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## Property Owners, Be Wary of 'Imminent Peril'

### Focus Column

By Gary A. Watt

Over the past decade, property owners could be forgiven for becoming a little complacent after a trilogy of favorable California Supreme Court decisions. Two of those cases - *Ann M. v. Pacific Plaza Shopping Center*, 6 Cal.4th 666 (1994) (rape in retail outlet) and *Sharon P. v. Arman Ltd.*, 21 Cal.4th 1181 (1999) (rape in parking garage) - held that heightened foreseeability is required before property owners will be liable for third-party criminal acts such as sexual assault. The third case, *Weiner v. Southcoast Childcare Centers*, 32 Cal.4th 1138 (2004) (attack on children on playground by motorist), held that even if common everyday dangers arising out of negligence can be conceived of as resulting in similar harm, heightened foreseeability must be applied to cases involving criminal conduct.

Taken together, these cases confirmed that the question of duty is initially a question of law that is determined by the court, not a jury. Furthermore, heightened foreseeability is the crucial factor courts should consider when performing the duty analysis. Finally, the common thread in the three decisions is a property owner's actual knowledge of prior, similar crimes.

Yet despite all that, the high court insisted it was not mandating notice of prior similar incidents in all situations. In dicta, *Ann M.*, *Sharon P.*, and *Weiner* continued to discuss foreseeability as subject to a sliding scale in light of the burdens to be imposed. As the court put it in *Ann M.*, "In cases where the burden of preventing future harm is great, a high degree of foreseeability is required. On the other hand, in cases where there are strong policy reasons for preventing the harm, or the harm can be prevented by simple means, a lesser degree of foreseeability may be required." *Ann M.* at 678-679. The Supreme Court finally explained lesser foreseeability in *Delgado v. Trax Bar & Grill*, 36 Cal.4th 224 (2005) and *Morris v. De La Torre*, 36 Cal.4th 260 (2005).

*Delgado* involved notice to a bar's bouncer that a fight was imminent. However, instead of walking a patron to his car, the security guard simply told him to leave. When the patron exited the bar, he was attacked by individuals who followed him out, and others apparently waiting in the parking lot.

On review, the court first refused to abandon the heightened foreseeability requirement established in *Ann M.*, and *Sharon P.*, and reaffirmed in *Weiner*. (*Delgado* at 236-241.) In fact, the court agreed with the lower court that plaintiff failed to produce evidence of "prior similar incidents or other indications" sufficient to overcome heightened foreseeability, even though he produced evidence of prior altercations on the premises.

However, the court explained that *Delgado* illustrates what *Ann M.* recognized as facts allowing application of "sliding scale" or "lesser foreseeability." Given the "actual notice" to the bouncer of an "imminent assault" that was "unfolding in its presence," the security guard was required to do something more, such as dissuade the antagonists from leaving the bar or obtaining the help of the other security guard. The duty imposed upon all property owners includes an affirmative obligation to take reasonable measures to attempt to remove the imminent peril or prevent the harm.

In *Morris*, the plaintiff was attacked by gang members while waiting outside a restaurant as his friends were inside purchasing food. At one point, one of the gang members entered the restaurant and retrieved a knife from the kitchen to better attack the victims. All three employees of the restaurant saw the gang member grab a 12-inch knife and go back outside and continue the attack. The plaintiff ran away, but the gang members chased him down in their car and stabbed him several more times. One of the plaintiff's friends made it to a phone in a nearby convenience store, and a few minutes later the police arrived.

The plaintiff sued the restaurant's owner for premises liability. The trial court granted summary judgment for defendant, finding that evidence of prior fistfights, carjacking and robberies were not sufficiently similar to the vicious attack on the plaintiff to make the attack foreseeable.

The Supreme Court granted review on the sole issue of the restaurant's duty to the plaintiff. The court remarked that during the seven or eight minutes the attacks lasted, none of the restaurant's employees called the

police or any other emergency personnel. Such inaction was a violation of the proprietor's "special relationship-based duty to undertake reasonable and minimally burdensome measures to assist customers or invitees who face danger from imminent or ongoing criminal assault[s] occurring upon the premises." *Morris* at 270.

The court concluded that such duty extends to activity in the parking lot, and includes noncustomers in and around the premises. The court also stated that while owners and their employees have no duty to intervene to stop the attacks, their duty includes taking such minimally burdensome measures as calling 911.

The duty to take "minimally burdensome steps" triggered in *Delgado* and *Morris* arose not in the context of preventing future crime but of responding to actual crime when the events were unfolding in front of the defendants. *Delgado*'s duty to maintain separation between the eventual combatants required the property owner to maintain a course of action already undertaken by his security guard. Likewise, in *Morris*, the duty was to "assist customers or invitees" facing danger that the employees were watching unfold through the restaurant's windows. *Morris* at 270.

The result is not so much a sliding-scale but a broad future-crime rule of heightened foreseeability, with a narrow imminent/occurring crime exception. When third-party crime occurs without a property owner or agent observing it, courts will assess what the property owner actually knew with respect to prior-similar incidents. Courts will ask if the prior-similar incident was sufficiently similar in kind and localized in occurrence, to create a duty on property owners to take general preventive measures. If a sufficient nexus is found between the prior notice and the third-party crime, courts will then examine the utility of the proposed preventive measures. If those measures appear to be reasonably effective in comparison to their cost, duty can be found.

The narrow exception involves situations where property owners or their agents actually observe that third-party criminal conduct is imminent or already under way. In those situations, whether or not the property owner could have predicted the crime will occur is irrelevant. Instead, there will be a duty to take minimally burdensome steps such as calling 911. As the court put it in *Morris*, when assault is imminent, or actually occurring in plain view, "it requires no mastery of metaphysical philosophy or economic risk analysis to appreciate the strong possibility of serious injury." *Morris* at 271.

The law of property owner liability for third-party crime after *Delgado* and *Morris* can be summarized as follows:

Owners have a duty to take reasonable steps to secure common areas against foreseeable criminal acts of third parties that are likely to occur in the absence of such measures;

The question of duty is still initially a question of law that is determined by the court, not a jury;

Foreseeability is still the crucial factor courts should consider when performing the duty analysis;

With respect to preventing future crimes including violent criminal assaults such as rape, heightened foreseeability is still a prerequisite to finding a duty;

Actual notice of an imminent or already occurring assault unfolding in an owner's (or the agents') presence triggers a duty to take reasonable measures to attempt to remove the imminent peril or prevent the harm and lesser foreseeability applies in these situations.

It is clear that the high court is reluctant to impose increased costs for security measures upon property owners absent prior criminal conduct similar in nature and localized in occurrence to the type for which a plaintiff is seeking to hold the owner liable. As the court said in *Ann M.*, any lesser requirement would make property owners the absolute insurers of public safety.

Critics claim that the court's approach to heightened foreseeability gives property owners "one free bite of the apple," a situation that is inherently unfair to the first victim. That criticism is now muted somewhat by the imminent/actual peril exception to heightened foreseeability established in *Delgado* and *Morris*. However valid the criticism, in the words of *Weiner*, the Supreme Court refuses to require property owners to "create a fortress" to protect their customers.

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