

## **Tan v Arnel Management Co.**

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Liability for Third Party Criminal Conduct; Sliding scale formula; Forseeability

Defendant manages the 620 unit Pheasant Ridge apartment, with over 1000 residents on 20 acres. The entry road bisects the property, and passes by several tennis courts, visitor parking lots, and the leasing office, which has its own parking lot. Further down, the road splits, each going to an opposite side of the premises, through two security gates. Each resident is given one parking spot and offered additional spots for a fee.

Plaintiffs moved in during July of 2002 and were assigned a parking space. Since they had two cars, they inquired about additional free parking. Plaintiffs learned they could park in any unassigned space inside the gates, or in one of the visitor lots or the leasing office parking area. On December 22, 2002, plaintiff was unable to find an unassigned space near his residence and ultimately returned to the front, parking in the leasing office lot, outside the gated area.

After parking, plaintiff was approached by an unidentified man who pulled a gun and attempted to "carjack" the vehicle. Plaintiff did not fight back, but as he attempted to park, the assailant shot him in the neck, rendering plaintiff a quadriplegic. Plaintiffs sued for negligence, loss of consortium and fraud. At trial, the court granted summary adjudication on the fraud claim. Defendants moved for an Evidence code section 402 hearing to ascertain plaintiff's evidence of prior similar criminal activity.

At the hearing, plaintiffs' expert demonstrated that 10 prior incidents of "significant warning signs" had occurred, of which three involved "prior violent incidents." All involved a sudden attack at night in the ungated portion of the property. One was an assault with a sharp weapon, the second was an assault and robbery, and the third involved the use of a deadly weapon or force according to the police report. Thus, each event in the past two years involved strangers, at night, using violence in the ungated area.

Plaintiffs stated that the remedy of a simple electric gate at the entrance to the property would have served as a sufficient deterrent to such conduct. The trial court found plaintiffs had presented no evidence of a prior attempted carjacking or attempted murder or shooting, so therefore the defendants had no duty to take plaintiff's proposed measures to enhance security. The trial court granted defendants' ensuing motion for judgment on the pleadings and plaintiffs appealed.

The Second District Court of Appeals noted the motion was the functional equivalent of a nonsuit. As such, all of defendants' evidence that contradicted plaintiffs' evidence was disregarded for the analysis.

The California Supreme Court has articulated the scope of a landowner's duty to provide protection from foreseeable third party criminal acts. It is determined in part by

balancing the foreseeability of the harm against the burden of the duty to be imposed. Duty is determined by balancing the foreseeability of the criminal act against, "... the burdensomeness, vagueness and efficacy of the proposed safety measures." (***Ann M. v Pacific Plaza Shopping Center*** (1996) 6 Cal.4th 666)

The **sliding scale balancing formula** recognizes that imposing a high burden on the property owner requires a heightened showing of foreseeability, but a **minimal burden** may be imposed on the landowner upon a showing of a **lesser degree of probability**. (***Delgado v Trax Bar & Grill*** (2005) 36 Cal.4th 224) In circumstances in which the burden of preventing future harm caused by third party criminal conduct is great, such as providing security guards or installing security cameras, heightened foreseeability – shown by prior similar criminal conduct or other indications of a reasonably foreseeable risk of violent criminal assaults in that locations – will be required. (***Delgado***, at p. 243, fn 24)

**The court must determine the specific measures the plaintiff asserts the defendant should have taken to prevent the harm.** This frames the issue for the court by defining the scope of duty under consideration. Second, the court must analyze how **financially and socially burdensome** these proposed measures would be to the landlord. Third, the court must **identify** the nature of the third party **conduct** that the plaintiff claims **could have been prevented** had the landlord taken the proposed measures, and **assess how foreseeable** (from a mere possibility to a reasonable probability) it was that this **conduct would occur**. (*Castaneda v Olsher* (2007) 41 Cal.4th 1205) The more ***certain*** the likelihood of harm, the ***higher the burden*** a court will impose on a landlord to prevent it; the ***less foreseeable*** the harm, the ***lower*** the burden a court will agree to impose on a landlord.

Here, the Second DCA observed that the security measures proposed by plaintiffs were minimal (a lower burden). Moving the existing gates, or installing additional gates at the front of the property would suffice to define the property boundary. The trial court had **overstated** the plaintiffs' position by concluding they sought a guard or ongoing surveillance or monitoring. The gates suggested by plaintiff would cost a total of \$13,050. This was a one-time security expenditure and was **not onerous**, as the trial court found.

Finally, the three prior incidents of sudden, unprovoked, increasingly violent assaults on people in ungated parking areas by strangers in the middle of the night showed **sufficient foreseeability**. The Justices concluded the plaintiffs presented substantial evidence of prior similar incidents or other indications of a **reasonably foreseeable risk of violent criminal assaults on the property so as to impose on defendants a duty to provide the comparatively minimal security measures plaintiffs described**.

As set forth in ***Ann M.***, the test is prior similar incidents, not prior identical incidents. (***Claxton v Atlantic Richfield Co.*** (2003) 108 Cal.App.4th 327. Along with the ***minimal*** security measures proposed by plaintiffs here, they have presented ***substantial*** evidence of prior, sudden, vicious assaults by a stranger at Pheasant Ridge. Plaintiffs

demonstrated a reasonably foreseeable risk of violent criminal assaults on the property.

Perfect identity of prior crimes to the attack on plaintiff is not necessary. Under the Supreme Court's "[sliding-scale balancing formula](#)," [heightened foreseeability is required to impose a high burden whereas some showing of a lesser degree of foreseeability is sufficient where a minimal burden is sought to be imposed on the defendants](#). Because plaintiffs have only asked for relatively minimal security measures, the degree of foreseeability required here is not especially high.

As a matter of law, the Court found the three prior incidents cited were sufficiently similar to make the assault on plaintiff foreseeable and to place a duty of care on defendants. Accordingly, the trial court erred in ruling the defendants had no duty of care in this case. The judgment is reversed.