highway.⁴⁴ The ruling rested on the fact that a police officer has no choice about performing his duties. It is sufficient if under the circumstances the assumption of risk was practically unavoidable. Most importantly, the court reasoned that a police

39. Chapman, *Perspectives on Police Assaults in the South Central United States*, NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, U.S. DEP'T OF JUSTICE 13, 22 (1974), cited in Brief for Americans for Effective Law Enforcement as Amicus Curiae at 5, *Fancil v. Q.S.E. Foods, Inc.*, 60 Ill.2d 552, 328 N.E.2d 538 (1975).

40. F.B.I. statistics reveal that sixty percent of all police assaults occur between 8:00 p.m. and 4:00 a.m. UNIFORM CRIME REPORTS 173 (1974). F.B.I. statistics further disclose that the investigation of burglaries is the third most dangerous police activity. UNIFORM CRIME REPORTS 37-38 (1974).

41. See, e.g., *Clausen v. Hightower*, 527 P.2d 922 (Colo. App. 1975) (sheriff allowed to recover for injuries suffered while pursuing a car speeding at 130 miles per hour); *Collins v. Christenberry*, 170 S.E.2d 515 (N.C. App. 1969) (highway patrolman sued and recovered for damages resulting from his attempts to apprehend the defendant, a speeder in a stolen car); *Brechtel v. Lopez*, 140 So.2d 189 (La. App. 1962) (police officer allowed to recover for injuries when forced to pursue the defendant at speeds up to 105 miles per hour).

42. *Brechtel v. Lopez*, 140 So.2d at 193; *Clausen v. Hightower*, 527 P.2d at 923.

43. 191 Cal.App. 2d 1, 12 Cal. Rptr. 418 (1961).

44. *Id.* at 9, 12 Cal. Rptr. at 423.

officer may be unable to protect himself against certain risks which are a part of his job:

An officer is employed by a city to direct traffic. From the very nature of this work he cannot be expected to keep as sharp a lookout for approaching vehicles, and he has a right to have the same degree of care exercised for his safety as any other person lawfully in the street.⁴⁵

In these speeding cases the police officers were confronting risks inherent in their occupation. Although police officers are paid and trained to apprehend speeders, courts have permitted recovery. This is a realistic approach recognizing that an assumption of risk defense is inapplicable when the police officer is obligated to confront a risk that is highly dangerous despite his training.

Admittedly, the speeding cases do not involve the precise issue raised in *Fancil* whether a legal duty is owed by a landowner to a police officer-invitee. However, the assumption of risk defense rejected in *McAllister v. Cummings*⁴⁶ is similar to the assumption of risk policy applied by the courts in determining that a landowner owes no legal duty to protect officers against dangerous conditions inherent in their occupation.⁴⁷ In future litigation courts should make use of the rationale and spirit of these speeding cases. Their message is clear: Police officers do not assume the risks of all dangers inherent in their occupation.

Should the landlord foresee that a police officer will not protect himself?

Under Restatement analysis, a finding of unreasonable risk is not sufficient to impose a duty on the landlord. It also must be established that the invitee's failure to protect himself was foreseeable.⁴⁸ Addressing itself to this second component, the court in *Fancil* held that the landlord could justifiably assume that the policeman would protect himself. The court noted that the policeman knew of the previous burglaries and was armed.⁴⁹ The court also suggested that Officer Fancil proceeded against a known danger because the lack of illumination was obvious to all.⁵⁰ Generally, this factor alone would be sufficient to dismiss the action since a landowner has no duty to prevent an invitee from encountering an obvious danger.⁵¹ It is usually sufficient for a landowner to warn

45. *Id.* at 10, 11, 12 Cal. Rptr. at 423, 424 quoting 2A BLASHFIELDS CYCLOPEDIA OF AUTOMOBILE LAW AND PRACTICE § 1573 (perm ed. 1927).

46. 191 Cal.App.2d 1, 12 Cal. Rptr. 418 (1961).

47. See cases cited in note 34 *supra*.

48. RESTATEMENT (SECOND) OF TORTS §343(b).

49. 60 Ill.2d at 557, 328 N.E.2d at 541.

50. *Id.* at 558, 328 N.E.2d at 541.

51. PROSSER, HANDBOOK OF THE LAW OF TORTS 394 (4th ed. 1971).

the invitee of unknown defects on the premises. Presumably, once these dangers are exposed the landowner has satisfied his duty and the invitee is free to avoid the harm.

There are, however, exceptions to this general rule when the invitee is likely to proceed against the danger despite its obviousness. Thus, in circumstances in which the invitee is required to encounter a known danger, the obviousness of the condition is not enough to justify a conclusion that the landowner has no duty. Section 343(A) of the Restatement⁵² requires landowners to take positive steps to protect invitees if there is a likelihood of harm despite the obviousness of the danger. It should be noted that Officer Fancil was not free to avoid the obvious danger since an officer can be cited for neglect of duty for failing to respond.⁵³ Therefore, although the lack of lighting was obvious, a duty could be imposed consistent with the Restatement.

The court's reliance on officers being armed and trained again indicates an assumption that the police will protect themselves from any job-related danger. As previously discussed, this assumption may not be valid.⁵⁴ In addition, the facts in *Fancil* present a situation in which a

52. Section 343A(1) of the Restatement states:

A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

RESTATEMENT (SECOND) OF TORTS §343A(1) (1965). Comment f to this section notes additionally:

There are, however, cases in which the possessor of land can and should anticipate that the dangerous condition will cause physical harm to the invitee notwithstanding its known and obvious danger. In such cases the possessor is not relieved of the duty of reasonable steps to protect him, against the known or obvious condition or activity, if the possessor has reason to expect that the invitee will nevertheless suffer physical harm.

RESTATEMENT (SECOND) OF TORTS §343A, Comment f (1965).

53. *Bagat v. Police Bd.*, 95 Ill.App.2d 45, 238 N.E.2d 89 (1st Dist. 1968). In this respect, the police officer is more likely to suffer injury than the average lay person because the lay person is free to avoid an obviously dangerous situation. Additionally, the International Association of Chiefs of Police, Inc., in its textbook on police patrol functions notes that:

[C]rime prevention cannot be accomplished from the front seat of an automobile.—It can only be done on the street or in the bars or in the alleys when and where the criminal is most likely to strike The beat officer who fails aggressively to seek and correct crime breeding conditions is an officer who fails to serve. The man who feels that patrol involves only responding to radio calls is a man who is performing only the secondary task to which he is assigned.

O'CONNOR & VANDERBOSCH, *THE POLICE PATROL FUNCTION* 31-32 (1967), cited in Brief for Americans for Effective Law Enforcement as Amicus Curiae at 8, *Fancil v. Q.S.E. Foods, Inc.*, 60 Ill.2d 552, 328 N.E.2d 538 (1975).

54. See text at notes 37-40 *supra*.

countervailing public policy of effective crime control should have been considered by the court. The presence of illumination and its positive effect on the routine patrol function is no longer a subject of speculation. It deters crime; it helps a patrolling officer detect criminal activity; and it facilitates an officer's efforts to apprehend the suspects at the scene of a crime.⁵⁵ Logically, it would also reduce the incidence of surprise attacks on officers who enter someone's premises in the performance of their duty. The landlord in *Fancil* knew of the risk of burglary and had provided lighting which could minimize the risk. When the landlord knows of the foreseeable danger and is able to protect the police officer, it is unwise to allow him to hide behind an unproven assumption that police officers can protect themselves in any dangerous situation. Unfortunately, by refusing to impose a legal duty the *Fancil* decision discourages landowners from making positive contributions toward their own protection and the safety of the patrolling officer.

The consequences of the ruling are two-fold. First, permitting landowners to knowingly ignore dangerous conditions on their premises subjects the officer to increased and unnecessary danger. Police officers usually will patrol the premises regardless of the increased danger as they can be cited for neglect of duty for failing to do so.⁵⁶ Second, the *Fancil* holding reflects an improper attitude regarding society's obligation toward crime control. The police cannot protect the public single-handedly, and the public should not be allowed to act as if they can. In small ways members of the public should be encouraged to assume some reciprocal responsibility in aiding those police officers who protect their homes and stores.

The *Fancil* decision discourages storeowner participation by allowing the defendant to knowingly disconnect his mercury light although it increased the danger to officers patrolling the darkened premises. The court places the entire burden on the officer. The officer must confront dangers beyond his control, yet the landowner is not forced to minimize

55. A study in Oakland, California revealed a 23% decline in commercial burglaries and decrease of up to 10% in other areas after installation of improved lighting. Jones, *The Impact of Street Lighting on Crime and Traffic Accidents*, The Library of Congress, Legislative Reference Service 10 (August 1970), cited in Brief for Americans for Effective Law Enforcement as Amicus Curiae at 7, *Fancil v. Q.S.E. Foods, Inc.*, 60 Ill.2d 552, 328 N.E.2d 538 (1975). In Kansas City, Missouri a study showed a reduction in commercial burglaries of 56% and a 67% reduction in assaults committed upon commercial premises after installation of improved lighting. Wright, *The Impact of Street Lighting on Street Crime*, NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, U.S. DEP'T OF JUSTICE 84-86 (1974), cited in Brief for Americans for Effective Law Enforcement as Amicus Curiae at 7, *Fancil v. Q.S.E. Foods, Inc.*, 60 Ill.2d 552, 328 N.E.2d 538 (1975).

56. *Bagat v. Police Bd.*, 95 Ill.App.2d 45, 238 N.E.2d 89 (1st Dist. 1968).

dangers within his control. Under these circumstances it is not necessary to approach the issue of legal duty so narrowly. As a California appellate court has noted:

There are some special situations in which the high potential of risk to the plaintiff, coupled with the ease of protective steps available to the defendant have led the courts to expand the relative weight of the foreseeability factor and thus diminish the other ingredients which normally compound that broth of elements called duty.⁵⁷

Fancil was one such situation. Clearly there existed a high potential of risk to the police officer and protective steps were readily available to the storeowner by maintaining the light in question at a minimal cost.⁵⁸ The Illinois Supreme Court should not have tolerated this inequitable apportionment of responsibility. The public's concern for their own safety, as well as that of the officer, and the storeowner, is ill-served if the storeowner can refuse to minimize the potential dangers facing the officer who is protecting his property and conferring an economic benefit on his enterprise.

CONCLUSION

At stake is the overriding question whether a commercial property owner has a duty under certain circumstances to minimize the opportunity for crime and to protect patrolling officers from surprise, and perhaps fatal assaults. The Illinois Supreme Court refused to impose such a duty. However, under the alternative approach described herein courts would be more likely to hold the landowner accountable. In situations like *Fancil*, courts could impose a legal duty on the storeowner by finding that the danger was unreasonable in view of the officer's inability to adequately protect himself. When the landlord knows of the danger and can reduce the risk, he should not be allowed to assume that the officer will protect himself from a situation he is not free to avoid. Of course, the imposition of a legal duty does not signal an automatic

57. *Wright v. Arcade School Dist.*, 230 Cal.App.2d 272, 278-79, 40 Cal.Rptr. 812, 815 (dictum). The court ultimately refused to impose a duty on the school district when a five year old school boy was hit by a car on the way to school.

58. The cost of the light would have been \$4.00 per month, including rental of the light itself. Letter from C.C. Schachtsiek, Rate Administration Supervisor, Central Illinois Public Service Company, Springfield, Illinois (November 8, 1974), cited in Brief for Americans for Effective Law Enforcement as Amicus Curiae at 6, *Fancil v. Q.S.E. Foods, Inc.*, 60 Ill.2d 552, 328 N.E.2d 538 (1975). It should also be noted that the amount of energy consumed in outdoor lighting is insignificant when compared with the monetary loss prevented by its use. Looney, Position Paper, International Association of Chiefs of Police, (December 13, 1973), cited in Brief for Americans for Effective Law Enforcement as Amicus Curiae at 7, *Fancil v. Q.S.E. Foods, Inc.*, 60 Ill.2d 552, 328 N.E.2d 538 (1975).

recovery. However, it affords the plaintiff the opportunity to convince the jury that the landowner's failure to illuminate the premises was the proximate cause of the officer's injury, in that it enabled burglars to conceal themselves in the darkness and ambush the inspecting officer. In the larger context, it establishes a valid public policy favoring citizen responsibility in reducing crime and protecting officers who risk their lives to protect the public.

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