Don’t get beaten up by an assault case

How to decide whether to take on these challenging cases, and a game plan for when you do

By Chuck Geerhart

If your practice is like mine, you get calls from prospective clients who have been assaulted by someone. If it’s simply a case of “some guy attacked me in the street,” the case probably has no recoverable damages. I do not spend much time talking to these folks. Even if the perpetrator has assets, it can be difficult reaching them. If it’s a case of “my neighbor assaulted me,” you might think there would be homeowner’s coverage. Think again. In California, insurance cannot by law cover intentional torts. (See Ins. Code, § 533) [“An insurer is not liable for a loss caused by the willful act of the insured . . . .”]. Occasionally you can fit an assault by a homeowner into the negligence box, but it’s a dicey proposition.

Now let us take up the case where your prospective client has been badly injured by a third party in a retail or similar establishment (e.g., bar, nightclub, Starbucks). I say “badly injured” because these cases usually require extensive litigation and motion practice. As discussed below, there will often be multiple depositions of both the establishment’s employees and its security personnel, plus eyewitnesses. The establishment sometimes, but not always, attempts to extricate itself via summary judgment [MSJ]. Because the cases are so labor intensive, with the distinct possibility of summary judgment, you are taking a substantial risk with your time and money in almost every case. Therefore, you do not want to handle a third-party assault case unless damages are into six figures.

The goal of this article is to help you identify the type of third-party assault

Copyright © 2014 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**

case that will simultaneously work for your practice and help obtain a good recovery for your client.

Law – *Delgado v. Trax Bar & Grill*

There is a long body of case law, and this article does not purport to be anything more than a short primer on it. You absolutely need to read *Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224. Read it over and over. It is a lengthy opinion, and summarizes the development of California law governing third-party assaults. There is a companion case involving a parking lot stabbing, *Morris v. De La Torre* (2005) 36 Cal.4th 260. *Delgado* involved a bar which was on notice of a confrontation between customers brewing inside the bar. The bar simply ordered all the parties out of the bar. Once outside, one of the parties badly injured the other. Plaintiff won at trial. The Court of Appeal reversed, finding no duty. The California Supreme Court reversed, holding that the bar did have a duty based on the "special relationship" between owner and customer.

In *Delgado*, the California Supreme Court described the special relationship doctrine:

> For example, it long has been recognized that restaurant proprietors have a special-relationship-based duty to undertake relatively simple measures such as providing "assistance [to] their customers who become ill or need medical attention and that they are liable if they fail to act." (*Breaux v. Gino's, Inc.* (1984) 153 Cal.App.3d 379, 382; see generally Rest.2d Torts, § 314A.) Similarly, a restaurant or bar proprietor also has a duty to warn patrons of known dangers (see Rest.2d Torts, § 344) and, in circumstances in which a warning alone is insufficient, has a duty to take other reasonable and appropriate measures to protect patrons or invitees from imminent or "ongoing" criminal conduct. (*Kentucky Fried Chicken, supra*, 14 Cal.4th 814, 823.) Such measures may include telephoning the police or 911 for assistance (e.g., *Johnson v. Fontana* (La.Ct.App.1997) 610 So.2d 1119, 1121-1122 [duty of bar proprietor]), or protecting patrons or invitees from an imminent and known peril lurking in a parking lot by providing an escort by existing security personnel to a car in that parking lot.

(*Taylor, supra*, 65 Cal.2d 114, 121-125 [duty of bar proprietor]; ... (*Delgado* at 241.)

Delgado also makes clear that "heightened foreseeability" is not always required when a plaintiff seeks to impose a special-relationship-based duty. The assertion that "the requirement of 'prior similar incidents' is ... a factual precondition to premises liability":

> ... is facially *inconsistent* with our decisions in *Ann M., supra*, 6 Cal.4th 666, and its progeny, all of which, when articulating and applying the heightened foreseeability doctrine, expressly reaffirm the sliding-scale balancing formula articulated prior to and in our decision in *Isaacs, supra*, 38 Cal.3d 112, 125, under which we have recognized that, as a general matter, imposition of a high burden requires heightened foreseeability, but a minimal burden may be imposed upon a showing of a lesser degree of foreseeability. (See ante, at p. 237, quoting *Ann M., supra*, 6 Cal.4th at pp. 678-679, which in turn quoted and followed both *Isaacs, supra*, 38 Cal.3d 112, 125, and *Gomez v. Ticor, supra*, 145 Cal.App.3d 622, 631; *Sharon P., supra*, 21 Cal.4th at p. 1195 [same]; *Wiener, supra,* 32 Cal.4th at pp. 1146-1147 [same; described ante, at fn. 20]; see also *Kentucky Fried Chicken*, supra, 14 Cal.4th 814, 819.) (*Delgado* at 243.)

The absence of heightened foreseeability (prior similar incidents):

> "does not signify that defendant owed no other special-relationship-based duty to plaintiff, such as a duty to respond to events unfolding in its presence by undertaking reasonable, relatively simple, and minimally burdensome measures."
> (*Delgado* at 245.)

> [I]n cases in which harm can be prevented by simple means, or by imposing merely minimal burdens, only 'regular' reasonable foreseeability as opposed to heightened foreseeability is required.

(*Id*., fn. 24.)

The applicable jury instruction is CACI 1005, which states:

> Business Proprietor's Liability for the Negligent/Intentional/Criminal Conduct of Others
>
> An owner of a business that is open to the public must use reasonable care to protect patrons from another person's harmful conduct on his property if the owner can reasonably anticipate such conduct.

Note that this instruction includes *negligent* (not just criminal) conduct of others.

The key legal points are that foreseeability based on prior similar incidents is not always required in the retail setting. The burden of providing security guards is not always imposed, in the absence of prior incidents. From a practical standpoint, the longer it takes for the assault to happen after the defendant has notice, the better. Many assaults develop in 10 seconds, and the perpetrator flees. These are tough cases, unless the perpetrator was known to the establishment based on prior incidents.

I am going to focus on assaults in the retail/bar/restaurant setting as opposed to apartment or parking lot security cases. The latter cases are even tougher because, in general, you do not have the special relationship. Thus, you have to satisfy the heightened foreseeability standard. This perforce dramatically increases the expenses of the case, and will require conducting intensive research into the history of the apartment or parking lot, and deep research into crime statistics in the area. If you hire an expert to do this (see below), you are probably looking at spending $5,000 to $10,000 to do all the research some experts recommend.

Copyright © 2014 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**

Discovery

Propound a detailed set of special interrogatories and document requests aimed at learning what policies and procedures were in place for security, as well as how the club is staffed. (If you send me an email at cgeerhart@gmail.com, I will share my standard discovery requests. Specify Word or WordPerfect.) You also want to discover all prior incidents and police calls for assistance. You can cross-check what you get in discovery with public record requests to the local police. (Include the 911-call for your incident). You also want to obtain in-house video – request it immediately after the incident before it is destroyed.

I like to obtain lists of all current and former employees. Insist on address and telephone for former employees – then talk to them. Former employees will tell the truth about how things really worked at the club, and will often contradict the person most knowledgeable, whose deposition you will take after you get discovery.

What makes a *good* case

Remember the three-legged stool that dictates how attractive a case is – liability, damages and insurance/assets? You are almost always in trouble with the liability leg in third-party assault cases. So you had better have big damages and some insurance. I say "some" insurance because many times in the bar/nightclub setting, the bar will have only basic general liability insurance. The owner has a choice: pay a couple thousand dollars for cheap insurance (which expressly excludes assaults by others), or pay $20,000 or more for the really good insurance that covers third-party assaults[1]. What economic choice do you think he makes? In my experience (see below), there are always insurance coverage issues in these cases.

The assaults range from fistfights to stabbings to shootings. I hate to be crass, but if your prospective client only has a black eye, a sore back, a few stitches, or a minor fracture without surgery, the case is probably not worth pursuing, at least in litigation, as the costs may exceed the recovery. Sometimes, however, the cases involve surgeries or death. These are the cases worth pursuing.

As a pleading matter, I almost never name the third-party assailant. They tend to have no assets, are hard to serve, and will not cooperate in discovery in any event. They will be subject to Prop. 51 (Civ. Code, § 1431.2) apportionment, but that is a risk factor in every case. The defense will always argue that the assailants will take 90 percent to 100 percent of the fault on the verdict form.

Examples of how cases play out

Here are a few cases I have handled:

Shooting death in a bar

My clients were the parents and young child of the decedent, a 23-year-old union worker. There was a lot of video showing the two hours up to and including the shooting. The decedent was captured on video delivering a series of haymaker punches to a Norteno gang member's head just before being shot dead by other Nortenos at point-blank range. The two shooters pleaded guilty to second degree murder. Can you believe that alcohol was involved? The decedent had a .19 BAC. But the video also showed the bar was serving underage Nortenos for hours before the event. One of the shooters was only 17.

Under Business & Professions Code section 25602.1, if a bar serves an obviously intoxicated minor who causes harm, liability is presumed. Also, this triggered the potential for mandatory insurance coverage, because negligent service of alcohol to intoxicated minors arguably sounds in negligence, which is covered. MSJ was not attempted.

The bar owner's liability insurance defended under a reservation of rights. At trial call, the case settled for $300,000, from the following sources: $100,000 from owner's liability carrier; $175,000 from insurance broker's E & O carrier (for selling wrong kind of insurance); and $25,000 from the bar owner himself.

Why so little in a death case, you might ask? First, the basic difficulty in proving liability against the bar. Second, large comparative fault on the part of the decedent and the third-party gang members. Third, insurance coverage problems.

Stabbing in a nightclub

My client was suddenly stabbed many times in a nightclub. The attack happened quickly and without warning, making this a very difficult case. The club had security. The assailants got away. The nightclub, a well-known San Francisco spot, had no liability coverage for assaults. The event promoter however, which business publicized the event, played music and shared in the gate and bar receipts, had a $1 million commercial liability policy. Although the promoter had no control over security, we argued it was in a joint venture with the bar. In a joint venture, the negligence of one joint venturer is imputed as a matter of law to his co-joint venturer. [See *Leming v. Oilfields Trucking Co.* (1955) 44 Cal.2d 343, 350 – tortious acts of joint venturer's employees committed in conjunction with joint venture imputed to other joint venturers.] MSJ was not attempted.

As a result of the joint venture allegation, the commercial carrier paid $160,000, and the bar owner contributed $40,000 of its own money. The takeaway here: always probe the relationship between promoter and club owner.

Another stabbing in a nightclub

In some ways, this is a carbon copy of the last case: My client was suddenly stabbed in a nightclub. It all happened very quickly. The unknown assailants got away. The nightclub, also a well-known San Francisco establishment, had no liability coverage for assaults. They did, however, have a uniformed security company, which had a $1 million commercial policy. The insurer paid $100,000 and the club promised to pay $6,000, but never did.

Copyright © 2014 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**

Note that the two stabbing cases happened quickly – if they had taken longer to develop, the defendants could have had more liability. MSJ was not attempted.

Stabbing in a homeless shelter

Our client was asleep in a homeless shelter in San Francisco and awoke to find the assailant standing over him with a knife. Believe it or not, there was commercial insurance available in this setting. What's more, we defeated MSJ based on the special relationship doctrine and a prior history of problems with the assailant. The carrier paid $150,000 at trial call.

Experts

There are very few good security experts for these cases, although there are people who will tell you they are the best. They are expensive because they want to do a lot of time-intensive activities. Even if the defense hires an expert who seems bulletproof, if you prepare well and take a thorough deposition, you will find the expert is often a paper tiger. When you depose that defense expert, you may find that what the expert says actually helps your case.

Unless your case has very large value, I would argue holding off on retaining an expert at the outset, which can easily cost upwards of $10,000 just for the expert to review discovery/depositions and examine historical police records. If you have the opportunity to settle the case, the medical liens will eat up a good chunk of the settlement – you don't need five-figure expert costs to be a factor in the decision to settle.

That said, if you are going to try the case you will probably need an expert, if for no other reason than to be a counterweight to the defense expert.

Mediation

Yes, mediation is a good thing in these cases, but don't go to mediation prematurely. Unless liability is conceded, you will likely need at least a person most knowledgeable deposition. If an MSJ is pending, wait to mediate until you have defeated the MSJ (unless of course you have come to feel doomed on liability, in which case you may want to take a shot at early mediation).

Closing thoughts

These can be valuable cases, but you will have to do the work. Because there are often many witnesses, be prepared to take or attend ten or more depositions. This complicates the challenge of keeping costs at a level that will not impede settlement. These cases are extremely gratifying because you are helping someone – your client – who has gone through what is probably the worst experience of his or her life.

Geerhart

Chuck Geerhart is a founding partner of Paoli & Geerhart *and was admitted to the California bar in 1989. He is a graduate of Cornell University and the UCLA Law School. He has tried more than 20 cases to jury verdict. He has also sat as a juror in three cases in San Francisco County. In addition to his active practice representing injured people, Chuck sits as a judge pro tem and serves as a court-appointed arbitrator and settlement conference officer in the San Francisco Superior Court.*

Endnote

[1] Distinguish third-party assaults from assaults by employees of a company. California law has consistently held that fights or assaults in the workplace are generally within course and scope of employment (hence *respondeat superior* applies). See *Rodgers v. Kemper Construction*, 50 Cal.App.3d 608 (1975) [upholding tort liability of an employer for an assault committed by an employee on a construction site]. Although insurance will not cover an intentional tort, a self-insured corporate employer is financially responsible.

Copyright © 2014 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**