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Eimann v. Soldier of Fortune Magazine: Determining the Scope of Duty in Negligence Cases

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I. INTRODUCTION

One of the most fundamental yet misunderstood prongs of the negligence formula is the scope of duty prong. For years courts and scholars have debated how the scope of duty should be determined.[1] Some authorities seek to define the scope of duty by speculating whether the defendant was the proximate cause of the plaintiff's injury;[2] others claim that the scope of duty question can be answered by some sort of foreseeability test;[3] while others use an algebraic formula to determine whether a defendant's duty should extend to a particular risk.[4]

A small minority of scholars, however, have proposed a multi-factor policy test to determine the scope of duty.[5] When grappling with the scope of duty question, the advantage of using a multi-factor policy analysis rather than a proximate cause analysis, a pure foreseeability test, or even an algebraic formula is the intellectual integrity inherent in this type of multi-factor policy analysis. Under the multi-factor policy analysis, the court recognizes and addresses important considerations that play an important part in determining the scope of duty. By openly dealing with and balancing these considerations, the court preserves the intellectual integrity of its analysis.

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1. Green, *Proximate Cause in Connecticut Negligence Law*, 24 CONN. B.J. 24, 25 (1950).

2. *Id.* at 27.

3. Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014, 1029 (1928).

4. United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).

5. Because a small minority of scholars advocate this test, the literature on the subject is by and large written by the same individuals. The leading proponents of determining the scope of duty through a multi-factor policy analysis include the following: Leon Green, formerly Professor of Law, University of Texas, Dean and Professor, University of North Carolina School of Law, Professor of Law, University of Yale, and Dean and Professor of Law, Northwestern University; Charles O. Gregory, Associate Professor of Law, University of Chicago Law School; E. Wayne Thode, Professor of Law, University of Utah College of Law; Carl S. Hawkins, Professor of Law, J. Reuben Clark School of Law, Brigham Young University, and former Executive Director of Florida's Academic Task Force for Review of the Insurance and Tort Systems, 1986-88.

This casenote will examine the tests which the federal district court and Fifth Circuit Court of Appeals used to determine the scope of duty in *Eimann v. Soldier of Fortune Magazine*,[6] and praise the Fifth Circuit for rejecting the proximate cause analysis proposed in the lower court, but suggest that the court should go further and adopt a multi-factor policy test.

II. *Eimann v. Soldier of Fortune*

A. Facts

In September 1984, John Wayne Hearn placed an advertisement in *Soldier of Fortune* magazine (SOF). The ad ran to the end of November and read, " 'EX-MARINES—67-69 'Nam Vets, Ex-DI, weapons specialist—jungle warfare, pilot, M.E., high risk assignments, U.S. or overseas."[7] Five months later, Hearn murdered Sandra Black at the behest of Robert Black, her husband. Hearn was successfully prosecuted for the murder of Sandra Black and is currently serving two concurrent life sentences.[8] "Sandra Black's son, Gary Wayne Black, and her mother, Marjorie Eimann, sued SOF and its parent, Omega Group, Ltd. for wrongful death under Texas law on the theory that SOF negligently published Hearn's classified ad."[9]

At the civil trial, "Hearn attempted to explain the meaning the classified ad he had placed with SOF. He testified that . . . 'M.E.' meant multi-engine planes; and 'high risk assignments' referred to work as a bodyguard or security specialist.' "[10] Hearn also stated that he and his partner, also a former Marine, placed the ad in hopes of recruiting Vietnam veterans to work as bodyguards or security men for executives. Hearn's partner quit the enterprise shortly after the first ad ran and never engaged in any of the work the ad generated.[11]

Both Hearn and his partner testified that they did not place

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6. Eimann v. Soldier of Fortune Magazine, 880 F.2d 830 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 729 (1990).

7. *Id.* at 831. The facts in this case are long and complicated. A good portion of the facts will be recounted in the paper in order to illustrate the specific factors that the Fifth Circuit took into account when applying its balancing test. Some facts that the Fifth Circuit did not include in its opinion that were shown at the trial and that appeared in the brief for the appellees will be recounted to indicate that the court's balancing may not have been as accurate as it could have been.

8. *Id.* at 832.

9. *Id.*

10. *Id.* at 831.

11. *Id.*

the ad with the intent to participate in criminal activity; however, about ninety percent of those who responded to the ad wanted to engage in some sort of criminal activity "including beatings, kidnappings, jailbreaks, bombings and murders."[12] The ad did produce one "lawful inquiry from an oil conglomerate in Lebanon seeking ten bodyguards; Hearn received a commission for placing seven men with the company."[13]

At the time Black contacted Hearn, Black had already tried unsuccessfully to solicit "at least four friends or coworkers from Bryan, Texas to kill Sandra Black [his wife] or help him kill her."[14] Hearn testified that early conversations with Black focused on Black's obtaining bodyguard work through Hearn. Hearn further testified that later calls focused on the sale of Black's gun collection to Hearn; and that on January 9, 1985, Hearn traveled from Atlanta to Black's home to examine the gun collection. During the visit, Black "hinted" that he wanted Hearn to kill his wife.[15]

After Hearn returned to Atlanta, Black was in frequent contact with him and on one occasion spoke with Hearn's girlfriend Debbie Bannister. Bannister became acquainted with Hearn when she replied to Hearn's ad in SOF. During their conversation, Black asked Bannister whether Hearn would kill Black's wife. Bannister passed the message to Hearn, and Black and Hearn talked extensively during the next few weeks. After a failed murder attempt in which Hearn was to help Black kill his wife, Hearn killed Sandra Black on February 21, 1985. By this time, Hearn had also killed Bannister's sister's ex-husband (January 6, 1985) and Bannister's husband (February 2, 1985).[16]

Neither Hearn nor his partner had a criminal record prior to the time that they placed the ad in SOF and "[n]either had received a dishonorable discharge from the Marines. Further, Hearn included his real name and correct address in submitting the ad to SOF; the ad itself listed Hearn's correct home telephone number."[17]

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12. *Id.*
13. *Id.*
14. *Id.* at 831-32.
15. *Id.* at 832.
16. *Id.*
17. *Id.*

B. Evidence Presented in the District Court

At the trial, "Eimann introduced into evidence about three dozen personal service classified ads selected from the 2,000 or so classified ads that SOF had printed from its inception in 1975 until September 1984."[18] These ads offered services for, among other things, " 'Mercenary for Hire,' 'bounty hunter' or 'mechanic'; others promised to perform 'dirty work,' 'high risk contracts' or to 'do anything, anywhere at the right price.' "[19] "Eimann presented evidence that seven and perhaps as many as nine classified ads had been tied to crimes or criminal plots."[20]

Eimann offered stories from major news organizations "including the Associated Press, United Press International, *The Rocky Mountain News*, *The Denver Post*, *Time* and *Newsweek* that reported on links between SOF classified ads and at least five of these crimes."[21] Evidence also showed that SOF had on more than one occasion talked and cooperated with law enforcement officials regarding crimes linked to classified ads appearing in SOF.[22]

Eimann also elicited expert testimony from Dr. Park Dietz, a forensic psychiatrist who had studied SOF's classified ads and its readers. "Dietz testified that an average SOF subscriber—a male who owns camouflage clothing and more than one gun—would understand some phrases in SOF's classified ads as solicitations for illegal activity given the 'context' of those ads."[23]

As a result of his research, Dietz postulated "that the Hearn ad 'or any other personal service ad in Soldier of Fortune in 1984 foreseeably is related to the commission of domestic crimes.' "[24] Dietz suggested that taken in the context of the magazine, Hearn's ad would take on added meaning that it would not have if published in another magazine like "Esquire or Vanity Fair."[25]

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18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*; *see* Brief for the Appellees at 11-13, Eimann v. Soldier of Fortune Magazine, 880 F.2d 830 (5th Cir. 1989)(No. 88-2499) [hereinafter Appellees' Brief] (The brief for the appellees contains more detail concerning the circumstances regarding communication with law enforcement officials than do the facts listed by the Fifth Circuit.).
23. *Eimann*, 880 F.2d at 832.
24. *Id.* at 833.
25. *Id.*

Dietz admitted, however, that he could not distinguish with any certainty lawful SOF classified ads from criminal ads on the basis of code words or phrases because some ads were too ambiguous. As Dietz finally conceded, " 'The code system doesn't work.' "[26] Although Dietz admitted that the code system did not work, the plaintiffs still relied on the theory that SOF was negligent because it printed ads that could foreseeably lead to criminal activity—specifically murder.

In defense, the president of SOF, Robert K. Brown, testified that "he did not know or suspect in 1984 that some of the SOF classified ads had been linked to criminal plots."[27] These denials were echoed by SOF staff employees. SOF also argued that the first amendment prohibited liability from attaching to SOF because a publisher has no duty to investigate the truth or untruth of ads.[28]

The district court submitted special interrogatories to the jury, who found that SOF's negligence was the proximate cause of Sandra Black's death. The jury also found that SOF was grossly negligent, which was defined as conscious indifference, and "awarded Eimann $1.9 million in compensatory damages and $7.5 million in punitive damages."[29]

On appeal, the Fifth Circuit reversed the trial court's ruling finding as a matter of law that SOF had no duty to guard against this type of risk. It also ruled that because there was no duty, the first amendment issue need not be addressed.[30]

III. Methods of Resolving the Scope of Duty Question

The purpose of this casenote is to examine the scope of duty tests used by the district court and Fifth Circuit and to propose that the correct analysis of the scope of duty lies in multi-factor policy analysis, which may be a more difficult test to apply yet one with more intellectual integrity.

The negligence formula proposed by this casenote is as follows:

1. Duty
   a) Basis

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26. *Id.*
27. *Id.*
28. *Id.* at 834.
29. *Id.* at 833.
30. *Id.* at 834.

b) Scope
2. Breach
3. Causation
4. Damages

The first prong of this negligence formula is duty. Duty is further subdivided into two prongs consisting of basis and scope. Under the basis prong, some sort of basis or foundation must exist upon which a duty can be predicated. The basis upon which a duty is usually predicated is "ordinary care in the circumstances." Under the scope prong, the court will analyze multiple factors to determine whether the defendant's duty of ordinary care will extend to the particular risk encountered in the particular case. If the court finds that the defendant's duty does not extend to this type of risk then no liability attaches. If, however, the court decides that the duty does extend to this type of risk, then the question of whether the defendant breached his duty will be submitted to the jury. The second prong of this negligence formula is breach. The jury is the finder of fact. As such, they alone must determine whether the defendant breached his duty of ordinary care in the circumstances. This conclusion can only be made after the jury hears and deliberates over all relevant facts.

The third prong of this negligence formula is causation. Causation is merely cause in fact. Determining causation is simple. The court need only "follow the molecules;"[31] and if a causal connection exists between what the defendant did and the plaintiff's injury, then proximate cause is satisfied. The proximate cause prong, under this formula, is almost always satisfied.

The last prong of this negligence theory is damages. Damages are determined by the jury after hearing and deliberating over the relevant facts relating to the plaintiff's injury.[32]

The main difference between the negligence formula proposed in this article and other negligence formulas being used by courts today is the manner in which liability is limited or extended in a particular case. Most courts today are using proximate cause and foreseeability as the sole means of limiting or extending liability. The negligence formula proposed by this ar-

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31. "Follow the molecules" is a term espoused by Professor Carl Hawkins and refers to causation at a molecular level. If causation can be satisfied at a molecular level (which is usually possible) then no further proof of causation is needed.

32. Lecture by Carl S. Hawkins, *Brigham Young University* Torts Class (Sept. 30, 1988).

ticle rejects proximate cause and foreseeability as a means to limit or extend liability and instead proposes an alternative formula for analyzing negligence cases.

A. Proximate Cause

The Fifth Circuit's opinion began with a recitation of the standard negligence formula. "Under Texas law, negligence liability requires the existence of a duty, breach of that duty, and an injury proximately resulting from that breach."[33] This formula has been almost universally adopted. The way the formula is applied, however, varies dramatically depending on the jurisdiction. Most courts today are using proximate cause in place of a scope of duty analysis as a means of limiting or extending liability.[34] In the words of one scholar,

> The doctrine of 'proximate cause' has come to dominate the administration of negligence law in most American jurisdictions. It is a parasite which has sucked the life blood of the judicial process so completely in some areas that its present usage only betrays the paralysis of rational thought on the part of the profession.[35]

In an attempt to limit liability, the district court required the jury to make two findings before liability would attach. First the jury had to find that SOF was negligent. The jury could find that SOF was negligent if SOF should or could have foreseen that the Hearn's ad would lead to criminal activity. The finding of negligence alone, however, did not mandate that liability attach. For plaintiff to recover the court required the jury to fur-

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33. *Eimann*, 880 F.2d at 833 (citing City of Gladewater v. Pike, 727 S.W.2d 514, 517 (Tex. 1987)).

34. One author writing on the development of proximate cause in negligence cases stated the following:

> The proximate cause method of analysis developed in negligence cases for understandable reasons. The negligence tort is a general tort, whereas each intentional tort is narrow and specific and has built-in liability limitations in its specific elements. Also, there is less pressure to place limits on liability for the unexpected results of intentional harm. Because of the generalized nature of the negligence tort and the less anti-social nature of defendant's conduct, there was obviously a felt need for some means of limiting the scope of liability. The means that emerged in most jurisdictions was the 'proximate cause' issue.

Thode, *Tort Analysis: Duty-Risk v. Proximate Cause and the Rational Allocation of Functions Between Judge and Jury*, 1977 UTAH L. REV. 1, 11.

35. Green, *supra* note 1, at 24; *see* Green, *Proximate Cause in Texas Negligence Law*, 28 TEX. L. REV. 471 (1950); *see also* Gregory, *Proximate Cause in Negligence—A Retreat From "Rationalization,"* 6 U. CHI. L. REV. 36 (1938).

ther find that SOF was the proximate cause of Sandra Black's death.[36]

The jury instructions are flawed, however, because negligence and causation (termed as proximate cause) were decided by the same test—the test of foreseeability—and were used as a means to limit liability. Thus, SOF was negligent if it could have foreseen that the ad would lead to criminal activity, but it was only liable if it could have foreseen that the ad would lead to Sandra Black's death. Foreseeability was used to determine if SOF were negligent and again to determine if SOF was liable. By requiring the jury to find this additional element of proximate cause, couched in the language of foreseeability, in order for liability to attach, the court attempted to limit liability. Proximate cause should not be used in this manner.

Limiting liability is a question best decided under the scope of duty prong of the negligence formula. Courts, however, have been able to avoid the tough choices and the analysis required to justify the extension or limitation of liability and instead have hidden behind the veil of proximate cause. As one author has stated, "Instead of carefully searching out the particular step where the plaintiff failed and putting a finger on the exact weakness [in the case where proximate cause has been used to deny plaintiff's recovery], it was much easier and just as productive of a correct result to declare that 'proximate' cause was lacking, or that the consequences were too 'remote.' "[37]

The brief for the appellees illustrates how ingrained this problem has become in negligence law. Citing Texas law the appellees' brief states, "Proximate cause . . . requires proof of both cause in fact and foreseeability."[38] In this statement lies the problem. Instead of using foreseeability as merely a factor to consider when applying the scope of duty prong of the negligence formula, courts and lawyers alike have decided to use fore-

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36. The district court allowed the jury to find SOF negligent if it could find that (1) the relation to illegal activity appears on the ad's face; or (2) 'the advertisement, embroidered by its context, would lead a reasonable publisher of ordinary prudence under the same or similar circumstances to conclude that the advertisement could reasonably be interpreted' as an offer to commit crimes. . . . The jury answered 'yes' to the first two interrogatories, and found that SOF's negligence was a proximate cause of Sandra Black's death . . . .

Eimann, 880 F.2d at 833.

37. Green, *Are Negligence and "Proximate" Cause Determinable by the Same Test?—Texas Decisions Analyzed*, Vol. I No. 3 TEX. L. REV. 243, 247 (1923).

38. Appellees' Brief, *supra* note 22, at 40.

seeability to determine proximate cause and thereby limit liability.

Again, proximate cause has no place in determining the scope of duty question and should be limited to cause in fact. While foreseeability should not be used to limit liability under the proximate cause prong of the negligence formula, it is appropriate to analyze foreseeability under the breach of duty prong of the formula as one of many factors considered by the judge in determining whether a duty exists.[39] The reason that it is inappropriate to include foreseeability under a proximate cause analysis is because it deals with fault and the ultimate question of whether liability should attach. Causation is strictly a matter of "following the molecules" and determining cause and effect. Writing about Texas negligence law, Leon Green said the following:

> [T]he term 'proximate cause' is defined as requiring 'foreseeability or anticipation of some harm' as the result of defendant's conduct. This gives a context of fault or some other form of wrongdoing, and destroys or at least overshadows the simple idea of cause and effect. . . . [C]ausal relation is a matter of ascertaining what has actually happened, not what could be foreseen as likely to happen or what would probably happen. The 'foreseeability of harm' formula is properly used to determine the issue of negligence but it has no bearing on causal relation.[40]

Notably, the Fifth Circuit did not use the "chameleon"[41] of proximate cause in determining the scope of duty question. It at least tried to use some analysis in determining whether SOF's duty extended to the risk of someone hiring a killer through one of SOF's classified ads. Even though the Fifth Circuit refused to

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39. Thode, *supra* note 34, at 20-21; *see also* Green, *supra* note 3.

40. Green, *Proximate Cause in Texas Negligence Law*, *supra* note 35, at 475-76.

41. The reason proximate cause is referred to as a chameleon is because it has chameleon-like qualities. Whenever any portion of the negligence formula gets tough—usually the decision of whether the duty extends to this type of a risk (scope of duty)—the courts use proximate cause to solve the problem. Either the risk was too remote or distant and therefore recovery is denied or the court allows recovery by saying that this particular risk was proximate. This allows the courts to avoid careful consideration of the policies behind its decision and to avoid having to make the hard choice. "The ease with which it [proximate cause] permits the lumping of a whole case into a single conceptual bundle saves the pains of bit by bit consideration of details and holds out the temptation to save the time and trouble required for basic analysis." *Id.* at 471.

use proximate cause, however, the method it used to determine the scope of duty can be improved.

Instead of using proximate cause as the method of determining whether SOF's duty extends to Hearn's murder of Sandra Black, the Fifth Circuit used a risk-utility balancing test. In summation of this balancing test, the court stated that duty exists only after the determination of two related factors: "(1) whether the defendant owes an obligation to this particular plaintiff to act as a reasonable person would in the circumstances; and (2) the standard of conduct required to satisfy that obligation."[42]

Since the court assumes that a publisher owes a duty of reasonable care to print things that will not put the public in mortal danger, the only question remaining is whether the second factor stated by the court was fulfilled or "whether SOF's decision to print Hearn's ad violated the standard of conduct."[43] To answer this question, the Fifth Circuit chose to use the test created by Judge Learned Hand.

B. Learned Hand's Algebraic Formula

Hand suggested that an algebraic formula could be used to determine negligence. In order to explain exactly what his formula entailed Hand stated, "[I]f the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i. e., [sic] whether BL."[44] Although this test is much more effective than a proximate cause analysis, in that it requires the court to look at relevant factors and balance various interests, it also has its flaws. Many writers have criticized the theory as being utilitarian. Others have called the test unquantifiable and therefore not a true algebraic expression.

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42. *Eimann*, 880 F.2d at 834. Essentially, the Fifth Circuit bifurcated the duty question into duty (ordinary care in the circumstances by a reasonable person) and scope of duty (does the risk to this particular plaintiff come within the scope of this defendant's use of reasonable care). Whether the court chooses to put the scope of duty question under the duty prong of the negligence formula or the scope of duty prong as this article suggests, the question of scope of duty should be reached by the same analysis.

43. *Id.* at 835.

44. United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).

1. The utilitarian argument

Utilitarian arguments tend to be couched in economic terms. Since efficiency and utility are the basis of the philosophy, other important factors can be overlooked. Linda S. Mullenix has said that the Hand formula, "has been fairly criticized for its emphasis on economic efficiency and lack of concern for human variables and individual rights."[45] Since the Hand formula focuses so much on economic efficiency, other facts, such as moral and administrative considerations, are not weighed when determining whether negligence exists.[46]

2. Hand's formula is unquantifiable

Another criticism of the Hand formula is that the factors sought to be plugged into this algebraic formula cannot be quantified and therefore have no part in a mathematical equation. The burden of prevention, probability of the harm, and gravity of the resulting injury are abstract principles that only acquire meaning in the context of one's experience and worldview.

To one person the probability of the harm may be very high; but to another person, the probability of the same harm may seem remote. If these criteria cannot be quantified, how can a court determine whether two individual criteria multiplied together will be greater or lesser than the one standing alone?

Again, even if a court thought it could quantify the factors, what is to stop a different court from quantifying an identical or similar fact pattern in a different manner? This would defeat the whole purpose of the formula. The formula is a tool to achieve precision and stability in determining the scope of duty; but without numerical value attached to each of Hand's balancing principles, the stability and certainty sought by the formula can never be realized. The *Eimann* case illustrates this principle.

C. How the Fifth Circuit Used Hand's Formula

The Fifth Circuit began its analysis by examining the probability of the harm. The court stated that "SOF classified

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45. Mullenix, *Burying (With Kindness) the Felicific Calculus of Civil Procedure*, 40 VAND. L. REV. 541, 561 (1987).

46. Tribe, *Technology Assessment and the Fourth Discontinuity: The Limits of Instrumental Rationality*, 46 S. CAL. L. REV. 617 (1973); Hubbard, *Reasonable* Human *Expectations: A Normative Model for Imposing Strict Liability for Defective Products*, 29 MERCER L. REV. 465 (1978).

ads presented *more than a remote risk.*"[47] Referring to the facts, the court restated that of 2,000 ads SOF printed between 1975 and 1984, nine were linked to criminal activity. The investigations of at least two of these nine required the participation of SOF staff personnel with law enforcement officers while other ads received various amounts of media attention.[48]

The next prong of the formula the court analyzed was the gravity of the injury. The court stated that if the gravity of the injury were great enough, precautions may be required even against events that cannot be foreseen.[49] By way of example the court stated, "[T]he standard of care may require those who own oil storage tanks to take precautions against fires caused by an unpredictable lightning strike."[50] The court continued by saying "The prospect of ad-inspired crime represents a threat of *serious harm.*"[51] The court then stated in one sentence that Sandra Black's murder represented "one aspect" of what crime-linked ads produce.[52] Thus, on one side of the equation the court has multiplied "more than a remote risk" by "serious harm."

The court spent considerably more time examining the burden of prevention in this particular case than it did on the first two factors combined. The court reasoned that if SOF were found liable, the duty imposed on the publisher would be more exacting than a mere duty to investigate the ads and the people who placed them; "it requires publishers to recognize ads that 'reasonably could be interpreted as an offer to engage in illegal activity' based on their words or 'context' and refrain from printing them."[53] The court continued by stating that "[t]his represents an especially heavy burden given (1) the ambiguous nature of Hearn's ad; and (2) the pervasiveness of advertising in our society."[54]

The court focused on the extremely heavy burden that SOF and all publishers would have to bear if liability attached when Hearn's ad seemed to be facially innocuous—neither he nor his partner had criminal records prior to the time he placed the ads,

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47. *Eimann*, 880 F.2d at 835 (emphasis added).
48. *Id.; see supra* notes 7-8 and accompanying text.
49. *Eimann*, 880 F.2d at 835.
50. *Id.*
51. *Id.* (emphasis added).
52. *Id.*
53. *Id.*
54. *Id.* at 836.

and neither had received dishonorable discharges.[55] Thus the court's decision under the Hand formula produced the following: extremely heavy burden on publishers > serious risk X more than a remote probability.

Aside from the fact that these principles are impossible to quantify and therefore inappropriate as part of a mathematical equation, the burden on publishers may well outweigh a foreseeable murder under a strictly economic, utilitarian argument. A multi-factor policy analysis is a better way to handle the problem.

D. The Multi-factor Policy Analysis

The alternative to the balancing test discussed above is the multi-factor policy analysis. All the factors discussed in the Hand test are present in this test, but additional factors are taken into account that enable the courts to deal with the hard case in an intellectually sound manner.

One scholar has suggested that the list of factors to be examined should include:

1. The administrative factor.
2. The ethical or moral factor.
3. The economic factor.
4. The prophylactic factor.
5. The justice factor.[56]

Some of these factors, for convenience sake, have been combined. The combination of factors that make up the analysis include: the moral considerations, the economic considerations, and the administrative considerations.[57]

1. The moral considerations

Although Learned Hand's formula is primarily a utilitarian equation, it does take into account some moral considerations in that when "B" is greater than "PL" and negligence is found to exist, liability attaches. When liability attaches, the defendant is found to have done something wrong and must make recompense.

Although this slight moral factor may be termed part of Hand's formula, the formula does not allow for the possibility

55. *Id.* at 831-32.
56. Green, *supra* note 3, at 1034.
57. D'Ambra v. United States, 338 A.2d 524, 528 (R.I. 1975).

that overriding moral considerations may exist and by themselves sway the decision of the court as to whether the scope of duty extends to a certain risk. The factors the court should examine under the heading of moral considerations include foreseeability and justice.

a. Foreseeability. Foreseeability is a term that has been used in a variety of different contexts. This paper has criticized the use of foreseeability to determine proximate cause; however, foreseeability can serve a useful purpose. The correct use of foreseeability, as one factor under the heading of moral considerations in a multi-factor policy analysis, has been explained as follows:

> Foreseeability of the specific risk to plaintiff or his class and the specific harm suffered by plaintiff are two of the many factors to be considered by the court. There will be situations in which the specific risk and the consequences suffered by plaintiff are readily foreseeable, but for good reasons [the other policy considerations] the court finds that 'the law does not spread its protection so far.' Contrariwise, although the specific risk or its consequences are found by the court not to be foreseeable, upon the basis of policies that the court finds persuasive it may hold that there was a duty in the circumstances of the case. In short, foreseeability is a factor, but not the controlling factor.[58]

Thus, even if the risk is not foreseeable, liability may still attach if other factors mandate that result.

On the other hand, foreseeability can be useful in tracking fault. If a defendant takes an action that carries a clearly foreseeable risk, then the defendant should know his or her conduct may cause an injury. If this is the case, foreseeability becomes an important focus of the court in determining whether liability should attach.

E. Wayne Thode has suggested that foreseeability may play a part in determining whether the injury would have occurred "but for" the defendant's conduct. This hypothetical scenario has been widely criticized when used under the cause-in-fact prong of the negligence formula. Thode is quick to point out that this " 'but for' test can be helpful, but *observe carefully* that the issue is risk allocation, not cause-in-fact."[59]

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58. Thode, *supra* note 34, at 27.
59. *Id.* at 28 (emphasis added).

b. Justice. Justice refers to the gut feeling that any person might have when asked to read a case and determine its outcome. It encompasses what our culture tells us about right and wrong. Factors such as who is at fault, how the plaintiff was injured, and the attendant sense of moral responsibility to prevent certain types of behavior play a part in this section of the moral considerations analysis.

2. The economic considerations

The economic considerations include those principles which Learned Hand set forth in his algebraic formula, i.e., the burden of prevention, the cost of the harm, and the probability of the harm. The court should also consider who is best able to absorb the loss and who can absorb the loss most efficiently.[60] This is important because, from a purely economic standpoint, analyzing resource allocation is crucial to any decision. If this factor is left out of the analysis, the economic test will not be structurally complete.

3. The administrative considerations

When weighing the administrative factors, the court must consider whether this extension of duty will be the kind of rule that will be difficult to administer. By extending the duty, will the rule go too far? Will the courts be flooded by meritless claims if this new rule is adopted? Will undeserving plaintiffs be able to maintain claims against defendants who have not really breached the duty of reasonable care? These are some of the questions that a court must answer before it can rightfully extend the duty. As Professor Green states, "A court will not knowingly enter upon a course of dealing which it cannot finish, or that may bring down upon it an increase in business or a mass of problems which it is not prepared to handle."[61]

Conversely, even if courts find a new way of analyzing the scope of duty, they may be reluctant to accept it even if the new method is found to be more intellectually sound. This is because of the following:

Any considerable change in the court's 'scheme' may require a

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60. Since these factors have already been explained, no further explanation is necessary under the economic section of the multi-factor policy test.

61. Green, *supra* note 3, at 1035.

> re-examination and realignment of many doctrines, a process which cannot be completed for years. It is little wonder that opposition is encountered when the integrity of the court's scheme of things is threatened by some new doctrine or new practice, or new demand for relief.[62]

Thus, the courts do not readily accept change and use *stare decisis* to justify the status quo.

E. Applying the Multi-factor Policy Analysis to the Eimann *Case*

Now that the formula has been delineated, application to the case is the next step. In doing so, a court would review the particular facts of the case and balance the moral, economic, and administrative considerations.

1. The moral considerations

The court should first determine whether this type of risk is foreseeable. Remember, however, that this use of foreseeability is different from the use under a proximate cause analysis. When using foreseeability, we are merely trying to track whether the defendant may have known that his or her conduct could cause the plaintiff's injury.

According to the facts in the opinion, SOF relied heavily on the testimony of Robert K. Brown, the president and owner of the magazine, who testified that "he did not know or suspect in 1984 that some of the SOF classified ads had been linked to criminal plots."[63] What the Fifth Circuit's opinion failed to include, however, was evidence introduced at the trial that the SOF hierarchy and Robert K. Brown probably did know that SOF classified ads were linked to the commission of crime.[64]

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62. *Id.* at 1036.

63. *Eimann*, 880 F.2d at 833.

64. The Appellees' Brief, which of course contains arguments favorable to the appellees only, contains many examples which indicate that the SOF hierarchy knew or should have known that their ads were linked to criminal conduct. "William Guthrie, [SOF's executive editor] in depositions testimony admitted at trial that the magazine received 'frequent and ongoing' calls from the FBI and other investigating agencies inquiring about the SOF's advertisers and expressed concern about the ads." Appellees' Brief, *supra* note 22, at 12. Also, a New Jersey police detective contacted Joan Steele, SOF's advertising manager, a month before Hearn placed his ad in regards to another ad that offered "high risk" operations, *the same language used in the Hearn ad.* In that case "high risk" operations had meant kidnapping. *Id.* As the Fifth Circuit opinion stated, numerous articles had run in major papers linking crimes to articles appearing in SOF.

Obviously, Hearn and Black caused the actual harm; they planned and executed the murder of Sandra Black. SOF, however, is not free from blame. Although Hearn actually pulled the trigger, he would have never been in a position to kill Sandra Black if he had not been contacted through the ad in SOF. Had SOF been more meticulous in selecting classified ads printed in the magazine, Hearn's ad may never have been published.

Not only must the court identify those who committed the actual harm, but it must also must recognize the harm suffered by the victim. In this case, Sandra Black is dead, and her son is left with neither mother nor father. If SOF knew that this "type" of ad, even if facially innocuous, was linked to criminal activity, SOF seems to be partly to blame for the plaintiff's injury.

Under the justice prong of the moral analysis, SOF also appears to be culpable. A magazine that caters to "males that own camouflage clothing and own more than one gun,"[65] allows ads to be printed—some of which have been linked with criminal activity, and whose owner likes the wide assortment of "personal services" offered because they add "to the 'flavor and mystique' of the publication"[66] cannot claim to be unaware of the fact that its advertising may lead to the commission of a capital offense.

SOF is not *Time*, *Newsweek*, or *Good Housekeeping*. Its subscribers and its subject matter are extremely unique. Because the magazine is so different and caters to such a different clien-

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Id. at 13-16. *See supra* note 7 and accompanying text. When introducing evidence of the plot to kill Susan Chanslor, the appellees hoped to put to rest any further doubt that defendant had knowledge that its ads were related to crime. "In a matter that received national publicity, the former president of the Houston Trial Lawyers Association . . . was charged in 1982 with plotting to murder his paraplegic wife . . . . During his trial, he testified that he had attempted to buy the services of a self-proclaimed assassin by placing an ad for a poisons expert in SOF." Appellees' Brief, *supra* note 22, at 15. In preparation for the Chanslor trial, Jim Lavine, a former Harris County District Attorney who prosecuted Chanslor, went to SOF staff personnel and was assisted by them in obtaining a copy of the ad placed in SOF and also received affidavits from them. One of these affidavits was from James C. Graves, SOF's then managing editor, who was said to have Robert Brown's ear. *Id.* at 17. Evidence also showed that two months before Hearn placed his ad, "Robert Brown met with his staff to discuss what guidelines, if any, should be imposed on personal service and other classified advertisements . . . . In continuing to publish the ads, Brown admitted that he rejected the advice of not only every staff member, but also that of his own brother, who had served as a consultant to the magazine." *Id.* at 18.

Having reviewed all the facts, the foundation has been laid to examine the foreseeability test under the heading of moral considerations.

65. *Eimann*, 880 F.2d at 831.

66. Appellees' Brief, *supra* note 22, at 5.

tele than most other magazines, perhaps it should be treated differently from other magazines.

2. The economic considerations

The economic considerations were discussed under the Fifth Circuit's analysis of the Learned Hand formula. Admittedly, the price for publishers to investigate the people who place ads is extremely high. Publishers would need to spend thousands of dollars each year investigating the backgrounds of those wishing to place advertisements in their magazines.

However, SOF caters to a different type of consumer than most of the commercial publications in the country, and the information it publishes is different from the information a major newspaper or news service would publish. The argument could be made that given the type of reader and the type of information the magazine publishes, SOF should be responsible to the people that get hurt by its existence—no matter what the cost.

3. The administrative considerations

In order to extend liability to encompass a risk which the court has not previously recognized, the court must feel that it can adequately administer the rule. The Fifth Circuit found it unnecessary to reach the first amendment issues posed by this case because as a matter of law the duty did not extend to that type of risk. The first amendment issue, however, should have been addressed in deciding whether the scope of duty should extend to that type of a risk. The first amendment issue should have balanced equally with all the economic arguments in determining whether a duty existed.

The appellants argued that under *Pitman v. Dow Jones & Co.*,[67] no liability can attach to publishers for advertisements of services or products because of first amendment and public policy concerns.[68] They cited numerous cases that have denied recovery for plaintiffs who were injured as a result of advertising. This does not necessarily mean, however, that the court must reach that result. The law is changing and dynamic. As our society evolves, so does the law.

SOF's advertising is commercial speech, i.e., speech done in

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67. 662 F. Supp. 921 (E.D. La), *aff'd* 834 F.2d 1171 (5th Cir. 1987).

68. Brief for the Appellants at 24, Eimann v. Soldier of Fortune Magazine, 880 F.2d 830 (5th Cir.1989) (No. 88-2499).

order to gain profit. Because advertising is commercial speech, it enjoys a lesser degree of protection than does other first amendment speech. The court needs to take this into account when deciding whether the first amendment issue, standing alone, would disallow recovery. As was mentioned earlier, SOF has a reputation for this "type" of advertising. The trial record clearly showed that SOF had constructive, if not actual, knowledge that its advertising was linked to criminal activity. These factors that may lead to a mitigation of the first amendment protection of SOF's advertising were never considered, at least not in the Fifth Circuit's opinion. The first amendment issue, however, is a powerful hurdle that the plaintiffs need to overcome.

One court has already decided that administratively it can cope with extending liability to a similar type of risk. In *Weirum v. RKO General*[69] the California Supreme Court stated, "We are not persuaded that the imposition of a duty here will lead to unwarranted extension of liability."[70]

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69. 15 Cal. 3d 40, 539 P.2d 36, 123 Cal. Rptr. 468 (1975).

70. *Id.* at 48, 539 P.2d at 40, 123 Cal. Rptr. at 472. (KHJ is a radio station that has a large teenage following. In an attempt to attract more listeners to the radio station, KHJ held a contest. A KHJ disc-jockey drove throughout the Los Angeles area and announced, from time to time, his location. The first listener to reach him and answer a question won a prize. On the morning of July 16, 1970, Donald Steele Revert ("the Real Don Steele"), the KHJ disc-jockey, was driving throughout L.A. announcing his position and inviting listeners to find him and collect cash awards. The court said:

> In Van Nuys, 17-year-old Robert Sentner was listening to KHJ in his car while searching for 'The Real Don Steele.' Upon hearing that 'The Real Don Steele' was proceeding to Canoga Park, he immediately drove to that vicinity. Meanwhile, in Northridge, 19-year-old Marsha Baime heard and responded to the same information. Both of them arrived at the Holiday Theater in Canoga Park to find that someone else had already claimed the prize. Without knowledge of the other, each decided to follow the Steele vehicle to its next stop and thus be the first to arrive when the next contest question or condition was announced.

Id. at 45, 539 P.2d at 38, 123 Cal. Rptr. at 470. In attempting to follow the Steele vehicle, "either Baime or Sentner . . . forced decedent's [innocent third party driving on freeway] car onto the center divider where it overturned." *Id.* Decedent's wife sued Baime, Sentner, and RKO radio, the owner of KHJ. The trial court ruled that RKO did have a duty to the "decedent arising out of its broadcast of the giveaway contest." *Id.* at 45-46, 539 P.2d at 39, 123 Cal. Rptr. at 471. Notably, the court also ruled that the first amendment did not protect RKO from liability.

> Defendant's contention that the giveaway contest must be afforded the deference due society's interest in the First Amendment is clearly without merit. The issue here is civil accountability for the foreseeable results of a broadcast which created an undue risk of harm to decedent. The First Amendment does not sanction the infliction of physical injury merely because achieved by word, rather than act.

Id. at 48, 539 P.2d at 40, 123 Cal. Rptr. at 472.

IV. Conclusion

The analysis best used in determining any scope of duty is the multi-factor policy analysis. It gives the court more factors to weigh and a more principled approach to the extension or limitation of liability. If the Fifth Circuit had used this approach in *Eimann v. Soldier of Fortune*, the ultimate decision in the case may have been the same; but the plaintiff would have had the benefit of having many factors weighed with less emphasis on the economic aspects of the case. Moreover, future litigants would have a clearer picture of the factors that extend liability to the publishers of "high risk" advertisements. The Fifth Circuit must openly examine all the relevant considerations in determining the scope of duty to preserve the intellectual integrity of its negligence analysis.

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