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Liability of business owners and social hosts

THE EVER-CHANGING TAPESTRY OF CASE LAW ON WHEN A BUSINESS OWNER OR SOCIAL HOST MAY BE LIABLE FOR INJURIES OF A PATRON OR GUEST; ALSO A LOOK AT WHAT GIVES RISE TO A BUSINESS'S DUTY TO PREVENT CRIMINAL ACTS

This article will review the ever-changing tapestry of case law addressing the circumstances under which a business owner or social host may be held liable for injuries of a patron or guest. This article also will address circumstances under which a duty to prevent criminal acts arise. Emphasis will be on specific issues every lawyer must consider when handling these cases, including establishing a duty, causation, discovery, jury instructions and experts.

Is there a duty for the landowner?

While an owner or possessor of land or business is not an insurer of the safety of persons on the premises, a business owner has a duty of reasonable care to protect against known or reasonably foreseeable risks. "Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person." (Civ. Code, § 1714 (a).) This duty not only relates to the condition of the premises but may include the duty to prevent third-party criminal conduct.

Social hosts

Social hosts who furnish alcohol have limited duties pursuant to statutory law. Specifically, Civil Code section 1714 (c) provides "no social host who furnishes alcoholic beverages to any person may be held legally accountable for damages suffered by that person, or for injury to the person or property of, or death of any third person, resulting from consumption of those beverages." There is one caveat to the exception, which is "knowingly furnishing alcoholic beverages at his or her residence to a person whom he or she knows, or should have known, to be under 21 years of age." (Civ. Code, § 1714(d)(1).)

Some cases have attempted to distinguish situations in which the social host merely provides the atmosphere, but not the alcohol. In such situations, a duty will only exist if a special relationship can be established. However, most cases find that liability cannot be imposed on the social host, especially cases involving minors. (*Allen v. Liberman* (2014) 227 Cal.App.4th 46; *Andre v. Ingram* (1985) 164 Cal.App.3d 206.) Thus, social hosts have no additional duties imposed upon them when alcohol is furnished by the host or others, except, when individuals under 21 are served and/or consume alcoholic beverages.

Duty to prevent foreseeable risks

California law requires landowners to maintain land in their possession and control in a reasonably safe condition. This duty includes the duty to take reasonable steps to prevent foreseeable criminal acts of third parties. (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 674.) The question of foreseeability is central to one's analysis. Foreseeability hinges upon the ability to show prior criminal acts of a similar nature on the premises, thus putting the property owner on notice. While case law does establish that prior instances are not required to establish foreseeability, and that the court should evaluate foreseeability based upon "totality of the circumstances," prior instances remain crucial. (*Id.* at. 677.)

"If the place or character of the landowner's business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it and to use such means of protection as are available to afford reasonable protection." (*Nola M. v. University of Southern California*, (1993) 16 Cal.App.4th 421, 426.)

There are several key case-law decisions which address the duty to prevent foreseeable risks. They include, but are not limited to, the following cases:

Isaacs v. Huntington Memorial Hospital (1985) 38 Cal.3d 112;

Ann M. v. Pacific Plaza Shopping Center (1993) 6 Cal.4th 666; and

Sharon P. v. Arman, Ltd. (1999) 21 Cal.4th 1181.

In *Isaacs*, the plaintiff was shot in the parking lot of a hospital. While the plaintiff produced evidence that the hospital was located in a high crime area, that there had been prior assaults near the emergency room, that emergency room area was frequented by persons under the influence of drugs or alcohol, the plaintiff could not prove notice of prior crimes of the same or similar nature in the same or similar portion of the hospital. The trial court granted defendant's motion for nonsuit. The Supreme Court reversed, noting that "foreseeability" is a "flexible concept," and a "rigidified approach" requiring prior similar incidents should not be utilized. "Prior similar incidents are helpful to determine foreseeability but they are not necessary." (*Id*. 38 Cal.3d at 127.)

In *Ann M.*, the plaintiff was raped in a shopping center, the defendant shopping center moved for summary judgment which was granted. The Supreme Court concluded that a "high degree of foreseeability" was required to impose a duty to undertake more onerous measures such as hiring security guards. The court noted that the "high degree of foreseeability" could rarely be established in the absence of prior similar incidents, thus departing from the ruling in *Isaacs*. The court focused on the nature of the

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prior instances, bank robberies and purse snatchings versus the incident in this case, rape. Further, there was no evidence that the defendant had any notice regarding these prior instances. The court ruled that summary judgment had been properly granted since a violent criminal assault was not sufficiently foreseeable to impose a duty upon the defendant to provide security guards in the common areas.

In *Sharon P.*, plaintiff was sexually assaulted in an underground parking garage. Plaintiff argued that the owner should have had security guards in the garage because underground parking structures are inherently dangerous. The Supreme Court rejected plaintiff's argument and followed the court's prior ruling in *Ann M*. The prior instances of crime at the location did not involve violent attacks against anyone and were not sufficiently similar to the sexual assault to justify the imposition of hiring a security guard. In other words, the evidence was insufficient to establish that the assault was foreseeable, and therefore insufficient to impose the burden of hiring a security guard on the defendant.

Contemporaneous criminal conduct

The California Supreme Court has addressed an owner's duty in the face of contemporaneous criminal conduct in the following cases:

Delgado v. Trax Bar & Grill (2005), 36 Cal.4th 224;

Morris v. De La Torre (2005), 36 Cal.4th 260; and

Kentucky Fried Chicken of California, Inc. v. Superior Court (1997), 14 Cal.4th 814.

In *Delgado*, the plaintiff was assaulted in the parking lot of a bar. The plaintiff's wife expressed concern to the bar's security guard that there was going to be a fight. The security guard then observed hostile stares between the plaintiff and the other patrons. Concerned there would be a fight, the security guard asked Plaintiff to leave, but did not escort him to his car. The plaintiff was then attacked in the parking lot approximately 40 feet away. The jury found for the plaintiff, and defendant filed a motion for new trial, which was denied. Defendant appealed, claiming there was no evidence of prior similar assaults; the Supreme Court affirmed the trial court. The court concluded that a business with "actual notice of an impending assault" has a special-relationship duty that includes "an obligation to take reasonable, relatively simple, and minimally burdensome steps to avert that danger." (*Delgado* 36 Cal.4th at 250.)

In *Morris*, the plaintiff was a patron at defendant's 24-hour restaurant. An altercation began in the parking lot, which the employees could see. An individual entered the restaurant and demanded a knife. All three employees watched the individual depart the restaurant with a 12-inch knife. Approximately 25 feet away the plaintiff was stabbed at least twice. The trial court granted the defendants' motions for summary judgment due to the lack of prior similar instances. The California Supreme Court reversed and again noted the existence of a special relationship between the plaintiff and the business. The court concluded, based on the circumstances, a duty to respond to ongoing criminal conduct by undertaking "appropriate action as is reasonable under the circumstances." (*Morris,* 26 Cal.4th at 264.) The court found that as a matter of law, based upon the evidence presented on the record, it could not conclude that defendant owed no duty of care to the plaintiff to take any steps, including dialing 911.

In *Kentucky Fried Chicken*, the court concluded that while a business may have a duty to undertake "minimally burdensome" measures in the face of ongoing criminal conduct, that does not include an obligation to comply with a criminal's demands. In that case, the robber demanded action of a KFC employee who refused. (*Kentucky Fried Chicken of California, Inc*. 14 Cal.4th at 830.)

The Dram Shop Act

California Business & Professions Code section 25602 generally immunizes an establishment from liability to third parties for injuries resulting from the furnishing of alcohol to its patrons. "However, section 25602 does not preclude all actions against innkeepers [or other establishments] merely because they furnish alcohol." (*Cantwell v. Peppermill, Inc*. (1994), 25 Cal.App.4th 1797, 1801.) "'[T]he proprietor of a place where intoxicating liquors are dispensed owes a duty of exercising reasonable care to protect his patrons from injury at the hands of fellow guests." (*Ibid*.) "Although the proprietor is not an insurer of its patrons' safety, he has a duty of care to protect patrons from the reasonable criminal or tortious conduct of third persons." (*Ibid*.)

In *Cantwell*, the court held that section 25602 did not immunize the owner of a bar from liability to a patron who was stabbed by another intoxicated patron on the premises. The plaintiff's complaint alleged that the bar owner knew numerous assaults and other crimes related to the consumption of alcoholic beverages had been committed on its premises, and had failed to take appropriate action to protect its patrons. The court noted that the purpose of the statute was to prevent a plaintiff who was injured by a drunk driver from suing the person or entity who had served alcohol to the drunk driver, but it did not relieve the bar owner from liability for failing to protect its patrons from assaults by other intoxicated customers. The court emphasized that "an innkeeper cannot with impunity encourage or permit its patrons to become drunk and belligerent to the point where they start assaulting other guests."

Intoxicated employees

Office parties where alcohol is served may impose liability on the host where an intoxicated employee causes harm. Important cases addressing liability of a social host such as an employer are the following:

Purton v. Marriott Int'l, Inc. (2013), 218 Cal.App.4th 499;

McCarty v. Workmen's Compensation Appeals Board (1974), 12 Cal.3d 677; and

Harris v. Trojan Fireworks Co. (1984), 120 Cal.App.3d 157.

In *Purton*, the hotel hosted its annual holiday party for employees. Despite a policy of providing two drink tickets to each employee, management did not

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enforce the two-drink limit. Later, an employee rear-ended a vehicle, killing an occupant. The trial court granted summary judgment in favor of the hotel, finding no vicarious liability because the intoxicated employee's actions after leaving the party were outside his scope of employment since the accident occurred after his safe return home before leaving for another drive. The Court of Appeal reversed, finding that a jury could conclude that the party benefitted Marriott by improving employee morale. The court also noted that Marriott did not follow its plan to limit consumption to two drinks.

In *McCarty*, an employee was killed when he drove into a pole after leaving his employer's office Christmas party. The Supreme Court noted that the employee's purchase of alcoholic beverages for the gathering demonstrated that the employee considered such gatherings beneficial to promoting camaraderie. [Note: This was a workers' compensation case.]

In *Harris*, an intoxicated employee left an office party and was involved in a collision which killed the driver of another vehicle. Again, the Court of Appeal found that the employee's attendance at the party was within the scope of the employee's employment. The court also noted that it was foreseeable that an employee would leave the party intoxicated.

Causation

If a duty of care is imposed, the plaintiff bears the burden of proving a substantial link or nexus between the breach/omission and the injury. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763.) In other words, the plaintiff must prove how the security conditions actually caused the injury or how different security measures would have prevented the injury. Courts have rejected claims of abstract negligence pertaining to the lighting and maintenance of property where no connection to the alleged injuries was shown.

In *Noble v. Los Angeles Dodgers, Inc*. (1985), 168 Cal.App.3d 912, the plaintiffs were assaulted in the parking lot of Dodger Stadium. The plaintiffs asserted that more security guards on duty would have averted the assault. "Plaintiffs do not contend that the Dodgers had actual advance knowledge of the conduct of the assailants or of their presence in the parking lot. Plaintiffs' theory is purely and simply that the Dodgers were negligent in failing to effectively *deter* any and everyone from acting in such a manner." (*Id*. at 917.) Plaintiffs' expert opined that security was inadequate and that additional security should have been employed. He did not state that the presence of additional security would have prevented the incident. The court found that the plaintiff had established abstract negligence, in the context that the Dodgers' security didn't comport with plaintiffs' expert's or the jury's notion of "adequacy," but failing to prove any causal connection between that negligence and the injury. The *Noble* Court concluded that plaintiff "must prove more than abstract negligence unconnected to the injury." (*Id.* at 916.) It is worth noting that in *Noble*, the plaintiff was found to be the primary cause of his own injury, further weakening his causation argument.

To demonstrate actual or legal causation, the plaintiff must show that the defendant's act or omission was a substantial factor in bringing about the injury. The plaintiff must do more than simply criticize the defendant's security measures or compare them to some abstract standard put forward by an expert. (*Nola M. v. University of Southern California* (1993), 16 Cal.App.4th 421.) In *Nola M.,* the court found that plaintiff's "expert did not, and could not, say that more security guards or guards on foot instead of in cars or lower hedges or more light would have prevented Nola's injuries. And, of course, Nola's expert conveniently ignored the fact that, on the night Nola was attacked, USC had eight officers patrolling a quarter-mile area while the Los Angeles Police Department had about the same number patrolling the surrounding ten and one-half miles."

The court asserted, "we think it comes down to this: when an injury can be prevented by a lock or a fence or a chain across a driveway or some other physical device, a landowner's failure to erect an appropriate barrier can be the legal cause of an injury inflicted by the negligent or criminal act of a third person." (*Id.* at 436.) While causation can be established based upon broader omissions, one must be careful to avoid the pitfalls of abstract negligence.

Jury instructions/discovery

Your discovery efforts should be focused on the elements of a premises liability case. CACI 400 and 1000 should be the guide in formulating discovery requests. CACI 1005 provides the law on a business proprietor's liability for criminal acts.

The use of special jury instructions may complicate matters and provide grounds for appeal. Be wary of the defense request for special instructions. More likely than not, the proposition the defense is trying to advance through special instructions is out of context or will misstate the law.

However, when it comes to the failure to provide security, it is worth noting that such a responsibility cannot be delegated to a third party. (*Srithong v. Total Inv. Co*. (1994) 23 Cal.App.4th 721, 726.) If one encounters such an argument, a special instruction will be necessary in order to educate the jury that the landowner is ultimately the responsible party despite attempts by the defense to blame a third party.

Experts

Experts are necessary, but one must tip-toe around the perils of abstract negligence. Rather than focusing on what should have been done based upon an expert's opinion, it is best to look for breaches in the defendants' own policies. By pointing out defendants' failure to follow their own policies and procedures, plaintiffs avoid the argument that the expert's standard is inapplicable. Further, it focuses the issues and forces plaintiffs to home in on their theory rather quickly.

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