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## Premises-liability cases involving third-party criminal conduct

### SUCCESSFULLY CHALLENGING THE DEFENSE MOTION FOR SUMMARY JUDGMENT

Premises-liability cases involving third-party criminal conduct are challenging because they involve determining whether the property owner should have foreseen or prevented the criminal act. This article will explore the key legal issues surrounding premises-liability cases involving third-party criminal conduct and how to overcome the typical motion for summary judgment associated with these types of cases, particularly focusing on the factors that California courts consider in determining a property owner's liability, what discovery to obtain and how to obtain it, and defense arguments and how to defeat them.

#### Duty and the *Rowland* factors

The defense often argues that they had no duty to protect against unforeseeable criminal conduct. However, in California, foreseeability alone does not define duty; it is one of several factors outlined in *Rowland v. Christian* (1968) 69 Cal.2d 108, 113.) The *Rowland* factors include: (a) whether there was a special relationship between the landowner and injured party, (b) the foreseeability of harm, (c) degree of certainty, (d) the connection between defendant's conduct and the injury, (e) the moral blame, (f) the policy of preventing future harm, burden on defendant and consequences to the community, (g) and availability, cost, prevalence of insurance. (*Ibid.*)

While foreseeability is an essential component of duty, it is also often a component of causation or breach, and therefore a jury question in those contexts. In the duty context, it is a legal issue for the court. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 572 fn. 6.) But in the duty context, the inquiry by the court is "not to decide whether a particular plaintiff's injury was reasonably foreseeable in light of a particular defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed on the negligent party." (*Ibid.*)

By contrast, the jury considers foreseeability "in two more focused, fact-specific settings. First, the jury may consider the likelihood or foreseeability of injury in determining whether, in fact, the particular defendant's conduct was negligent in the first place. Second, foreseeability may be relevant to the jury's determination of whether the defendant's negligence was a proximate or legal cause of the plaintiff's injury." (*Ibid.*)

#### Special-relationship defendants

California law recognizes that certain property owners have an elevated duty to protect others from criminal conduct,



especially where there is a "special relationship" with the injured party. For instance, businesses like shopping centers, restaurants, and bars have a heightened duty to safeguard their patrons. In *Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 235, the Supreme Court explained a defendant owes an affirmative duty to protect another from the conduct of third parties if it has a "special relationship" with the other person. And in *Taylor v. Centennial Bowl, Inc.* (1966) 65 Cal.2d 114, 121, the Court held that a business proprietor has a "duty to take affirmative action to control the wrongful acts of third persons which threaten invitees where the [proprietor] has reasonable cause to anticipate such acts and the probability of injury resulting therefrom."

#### Discovery

Discovery is a critical step in premises-liability cases, particularly those involving third-party criminal conduct. The focus is often on gathering information about previous criminal incidents on the property, but several other types of

documents and records can establish a property owner's negligence. If you are dealing with a big-box retailer, this will present some nuanced challenges discussed below.

### Requests for production

Below is a list of topics that you will want to request documents about:

- Surveillance footage of the subject incident
- Crime reports and police records detailing prior criminal incidents on or near the premises
- Internal incident reports detailing past criminal activity
- Lease agreements and tenant records that may show prior concerns about security
- Security policies and procedures in place at the time of the incident

### Depositions

Below is a list of persons who will likely be a good starting point for depositions:

- Property owners/managers can speak about the property's security measures and prior criminal incidents
- Employees who worked at the time of the incident (e.g., security personnel, maintenance staff) can provide insights into the security measures in place
- Law enforcement officers can help establish whether the criminal activity was part of a pattern and whether the property owner was aware of similar risks

### Topics for PMK depositions

- What security measures (e.g., lighting, surveillance cameras, security guards) were in place at the time of the incident
- How criminal incidents were reported and recorded

### Public records

Public records can also be particularly helpful in finding information about prior criminal instances for the premises and the surrounding area. For example, investigating records from nearby businesses, local police departments, or neighborhood watch groups to identify

whether there were any warnings to the property owner about potential risks. Additionally, LAPD has a database that helps filter crime reports by location and type of crime. See link: [https://data.lacity.org/Public-Safety/Crime-Data-from-2020-to-Present/2nrs-mtv8/about\\_data](https://data.lacity.org/Public-Safety/Crime-Data-from-2020-to-Present/2nrs-mtv8/about_data).

### Big-box retailers and sophisticated databases

Big-box corporations often use sophisticated databases to record prior criminal and security incidents within their stores. Early in discovery, you will want to inquire about the name(s) of these databases and the specific records they contain. A PMK deposition will likely get you the answer. Keep in mind, some big-box retailers use multiple databases for different purposes, for example, theft vs. criminal instances. Once you track down the names of the applicable databases, you will want to request all relevant records within the database.

Unfortunately, when it comes to big-box retailers, you will likely get stonewalled and will be forced to bring a motion to compel. Defense will tell you the database documents are not discoverable because your request is overbroad as to the type of crimes, the geographical scope, and the time period. However, the defense will mistakenly use the admissibility standard, not the discoverability standard.

Below is case law to keep in your arsenal for obtaining discovery related to non-identical prior instances, including nationwide instances and instances dating back, at least, ten years before your subject incident.

#### ***Isaacs v. Huntington Mem'l Hosp.*, (1985) 38 Cal.3d 112, 133**

The *Isaacs* case involved a doctor who was shot in the parking lot of a hospital by an assailant. The doctor sued the hospital, alleging there were inadequate security measures. On appeal was the issue of whether the trial court improperly granted nonsuit because the plaintiff failed to prove notice of prior crimes of the same or similar nature. The *Isaacs* court concluded that foreseeability

does not require prior identical or even similar events, instead, courts should look at the totality of the circumstances and whether the prior criminal act is within the class of injuries that is reasonably foreseeable.

At trial, the court only allowed prior incidents that were assaultive crimes or thefts. However, the *Isaacs* court explained a trial court should determine the admissibility of each incident on the basis of whether it is relevant under Evidence Code section 350 and satisfies the requirements of Evidence Code section 352. For example, a prior identical or similar incident which occurred five years ago may have greater probative value than a dissimilar incident which occurred only three years ago. It is important to note that the *Isaacs* court stated even dissimilar incidents, i.e., a kidnapping, could potentially be admissible at trial so long as there is probative value to the foreseeability of criminal activity on the premises.

*Isaacs* is a crucial case for two reasons 1) Although helpful, you do not necessarily need prior instances to defeat the defense's motion for summary judgment (discussed below); and 2) Prior dissimilar incidents are surely discoverable if they can be potentially admissible at trial.

#### ***Cohen v. Southland Corp.*, (1984) 157 Cal.App.3d 130, 141**

In *Cohen*, the plaintiff was shot by an armed assailant attempting to rob a 7-Eleven store. Before the subject incident, there was one incident at that particular store where a man demanded and received money from the cash register. The incident did not involve a weapon. The *Cohen* court found even with just one prior incident, not involving a weapon, coupled with the uncontroverted statistic on 7-Eleven robberies, generally, that the foreseeability of a robbery at the subject 7-Eleven store was a triable issue of fact.

*Cohen* is helpful because the court looked at both robberies at the subject store, and at 7-Elevens nationwide. This case will help you get nationwide prior instances for big-box retailers.

***Sharon P. v. Arman, Ltd. (1999) 21 Cal.4th 1181, 91***

In *Sharon P.* the court looked at criminal activity 10 years prior to the subject incident. Specifically, the court held the occurrence of a sexual assault in a commercial underground parking garage was not foreseeable because no assaults had occurred in the underground garage during the 10 years preceding the attack upon plaintiff.

(For sample motions to compel prior instances, please contact Robert Glassman, [rglassman@panish.law](mailto:rglassman@panish.law) or Nadine Khedry, [nkhedry@panish.law](mailto:nkhedry@panish.law).)

**Defense arguments**

Defendants routinely rely on a handful of cases and cherry-pick language to support their position that your incident was unforeseeable because the exact crime hadn't happened before. The cases the defense frequently relies on require a closer look.

***Lopez v. McDonald's Corp. (1987) 193 Cal.App.3d 495***

*Lopez* involved a shooting at a McDonald's. The plaintiffs presented evidence that, in the two years before the subject shooting the subject McDonald's had two robberies, two petty thefts, one unlawful use of vehicle, vandalism, grand theft and theft by fraud. During the same approximate time period, crime statistics revealed that within a one-tenth of a mile radius of the restaurant, six burglaries, five batteries, one assault with a deadly weapon, two drawings of a deadly weapon, numerous grand thefts and various other crimes were committed. Two months after McDonald's made the decision to not hire security guards, an individual armed with a semiautomatic rifle, a semiautomatic pistol, and a 12-gauge shotgun entered the restaurant and immediately opened fire, killing 21 people and wounding 11 others.

The appellate court analyzed the *Rowland* factors and found the criminal

activity that had occurred in the vicinity of the McDonald's (but not at other McDonald's) bore no relationship to purposeful homicide or assassination that occurred during the subject incident, as most of the prior crimes involved theft.

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

*Sharon P.* involved a woman who operated an accounting business in a Los Angeles office building. The plaintiff paid for an assigned space in the building. One day, as she was preparing to leave in her car, a masked assailant came up from behind. He held a gun to her head, forced her back into her car, and sexually assaulted her. The plaintiff sued the premises owner. In the 11 years prior to the subject incident, no one had been physically assaulted on the premises or confronted with a firearm in the tenant garage.

Furthermore, Los Angeles Police Department records indicated a total of 363 crimes, including two rapes, within the 50 square blocks surrounding the office building throughout 1992.

During the first quarter of 1993, just prior to the plaintiff's assault, 72 crimes, but no rapes, were recorded. The *Sharon P.* court reasoned that the prior bank robberies were not sufficiently similar to the sexual assault on the plaintiff to justify such an obligation, and the statistical crime rate in the area around the building also did not establish the requisite foreseeability.

**What to do when you have no prior instances?**

California law states prior similar incidents are *not* a necessary element for proving "foreseeability." (*Jennifer C. v. Los Angeles Unified School Dis.* (2008) 168 Cal.App.4th, 1320, 1329-1330.) Instead, "what is required to be foreseeable is the general character of the event or harm . . . not its precise nature or manner of occurrence." (*Chanda v. Federal Home Loans Corp.* (2013) 215 Cal.App.4th 746,

755-756.) The reality is prior similar incidents end up being the most convincing evidence available. Unfortunately, sometimes despite best efforts, you may be left empty-handed when it comes to prior similar instances. When you are in this situation, you will need to work to gather other evidence regarding the defendant's negligence, i.e., how the defendant handled the ongoing situation, etc., whether defendant violated their own policies, or the general crime rate in the area. If it is early in the case and you know there are limited prior instances and no evidence of the defendant's negligence, you may want to rethink about continuing on.

**Conclusion**

There is no disputing these cases are difficult. However, through strategic discovery, including document requests, depositions, and the use of public records, plaintiffs can uncover crucial evidence to establish the property owner's negligence. Although prior incidents are often central to proving foreseeability, courts recognize that such incidents need not be identical to the crime in question. Defense arguments typically rely on the absence of identical incidents, but with the right tools and legal precedents, plaintiffs can successfully challenge motions for summary judgment and push their case forward.

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