

**BUSINESS PROPRIETORS OWE A LEGAL DUTY TO
TAKE MINIMAL MEASURES TO AID NON-PATRONS
DURING COMMISSION OF CRIMINAL ACTS**

In *Morris v. De La Torre*, the California Supreme Court recently held that the defendant, Silvino De La Torre, the proprietor of a Mexican restaurant, owed a duty to take reasonable, minimal measures to aid the plaintiff, Charles E. Morris IV, when he was attacked and stabbed in the parking lot directly in front of the restaurant while three of Mr. De La Torre's employees watched from inside. This duty arises even though Mr. Morris admitted that he had no plans to purchase food from the restaurant.

Mr. De La Torre owns Victoria's Mexican Food, a 24-hour restaurant. It has a 40-foot wide plate glass window with an unobstructed view of the parking area. A standard-height counter separates the dining area from an open kitchen. At one end of the counter is a gate at counter height which allows access from the dining area to the kitchen. At the other end, there is a telephone mounted on a wall lower than counter-height.

On August 1, 2000 at approximately 1:00 a.m., Mr. Morris and four of his friends parked in the parking lot immediately in front of the restaurant. Two of Mr. Morris' friends went inside to purchase food while he remained outside with the rest of his companions. Mr. Morris was a frequent customer of the restaurant but had a stomach ache at the time and did not plan to eat. Richard Cuevas and Saul De La Vega who were members of the Nestor Street gang parked their car near plaintiff and his friends. Mr. Cuevas approached Mr. Morris' group in a hostile manner. Mr. Morris' friends who were purchasing food went outside and tried to calm Mr. Cuevas down. However, Mr. Cuevas punched Mr. Morris and a fight ensued.

Mr. De La Torre's three employees had been watching the fight from inside the restaurant. At some point, Mr. Cuevas ran into the restaurant and demanded a knife. He retrieved a 12-inch knife from the kitchen, went back to

the parking lot and stabbed Mr. Morris twice. The three employees continued to watch as Mr. Cuevas chased two of Mr. Morris' friends who ran across the street. Mr. Cuevas then used the knife to puncture three tires of the car Mr. Morris and his friends were using. Mr. Cuevas and his friend then drove off and tracked down Mr. Morris who had stopped on a nearby public sidewalk and proceeded to stab him several more times. One of Mr. Morris' friends was able to call 911. The whole attack lasted approximately seven to eight minutes.

Mr. Morris sued Mr. De La Torre and the shopping center landlord alleging negligence under theories of premises liability and battery. The trial court granted defendants' motion for summary judgment finding that there was no duty owed to Mr. Morris to protect him during the attack. Mr. Morris filed for reconsideration as to Mr. De La Torre only. The Appellate Court found that a business proprietor owes a duty to invitees to take reasonable and minimal measures to aid invitees during an ongoing attack upon the premises. The issue in front of the California Supreme Court was whether Mr. De La Torre had a duty to

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aid Mr. Morris with respect to avoiding ongoing criminal conduct.

In general, there is no duty to protect another from conduct of a third party. However, the California Supreme Court, in referring to *Delgado v. Trax Bar & Grill* and *Ann M. v. Pacific Plaza Shopping Center*, noted that there is a special relationship between business proprietors and their patrons or invitees. The court held that a business proprietor owes a duty to take reasonable minimal measures to assist patrons or invitees from imminent or ongoing criminal conduct upon the premises, particularly if the criminal conduct was occurring in the presence of the proprietor. The court further held that it does not require a showing that a proprietor have notice of other similar criminal conduct to impose a duty to assist invitees with respect to ongoing criminal conduct. Rather, a showing of prior notice is only required for future criminal conduct and not for ongoing criminal conduct.

In this case, Mr. De La Torre's employees failed to take minimal measures, such as calling 911, to assist Mr. Morris while he was being assaulted. The court noted that the employees would not have been placed in danger if they had called 911 since the phone was mounted behind the counter and below counter height so that it would have been unobserved from outside. Despite the foregoing, the court held that whether the failure to call 911 constitutes a breach of duty was a factual determination for the jury to make.

In addition, the California Supreme Court held that Mr. Morris was still considered an invitee even though he admitted that he did not plan to purchase food from the restaurant. It was irrelevant that the fight ensued outside of the restaurant because the duty of a business proprietor to his invitees extends beyond the physical structure to all areas within the proprietor's control.

- Katherine S. Agbayani

**Ask about our Fair Claims
Settlement . . . and Sexual
Harassment Prevention
Training Seminars**

W & Z ON APPEAL

1. W & Z has obtained complete victory in a First Amendment case where the plaintiff tax preparation company was seeking to have the city's sign law declared invalid. It supposedly unfairly prohibits the signs that plaintiff was mounting on top of his car to advertise his business. The Second District unanimously agreed with all of W & Z's arguments and upheld the sign ordinance.

2. A truck braked on the freeway for vehicle two, jack knifed, crossed several lanes and consequently was struck by plaintiff's vehicle resulting in brain injuries. Vehicle two had inexplicably stopped in the middle of the freeway to check a rattling door. Plaintiff sued the truck, represented by Wesierski & Zurek, and vehicle two. At trial, the truck and vehicle two put on a joint defense through joint experts including a seat belt defense and a sub rosa suggesting that plaintiff was not brain injured. During closing argument, vehicle two's lawyer said "I've been watching this trial objectively and I think plaintiff really was hurt and deserves \$7 million. But I think the truck was solely liable." Vehicle two only had \$1 million in insurance coverage, which had previously been offered but was deemed insufficient by the court for a good faith settlement. When co-defendant argued for a plaintiff's verdict of seven times his client's policy limits, Wesierski & Zurek objected that this obviously implied a collusive settlement, that has to be disclosed to the jury, so they can take bias into account. The judge disagreed, and let the jury issue a verdict of over \$5 million split between the defendants. W & Z appealed. On appeal, W & Z is trying for the right to do more discovery to prove the existence of a collusive agreement although both of the other attorneys vehemently denied any such agreement. The Second District appears to agree with W & Z, and issued a new round of briefing in anticipation of sending the case back down to the lower court for further proceedings.

3. In another recent case, plaintiff was selling a multi-ton battery-powered construction crane never meant for the highway. It was kept in front of the plaintiff's house and when defendant came over to possibly buy it, the plaintiff called his friend to come over with a tilt-bed truck to winch the crane up the tilt-bed, level out the tilt bed, back defendant's flat bed truck against the now-level other truck, and then drive the crane into defendant's truck. However, when plaintiff tried to drive the crane onto the second truck, the vehicles separated and the crane tumbled through the crack. Plaintiff claimed defendant did not set the brake on his truck. Plaintiff sued for serious injuries, and W & Z asserted Prop. 213, saying plaintiff was "driving" the crane without insurance. Plaintiff countered that the vehicle was not required to be registered with the DMV, was not designed for driving on the street, and that he was not driving "on" the street, but rather "on" his friend's truck. The trial court ruled for W & Z, and plaintiff appealed. The Second District held that these very unusual circumstances were not contemplated by Prop. 213 and that the crane was more a freight vehicle than a highway vehicle. W & Z has appealed this result to the California Supreme Court.

KNOW YOUR NEIGHBOR: HOW *CASTANEDA V. OLSHER* MAY RESURRECT THE IDEA THAT A "BAD NEIGHBORHOOD" MAY CONSTITUTE NOTICE EVEN WITHOUT PRIOR SIMILAR CRIME ON THE PREMISES

In *Castaneda v. Olsher*, a premises liability case involving a gunshot wound and gang activity, the California Court of Appeal for the Fourth District set forth what may be a troubling new standard for determining a landowner's duty to protect against third-party criminal activity. According to the court, if a plaintiff can show that the landowner 1) knew of prior similar criminal incidents on the land or 2) knew that similar crimes had been committed on the properties of similar businesses *nearby*, a plaintiff may state a cause of action for negligence. The case is now up for review by the California Supreme Court.

In *Castaneda*, plaintiff was living in a mobile home with his grandmother and sister at the Winterland-Westways Mobile Home Park ("Park"). One night, he arrived home from a party at around 2:00 a.m. He was standing on the steps of his mobile home when one of a group of men standing outside a neighboring home fired shots, though not aimed at plaintiff. Regardless, plaintiff was injured by a stray bullet. Police later determined that the shooter was a gang member who had exchanged words with rival gang members, who were in a car inside the Park, near the neighboring mobile home, just prior to the shooting.

In September 1997, plaintiff sued George Olsher, the owner of the Park, based on the theory of premises liability. A jury trial took place in September 2003, and at the end of plaintiff's case-in-chief, Olsher moved for nonsuit. The trial court granted Olsher's motion, ruling that plaintiff had failed to present evidence sufficient to establish that Olsher owed a duty to take additional security measures, or that Olsher's alleged inaction had proximately caused plaintiff's injuries. Plaintiff appealed.

In its decision, the court first referred to *California Civil Code* § 1714 which imposes upon a landowner a duty to exercise "ordinary care or skill in the management of his or her property." California cases have held that a landowner who opens his land to the public for business purposes must, in protecting invitees against accidental, negligent or intentional physical harm from third parties, exercise reasonable care to discover that such harmful acts are being done or are likely to be done, and warn the visitors so that they can avoid the harm, and also take reasonable steps to minimize the damages. Indeed,

California operates on a "sliding scale balancing formula," in which the imposition of a high burden on a landowner requires heightened foreseeability of a particular injury. The converse is also true: where a danger is less foreseeable, a lower burden of prevention is imposed on the landowner.

Further, California courts have ruled in favor of landowner defendants where the severity of the crime and the subsequent injury far surpassed any prior crime or injury on the land, and therefore was not foreseeable. However, knowledge of the precise nature of prior crimes is not always required to impose a duty. Indeed, in *Castaneda*, the court noted that under California law, a landowner defendant may have a higher duty to protect if other circumstances make the crime that caused the injury foreseeable. For example, the court held that a similar violent crime occurring on the premises of a nearby and substantially similar business may provide the landowner with the requisite notice to impose a heightened duty of care. This may be counter to the California Supreme Court's decision in *Ann M. v. Pacific Plaza*, which many lawyers understand to hold that "bad neighborhood" evidence does not create foreseeability, and that there must be a prior, similar crime on the premises to impose a duty to make reasonable efforts to prevent the crime. Perhaps for this reason, the California Supreme Court has agreed to hear the *Castaneda* case, and ultimately may overturn it.

In *Castaneda*, the Court of Appeal found that a higher duty of care is acceptable because the events that led to plaintiff's injury were highly foreseeable. Specifically the defendant landowner knew that Park residents were fearful of certain groups of people who would congregate for hours in front of mobile homes, including the mobile home in question. For example, Beverly Rogers, who, along with her son Rodney Hicks, managed the Park, received complaints from tenants about gang activity in the Park for several years before the shooting, and reported these complaints to the landowner, who only took sporadic action. Despite the foregoing, these onsite incidents generally did not involve violent crime but rather drug deals and property damage

Violent incidents did occur near and concerning the Park. A little over one year before plaintiff was shot,

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someone had fired a gunshot into the Park from approximately one and one-half blocks away. The bullet penetrated the walls of two mobile homes. Also, in 1996, a Park resident who was a suspected gang member fired a gun into a lot adjacent to the Park, and then ran back into the Park with the gun in his possession. These occasions, the *Castaneda* court said, were sufficiently similar to the incident at issue to put the defendant landowner on notice that a shooting may occur on the premises.

The court also stated that gang-related crimes are different from random criminal acts of third parties. "It is well known that criminal and often violent activities are inherent to the gang lifestyle." The court noted that prior California decisions have recognized that the congregation of gangs poses a foreseeable risk of harm to the public. On that point, the court concluded that where the landowner knows that gang members are congregating on his property, and that gang activity and gang-related crimes are occurring, a gang-related shooting is foreseeable. Moreover, the court found that when a landowner is on notice of the presence of gang members, gang activity, and the "gang lifestyle" on his property, it is reasonable to expect the landlord to make efforts to increase security measures on the premises.

The court listed several ways the defendant landowner could have protected his tenants. For example, he could have increased security presence, provided security personnel with specialized training, imposed and enforced strict rules as to resident conduct in common areas, or simply ensured that the existing lighting in the Park was maintained in working order. However, he did not take any of those precautions.

In essence, the *Castaneda* decision attempts to impose a higher burden of care on landowners facing possible third-party violent crime on their premises. If a landowner knows about specific crimes and injuries that have occurred on his land, he has a corresponding duty to protect invitees against those crimes and injuries. *Castaneda* extends even further and says that if certain crimes and injuries are taking place in a similar business establishment nearby, that, too, may provide sufficient foreseeability to place a greater burden of care on the landowner. In light of the foregoing, the decision in *Castaneda* may run counter to the rule of *Ann M*. The California Supreme Court has agreed to review the case and its decision will impact premises owners throughout California.

- Marisa Sarnoff

NEW AT W & Z

Katherine S. Agbayani: Ms. Agbayani received her Bachelor's of Arts degree in Political Science from the University of California at Berkeley in May 1997, and her Juris Doctor degree from the University of Southern California Law School in May 2000. While still in law school, she was an extern for the Honorable Justice Candace Cooper, Presiding Justice of Division 8 of the California Courts of Appeal, Second Appellate District. Ms. Agbayani was admitted in June 2001, and her primary area of practice has been business and real estate litigation.

Linda Luna: Ms. Luna earned her Juris Doctor degree from Chapman University, School of Law in 2005 where she served as contributing editor of Nexus Law Journal. She is a former recipient of the Wally Davis Memorial Scholarship for her academic achievement, leadership and dedication to the community. While pursuing her law degree, Ms. Luna studied international law at the Universidad de Cantabria in Santander, Spain. Ms. Luna is fluent in Spanish.

While attending law school, Ms. Luna worked as a law clerk with the Office of the Attorney General - California Department of Justice, and RSM EquiCo, Inc. Prior to law school, Ms. Luna gained extensive experience working with municipalities. Ms. Luna was admitted to practice in all California State Courts in 2005.

Marisa Sarnoff: Ms. Sarnoff graduated with a Bachelor of Science degree from the Medill School of Journalism at Northwestern University, where she also majored in History. Ms. Sarnoff graduated from Loyola Law School of Los Angeles in 2005 and was admitted to the California Bar in November 2005.

Prior to attending law school, Ms. Sarnoff lived and worked in New York City where she was a television news producer. During law school, Ms. Sarnoff was the Executive Editor of the Entertainment Law Review and also clerked at the law firm of Johnson & Rishwain.

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