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## The Law of Causation in Actions Involving Third-Party Assaults When the Landowner Negligently Fails to Hire Security Guards: A Critical Examination of Saelzler v. Advanced Group 400

Dennis T. Yokoyama  
*Southwestern University School of Law*

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**THE LAW OF CAUSATION IN ACTIONS INVOLVING THIRD-PARTY ASSAULTS WHEN THE LANDOWNER NEGLIGENTLY FAILS TO HIRE SECURITY GUARDS: A CRITICAL EXAMINATION OF *SAELZLER v. ADVANCED GROUP 400***

DENNIS T. YOKOYAMA\*

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\* Associate Professor of Law, Director of the Legal Research and Writing Program, Southwestern University School of Law. The author is grateful for the research stipend provided by the Board of Trustees of Southwestern University School of Law. The author thanks his research assistants for their able help: Christine Juneau, Aaron Morrison, and Bryan Quick. The author also thanks his Southwestern colleagues for their helpful suggestions: Alan Calnan, Catherine Carpenter, Michael Frost, James Kushner, Austen Parrish, Lawrence Sullivan, and Leigh Taylor. Finally, the author expresses his gratitude to Janis K. Yokoyama and Denise K. Yokoyama for their assistance, support, and encouragement.

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## I. INTRODUCTION

Carrying a package for delivery, Marianne Saelzler, a Federal Express employee, entered through a propped-open gate leading into a sprawling apartment complex considered a haven for crime.<sup>1</sup> Ms. Saelzler noticed two men standing next to the gate.<sup>2</sup> On her way out of the premises, the two men she had seen earlier, along with another man, stopped her, whereupon the unthinkable happened—they assaulted and attempted to rape her.<sup>3</sup> Even though security guards routinely patrolled the grounds at night,<sup>4</sup> no security guards were on duty that afternoon.<sup>5</sup>

Ms. Saelzler sued the property owners and the apartment management company<sup>6</sup> for negligence.<sup>7</sup> She alleged that, given the well-documented history of crime that had plagued the apartment complex,<sup>8</sup> Advanced Group 400 failed to take reasonable security precautions, which should have included the hiring of daytime security guards.<sup>9</sup> Advanced Group 400 moved for summary judgment, only contending that Ms. Saelzler lacked sufficient proof of causation.<sup>10</sup> The trial court granted summary judgment.<sup>11</sup> The court of appeal reversed.<sup>12</sup>

1. Saelzler v. Advanced Group 400, 23 P.3d 1143, 1147 (Cal. 2001).

2. *Id.*

3. *Id.*

4. *Id.* at 1159 (Werdegar, J., dissenting).

5. *Id.* at 1155 (Kennard, J., dissenting).

6. This article often refers to these defendants collectively as “Advanced Group 400.”

7. Saelzler, 23 P.3d at 1147.

8. *Id.* at 1147-48.

9. *Id.* at 1147.

10. *Id.* In California, the causation requirement has two aspects: “[w]hether or not there is any factual relationship between the defendant’s conduct and the plaintiff’s claimed injuries (an issue often referred to as ‘actual causation’ or ‘cause in fact’); and [w]hether assuming such a factual relationship is shown, the defendant should be held legally responsible for the plaintiff’s injuries.” Sheryl L. Heckmann & Howard C. Anawalt, 2 CALIFORNIA TORTS § 2.01 (Neil M. Levy et al. eds. 2003) (footnotes omitted). See also Leslie G. v. Perry & Assocs., 50 Cal. Rptr. 2d 785, 790 (Ct. App. 1996) (“In California, the causation element . . . is satisfied when the plaintiff establishes (1) that the defendant’s breach of duty (his negligent act or

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A sharply divided California Supreme Court reversed the appellate decision and affirmed summary judgment, reasoning that, despite the lack of much-needed security personnel at the critical time, Ms. Saelzler's proof of causation was inadequate because she could not prove that the presence of security guards, as well as the taking of other security precautions, would have prevented the attack.<sup>13</sup> By requiring that plaintiffs prove causation to a virtual certainty, the *Saelzler* decision gives defendant-landowners an upper hand in obtaining summary judgment in situations where the defendant fails to take reasonable security precautions,<sup>14</sup> and imposes on the plaintiff an unduly difficult burden to prove causation.<sup>15</sup>

Given the crime-plagued history of its apartment complex,<sup>16</sup> Advanced Group 400 had little choice but to concede, in making its motion for summary judgment, that it owed a duty to Ms. Saelzler to take reasonable precautions to safeguard her against the assault she suffered. It is axiomatic that California landowners have a duty to maintain their premises in a reasonably safe condition and that this duty extends to taking reasonable precautions to safeguard against foreseeable crime.<sup>17</sup> If a particular crime was foreseeable, and thus the landowner had the duty to take reasonable precautions to prevent the crime, the court then must determine the landowner's standard of care.<sup>18</sup> What constitutes reasonable precautions depends on a variety of fac-

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omission) was a substantial factor in bringing about the plaintiff's harm and (2) there is no rule of law relieving the defendant of liability.").

This Article focuses exclusively on the former aspect of causation and will simply refer to this element as "causation" or "cause-in-fact."

11. *Saelzler*, 23 P.3d at 1148.

12. *Saelzler v. Advanced Group 400*, 92 Cal. Rptr. 2d 103 (Ct. App. 2000), *rev'd*, 23 P.3d 1143 (Cal. 2001).

13. *Saelzler*, 23 P.3d at 1145.

14. For a discussion of the practical ramifications the decision portends for California litigators, see Dennis Yokoyama, *Danger Zones*, 24 LOS ANGELES LAW. 45 (Jan. 2002).

15. This Article focuses almost exclusively on cases involving crime committed by unknown third parties, and excludes discussion of situations where the defendant had advance notice that a particular person or persons posed a threat to another. See, e.g., *Rosh v. Cave Imaging Sys., Inc.*, 32 Cal. Rptr. 2d 136, 137-39 (Ct. App. 1994) (action against security company for negligently allowing an individual to return to his former employer's premises where he then shot his former boss); *Faheen v. City Parking Corp.*, 734 S.W.2d 270, 273 (Mo. Ct. App. 1987) (discussing situations where the landowner's "duty may arise when a person, known to be violent, is present on the premises or an individual is present who has conducted himself so as to indicate danger and sufficient time exists to prevent injury"); *Lambert v. Doe*, 453 So. 2d 844, 847-48 (Fla. Dist. Ct. App. 1984) (holding that the landlord's duty to take reasonable security precautions extends to tenants who the landlord knew or should have known was a danger to others).

16. See *infra* Part IV.A.

17. *Lopez v. Baca*, 120 Cal. Rptr. 2d 281, 285-86 (Ct. App. 2002). California law coincides with the majority rule that "while not insurers of their customers' safety, businesses do have a duty to take reasonable precautions to protect customers from foreseeable criminal acts." *McClung v. Delta Square Ltd. P'ship*, 937 S.W.2d 891, 898 (Tenn. 1996) (listing cases imposing the duty).

18. See *Lopez v. McDonald's Corp.*, 238 Cal. Rptr. 436, 448 (Ct. App. 1987).

tors.<sup>19</sup> Reasonable precautions may range from the relatively simple and inexpensive, such as illuminating a parking lot at night,<sup>20</sup> or installing and maintaining operable locks on the entry doors of apartment buildings,<sup>21</sup> to the much more expensive and burdensome step of employing security personnel to patrol the premises.<sup>22</sup>

By not disputing that it had a duty to provide security guards during the day, Advanced Group 400 implicitly conceded that the attack on Ms. Saelzler was highly foreseeable.<sup>23</sup> In addition, Advanced Group 400 conceded its negligence by failing to produce proof that security guards were on duty or that it had taken any other security precautions when Ms. Saelzler was attacked.<sup>24</sup> Because of Advanced Group 400's negligent failure to take security precautions and thus its implied concession that the assault on Ms. Saelzler was highly foreseeable, the burden of causation should have been shifted from Ms. Saelzler, the innocent plaintiff, to Advanced Group 400.<sup>25</sup> This would require that Advanced Group 400 prove that, even if it has taken reasonable security precautions, the assault would still have occurred.<sup>26</sup>

While much has been written and debated regarding a landowner's duty to safeguard its premises from crime,<sup>27</sup> the same cannot be said of causa-

19. The standard of care should vary according to the nature of the premises. "Obviously, a six-unit, one building 'Mom and Pop' motel will not have the same security problems as a large high-rise thousand room hotel, or of a three hundred room motor lodge spread out over six buildings. Each presents a peculiar security problem of its own." *Orlando Executive Park, Inc. v. P.D.R.*, 402 So. 2d 442, 447 (Fla. Dist. Ct. App. 1981).

20. *See, e.g., Staveris v. 125 Holding Co.*, 709 N.Y.S.2d 507, 507-08 (App. Div. 2000) (holding that lack of lighting and unsecured openings in parking lot raised question of fact as to breach of duty); *Loeser v. Nathan Hale Gardens, Inc.*, 425 N.Y.S.2d 104, 106-07 (App. Div. 1980) (holding that defendant was negligent in failing to light outdoor parking lot reserved for apartment tenants).

21. *See, e.g., Rios v. Jackson Assocs.*, 686 N.Y.S.2d 800, 801-02 (App. Div. 1999) (failure to keep in repair front door lock of apartment building); *Gibbs v. Diamond*, 682 N.Y.S.2d 181, 182 (App. Div. 1998) (failure to lock vacant apartment unit, into which the plaintiff was dragged and attacked); *Eleby v. New York City Hous. Auth.*, 637 N.Y.S.2d 219, 220 (App. Div. 1996) (ruling that plaintiff must prove "that the lock at issue was inoperable at the time of the attack and that the defendant knew or should have known of such a fact for a period of time sufficient to have repaired it . . .").

22. Given the great expense involved in hiring security personnel, a duty to hire guards is one that California courts will not readily impose upon landowners. *Ann M. v. Pacific Plaza Shopping Ctr.*, 863 P.2d 207, 215-16 (Cal. 1993).

23. California law requires a landowner to hire security guards only when it is highly foreseeable that violent crimes will take place on the landowner's premises. *Ann M.*, 863 P.2d at 215-16. *See infra* Part II.B.2.

24. *Saelzler*, 23 P.3d at 1149.

25. *See infra* Part VI.

26. *See infra* Part VI.B.

27. *See, e.g., Shannon D. Sweeney, Note, "Inherently Dangerous" Premises: Sharon P. v. Arman, Ltd. Dictates That Criminal Acts of Third Parties Are Foreseeable in California Commercial Parking Structures*, 33 U.S.F. L. REV. 521 (1999); Donna Lee Welch, Comment, *Ann M. v. Pacific Plaza Shopping Center: The California Supreme Court Retreats from Its "Totality of Circumstances" Approach to Premises Liability*, 28 GA. L. REV. 1053 (1994); Suzanne Ciccone, Comment, *Business Owners' Duty to Protect Patrons from the Criminal*

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tion.<sup>28</sup> In California, where the landowner's duty to safeguard against crime is now well entrenched, much of the development of California case law regarding third-party crime has shifted away from duty to causation.<sup>29</sup> Unlike its decisions in *Sharon P. v. Arman, Ltd.*<sup>30</sup> and *Ann M. v. Pacific Plaza Shopping Center*,<sup>31</sup> where the California Supreme Court held that the landowner did not breach its duty to the plaintiff, the court in *Saelzler* squarely addressed and explicitly resolved the causation question by ruling in the landowner's favor.

While the *Saelzler* decision embodies the California Supreme Court's most extended analysis of causation in third-party crime cases, the decision represents a missed opportunity on two key fronts. The court failed to justly recast the law of causation in favor of innocent persons assaulted on premises where the landowner breached its duty to hire security guards and to take meaningful security precautions in a vast crime-plagued apartment complex. Additionally, the court missed an opportunity, through the power of law, to encourage or otherwise prod landowners to do their part in stemming violent crime. The court compounded both failures by also failing to provide a persuasive or logically consistent rationale.

This Article is organized as follows: Part II briefly traces how the determination of duty has evolved in California premises liability law in third party criminal conduct cases. Even though imposing a duty on landowners to

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*Acts of Third Parties in Louisiana*, 53 LA. L. REV. 1847 (1993); David W. Robertson, *Negligence Liability for Crimes and Intentional Torts Committed by Others*, 67 TUL. L. REV. 135 (1992); G. Robert Friedman & Kathleen J. Worthington, *Trends in Holding Business Organizations Liable for the Criminal Acts of Third Persons on the Premises: A Texas Perspective*, 32 S. TEX. L. REV. 257 (1991); Uri Kaufman, *When Crime Pays: Business Landlords' Duty to Protect Customers from Criminal Acts Committed on the Premises*, 31 S. TEX. L. REV. 89 (1990); David A. Roodman, Note, *Business Owners' Duty to Protect Invitees from Third Party Criminal Attacks—Or—"Business Owners Beware: Missouri Ups the Ante"* Madden v. C & K Barbecue Carryout, Inc., 54 MO. L. REV. 443 (1989); Michael J. Yelnosky, *Business Inviters' Duty to Protect Invitees from Criminal Acts*, 134 U. PA. L. REV. 883 (1986); Dennis A. Ross, Comment, "Am I My Brother's Keeper?" Cornpropst v. Sloan, A *Business Proprietor's Civil Liability for Criminal Attacks to an Invitee by a Third Party*, 9 AM. J. TRIAL ADVOC. 473 (1986); Kevin J. O'Donnell, Comment, *Landlord Liability for Crime to Florida Tenants—The New Duty to Protect from Foreseeable Attack*, 11 FLA. ST. U. L. REV. 979 (1984).

28. See *Leslie G. v. Perry & Assocs.*, 50 Cal. Rptr. 2d 785, 793 (Ct. App. 1996) ("In California, very little has been written about the specific sort of proof it takes to establish causation in a negligence action against a landowner arising out of a third party's criminal or negligent conduct."); *Nola M. v. Univ. of S. California*, 20 Cal. Rptr. 2d 97, 102 (Ct. App. 1993) ("Very little has been written about the sort of proof it takes to establish causation in third party cases."). But see *Julie Davies*, Essay, *Undercutting Premises Liability: Reflections on the Use and Abuse of Causation Doctrine*, 40 SAN DIEGO L. REV. 971 (2003) (critiquing the *Saelzler* decision); Yokoyama, *supra* note 14, at 45 (describing key California cases pertaining to causation in third-party crime cases).

29. See *infra* Part III.

30. 989 P.2d 121 (Cal. 1999) (holding that parking garage owner did not breach its duty to patron).

31. 863 P.2d 207 (Cal. 1993) (holding that shopping center owed no duty to hire security guards to patrol common areas).

protect against third-party crime is a departure from common law, the existence of the duty is circumscribed by the foreseeability of the criminal conduct at issue. The California Supreme Court has largely departed from the rule that foreseeability is determined only by examining whether there were prior similar incidents of the kind at issue. Instead, the court has ruled that foreseeability should be determined by examining the totality of the circumstances, a more expansive and balanced standard. A notable exception to that rule exists, however, when the plaintiff alleges that the landowner had a duty to hire security guards. In this situation, given the relatively high burden and expense of hiring security guards compared with other security measures, the plaintiff must prove foreseeability through the prior similar incidents test, a much more difficult standard for plaintiffs to meet. A plaintiff who meets this standard has established that a significant threat of violence exists on the premises, which makes the landlord's failure to take any reasonable precautions an egregious breach.

Part III reviews two key California Court of Appeal decisions that shaped the law of causation in cases involving third party assaults on plaintiffs. These decisions ultimately influenced and were embraced by the California Supreme Court in deciding *Saelzler*. Part IV describes the *Saelzler* case itself, from the circumstances surrounding the assault on Ms. Saelzler, through the procedural aspects that brought the case before the California Supreme Court, and into the court's rationale explaining the inadequacy of Ms. Saelzler's proof of causation. Part V critically examines the *Saelzler* decision, contending that the majority opinion suffers from a questionable description and application of the law of causation and misguided pronouncements about the functions of security personnel, all of which ultimately undermine its holding. Finally, Part VI contends that, in cases like *Saelzler*, public policy demands shifting the burden of causation from the innocent plaintiff to the negligent defendant. This burden shifting finds ample support in long-standing California case law. Under this rule, the defendant would have the burden of proving the crime perpetrated upon the plaintiff would still have occurred even if it had take reasonable security measures.

## II. OVERVIEW OF CALIFORNIA LAW: THE LANDOWNER'S DUTY TO PROTECT AGAINST THIRD PARTY CRIME

### A. *The Basis of the Duty in California: Landowner Control of Common Areas*

California's common law of negligence is straightforward to state. To establish a claim for negligence, a plaintiff must prove that the defendant owed the plaintiff a duty, that the defendant breached the duty owed, and that the defendant's breach proximately caused the plaintiff to suffer com-

pensable harm.<sup>32</sup> California landowners owe a general duty to maintain land in their possession and control in a reasonably safe condition.<sup>33</sup>

Despite this deeply-entrenched general rule, landowners in most jurisdictions did not always owe a duty to prevent third-party criminal activity on their premises. Such a duty at common law, in fact, was limited to certain discrete situations.<sup>34</sup> At one time, the duty was only imposed upon those who had a special relationship with the plaintiff, such as “common carrier-passenger, innkeeper-guest, landowner-invitee, custodian-ward.”<sup>35</sup> In declining to impose this duty on all landowners, courts have cited a panoply of reasons:

judicial reluctance to tamper with the traditional common law concept of the landlord-tenant relationship; the notion that the act of a third person in committing an intentional tort or crime is a superseding cause of the harm to another resulting therefrom; the oftentimes difficult problem of determining foreseeability of criminal acts; the vagueness of the standard which the landlord must meet; the economic consequences of the imposition of the duty; and conflict with the public policy allocating the duty of protecting citizens from criminal acts to the government rather than the private sector.<sup>36</sup>

In negligence actions against landowners, crimes, such as assault and battery, were regarded as simply unpredictable events, incapable of being reasonably foreseen, or were considered to be intervening causes of a plain-

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32. “To recover for the consequences of another’s purportedly wrongful action, the victim must show that the tortfeasor owed a duty of care, that it breached its duty, that the breach proximately caused the harm, and that the victim is entitled to money damages as a result. This is the bedrock of negligence law.” *Sharon P. v. Arman, Ltd.*, 989 P.2d 121, 135 (Cal. 1999) (Mosk, J., dissenting) (citation omitted). While the negligence rule is easy enough to recite, judges, practicing lawyers, scholars, and law students alike know that applying the rule can be a source of great consternation. See Catharine Pierce Wells, *A Pragmatic Approach to Improving Tort Law*, 54 VAND. L. REV. 1447, 1452 (2001) (“[N]egligence doctrine has never consisted of the kind of rules that can make outcomes seem predictable and certain.”).

33. *Ann M. v. Pacific Plaza Shopping Ctr.*, 863 P.2d 207, 211 (Cal. 1993) (citations omitted). The statutory foundation for this rule, which has existed since 1872, is California Civil Code section 1714, which states: “Every one is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his property or person. . . .” CAL. CIV. CODE § 1714 (West 2003).

34. “By the common law there was neither an implied covenant by the landlord of the fitness of the premises for the intended use nor responsibility in him to maintain the leased premises.” *Goldberg v. Hous. Auth.*, 186 A.2d 291, 296 (N.J. 1962).

35. *Totten v. More Oakland Residential Hous., Inc.*, 134 Cal. Rptr. 29, 32 (Ct. App. 1976) (finding apartment owner owed no duty to girlfriend of tenant), *rev’d*, *Isaacs v. Huntington Mem’l Hosp.*, 695 P.2d 653 (Cal. 1985). See also *O’Hara v. Western Seven Trees Corp. Intercoast Mgmt.*, 142 Cal. Rptr. 487, 489 (Ct. App. 1977); *Kline v. 1500 Massachusetts Ave. Apartment Corp.*, 439 F.2d 477, 482-85 (D.C. Cir. 1970) (discussing rationale underlying the innkeeper duty and extending the rationale to impose duty on landlords of large apartment buildings).

36. *Kline*, 439 F.2d at 481.



tiff's injury that superceded the landowner's negligence and were therefore unforeseeable.<sup>37</sup> In addition, courts viewed the landowner's failure to take security precautions as nonfeasance, and courts were hesitant to impose liability when the landowner's fault arose out of an omission.<sup>38</sup>

At times, courts analyzed the foreseeability of the assault upon a plaintiff in light of policy concerns that frequently favored landowners. Courts, for example, have refused to hold landowners liable for crime occurring on their premises, maintaining that such liability would make the landowner the absolute insurer of the public's safety, an economic burden that would overwhelm many businesses.<sup>39</sup> Some courts flatly refuse to impose a duty on landowners to hire security personnel by characterizing the employment of security personnel as a police function, a task that is solely delegated to, and provided by, the government.<sup>40</sup>

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37. The notion that criminal acts, unless the crime in question was foreseeable, are intervening causes that supercede the defendant's own negligence continues on. *See, e.g.,* *Suarez v. Sordo*, 685 A.2d 1144, 1149 (Conn. App. Ct. 1996) ("In analyzing issues of proximate cause, we note that an intervening intentional or criminal act relieves a negligent defendant of liability, except where the harm caused by the intervening act is within the 'scope of risk' created by the defendant's conduct or where the intervening act is reasonably foreseeable."); *Iannelli v. Powers*, 498 N.Y.S.2d 377, 381 (App. Div. 1986) (holding that assailant's killing of decedent after assailant had robbed a credit union was unforeseeable and therefore a "superceding, intervening" criminal act).

38. The Michigan Supreme Court stated it well:

In determining standards of conduct in the area of negligence, the courts have made a distinction between misfeasance, or active misconduct causing personal injury, and nonfeasance, which is passive inaction or the failure to actively protect others from harm. The common law has been slow in recognizing liability for nonfeasance because the courts are reluctant to force persons to help one another and because such conduct does not create a new risk of harm to a potential plaintiff.

*Williams v. Cunningham Drug Stores*, 418 N.W.2d 381, 382-83 (Mich. 1988) (footnote omitted).

39. *See, e.g.,* *Shaner v. Tucson Airport Auth., Inc.*, 573 P.2d 518, 522 (Ariz. Ct. App. 1977) (finding that to hold defendant liable in case where there was no proof of how crime took place would make defendant absolute insurer); *Faheen v. City Parking Corp.*, 734 S.W.2d 270, 273 (Mo. Ct. App. 1987) (ruling that in the absence of prior incidents similar to how the plaintiff was harmed, landowner would be an absolute insurer).

40. In rejecting the imposition of a duty to hire guards, the Michigan Supreme Court stated:

The duty [to employ security guards] advanced by plaintiffs is essentially a duty to provide police protection. That duty, however, is vested in the government by constitution and statute. . . . [N]either the Legislature nor the constitution has established a policy requiring that the responsibility to provide police protection be extended to commercial businesses.

*Williams*, 418 N.W.2d at 384 (footnote omitted). The *Williams* court, however, acknowledged that its rationale applied with much greater force when the proprietor's premises was open to the public, such as the drugstore at issue in the case, compared with the landlord-tenant situation, where the landlord would have much greater control over "the common areas of a building which tenants must necessarily use." *Id.* at 384 n.17. *See also* *Madden v. C & K Barbecue Carryout, Inc.*, 758 S.W.2d 59, 66 (Mo. 1988) (Donnelly, J., dissenting) ("Historically, Missouri public policy has been to seek to prevent crime through utilization of public police forces financed by tax money. Today the Court opts for crime prevention in

It was not until 1977, in *O'Hara v. Western Seven Trees Corp. Intercoast Mgmt.*, that a California appellate court imposed a duty on landowners to take reasonable precautions to prevent foreseeable criminal acts.<sup>41</sup> Until *O'Hara* was decided, California law followed the approach long taken in other jurisdictions by imposing such a duty only upon innkeepers.<sup>42</sup> The *O'Hara* court noted the compelling and simple logic behind imposing a duty to protect against foreseeable crime: the landowner is the one party who exerts control over the common areas of a residential complex. Thus, if the landowner is aware of a recurring threat of crime in the common areas, the landowner should be charged with the duty to take steps to prevent those crimes.<sup>43</sup> To fulfill this duty, landowners must take reasonable precautions to secure common areas against foreseeable third party criminal acts that are likely to occur in the absence of such precautionary measures.<sup>44</sup>

Despite having created this duty, courts have placed limits on when the duty will attach; these limits are linked to whether a particular criminal act was foreseeable. A criminal act is considered foreseeable only when the landowner can reasonably anticipate the threat.<sup>45</sup> Courts have rejected the notion that the duty to protect against crime should be imposed universally to all landowners simply on the basis that crime can occur anywhere and at any time.<sup>46</sup> Thus, merely establishing that a city has a high crime rate is insufficient to establish that a particular owner of land in the city was required to have guards on the premises.<sup>47</sup>

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higher prices."); *Goldberg*, 186 A.2d at 296 ("The duty to provide police protection is foreign to the history of the landlord-tenant relationship.").

41. 142 Cal. Rptr. 487, 489 (Ct. App. 1977).

42. *Id.* ("Traditionally, a landlord had no duty to protect his tenants from the criminal acts of others, but an innkeeper was under a duty to protect his guests."). It may be surprising to note, in light of the perception that the California courts were often in the vanguard of expanding tort liability, that California was not the first state to impose upon all landlords the duty to prevent foreseeable crime on their premises. Other states with urban areas rocked by crime established the duty before California. *Id.* (citing *Kline*, 439 F.2d at 482; *Samson v. Saginaw Pro Bldg., Inc.*, 224 N.W.2d 843 (Mich. 1975); *Johnston v. Harris*, 198 N.W.2d 409, 411 (Mich. 1972)).

43. *O'Hara*, 142 Cal. Rptr. at 489-90. *See also* *Nallan v. Helmsley-Spear, Inc.*, 407 N.E.2d 451, 457-58 (N.Y. 1980) (duty to take reasonable precautions to protect persons from crime is "natural corollary to the landowner's common-law duty to make the public areas of his property reasonably safe for those who might enter").

44. *Ann M.*, 863 P.2d at 212. *See also* *Foster v. Po Folks, Inc.*, 674 So. 2d 843, 844 (Fla. Dist. Ct. App. 1996) ("The owner or occupier of property has a duty to protect an invitee on his premises from a criminal attack that is reasonably foreseeable."); *Loeser v. Nathan Hale Gardens, Inc.*, 425 N.Y.S.2d 104, 108 (App. Div. 1980) ("It has long been the rule that liability attaches if the danger from the criminal act was foreseeable.").

45. *Ann M.*, 863 P.2d at 213. *See also* *Nicole M. v. Sears, Roebuck & Co.*, 90 Cal. Rptr. 2d 922, 927 (Ct. App. 1999) ("[T]he predicate of any duty to prevent criminal conduct is its foreseeability. Property owners have no duty to prevent unexpected and random crimes.").

46. *See Goldberg*, 186 A.2d at 293 ("The question whether a private party must provide protection for another is not solved merely by recourse to 'foreseeability.' Everyone can foresee the commission of crime virtually anywhere and at any time.").

47. *See Cook v. Safeway Stores, Inc.*, 354 A.2d 507, 509 (D.C. Ct. App. 1976) ("This court is all too familiar through daily police reports of the high incidence throughout the

The evolution of California case law involving negligence actions for third party crime reflects the shifting judicial attitude towards balancing the public's safety, and the concomitant desire to compensate the victims of crime, against the economic burdens on landowners to protect against the threat of crime. A pertinent example of this evolution relates to what a plaintiff must establish to show that the defendant should have hired security personnel.

In the wake of *O'Hara*, the duty to take reasonable precautions, including the hiring of guards, was determined primarily through application of the prior similar incidents rule.<sup>48</sup> Under this rule, a plaintiff who was assaulted on the defendant's premises must prove that similar assaults had previously occurred on the premises.<sup>49</sup> The past occurrence of assaults supports the conclusion that the defendant should have foreseen that another assault could happen and that the defendant should have taken the reasonable step of hiring security guards to prevent such assaults.<sup>50</sup>

In *Isaacs v. Huntington Memorial Hospital*, the California Supreme Court rejected the prior similar incidents rule and adopted the more balanced but open-ended approach that required courts to examine the totality of circumstances.<sup>51</sup> Several years later in *Ann M. v. Pacific Plaza Shopping Center*, the California Supreme Court reinstated the prior similar incidents rule to determine whether the landowner owed a duty to hire security guards, justifying its holding on the burden and expense of their hire and employment.<sup>52</sup>

### B. *The Evolution of Duty in Negligence Actions Involving Third-Party Crime*

#### 1. *Isaacs: The Rejection of the Prior Similar Incidents Rule and the Adoption of the Totality of Circumstances Approach*

As in many other jurisdictions by the mid-1980s,<sup>53</sup> California courts had generally settled on the prior similar incidents test.<sup>54</sup> However, in 1985, dis-

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entire city of such crimes as mugging, purse-snatching, assault and robbery—a constant hazard to all law abiding persons who use the streets and public places of business. But simply because this hazard exists, it does not follow that the common law of negligence imposes an obligation upon private enterprises to provide armed guards to insure the safety of persons invited to do business with them.”).

48. Most decisions following *O'Hara* relied upon the prior similar incidents test to establish whether the incident at issue should have been reasonably foreseen by the landowner. See cases cited *infra* note 54.

49. See discussion of *Ann M.*, *infra*, Part II.B.2.

50. *Ann M.*, 863 P.2d at 145.

51. 695 P.2d 653, 658 (Cal. 1985).

52. 863 P.2d 207, 212 (Cal. 1993). See *infra* text accompanying notes 81-107.

53. See, e.g., *Jardel Co. v. Hughes*, 523 A.2d 518, 525 (Del. 1987); *Tolbert v. Captain Joe's Seafood, Inc.*, 316 S.E.2d 11, 13 (Ga. Ct. App. 1984); *Galloway v. Bankers Trust Co.*, 420 N.W.2d 437, 438-39 (Iowa 1988); *Scheibel v. Hillis*, 531 S.W.2d 285, 288 (Mo. 1976).

54. *Isaacs v. Huntington Mem'l Hosp.*, 695 P.2d 653, 658 (Cal. 1985). The court noted

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satisfied with the prior similar incidents test that had held sway in the courts of appeal, the California Supreme Court decided *Isaacs v. Huntington Memorial Hospital* and rejected the prior similar incidents test in favor of a more expansive concept of duty.<sup>55</sup> The court ruled that the foreseeability of harm, and therefore the existence of a duty, should be determined by examining the “totality of the circumstances.”<sup>56</sup>

In *Isaacs*, the plaintiff, a physician affiliated with the defendant-hospital, was shot by an unknown assailant in the parking lot “across the street from the emergency room and the physicians’ entrance to the hospital.”<sup>57</sup> The plaintiff sued the hospital, alleging “that the hospital had failed to provide adequate security measures to protect its invitees and licensees against the criminal acts of third persons on its premises.”<sup>58</sup> The case proceeded to trial. When the plaintiff had concluded his case-in-chief, the defendant moved for nonsuit. The trial court applied the prior similar incidents test and granted the motion because the plaintiff had failed to show, among other things, that the defendant had “[n]otice of prior crimes of the same or similar nature in the same or similar portion of the defendant’s premises.”<sup>59</sup>

In reversing the trial court’s grant of nonsuit, a unanimous California Supreme Court questioned the wisdom of the prior similar incidents rule.<sup>60</sup> Observing that “foreseeability is of primary importance in establishing the element of duty,”<sup>61</sup> the court declared the prior similar incidents rule to be “fatally flawed in numerous respects.”<sup>62</sup> First, the court expressed concern that the prior similar incidents rule did little to assure that landowners met their standard of care, which the court found “contravenes the policy of pre-

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that recent court of appeal decisions had established and reinforced the rule that, in the absence of prior similar incidents, a landowner cannot reasonably anticipate the criminal activities of third persons. *Id.* (citing *Wingrad v. Safeway Stores, Inc.*, 176 Cal. Rptr. 320, 323-24 (Ct. App. 1981); *Anaya v. Turk*, 199 Cal. Rptr. 187, 191 (Ct. App. 1984); *Riley v. Marcus*, 177 Cal. Rptr. 827, 830 n.2 (Ct. App. 1981); *Jamison v. Mark C. Bloome Co.*, 169 Cal. Rptr. 399, 402-04 (Ct. App. 1980); *Totten v. More Oakland Residential Hous., Inc.*, 134 Cal. Rptr. 29, 33-34 (Ct. App. 1976); *Rogers v. Jones*, 128 Cal. Rptr. 404, 407-08 (Ct. App. 1976); *Jubert v. Shalom Realty*, 185 Cal. Rptr. 641, 644 (Ct. App. 1982)).

In addition, the court observed that a handful of other California appellate decisions “properly recognized that evidence of prior similar incidents is not the *sine qua non* of a finding of foreseeability.” *Id.* at 659 (emphasis added) (citing *Kwaitkowski v. Superior Trading Co.*, 176 Cal. Rptr. 494 (Ct. App. 1981); *Gomez v. Ticor*, 193 Cal. Rptr. 600 (Ct. App. 1983); *Cohen v. Southland Corp.*, 203 Cal. Rptr. 572 (Ct. App. 1984)).

55. 695 P.2d 653 (Cal. 1985).

56. *Id.* at 661.

57. *Id.* at 655.

58. *Id.*

59. *Id.* at 657. The trial court’s ruling was also based on “[t]he reasonable foreseeability of the subject crime occurring,” plaintiff’s failure to introduce evidence concerning “[t]he minimum standards of security for premises similar to those of defendant for the period of time and locality involved [and] . . . [a]ny proof of causation.” *Id.*

60. *Id.* at 657-63. The opinion was authored by then-Chief Justice Rose Bird.

61. *Id.* at 657.

62. *Id.* at 658.

venting future harm.”<sup>63</sup> The court asserted that “[t]he rule has the effect of discouraging landowners from taking adequate measures to protect premises which they know are dangerous.”<sup>64</sup> The court pointed out that the rule generates the anomalous and unfair result of ensuring that “the first victim always loses, while subsequent victims are permitted recovery.”<sup>65</sup> Additionally, the court stated that the prior similar incidents rule leads to “arbitrary results and distinctions,”<sup>66</sup> pointing out that, under the doctrine, there was no certainty as to “how ‘similar’ the prior incidents must be.”<sup>67</sup> Specifically, the court stated that a prior similar incidents approach gave little guidance as to “how close in time” and “how near in location” the prior incidents had to be to satisfy the rule.<sup>68</sup> Such “troubling questions,” according to the court, “invite[d] courts to enunciate different standards of foreseeability based on their resolutions of these questions.”<sup>69</sup>

The court also flatly rejected the premise underlying the prior similar incidents rule: the equating of foreseeability solely with the existence of prior similar incidents. The court declared that “the fortuitous absence of prior injury does not justify relieving defendant from responsibility for the foreseeable consequences of his acts.”<sup>70</sup> The court emphasized that because foreseeability was ordinarily a question for the jury, the prior similar incidents rule “improperly remove[d] too many cases from the jury’s consideration.”<sup>71</sup> Thus, the proper analysis in such situations, asserted the court, would be to determine the landowner’s duty under the factors enunciated in *Rowland v. Christian*.<sup>72</sup> In *Rowland*, the California Supreme Court held that in determining the existence of duty, courts should consider the following factors:

[T]he foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant’s conduct and the injury suffered, the moral blame attached to the defendant’s conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of impos-

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63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 658-59. *See also Jardel Co.*, 523 A.2d at 525 (noting that a foreseeability standard limited to prior crimes is “unrealistic. Criminal activity is not easily compartmentalized. So-called ‘property crimes,’ such as shoplifting, may turn violent if a chase ensues. . . .”).

68. *Id.* at 659.

69. *Id.*

70. *Id.* at 659 (quoting *Weirum v. RKO General, Inc.*, 539 P.2d 36, 40 (Cal. 1975)).

71. *Id.*

72. *Id.* at 662 (citing *Rowland v. Christian*, 443 P.2d 561, 564 (Cal. 1968)). The California Supreme Court decision in *Rowland* marked the first time that a state had “eradicate[d] common law distinctions of land entrants.” *Nixon v. Mr. Property Mgmt. Co.*, 690 S.W.2d 546, 552 (Tex. 1985).

ing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.<sup>73</sup>

Applying the *Rowland* factors to the case at hand, the *Isaacs* court held that the hospital had a “duty to take precautions to protect Dr. Isaacs from criminal assaults in the parking lot[, because] the foreseeability of the assault was high in comparison to the minimal burden on the hospital to take security measures to ensure the safety of persons using the research parking lot.”<sup>74</sup> The court further held that the imposition of a duty in this case would greatly benefit the community, because the defendant’s negligence and the serious injury to the plaintiff were closely connected.<sup>75</sup> Moreover, reasoned the court, “[a] jury’s affirmative finding on foreseeability [of harm to the plaintiff] would [also] establish . . . a close connection between the defendant’s conduct and the injury suffered.”<sup>76</sup> Finally, the court, with an eye towards encouraging landowners to take security precautions, stated that “[a]lthough defendant’s conduct may have been without moral blame, imposition of liability would further the policy of preventing future harm.”<sup>77</sup>

## 2. Ann M. and the Duty to Hire Security Guards: Judicial Fear of Over-Expansive Liability and the Return of the Prior Similar Incidents Rule

Rather than being met with universal approval, the California Supreme Court’s adoption of the totality of circumstances in *Isaacs* drew sharp criticism. The *Isaacs* holding has been criticized for being an untoward exercise of elevating dictum into doctrine.<sup>78</sup> In addition, *Isaacs* was criticized for what some observers felt was an over-simplistic approach in making landowners liable for crime.<sup>79</sup> Given the criticism of the totality of circumstances

73. *Rowland*, 443 P.2d at 564.

74. *Isaacs*, 695 P.2d at 662.

75. *Id.*

76. *Id.* (citation and original alteration omitted).

77. *Id.* at 662-63.

78. *See, e.g.*, *Onciano v. Golden Palace Rest.*, 268 Cal. Rptr. 97, 101 (Ct. App. 1990) (Woods, J., concurring and dissenting) (urging the California Supreme Court to reconsider its adoption of the totality of circumstances rule, which the justice characterized “as broad brush dicta,” and to adopt “a more equitable rule of foreseeability”). In *Saelzler*, the California Supreme Court, itself, made a similar observation regarding *Isaacs*. *See also infra* text accompanying notes 99-101.

79. *See, e.g.*, Kaufman, *supra* note 27, at 115 (“While it would certainly be desirable to stop crimes before they happen, to expect merchants to gaze into a crystal ball and foresee criminal activity on their premises in the first instance is to dump one of society’s most vexing problems squarely in the lap of one group.”).

However, in other quarters, the *Isaacs* decision drew praise. For example, many other state courts have adopted the totality of circumstances approach. *See, e.g.*, *Seibert v. Vic Regnier Builders, Inc.*, 856 P.2d 1332 (Kan. 1993); *Doud v. Las Vegas Hilton Corp.* 864 P.2d 796, 799-800 (Nev. 1993); *Reitz v. May*, 583 N.E.2d 1071, 1075 (Ohio Ct. App. 1990); *Sharp v. W.H. Moore*, 796 P.2d 506 (Idaho 1990); *Shea v. Preservation Chicago, Inc.*, 565 N.E.2d 20, 25 (Ill. App. Ct. 1990); *Garner v. McGinty*, 771 S.W.2d 242, 248 (Tex. Ct. App. 1989); *Small v. The McKenna Hosp.*, 403 N.W.2d 410, 412-13 (S.D. 1987). Hawaii represents an interest-

rule, as well as the significant change in the court's composition,<sup>80</sup> the California Supreme Court was ready in 1993 to reexamine the *Isaacs* rule when it took the appeal of *Ann M. v. Pacific Plaza Shopping Center*, which posed the question of when a landowner would have to provide security guards on its premises.<sup>81</sup>

In ruling against the plaintiff in *Ann M.*, the court moved away from the totality of the circumstances approach adopted in *Isaacs*, at least with respect to whether landowners have a duty to provide security guards,<sup>82</sup> and resurrected the prior similar incidents test.<sup>83</sup> The court reasoned that, even though the law imposes upon landowners a duty to minimize the risk of third party crime, the requirement to employ security guards—perhaps the most costly and therefore most burdensome of all security measures—should not be imposed lightly.<sup>84</sup> The court ruled that a high degree of foreseeability of third party attacks is required to expand the scope of a landlord's duty to include the hiring of security guards and that this high level of foreseeability can ordinarily be established only by proof of prior similar attacks.<sup>85</sup>

In *Ann M.*, the plaintiff, an employee of a store in a shopping center owned and operated by defendants, was raped by an unknown assailant in the store.<sup>86</sup> She sued the shopping center, alleging it had negligently failed "to provide adequate security to protect her from an unreasonable risk of harm."<sup>87</sup> The plaintiff specifically alleged that the shopping center's duty included the hiring of security guards to patrol the common areas of the shopping center.<sup>88</sup>

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ing judicial twist as the Hawaii Court of Appeals adopted the totality of circumstances rule only to have its supreme court reverse its decision and reaffirm the prior similar incidents rule. *Moody v. Cawdrey & Assoc.*, 721 P.2d 708 (Haw. Ct. App. 1986), *rev'd*, 721 P.2d 707 (Haw. 1986). Some commentators also found the totality of circumstances preferable to the prior similar incidents rule. *See, e.g.*, Friedman & Worthington, *supra* note 27, at 274-84 (making the case that the totality of circumstances rule is superior to the prior similar incidents rule); Yelnosky, *supra* note 27, at 905-07 (criticizing the prior similar incidents rule).

80. The unanimous court deciding the *Isaacs* case was comprised of Chief Justice Rose Bird and Associate Justices Broussard, Grodin, Kaus, Lucas, Mosk, and Reynoso. When *Ann M.* reached the court's docket, the court consisted of Chief Justice Lucas and Associate Justices Arabian, Baxter, George, Kennard, Mosk, and Panelli. The Lucas court, decidedly more conservative than the Bird court, had already made several significant rulings that circumscribed tort liability. *See, e.g.*, *Thing v. La Chusa*, 771 P.2d 814 (Cal. 1989) (sharply circumscribing the tort of negligent infliction of emotional distress); *Foley v. Interactive Data Corp.*, 765 P.2d 373 (Cal. 1988) (eliminating tort recovery for the breach of the implied covenant of good faith and fair dealing arising out of employment contracts); *Moradi-Shalal v. Fireman's Fund Ins. Cos.*, 758 P.2d 58 (Cal. 1988) (eliminating private cause of action under California's statutory scheme regulating insurance practices).

81. 863 P.2d 207, 212 (Cal. 1993).

82. *Id.* at 215-16.

83. *Id.*

84. *Id.*

85. *Id.* at 215.

86. *Id.* at 209-10.

87. *Id.* at 211.

88. *Id.*

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The defendants moved for summary judgment, claiming that they owed no legal duty to plaintiff because the rape was unforeseeable.<sup>89</sup> The plaintiff responded that “the attack was foreseeable because [defendants] permitted transients to congregate in the common areas of the shopping center.”<sup>90</sup> The trial court granted summary judgment, concluding that the defendants owed no duty to the plaintiff.<sup>91</sup> The court of appeal affirmed summary judgment, but on different grounds, ruling that the shopping center did owe a duty to tenants and their employees but finding that the shopping center was not required to hire security patrols.<sup>92</sup> The plaintiff appealed to the California Supreme Court, which granted review “to determine whether the scope of the duty owed by the owner of a shopping center to maintain common areas within its possession and control in a reasonably safe condition include[d] providing security guards in those areas.”<sup>93</sup>

The court began on a familiar note when it emphasized that foreseeability was a “crucial factor in determining the existence of a duty.”<sup>94</sup> Having determined that the imposition of a duty on defendants “was not precluded . . . either by the lack of a direct landlord-tenant relationship or the lack of control over the premises where the crime occurred,”<sup>95</sup> the court turned to what it characterized as “the heart of the case,” namely, “whether [defendants] had reasonable cause to anticipate that criminal conduct such as rape would occur in the shopping center premises unless it provided security patrols in the common areas.”<sup>96</sup> In addressing this issue, the court cast a skeptical eye on the *Isaacs* decision’s abandonment of the “prior similar incidents” rule in favor of a “totality of the circumstances” approach.<sup>97</sup> The *Ann M.* court observed that “random, violent crime is endemic in today’s society” and that “it is difficult, if not impossible to envision any locale open to the public where the occurrence of violent crime seems improbable.”<sup>98</sup> The pervasive threat of violent crime convinced the court that “refinement of the rule enun-

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89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* (“The Court of Appeal held that [the defendants] owed a duty to tenants and their employers to maintain the common areas and leased premises in reasonably safe condition, including the duty to take reasonable precautions against foreseeable criminal activity by third persons; however, based on the evidence presented, the Court of Appeal held that no reasonable jury could have concluded that [defendants] acted unreasonably in failing to provide the security patrols that [plaintiff] claims were necessary.”).

93. *Id.* at 209.

94. *Id.* at 214.

95. *Id.* at 213; see also *id.* at 212-13 (“[I]n the commercial context where the tenant generally is not a natural person and must, therefore, act through its employees, it cannot be seriously asserted that a tort duty that a landlord owes to protect the personal safety of its tenant should not extend to its tenant’s employees.”).

96. *Id.* at 213.

97. *Id.* at 214.

98. *Id.* at 215.



ciated in *Isaacs*" was necessary.<sup>99</sup> The court further noted that it was "not reluctant" to revisit *Isaacs* because the decision in plaintiff's favor was supported by a record containing evidence of "prior, violent, third party attacks."<sup>100</sup> Thus, *Isaacs*, asserted the court, really had no occasion to "consider the viability" of the prior incidents rule.<sup>101</sup>

The court determined the existence of duty in California lay in balancing the "foreseeability of harm against the burden of the duty to be imposed."<sup>102</sup> With respect to the hiring of security guards, the court explained that "such action will rarely, if ever, be found to be a 'minimal burden,'" due to significant monetary costs and because "the obligation to provide patrols adequate to deter criminal conduct is not well defined."<sup>103</sup> In light of these considerations, the court held that "a high degree of foreseeability is required in order to find that the scope of a landlord's duty of care includes the hiring of security guards."<sup>104</sup> More specifically, the court ruled that "the requisite degree of foreseeability rarely, if ever, can be proven in the absence of prior similar incidents of violent crime on the landowner's premises."<sup>105</sup>

While *Ann M.* only addressed the question of whether a landowner had a duty to employ security guards, the court's decision resuscitated the most rigorous of all tests of foreseeability: the prior similar incidents test.<sup>106</sup> To es-

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* The court stated that "[n]o one really knows why people commit crime, hence no one really knows what is 'adequate' deterrence in any given situation." *Id.* (quoting 7735 Hollywood Blvd. Venture v. Super. Ct. of L.A. County, 172 Cal. Rptr. 528, 530 (Ct. App. 1981)). See also *Doe v. Manheimer*, 563 A.2d 699, 706 (Conn. 1989) ("Violent crimes are actuated by a host of social and psychological factors."); *Reichenbach v. Days Inn of America, Inc.*, 401 So. 2d 1366, 1368 n.6 (Fla. Dist Ct. App. 1981) (Coward, J., concurring) ("Only law-abiding citizens and timid would-be offenders are deterred. Bold determined robbers, rapists, murderers, and other criminal assailants are not deterred and rarely thwarted. As a practical matter their failures result from the inadequacy of their own abilities and efforts and not from the intervention of others.").

104. 863 P.2d at 215.

105. *Id.* Applying this rule to the facts of *Ann M.*, the court concluded that the attack upon plaintiff was not sufficiently foreseeable to impose a duty on the defendants to provide security guards. *Id.* at 216. First, plaintiff failed to present evidence that the defendants had any notice of "prior similar incidents occurring on the premises." *Id.* In this connection, the court noted that defendants routinely recorded instances of violent crimes on the premises, and that, prior to the attack upon the plaintiff, no references to violent criminal attacks had been recorded. *Id.* But even assuming that the defendants *did* have notice of the robberies and assaults alleged by the plaintiff to have occurred on the premises, "they were not similar in nature to the violent assault that she suffered." *Id.* Here the court's application of the prior similar incidents rule seems to recall the *Isaacs* court's disparagement of the rule as being difficult to apply when deciding whether past crimes are sufficiently similar to the crime at issue. See *supra* notes 66-68 and accompanying text.

106. Only Justice Mosk dissented in *Ann M.* In his dissent, Justice Mosk lamented that the *Isaacs* decision, handed down only eight years earlier by a unanimous court of which he was a part, had already extensively analyzed and rejected the prior similar incident rule, and that the majority in *Ann M.* in the guise of "refinement" of the *Isaacs* rule had actually gutted

establish that a defendant had to hire security guards, a plaintiff almost certainly would have to prove that acts of violence similar to the one perpetrated upon the plaintiff had previously occurred on the premises.<sup>107</sup> But the court's desire to curb what it viewed as onerous burdens on landowners would not end with duty. The court would further circumscribe landowner liability by turning its attention to the causation element of negligence. That point ultimately would come in *Saelzler v. Advanced Group 400*,<sup>108</sup> but not before the ground was cleared by a line of appellate decisions that addressed the issue of causation.

### III. CAUSATION AND ABSTRACT NEGLIGENCE: THE APPELLATE ROAD TO *SAELZLER*

To avoid the costs and risks of trial in an era when the duty to protect against third-party crime became doctrinal reality, defendant-landowners often had no other tactical choice but to seek summary judgment on grounds other than duty.<sup>109</sup> Defendants did so by attacking the element of causation. However, obtaining summary judgment on the basis that the plaintiff lacked sufficient proof of causation, rather than duty, presents some inherent difficulties. Unlike duty, the existence of which the court determines as a matter of law,<sup>110</sup> causation is frequently an issue for the trier of fact to decide.<sup>111</sup>

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it by resurrecting the prior similar incidents rule. *Ann M.*, 863 P.2d at 216-18. Because the thesis of this Article focuses on the analysis of causation, the question of whether *Ann M.* was correctly decided is beyond the Article's scope. However, Justice Mosk's concern that *Ann M.* overruled *Isaacs* in its entirety seems misplaced, as the *Ann M.* opinion only reached the question of what test should be used in determining whether the landowner had a duty to hire security guards. See Welch, *supra* note 27, at 1067-69 (commenting that the application of the prior similar incidents rule would be confined to onerous duties, such as the hiring of security guards, whereas the totality of circumstances rule would still apply to less burdensome duties). The state of California law, however, has puzzled at least one court. See Corley v. Evans, 835 So. 2d 30, 41 (Miss. 2003) ("we see no reason to endure the somewhat disjointed California experience and abandon our well-established premises liability law concerning third-party conduct.").

107. *Ann M.*, 863 P.2d at 215. In *Nicole M. v. Sears, Roebuck & Co.*, the court held that the rape of plaintiff in defendant's parking lot was not foreseeable because of the lack of prior similar occurrences. In addition the court reasoned that the "low lighting and overgrown bushes alone did not make the property inherently dangerous and further that these circumstances were not cause for the property owner to reasonably anticipate crime in the absence of prior similar incidents." 90 Cal. Rptr. 2d 922, 928 (Ct. App. 1999).

108. 23 P.3d 1143 (Cal. 2001).

109. See *O'Hara v. Western Seven Trees Corp. Intercoast Mgmt.*, 142 Cal. Rptr. 487, 489 (Ct. App. 1977).

110. *Ann M.*, 863 P.2d at 215. Justice Mosk described the rationale underlying why the court determines duty as a matter of law when he wrote, "Of these elements [of negligence], ordinarily only duty is a question of law to be resolved by a court. Thus, we routinely say that the existence of a duty is a legal question." *Sharon P. v. Arman, Ltd.*, 989 P.2d 121, 135 (Cal. 1999) (Mosk, J., dissenting) (citation and footnote omitted).

111. See *Hoyem v. Manhattan Beach City Sch. Dist.*, 585 P.2d 851, 858 n.5 (Cal. 1978); *Brewer v. Teano*, 47 Cal. Rptr. 2d 348, 354-55 (Ct. App. 1995); *Constance B. v. State of California*, 223 Cal. Rptr. 645, 649 (Ct. App. 1986). See also William Prosser, *Proximate Cause*

Nevertheless, beginning in the mid-1980s, the California Courts of Appeal decided a series of third party assault cases in which landowners argued that the plaintiffs had failed to muster sufficient proof of causation. In making this argument, the landowner often would concede that it had failed to take reasonable security precautions. After conceding breach of duty, the landowner would argue that the plaintiff had failed to establish that reasonable precautions would have prevented the assault perpetrated upon the plaintiff. Under these circumstances, the plaintiff would have failed to establish causation, by having only proven "abstract negligence."<sup>112</sup>

The earliest case explicitly discussing the concept of abstract negligence was *Noble v. Los Angeles Dodgers, Inc.*,<sup>113</sup> the case in which the California Court of Appeal coined the term "abstract negligence."<sup>114</sup> In *Noble*, the plaintiffs, a husband and wife, sued the Los Angeles Dodgers for injuries sustained during a brawl between the husband and two drunks in the Dodger Stadium parking lot.<sup>115</sup> The husband alleged that the Dodgers negligently failed to protect him against assault. The case went to trial, where the jury reached a verdict in the plaintiff's favor.

The court of appeal reversed the verdict, because the plaintiffs had failed to prove that improving the deployment of security guards at Dodger Stadium would have prevented the brawl.<sup>116</sup> The court concluded that the plaintiffs had failed to prove "there [were] any reasonable steps which the Dodgers could have taken to prevent [the incident] or that inaction on the part of the Dodgers in any way caused plaintiffs' injuries."<sup>117</sup> The court reached its conclusion despite the expert testimony plaintiffs proffered. The plaintiffs' security expert testified that the Dodgers should have had more security personnel that night and that the personnel working that night could have been more effectively deployed.<sup>118</sup> The plaintiffs' expert, however, did not state that more security guards "or a different deployment pattern would

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*in California*, 38 CAL. L. REV. 369, 377 (1950). The principle that a fact-finder ordinarily determines causation is widespread among the states. *See, e.g.*, *McClung v. Delta Square Ltd. P'ship*, 937 S.W.2d 891, 905 (Tenn. 1996) ("[Causation], as well as the existence of a superseding, intervening cause, are jury questions unless the uncontroverted facts and inferences to be drawn from the facts make it so clear that all reasonable persons must agree on the proper outcome.").

112. Of course, this legal precept is not unique to California. *See, e.g.*, *Gibbs v. Diamond*, 682 N.Y.S.2d 181, 182 (App. Div. 1998) ("It is not enough to show that elevators or lights were out of order; the plaintiff must offer evidence tending to establish that the alleged negligence of the landlord was in fact a proximate cause of the plaintiff's injuries.").

113. 214 Cal. Rptr. 395 (Ct. App. 1985).

114. *Id.* at 399.

115. *Id.* at 396. The brawl took place after a night baseball game, when the plaintiffs, along with a friend, witnessed two drunks "vomiting and urinating" on their car. Taking umbrage, the husband "remonstrated with the individuals," and harsh words were exchanged, followed by a "melee." *Id.* The injured husband sued the Los Angeles Dodgers for damages; his wife for emotional distress.

116. *Id.* at 399.

117. *Id.* at 397.

118. *Id.* at 398.

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have prevented the plaintiff's injury. In essence, he simply stated that he thought his method of policing the parking lot was better than the one the Dodgers used."<sup>119</sup>

The court ruled that even if a plaintiff proves that security forces could have been deployed more effectively, unless a plaintiff proves that improved security deployment would have prevented the assault, the plaintiff has proven only "abstract negligence."<sup>120</sup> The expert's opinion that security might have been better deployed, according to the court, was merely a "notion of adequacy" that had "fail[ed] to prove any causal connection between that negligence and the injury."<sup>121</sup> The court then stated:

The purpose of a trial in this type of case is not simply to critique defendant's security measures and to compare them to some abstract standards espoused by a so-called "security expert." The objective is to determine whether a particular defendant should, under the circumstances, be held liable for a plaintiff's injury because of a failure to prevent the criminal actions of a third party. We submit that causation is a critical question.<sup>122</sup>

Therefore, to establish cause in fact, a plaintiff must establish more than just lack of reasonable security measures; the plaintiff must prove a causal connection between the lack of reasonable security measures and the plaintiff's harm.<sup>123</sup>

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119. *Id.*

120. *Id.* at 399.

121. *Id.* The court found no authority for the plaintiff's position, stating "[w]e are . . . unaware of any case in which a judgment against the property owner has been affirmed solely on the basis of a failure to provide adequate deterrence to criminal conduct in general." *Id.* at 398.

122. 214 Cal. Rptr. at 398.

123. In one way, *Noble* represents a situation in which a plaintiff suddenly gets involved in an altercation, and then complains that the defendant failed to prevent the harm inflicted upon the plaintiff. In a case similar to *Noble*, the plaintiff-customer waiting in line at a fast-food restaurant got into an altercation with another customer, who then pulled out a knife and seriously injured the plaintiff. *Tucker v. KFC Nat'l Mgmt. Co.*, 689 F. Supp. 560, 561 (D. Md. 1988). The plaintiff claimed that the restaurant breached its duty in failing to provide a security guard on the premises. *Id.* at 561. Finding that the restaurant owed no such duty, *id.* at 562-64, the court also went on to hold that the plaintiff could not establish causation. "The incident occurred spontaneously when the two customers were standing in line waiting for service. Once the altercation started, it would be sheer speculation to determine how the security guard would have prevented the injury; considering the spontaneity and brevity of the incident, he most likely could not have prevented it." *Id.* at 564. *See also Kelly v. Retzer & Retzer, Inc.*, 417 So. 2d 556, 560-61 (Miss. 1982) (stating that proof of causation was lacking when decedent suddenly intervened in a violent encounter occurring in the restaurant parking lot).

In contrast to *Noble* and *Tucker* is *Whataburger, Inc. v. Rockwell*, 706 So. 2d 1220 (Ala. Civ. App. 1997). In *Whataburger*, the plaintiff, while waiting for his order in a fast-food restaurant, got into a verbal altercation with three men, which escalated into threats. The restaurant manager told the combatants "that if they were going to fight, they needed to 'take it outside.'" *Id.* at 1222. The manager failed to follow company policy, which required that the police be summoned. *Id.* at 1223. Before plaintiff walked outside with the three men, he told the manager several times to call the police. *Id.* at 1223. Once outside, the three men and

The link between the deployment of security guards and causation was discussed thoroughly in *Nola M. v. University of Southern California*,<sup>124</sup> a case in which an assailant assaulted and raped the plaintiff on the USC campus at night. The assailant, who was neither apprehended nor identified, had jumped the plaintiff from behind as she was walking past the university credit union.<sup>125</sup> The plaintiff alleged that the university had negligently failed to prevent the attack.<sup>126</sup> The plaintiff claimed that the university had negligently deployed its security personnel, and also had created an unreasonably dangerous condition by allowing the foliage in front of the credit union to become overgrown and dense.<sup>127</sup> As in *Noble*, the plaintiff won a jury verdict that the court of appeal reversed on the ground that the plaintiff had failed to prove causation.

In reaching its decision, the appellate court rejected the plaintiff's contention that the foliage constituted a dangerous condition sufficient to establish cause in fact.<sup>128</sup> The court pointed to the plaintiff's own testimony in which she stated that her assailant "came from nowhere, from behind."<sup>129</sup> She therefore could not prove that her assailant had been hiding in the overgrown shrubbery. Downplaying the evidence of the dense foliage, the court concluded that the assailant might have sought cover in places other than the foliage, remarking that a would-be attacker could find a number of different places in which to hide.<sup>130</sup>

As to whether USC had negligently deployed its security personnel, the court analogized the case before it with *Noble*, ruling that the plaintiff had proven only "abstract negligence" rather than cause in fact.<sup>131</sup> In both cases, security experts testified that the deployment of defendants' security person-

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the plaintiff began fighting, resulting in the plaintiff suffering serious injuries. *Id.* at 1222. Although the manager eventually did call the police, the evidence conflicted as to when the call was made. *Id.* at 1223-24. Ultimately, the case went to trial where the plaintiff prevailed. *Id.* at 1222. In rejecting Whataburger's contention that it owed no duty to the plaintiff, the court stated the question turned on foreseeability, noting that "whether the manager did in fact know that a fight was about to break out and that [the plaintiff] was in imminent harm is a question of fact to be determined by a jury." *Id.* at 1224. The court then summarily concluded that once the jury had determined that the restaurant negligently failed to protect the plaintiff, "the jury then could determine that [the manager's negligence] was the proximate cause of [the plaintiff's] injuries." *Id.* at 1224.

124. 20 Cal. Rptr. 2d 97 (Ct. App. 1993).

125. *Id.* at 99.

126. *Id.*

127. *Id.* at 100.

128. *Id.* at 107.

129. *Id.* at 107 n.8.

130. *Id.* at 107. Justice Spencer, in dissent, focused solely on the overgrown foliage, contending that the evidence was sufficient to find that the foliage was a cause of the assault upon plaintiff. *Id.* at 110 (Spencer, P.J., dissenting). He noted that the evidence showed that the plaintiff saw no one until she was passing the foliage at which point she was attacked from behind. *Id.* at 111. This evidence, he asserted, was enough to submit the question to the jury. *Id.* at 112.

131. *Id.* at 107.

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nel was inadequate.<sup>132</sup> Both experts, however, criticized the deployment of security only by describing alternate ways that security could have been deployed.<sup>133</sup> As did the court in *Noble*,<sup>134</sup> the *Nola M.* court faulted the plaintiff's expert testimony because the expert did not establish how improved security measures would have prevented the actual attack inflicted upon the plaintiffs.<sup>135</sup>

The fact that the courts in *Noble* and *Nola M.* ruled in their respective defendant's favor is perhaps unremarkable. However, these two cases arguably should have been decided, not on the basis that the plaintiff failed to prove causation, but on the basis that the defendants had satisfied their duty of care insofar as the duty related to the deployment of their security forces.<sup>136</sup> While the plaintiffs in both *Noble* and *Nola M.* asserted that defendants had negligently deployed their security personnel, the plaintiffs simply did not offer sufficient proof of negligence. The plaintiff's expert in *Noble* testified that the defendant, the Los Angeles Dodgers, should have hired several more security personnel and that the Dodgers should have deployed their security personnel differently.<sup>137</sup> That testimony, however, hardly proves that the Dodgers' actual use of security personnel was negligent. In addition, because the plaintiff-husband's own actions led to the brawl starting, the court found that the Dodgers owed no duty to protect the plaintiffs.<sup>138</sup> Therefore, the court should have decided the case either on the basis that the Dodgers did not owe the plaintiffs a duty to protect them from a fight in the parking lot that they themselves helped precipitate or that the Dodgers had reasonably deployed its security personnel and therefore did not breach its duty to the plaintiff.

In *Nola M.*, the number of guards hired by the University of Southern California to patrol the campus could not possibly support the contention that the university had understaffed its security personnel. The court found that the concentration of security personnel at USC was much greater than

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132. *Noble*, 214 Cal. Rptr. at 398; *Nola M.*, 20 Cal. Rptr. 2d at 107.

133. *Noble*, 214 Cal. Rptr. at 398; *Nola M.*, 20 Cal. Rptr. 2d at 107.

134. *Noble*, 214 Cal. Rptr. at 398.

135. *Nola M.*, 20 Cal. Rptr. 2d at 107 n.8.

136. Along with her allegation that the defendant negligently deployed its security guards, the plaintiff in *Nola M.* also alleged that the defendant negligently failed to trim the foliage in front of the credit union. *Id.* at 100. The dissenting justice in *Nola M.* chose only to address the latter allegation, impliedly conceding that the majority correctly concluded that the plaintiff had failed to prove that the defendant's deployment of security guards was the cause-in-fact of the attack. *Id.* at 110-12 (Spencer, J., dissenting).

137. *Noble*, 214 Cal. Rptr. at 398.

138. The jury found that the plaintiff was "the primary cause of his own injury." *Id.* at 399. Based on this finding, the court concluded its opinion that the "[p]laintiffs cannot claim that the Dodgers had any duty to control their conduct or to protect them against themselves. It could hardly be seriously contended that when someone instigates a fight on the Dodger parking lot . . . that the Dodgers should guarantee that he win the fight or that the other party not fight back." *Id.*

the concentration of police officers in the area surrounding the campus.<sup>139</sup> Moreover, even though the plaintiff's expert testified that USC could have better deployed its security personnel, the expert never explained why the actual deployment of personnel was unreasonable.<sup>140</sup> Just because security personnel could have been deployed in alternate ways does not mean that the defendants in *Noble* and *Nola M.* negligently deployed their security personnel.

Even if it was necessary for the courts in *Noble* and *Nola M.* to address the issue of causation, the holding in the defendants' favor was correct. The expert testimony in *Noble* and *Nola M.* clearly did not suffice in proving causation. In *Noble*, the expert testimony offered by the plaintiff could not have possibly established causation because the expert "did not, and of course could not, say that these additional [security guards] or a different deployment pattern would have prevented the plaintiff's injury."<sup>141</sup> Similarly, in *Nola M.*, the plaintiff's expert did not testify that more guards and a different way of deploying them "would have prevented Nola's injuries."<sup>142</sup>

What is remarkable about *Nola M.* is the majority's extended commentary that reflected both its marked disdain for these types of lawsuits and its perception that the California Supreme Court's decision in *Isaacs* had unjustifiably expanded the duty imposed upon landowners. In a stark admission of judicial activism and defiance, as well as challenge to the supreme court, the majority explicitly indicated that it interpreted and applied the causation element to curb what it considered to be the undue and unwise expansion of the landowner's duty by the California Supreme Court:

If the theoretical underpinnings of the duty cases are correct, there must be a legally sound approach to the causation issue and that is what we have attempted to articulate in this case. If there is a flaw in our analysis, we suggest it may be time for the Supreme Court to reexamine the concept of duty it articulated in *Isaacs v. Huntington Mem'l Hosp.*, . . . in the context of a society which appears unable to effectively stem the tide of violent crime. But unless we as judges limit the duty we created, it appears inevitable that the Legislature will do it for us.<sup>143</sup>

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139. *Nola M.*, 20 Cal. Rptr. 2d at 107 ("[O]n the night Nola was attacked, USC had eight officers patrolling a quarter-mile area while the Los Angeles Police Department had about the same number patrolling the surrounding ten and one-half miles.").

140. *Id.*

141. *Noble*, 214 Cal. Rptr. at 398.

142. *Nola M.*, 20 Cal. Rptr. 2d at 107. See also *May v. V.F.W. Post #2539*, 577 So. 2d 372 (Miss. 1991) (holding that plaintiff "failed to make a showing that an increased number of security guards would have prevented the attack").

143. *Nola M.*, 20 Cal. Rptr. 2d at 109. The court, obviously disdainful of the *Isaacs* rule, could not resist taking another poke at the *Isaacs* decision by stating, "[C]ausation is an established element of the law of negligence in California, perhaps because it imposes rational limits on liability which otherwise attaches under the judiciary's expansive view of duty." *Id.* In cases outside of California, some courts have held that the defendant simply had no duty to protect against criminal attacks. See, e.g., *Kolodziejzak v. Melvin Simon & Assocs.*, 685 N.E.2d 285 (Ill. App. Ct. 1997) (holding that shopping center was simply too vast and

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With no need to do so, the court of appeal justified its holding on causation by an in-depth, and ultimately misguided, discussion of policy considerations.<sup>144</sup> The court stated that because policing is a governmental task, it should not be imposed on private landowners, and landowners ought not to assume liability to crime victims when the police themselves are powerless to prevent violent crime.<sup>145</sup> In addition, allowing the plaintiff to recover, the majority asserted, would unjustly make the landowner the absolute insurer of the public's safety<sup>146</sup> and "would create a form of victim compensation which is not legislatively sanctioned."<sup>147</sup> The court stressed that the costs of additional security measures, especially the high costs of security personnel, would be borne ultimately by the public.<sup>148</sup> Noting that university employees and students likely would bear the costs if USC were liable, the court asserted that other landowners, unable to absorb or to pass on the extra costs of security, could be forced to take their businesses out of low-income areas.<sup>149</sup>

The court's entire discussion here raises points that pertain not to causation but to duty.<sup>150</sup> Obviously frustrated by what it viewed as an over-expansive rule regarding duty, the court defiantly sought to restrict liability by focusing its holding on causation. Yet, the facts of the case indicate that

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area in which to impose upon the management company a duty to protect against third party crime).

144. Suspecting that its decision would be open to criticism, the majority seems to have felt compelled to expound extensively on policy considerations as support for its decision. The majority asked rhetorically, and answered defensively: "Are we using causation as a smokescreen for a policy judgment on whether USC ought to be liable to Nola under the circumstances of this case? We don't think so." *Nola M.*, 20 Cal. Rptr. 2d at 108-09.

145. "Police protection is, and in our view should remain, a governmental and not a private obligation. Landowners in high crime areas ought not to be forced out of the area or out of business altogether by an imposition of liability to the victims of violent crimes which the police have been unable to prevent." *Id.* at 108.

146. "To characterize a landowner's failure to deter the wanton, mindless acts of violence of a third person as the 'cause' of the victim's injuries is (on these facts) to make the landowner the insurer of the absolute safety of everyone who enters the premises." *Id.*

147. *Id.* at 109.

148. The court discounted the cost-spreading effects of insurance when it stated: "Who is going to pay for all this security? It is no answer to say that insurance is available. First, the cost just gets passed on to the consuming public, either by the insurer, the insured, or both. Second, insurance would not in any event have covered the punitive damages awarded in this case. So who pays?" *Id.* at 108.

149. *Id.* The policy-laden discussion in *Nola M.* seems misplaced coming as it does in the court's analysis of causation. *Nola M.*'s concern for the plight of businesses serving low-income areas would be much better placed in an analysis of duty. In cases outside of California, some courts, concerned with imposing liability on businesses operating in low-income areas, have found that the business simply owed no duty. *See, e.g.,* *Godfrey v. Boddie-Noell Enters., Inc.*, 843 F. Supp. 114, 124 (E.D. Va. 1994) (remarking, in a case in which plaintiff was assaulted in a restaurant parking lot, that "holding [the restaurant] liable would only create a rule of liability that would threaten the existence of legitimate businesses serving the population in certain areas.").

150. *See Ann M.*, 863 P.2d at 215 (weighing various policy concerns, such as the costs of hiring security guards and the significant amount of violent crime plaguing society, to conclude that a landowner's duty to hire guards requires a high foreseeability of violent crime).



the university simply did not breach its duty to the plaintiff as far as its deployment of security is concerned. The significance of *Nola M.* is revealed not so much in its causation-based holding, but in its conflation of policy concerns germane to an analysis of duty, with its treatment of the causation issue.

#### IV. SAELZLER: USING CAUSATION TO INSULATE LANDOWNERS FROM LIABILITY FOR THIRD-PARTY ASSAULTS

In *Saelzler v. Advanced Group 400*, a sharply divided California Supreme Court, in a four-three decision, took the suggestion to curb landowner liability offered in the *Nola M.* decision not to redefine the scope of a landowner's duty, which was not at issue, but to hold that Marianne Saelzler, who was sexually assaulted at a large apartment complex managed and owned by the defendants, had failed to show sufficient evidence of causation.<sup>151</sup>

##### A. Facts

On March 15, 1996, in the middle of the afternoon, Marianne Saelzler, a Federal Express employee, went to make a delivery at the Sherwood Apartments Complex in Bellflower, California.<sup>152</sup> With package in hand, she noticed two men next to a propped-open gate as she entered the apartment complex. As she continued to her destination, she observed another man.<sup>153</sup> After discovering that the recipient of the package was not at home, Ms. Saelzler was walking on one of the main paths of the complex when the three men she had seen earlier stopped her.<sup>154</sup> They then assaulted and attempted to rape her.<sup>155</sup>

Sprawling over several acres, the apartment complex consisted of twenty-eight buildings totaling 300 apartment units. Street crime, primarily due to gang activity, permeated the surrounding neighborhood.<sup>156</sup> The apartment complex itself was no haven for its residents; trespassing and more serious offenses routinely occurred. Ms. Saelzler produced proof that "within the year prior to her assault, defendants received 41 reports of trespass, and 45 reports of occasions in which various perimeter fences and gate doors were broken or rendered inoperable."<sup>157</sup> The complex reportedly became a base for a ruthless street gang, its members dealing drugs and intimidating

151. 23 P.3d 1143, 1155 (Cal. 2001).

152. *Id.* at 1147.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

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and assaulting people on the premises.<sup>158</sup> The litany of criminal activity at the complex “included incidents of gunshots, robberies, and sexual harassment of women, including sexual assaults and rapes.”<sup>159</sup> The threat to personal safety was so great and well known that the apartment manager had security personnel escort her to her car.<sup>160</sup> The notoriety of the complex also was well known to the community at large.<sup>161</sup> Pizza delivery drivers asked residents to pick up their orders outside the premises.<sup>162</sup>

The scope of the problem was well known to the police. In the year before Ms. Saelzler was assaulted, the police were summoned to the complex approximately fifty times.<sup>163</sup> The prevalence of crime and other disruptive behavior prompted police to advise the apartment manager to hire daytime security in addition to its nighttime use of guards.<sup>164</sup> But Advanced Group 400 refused to heed the advice.<sup>165</sup> No security guards were on duty when Ms. Saelzler was attacked.<sup>166</sup>

Ms. Saelzler sued Advanced Group 400 for negligently failing to take reasonable security measures.<sup>167</sup> The superior court, despite finding “overwhelming evidence” of “recurring criminal activity” at the complex, granted summary judgment for Advanced Group 400, reasoning that Ms. Saelzler had “failed to establish a ‘reasonably probable causal connection’ between [Advanced Group 400’s] breach of duty and [her] injuries.”<sup>168</sup> Ms. Saelzler appealed, and the Court of Appeal for the Second District, in a split decision, reversed the superior court,<sup>169</sup> before being reversed itself by a bare majority of the California Supreme Court.<sup>170</sup>

The court of appeal, in reversing the entry of summary judgment, focused on the utter lack of security precautions taken at the apartment complex, holding “that barring unusual circumstances[,] the complete absence of required security measures is sufficient to create a triable issue [as to whether] this breach of duty was a contributing cause of the crimes committed at the unsecured location.”<sup>171</sup> Significantly, the court rejected the causa-

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158. *Id.*

159. *Id.*

160. *Id.* at 1147-48.

161. *Id.* at 1147.

162. *Id.*

163. *Id.*

164. *Id.* at 1148.

165. *Id.*

166. *Id.*

167. *Id.* at 1147.

168. *Id.* at 1148. The court of appeal noted that the trial court granted summary judgment “reluctantly” amid “evidence the apartment complex where [Ms. Saelzler] was assaulted had experienced many prior crimes and similar assaults . . . .” *Saelzler v. Advanced Group 400*, 92 Cal. Rptr. 2d 103, 104 (Ct. App. 2000), *rev’d*, 23 P.3d 1143 (Cal. 2001).

169. *Saelzler v. Advanced Group 400*, 92 Cal. Rptr. 2d 103 (Ct. App. 2000), *rev’d*, 23 P.3d 1143 (Cal. 2001).

170. 23 P.3d at 1155.

171. 92 Cal. Rptr. 2d at 104.

tion analysis in *Nola M.* and instead relied on the long-standing rule of causation based on common sense and ordinary experience.<sup>172</sup> This rule is based on the principle that “[i]f, as a matter of ordinary experience, a particular act or omission might be expected to produce a particular result, and if that result has in fact followed, the conclusion may be justified that the causal relation exists.”<sup>173</sup>

Applying the rule of causation based on ordinary experience, the court reached two conclusions. First, the causal link between the absence of security personnel and assault upon Ms. Saelzler was “one of those which is properly established by ‘common experience’ and is a jury question inappropriate for summary judgment.”<sup>174</sup> Second, the court reasoned that, given the utter lack of security precautions taken at the complex, the burden of causation should shift to Advanced Group 400. The court stated, for Advanced Group 400 to obtain summary judgment, it must conclusively establish that “the general causal connection between the absence of security and criminal activity does not apply . . . by showing this particular criminal would have committed this crime despite the presence of reasonable security measures.”<sup>175</sup>

The dissent, in rejecting the shifting of the causation burden, asserted that Ms. Saelzler “was required to prove that [Advanced Group 400] legally caused her injury—in other words, that but for [Advanced Group 400’s] neglect it was more probable than not that [Ms. Saelzler] would have avoided the attack.”<sup>176</sup> With respect to Ms. Saelzler’s evidence, the presence of security guards or functioning entry gates may generally deter crime, but there “is simply no way to show whether these precautions would have prevented the attack on [Ms. Saelzler].”<sup>177</sup> Thus, she could not show that her injuries were “more probably than not caused by inadequate security patrols.”<sup>178</sup>

Advanced Group 400 appealed the reversal of summary judgment, and the California Supreme Court granted review.

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172. *Id.* at 109.

173. *Id.* at 110 (quoting RESTATEMENT (SECOND) OF TORTS, § 433B(1) cmt. b (1965)).

174. *Id.*

175. *Id.* at 112.

176. *Id.* at 113 (Neal, J., dissenting).

177. *Id.* at 113-14.

178. *Id.* at 114. The dissenting opinion also concluded that Advanced Group 400 owed no duty of care to Ms. Saelzler or others to prevent third party criminal attacks. *Id.* To substantiate this proposition, the dissent pointed out that a “landlord or business owner. . . does not foresee injury to the specific victim (though future attacks on someone may reasonably be foreseen if other attacks have occurred) and is not ‘morally blameworthy’ for injuries caused by a third party’s crime.” *Id.* Furthermore, “the cost of imposing a duty [here] may well outweigh the benefit,” as compelling landlords to employ security guards will burden poor renters with rent increases. *Id.* at 114-15. Finally, even in the absence of a duty, landlords, according to the dissent, would still provide security measures, as the market would generate a demand for these services. *Id.* at 115.

### B. The California Supreme Court Decision

In reversing the court of appeal decision,<sup>179</sup> a majority of the California Supreme Court held that summary judgment in Advanced Group 400's favor was warranted "based on [Ms. Saelzler's] failure adequately to demonstrate that [Advanced Group 400's] negligence was an actual, legal cause of her injuries."<sup>180</sup> The majority of the court, obviously influenced by the appellate line of abstract negligence cases criticizing the expansion of duty wrought by the *Isaacs* decision, heavily relied on policy considerations to support its holding that Ms. Saelzler's proof of causation was deficient. The majority began its opinion by stating that the central element in the case—causation—would turn on policy considerations, framing the issue as "the need to balance two important and competing policy concerns: society's interest in compensating persons injured by another's negligent acts, and its reluctance to impose unrealistic financial burdens on property owners conducting legitimate business enterprises on their premises."<sup>181</sup> In balancing these concerns "consistent with prior case precedent," and in light of the fact that Ms. Saelzler could not identify the assailants, the court concluded that she was "unable to prove [that her attackers] would not have succeeded in assaulting her if [the defendants] had provided additional security precautions."<sup>182</sup> Therefore, the court held that summary judgment was warranted because Ms. Saelzler had not proven that Advanced Group 400's failure to provide reasonable security precautions was a "substantial factor in causing her injuries."<sup>183</sup>

The majority gave its unqualified endorsement of the appellate line of decisions that discussed abstract negligence,<sup>184</sup> beginning with *Noble v. Los Angeles Dodgers*,<sup>185</sup> and heavily relied upon this line of decisions.<sup>186</sup> In each of these decisions, the appellate courts ruled in favor of defendant-property owners and rejected the plaintiffs' claims as establishing nothing more than "abstract negligence."<sup>187</sup> In approving of these decisions, the California Supreme Court described "abstract negligence" as follows:

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179. Justice Ming Chin authored the majority opinion and was joined by Chief Justice Ronald George and Justices Marvin R. Baxter and Janice Brown.

180. *Saelzler*, 23 P.3d at 1145.

181. *Id.* The supreme court's emphasis on policy considerations echoes the *Nola M.* court's interweaving of policy into its analysis of causation. See *supra* text accompanying notes 143-50.

182. *Id.*

183. *Id.* at 1155.

184. *Id.*

185. 214 Cal. Rptr. 395 (Ct. App. 1985).

186. *Id.* at 1149-51 (discussing *Noble v. Los Angeles Dodgers Corp.*, 214 Cal. Rptr. 395 (Ct. App. 1985); *Constance B. v. State of California*, 223 Cal. Rptr. 645 (Ct. App. 1986); *Nola M. v. University of S. Calif.*, 20 Cal. Rptr. 2d 97 (Ct. App. 1993); *Leslie G. v. Perry & Assocs.*, 50 Cal. Rptr. 2d 785 (Ct. App. 1996)).

187. See *supra* Part III.

Where . . . there is evidence that the assault could have occurred even in the absence of the landlord's negligence, proof of causation cannot be based on mere speculation, conjecture and inferences drawn from other inferences to reach a conclusion unsupported by any real evidence, or on an expert's opinion based on inferences, speculation and conjecture.<sup>188</sup>

Of the abstract negligence decisions, the *Saelzler* court found *Leslie G. v. Perry & Associates*<sup>189</sup> to be most analogous. Unlike cases involving the hire or deployment of security personnel,<sup>190</sup> the plaintiff in *Leslie G.* alleged that the defendants, her apartment owners, negligently failed to maintain the property, thus creating an unreasonably dangerous condition that led to her being beaten and raped in her parking garage by an unknown assailant.<sup>191</sup> The plaintiff alleged that the defendants had breached their duty by leaving the parking garage's security gate in disrepair.<sup>192</sup> The plaintiff's evidence established that the gate did not go all the way down, leaving a three-foot gap between the gate and ground.<sup>193</sup> The defendants, arguing that the plaintiff had only proven abstract negligence, moved for summary judgment, which the trial court granted.<sup>194</sup>

In affirming summary judgment, the California Court of Appeal found that the critical question was "how the rapist entered the garage."<sup>195</sup> The plaintiff argued that she had produced sufficient evidence to support her theory that the rapist had gotten into the garage under the broken gate.<sup>196</sup> The police report indicated that, on the night she was assaulted, the gate could not fully close.<sup>197</sup> The plaintiff's security expert stated that the assailant had probably made his way into the garage through the opening left by the broken gate.<sup>198</sup> Her expert also stated the assailant "'selected this location because of the conditions that he found, one being the open gate providing him access.'"<sup>199</sup>

The court found the plaintiff's evidence insufficient to prove causation, holding that the plaintiff's proof failed to show that it was "more probable than not" that the rapist had come into the garage through the gap created by the broken gate.<sup>200</sup> The court reasoned that the inferences to be drawn from

188. *Id.* at 1151 (quoting *Leslie G.*, 50 Cal. Rptr. 2d at 795).

189. 50 Cal. Rptr. 2d 785 (Ct. App. 1996).

190. *Nola M.*, 20 Cal. Rptr. 2d at 99-100; *Thai v. Stang*, 263 Cal. Rptr. 202, 203 (Ct. App. 1989); *Lopez v. McDonald's*, 238 Cal. Rptr. 436, 438 (Ct. App. 1987); *Noble*, 214 Cal. Rptr. at 396-97.

191. *Leslie G.*, 50 Cal. Rptr. 2d at 787.

192. *Id.* at 787.

193. *Id.* at 788.

194. *Id.* at 787.

195. *Id.* at 791. Interestingly, the same appellate justice who authored the majority opinion in *Nola M.* also penned the opinion in *Leslie G.*

196. *Id.*

197. *Id.*

198. *Id.* at 788-89.

199. *Id.* at 791 (citations omitted).

200. *Id.* at 795.

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the plaintiff's evidence were not "more reasonable or probable than those against her."<sup>201</sup> The court found the opinion of plaintiff's security expert unpersuasive, characterizing as speculative his testimony that the assailant had entered the garage through the broken gate.<sup>202</sup> The inference that the malfunctioning gate had enabled the assailant to enter the garage was merely one possible means of entry among several.<sup>203</sup> The court stated that the plaintiff was unable to rule out the other means of entry<sup>204</sup> and remarked that:

[t]hese unknowns are significant because, had the gate been operating properly, the rapist still could have entered the garage. Moreover, even if it had been working, he could have entered through the security gate itself by waiting outside for a car to enter, ducking beneath the closing gate, and hiding in the garage as he apparently did on the night of Leslie's rape.<sup>205</sup>

Because the plaintiff had failed to rule out all other possible entry points, the court asserted that a "reasonably probable causal connection" between the broken gate and the assailant's presence in the garage was not established.<sup>206</sup> The court thus concluded that because the various ways in which the assailant could have entered the garage were all equally probable, the plaintiff had failed to satisfy her burden on summary judgment.<sup>207</sup>

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201. *Id.* at 792 (citing *San Joaquin Grocery Co. v. Trehwitt*, 252 P. 332, 333-34 (Cal. Ct. App. 1926); *Estate of Moore*, 223 P. 73, 75 (Cal. Ct. App. 1923)).

202. 50 Cal. Rptr. 2d at 794.

203. *Id.* at 795.

204. *Id.* at 792 (footnote omitted).

205. *Id.* (citations omitted).

206. *Id.* at 794-95. A number of cases have involved issues as to how the assailant entered the premises. In an Illinois case in which several people were murdered in a restaurant that had just closed for the night, the plaintiffs contended that the restaurant negligently failed to lock the entry doors upon closing. *Castro v. Brown's Chicken & Pasta, Inc.*, 737 N.E.2d 37, 47 (Ill. App. Ct. 2000). The court affirmed summary judgment, in part, because the plaintiffs could not prove that the assailant(s) entered the restaurant after it closed. "According to the investigative police reports it is highly likely that the killer gained entry to the restaurant through the front door prior to closing, purchased a meal as a ruse, and remained there until after the store was closed. There was nothing to indicate he gained entry through the unlocked door." *See also Blumenthal v. Cairo Hotel Corp.*, 256 A.2d 400, 402 (D.C. 1969) (holding proof of causation inadequate when plaintiff lacked evidence that her assailant had gotten into her apartment by climbing up iron bars that allegedly were negligently placed on the building's exterior); *Hendricks v. Kempler*, 548 N.Y.S.2d 544, 545 (App. Div. 1989) (stating that causation not established in case involving a thirteen-year-old who assaulted the minor plaintiff in plaintiff's apartment when "assailant had friends living in the building"); *Carmichael v. Colonial Square Apartments*, 528 N.E.2d 585, 587 (Ohio Ct. App. 1987) (holding proof of causation inadequate when plaintiff failed to prove that unidentified assailant had entered apartment building through front door whose lock allegedly was not working); *Dawson v. New York City Hous. Auth.*, 610 N.Y.S.2d 28, 29-30 (App. Div. 1994) (same). *But see Dick v. Great South Bay Co.*, 442 N.Y.S.2d 348, 349 (App. Div. 1981) (holding causation established when plaintiffs proved that assailant entered building through front door that had a broken lock).

207. *Leslie G.*, 50 Cal. Rptr.2d at 795. In cases in which no evidence surfaces as to how the crime took place, there can be no proof of causation. *See, e.g., Shaner v. Tucson Airport Auth., Inc.*, 573 P.2d 518, 522 (Ariz. Ct. App. 1977) (holding that, despite proof of poor light-

Why the *Saelzler* court found the *Leslie G.* decision to be analogous to the case before it is never made explicitly clear. Presumably, the court found Ms. Saelzler's proof of causation to be as fatally deficient as that of the plaintiff's in *Leslie G.* The court, immediately after describing the *Leslie G.* opinion, pointed out Ms. Saelzler's failure to produce any evidence pertaining to the assailants' identities. More specifically, the court emphasized that she offered no proof as to whether they were residents of the apartment complex or intruders.<sup>208</sup>

According to the court, because she could not identify her assailants, Ms. Saelzler's contention that reasonable security precautions would have prevented the assault was dismissed as pure speculation, making her proof of causation inadequate for trial.<sup>209</sup> This lack of evidence, the majority reasoned, defeated her claim for two reasons. First, Ms. Saelzler had the burden of proving that the assailants would have been deterred by reasonable security precautions, the most important of which would have been the presence of security personnel.<sup>210</sup> Because the assailants were still at large, they were unavailable to testify as to whether they would have assaulted Ms. Saelzler if security personnel had been present at the apartment complex.<sup>211</sup> Ms. Saelzler thus could not prove that Advanced Group 400's negligence caused the assault, because the assailants may have been daring enough to attack her even in the face of reasonable security precautions.

Second, and more importantly, the lack of evidence as to the assailants' identities left open the possibility that the assailants were lawfully present at the complex, as either tenants or guests, rather than trespassers.<sup>212</sup> In fact, according to the court, it was just as likely that the assailants were lawfully present at the complex as it was that they were trespassing.<sup>213</sup> The court stated that security measures would not have deterred the assailants from assaulting Ms. Saelzler if the assailants were lawfully on the premises.<sup>214</sup> The court likened the function of security personnel to security gates, stating that the "primary" purpose of such measures is to keep trespassers from entering the apartment complex.<sup>215</sup> Given this exceedingly narrow view of the function and effect of security personnel, and because Ms. Saelzler offered no proof that her assailants were trespassers, she could not prove that security

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ing and overall security at airport parking lot, the lack of evidence as to how the decedent was kidnapped from the lot meant that causation would be based on "sheer speculation").

208. 23 P.3d at 1145.

209. *Id.* at 1155.

210. *Id.* at 1145.

211. *Id. Compare with Thai v. Stang*, 263 Cal. Rptr. 202, 207 (Ct. App. 1989) (indicating that assailant, who was apprehended, stated that the presence of a security guard would not have deterred his commission of a drive-by shooting).

212. *Saelzler*, 23 P.3d at 1151-52.

213. *Id.* at 1151.

214. *Id.*

215. "The primary reason for having functioning security gates and guards stationed at every entrance would be to exclude unauthorized persons and trespassers from entering." *Id.*

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guards would have had any effect in deterring or otherwise stopping the assault perpetrated upon her.<sup>216</sup> The court apparently found Ms. Saelzler's failure to prove that her assailants were intruders rather than tenants or their guests was analogous to Leslie G.'s failure to prove that the assailant most likely entered the garage by slipping under the broken gate, which was but one means of entry among others. In both cases, it was equally probable that the attack would have occurred even in the absence of the defendant's negligence.

Additionally, despite her expert's declaration that Ms. Saelzler would not have been assaulted had security guards been present,<sup>217</sup> the court rejected Ms. Saelzler's contention that guards *on patrol* would have prevented the attack. Characterizing her expert's opinion as "speculation," the court appeared to require that Ms. Saelzler prove causation to an absolute certainty, stating that Ms. Saelzler "cannot show that roving guards would have encountered her assailants or prevented the attack."<sup>218</sup> The court noted that assaults and other crimes can and do occur despite the highest level of security.<sup>219</sup> The court demanded a showing from Ms. Saelzler that, at the time and place of the assault, one or more guards would have been nearby and thus in a position to prevent or otherwise stop the assault.<sup>220</sup> Without such exacting proof, in the court's eyes, she had failed to establish causation.

Finally, the court sought to bolster its rationale by articulating a policy basis for its holding. Echoing the fear of unlimited liability expressed in *Nola M.*, the court found that shifting the burden of causation to the negligent landowner for failing to deter the "mindless acts of violence of a third person" would "make the landowner the insurer of the absolute safety of everyone who enters the premises."<sup>221</sup> The net effect of such liability, according to the court, would be to have landowners pass along the costs to those least able to bear them.<sup>222</sup>

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216. The court concluded that Ms. Saelzler could not "show that defendants' failure to provide increased daytime security at each entrance gate or functioning locked gates was a substantial factor in causing her injuries. Put another way, she is unable to prove it was 'more probable than not' that additional security precautions would have prevented the attack." *Id.* at 1152 (citations omitted).

217. *Id.* at 1148. Robert Feliciano, a former Director of Police and Safety for the Housing Authority of Los Angeles County, served as Ms. Saelzler's expert. In his declaration, he asserted unequivocally "that [the] . . . assault and battery, and attempted rape on [Ms. Saelzler] would not have occurred had there been daytime security and a more concerted effort to keep the gates repaired and closed." *Id.*

218. *Id.* at 1152.

219. *Id.* (citations omitted).

220. *Id.* The dissent in the court of appeal decision made a similar argument. *Saelzler*, 92 Cal. Rptr. 2d at 113-14 (Neal, J., dissenting).

221. *Id.* at 1152 (quoting *Nola M.*, 20 Cal. Rptr. 2d at 108).

222. 23 P.3d at 1152. The majority stated "the ultimate cost of imposing liability for failure to provide sufficient daytime security to prevent assaults would be passed on to the tenants of low-cost housing in the form of increased rents, adding to the financial burden on poor renters." *Id.*



In response to the majority opinion, Justices Joyce Kennard and Kathryn Werdegar each wrote a sharply-worded and highly critical dissenting opinion.<sup>223</sup> In her dissent, Justice Kennard, joined by Justice Werdegar, asserted that the majority's decision erected "a virtually insurmountable barrier" in front of plaintiffs bringing premises liability actions involving "foreseeable third party criminal acts."<sup>224</sup> Both justices asserted that the majority had mischaracterized and misapplied the rules governing causation, with Justice Werdegar stating that the majority's decision had stretched unduly the protection afforded to landlords and, in doing so, "[distorted] the law of causation."<sup>225</sup> Justice Kennard sharply criticized the majority's holding, claiming that the majority distorted the element of cause in fact by unfairly imposing upon plaintiff "the burden of showing causation with certainty."<sup>226</sup>

#### V. A CRITIQUE OF THE *SAELZLER* DECISION: AN ALTERNATIVE VIEW OF THE CAUSATION QUESTION

The California Supreme Court's majority opinion in *Saelzler* rests on several questionable premises. First, the majority improperly analogized the *Saelzler* case to several precedents in the abstract negligence line of appellate decisions, because the proof of causation in these precedents was far less substantial than the proof established in *Saelzler*. Second, the majority mischaracterized the law of causation by requiring that the plaintiff prove causation to a certainty in negligence cases involving third party crime. Requiring plaintiffs to do so represents a marked departure from well-established California law. Finally, the majority's assumption that Advanced Group 400 used security guards as mere sentries to keep out intruders is contradicted by the factual record, and ultimately undermines completely the majority's rationale.

##### A. *The Court's Misplaced Reliance Upon the Appellate Decisions*

The California Supreme Court relied heavily upon cases such as *Nola M.*, *Leslie G.*, and *Noble*, finding these cases analogous to *Saelzler*.<sup>227</sup> The court's reliance on these cases, however, is misplaced. The decisions in *Noble* and *Nola M.* are flawed not because their outcomes favored the defendant-landowners but because their holdings centered on causation. Rather

223. In her dissent, Justice Werdegar, joined by Justices Kennard and Stanley Mosk, stated that it was tragic that Ms. Saelzler's assailants were never caught and brought to justice. *Saelzler*, 23 P.3d at 1164 (Werdegar, J., dissenting). But "[t]hat [Ms. Saelzler] should be barred from the courthouse for *this very reason*, is both cruelly ironic and legally unjustified." *Id.*

224. 23 P.3d at 1155 (Kennard, J., dissenting).

225. *Id.* at 1158 (Werdegar, J., dissenting).

226. *Id.* at 1156 (Kennard, J., dissenting). Several points raised in the dissent are discussed in more detail in the next section. See *infra* Part V.

227. *Saelzler*, 23 P.3d at 1149-52.

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than resting their decisions on causation, however, both cases should have been decided on the basis that the defendant did not breach its duty of care.<sup>228</sup> In addition, the court mistakenly relied on these cases because the evidence of causation in them is far weaker than that in *Saelzler*.

The factual record in *Saelzler*, as compared with that in *Noble* and *Nola M.*, did suffice to take the question of causation to the jury.<sup>229</sup> Ms. Saelzler's expert, unlike the expert testimony offered in *Noble* and *Nola M.*, opined that the assault on Ms. Saelzler would not have occurred had Advanced Group 400 taken reasonable security precautions, which would include the presence of security personnel.<sup>230</sup> Even assuming the defendants in *Noble* and *Nola M.* had negligently deployed their security personnel, Advanced Group 400's nonfeasance in *Saelzler* distinguishes it from the misfeasance in the former cases. Because the plaintiffs in *Noble* and *Nola M.* had to concede that security personnel were on the premises and thus only argued that the defendants could have more effectively deployed their security personnel, *Noble* and *Nola M.* "involved only marginal misfeasance,"<sup>231</sup> whereas, in *Saelzler*, Advanced Group 400's breach was one of nonfeasance, because *no security personnel were on the premises* when Ms. Saelzler was assaulted.<sup>232</sup> This distinction, among others, should have led the court to shift the burden of causation from Ms. Saelzler to Advanced Group 400.<sup>233</sup>

Moreover, the court's reliance on *Leslie G.* is misplaced because the case is distinguishable from *Saelzler*. In *Leslie G.*, the plaintiff alleged that her assailant had gotten into her apartment parking garage through the opening created by the broken garage gate.<sup>234</sup> The court found that, despite the broken gate, the assailant could have entered the garage in other ways, holding that because the plaintiff could not disprove that the assailant entered the garage in these other ways, the plaintiff failed to carry her burden as to causation.<sup>235</sup> The court reasoned that it was equally probable that the assailant had entered the garage through the gap left by the broken gate or through other avenues of entry.<sup>236</sup> *Saelzler* differs from *Leslie G.* in that, Ms. Saelzler stated that, as she entered the apartment complex, the assailants were standing next to a propped-open entry gate, part of the very area that security guards, had they been on duty, would be required to patrol.<sup>237</sup> Thus, summary judgment was improper because Ms. Saelzler established a triable issue of fact that the presence of security guards would have either deterred the as-

228. See *supra* text accompanying notes 136-40.

229. See *infra* Parts V.B-C.

230. See *supra* note 217 and accompanying text.

231. *Saelzler*, 23 P.3d at 1162 (Werdegar, J., dissenting).

232. *Id.*

233. See *infra* Part VI.

234. For a fuller description of *Leslie G.*, see *supra* text accompanying notes 191-207.

235. *Leslie G.*, 50 Cal. Rptr. 2d at 792-94.

236. *Id.* at 791-95.

237. For a more thorough discussion, see *infra* Part V.C.

sault altogether or at least enabled Ms. Saelzler to establish the identity of her assailants.

### *B. The Court's Improper Characterization and Application of Causation*

The California Supreme Court decision in *Saelzler* now requires plaintiffs bringing negligence actions based on third party crime to prove causation to a certainty. The court ignored well-settled law that proof of causation can be established through probabilities based on ordinary experience and common sense. The majority erroneously claimed that a holding in Ms. Saelzler's favor would necessitate a rule in which causation is established merely through proof of inadequate security measures. Such a rule, which would indeed make landowners absolute insurers of the public's safety, was neither endorsed by Ms. Saelzler nor necessary for her to prove causation. In addition, the court's fear that applying a rule of causation grounded in ordinary experience and common sense would lead to a finding of causation in all cases is unfounded.<sup>238</sup>

As an initial matter, the court misapplied the rule pertaining to summary judgment by stating that granting summary judgment for a defendant is proper unless plaintiff proves "it was 'more probable than not' that additional security precautions would have prevented the attack."<sup>239</sup> Such a rule would improperly allow the trial court to weigh the evidence and substitute its own judgment as to what was probable or not for that of a reasonable trier of fact.<sup>240</sup> In considering Advanced Group 400's motion for summary judgment, the majority shifted the burden of proof to the wrong party, as "it is the defendant [at the summary judgment stage] that has the burden of showing 'that one or more elements of the cause of action . . . cannot be established.'"<sup>241</sup> In evaluating a summary judgment motion, "the critical inquiry," as dissenting Justice Kennard correctly stated, is "whether the plaintiff has produced evidence from which a reasonable trier of fact could conclude that

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238. The court emphasized that a significant basis of its holding rested on policy considerations. See text accompanying note 181. The court's reliance on policy in addressing the causation issue is problematic because the policy questions raised involve questions of duty rather than causation. The court used policy to justify its causation holding in the same way as the court of appeal did in *Nola M. v. Univ. of Southern Cal.*, 20 Cal. Rptr. 2d 97 (Ct. App. 1993). See *supra* text accompanying notes 144-50. See also Davies, *supra* note 28, at 987 ("The policy issues [the *Saelzler*] court raised had nothing to do with causation. Rather, they were precisely the same burden arguments that already had been taken into account in analyzing duty.") (footnotes omitted). In fact, one appellate court has relied upon the *Saelzler* opinion's discussion of policy not in terms of causation but rather in determining whether the defendant owed a duty to the plaintiffs. *Kadish v. Jewish Comm. Ctrs. of Greater Los Angeles*, 5 Cal. Rptr. 3d 394, 404 (Ct. App. 2003) (citing *Saelzler*, 23 P.3d at 1145).

239. *Saelzler*, 23 P.3d at 1152 (citing *Leslie G.*, 50 Cal. Rptr. 2d at 795).

240. "A judge ruling on a motion for summary judgment is not sitting as a trier of fact." *Id.* at 1157 (Kennard, J., dissenting).

241. *Id.* at 1161 (Werdegar, J., dissenting) (quoting CAL. CIV. PROC. § 437c(o)(2) (West 2000)).

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the evidence is sufficient to establish that an element of the cause of action is more probable than not."<sup>242</sup>

The California Supreme Court decision in *Saelzler* appears to now require that a plaintiff prove, to an absolute certainty, that the defendant's negligence caused the plaintiff's injuries.<sup>243</sup> It is not surprising that the court imposed a causation standard of certainty upon plaintiffs, because the court's analysis relies largely on the appellate line of abstract negligence cases.<sup>244</sup> The same certainty requirement permeates the appellate decisions. For example, the *Nola M.* opinion repeatedly suggests that a plaintiff must prove to a certainty that the taking of reasonable security measures would have prevented the assault. In fact, the *Nola M.* court appears to have placed upon plaintiffs the burden of showing that *all* crime would be prevented by improved security measures. The court stated that even if the university campus were denuded of all foliage, "there would still be *no guaranty* of safety."<sup>245</sup> In equally telling language, the court further stated that the number of places where a would-be assailant could hide demonstrates that "[a]bsolute safety is not an achievable goal."<sup>246</sup>

The court of appeal in *Saelzler* rejected a causation principle requiring certainty as espoused in *Nola M.*, and instead applied a rule of causation based on ordinary experience.<sup>247</sup> The principle that causation can be established through ordinary experience, which has long been a canon of California jurisprudence, specifically describes causation, not in terms of proof demonstrating certainty, but in terms of probability, experience, and common sense. Perhaps the finest description of this rule comes from William Prosser, who wrote:

In the ordinary case the question becomes one of what would have happened if the defendant had acted otherwise. This is of course incapable of mathematical proof, and a certain amount of guesswork is always involved. Proof of the relation of cause and effect can never be more than the "projection of our habit of expecting certain antecedents merely because we have observed those sequences on previous occasions." When a child is drowned in a swimming pool, no one can say with certainty that a lifeguard would have saved him; but the experience of the community is that with guards present people are commonly saved, and this affords a sufficient basis for the conclusion that it is more likely than not that the

242. *Id.* at 1157 (Kennard, J., dissenting).

243. *See, e.g., Saelzler*, 23 P.3d at 1145 ("[Ms. Saelzler] is unable to prove [her assailants] would not have succeeded in assaulting her if defendants had provided additional security precautions."); *id.* at 1152 ("Despite her expert's speculation, [Ms. Saelzler] cannot show that roving guards would have encountered her assailants or prevented the attack.").

244. *See id.* at 1149-52 (discussing *Noble*, *Constance B.*, *Nola M.*, and *Leslie G.*).

245. *Nola M.*, 20 Cal. Rptr. 2d at 107 (emphasis added).

246. *Id.* (emphasis added). Whether the *Nola M.* court was engaged in hyperbole in making these statements may well be an open question. Nevertheless, the court's rhetoric reveals and underscores the court's less than sympathetic attitude for these types of negligence actions.

247. *Id.* at 109-10.

absence of the guard played a significant part in the drowning. *Such questions are peculiarly for the jury.*<sup>248</sup>

As a matter of policy in negligence cases involving third party criminal conduct, courts should refrain from imposing a standard of certainty in evaluating whether a defendant's conduct was a substantial factor causing the plaintiff's harm; rather it is "the experience of the community" that affords the best basis for the conclusion that certain conditions, "more likely than not," bring about particular consequences.<sup>249</sup> The court of appeal in *Saelzler* asserted that "*Nola M.* [did] not state the proper test for causation when a landlord fails to provide any security precautions on premises where there is a high risk of criminal assault if those precautions are not taken," noting that the scope of a landowner's duty was contingent on balancing the foreseeability of harm against the burden to be imposed on a defendant.<sup>250</sup> The court remarked that the determination of the standard of care is commonly understood to mean that as the risk of third party criminal conduct increases, so too does the duty to provide more extensive security measures.<sup>251</sup> Thus, where the burden of preventing harm is great, a high degree of foreseeability is required.<sup>252</sup> Conversely, where strong policy considerations compel prevention of a significant harm and the burden of preventing such harm is slight, a low degree of foreseeability may be sufficient in finding the defendant owed a duty to the plaintiff.<sup>253</sup>

Adherence to a "certainty" requirement for causation would discourage "the provision of security measures by private landowners in the very situations where the need for same is greatest."<sup>254</sup> Application of a causation rule requiring certainty would decrease the amount of security required as the danger increases, because "as the frequency of criminal acts increases it becomes more difficult to prove causation."<sup>255</sup> As the amount of crime increases at a given property, "it [becomes] difficult to establish a greater set of security precautions would have prevented any given criminal attack and so property owners are excused from liability even when they supply little or none."<sup>256</sup>

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248. Prosser, *supra* note 111, at 382 (footnotes omitted) (emphasis added). This passage was quoted with approval by the California Supreme Court in *Campbell v. General Motors Corp.*, 649 P.2d 224, 228-29 (Cal. 1982). Interestingly, both dissenting opinions in *Saelzler* quote the passage, *Saelzler*, 23 P.3d at 1156 (Kennard, J., dissenting); *id.* at 1160 (Werdegar, J., dissenting), while the majority chose to ignore both Dean Prosser's article and the *Campbell* case, the latter of which is discussed *infra* in Part VI.A.

249. *Id.* at 1160 (Werdegar, J., dissenting).

250. 92 Cal. Rptr. 2d at 106-07 (citing *Ann M.*, 863 P.2d at 215).

251. *Id.* at 109.

252. *Id.* at 107.

253. *Id.*

254. *Id.* at 106.

255. *Id.* at 109.

256. *Id.*

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In contrast to the rule of certainty, where ordinary experience suggests that security measures would have deterred the attack upon the plaintiff, causation ought to be presumed, and the burden should shift to the defendant to prove that the attack would have occurred even had the defendant taken reasonable security precautions.<sup>257</sup> Ordinary experience dictates that the total lack of security guards can be a substantial factor leading to the commission of crime.<sup>258</sup> Therefore, according to the court of appeal, *Advanced Group 400* should not escape liability based on the premise that one can never know whether such measures would have prevented the injury.<sup>259</sup>

In *Saelzler*, the California Supreme Court, seeking to reinforce its position that causation be proved to a certainty in third party crime cases, dismissed the ordinary experience approach to causation. In its critique, the court conflated the common sense approach to causation with an approach to causation that focuses on whether the defendant's security measures were inadequate.<sup>260</sup> The court propped up this straw man argument by stating "it would be grossly unfair to permit a lay jury, after the fact, to determine in any case that security measures were 'inadequate,' particularly in light of the fact that the decision would always be rendered in a case where the security had, in fact, proved inadequate. . . ."<sup>261</sup> The court's unfounded premise is that juries, in resolving the question of causation, would be instructed to determine whether a defendant's security measures were inadequate.<sup>262</sup> As the court suggested, any time anyone is victimized by crime, it can be said that security was inadequate. The adoption of a rule requiring that security measures be "adequate" would undoubtedly make landowners the absolute insurers of victims of crime, and would justifiably raise concern that the law had tilted too far in plaintiffs' favor.<sup>263</sup>

By couching causation in terms of adequacy, the court sought to justify its decision as preventing the imposition of absolute liability upon landown-

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257. *Id.* at 112.

258. *Id.* at 109 ("[C]ommon sense tells judges as well as jurors security measures—whether they be gates or lights or guard or more sophisticated approaches—indeed do reduce the probability crime will occur at locations enjoying these protections.").

259. *Id.* at 111-12.

260. The majority correctly indicated that a rule equating causation with the adequacy of the security precautions taken "seemingly would prevent summary judgment on the causation issue in every case in which the defendant failed to adopt increased security measures of some kind." *Saelzler*, 23 P.3d at 1153.

261. *Id.* at 1153 (quoting *Nola M.*, 20 Cal. Rptr. 2d at 102).

262. The concern that a plaintiff could prove that the landowner breached its duty simply on the basis that security measures were "inadequate" gained judicial currency in a widely-cited California appellate decision, 7735 Hollywood Blvd. *Venture v. Superior Court*, 172 Cal. Rptr. 528, 530 (Ct. App. 1981).

263. At least one court has fallen into the trap of casting breach of duty and causation in terms of the "adequacy" of the defendant's security measures. *See, e.g.*, *Godfrey v. Boddie-Noell Enters., Inc.*, 843 F. Supp. 114, 123-24 (E.D. Va. 1994) (stating in dictum, and relying extensively on *Nola M.*, that "the Court would hesitate to enter into an open-ended inquiry into the 'adequacy' of security measures without some rules to follow. Otherwise, whenever an incident occurs, security will be found to be inadequate.").

ers. However, the proper test, under well-settled California law, focuses not on the "adequacy" of the security measures but on whether the security measures taken were *reasonable*.<sup>264</sup> Thus, landowners who fulfill their duty by taking reasonable precautions immunize themselves from liability.

The application of the well-settled rule of causation based on ordinary experience to the *Saelzler* case establishes that summary judgment in Advanced Group 400's favor was unwarranted. Although it cannot be established with certainty that security guards on duty would have prevented the assault upon Ms. Saelzler, it is "the experience of the community" that the presence of security guards commonly deter such attacks.<sup>265</sup> Thus the issue of causation in *Saelzler* was one that should have been submitted to the jury because it "cannot be decided as a matter of law."<sup>266</sup>

Even if the majority correctly stated that security guards are primarily intended to keep out intruders, the absence of daytime security should still be considered a substantial factor that led to the assault upon Ms. Saelzler. This case is not one where a plaintiff merely criticized through speculative testimony the ineffectiveness of the defendant's security measures.<sup>267</sup> Ms. Saelzler offered expert testimony that the presence of security guards would have deterred or otherwise prevented the attack upon her.<sup>268</sup> By misinterpreting the substantial factor test, the court unjustifiably took away the issue of causation from the jury.<sup>269</sup>

Common sense would lead a reasonable trier of fact to conclude that Advanced Group 400's failure to take reasonable security precautions was a substantial cause of Ms. Saelzler's injuries, inasmuch as the evidence pointed to the assault as a crime of opportunity.<sup>270</sup> While no one could con-

264. "It bears emphasis that if a defendant has taken reasonable care in the discharge of its duty, then *no breach will be found even if a plaintiff nevertheless suffers injury*. Our permitting this case to proceed, therefore would *not* make a landlord the 'insurer' of all who enter its premises." *Saelzler*, 23 P.3d at 1158 (Werdegar, J., dissenting).

265. *Id.* at 1160 (Werdegar, J., dissenting) (quoting *Campbell v. General Motors Corp.*, 32 Cal.3d 112, 120 (1982)).

266. *Id.*

267. The speculative link between the defendant's negligence and the injury to the plaintiff is what doomed the plaintiffs' cases in *Noble*, *Nola M.*, and *Leslie G.*

268. Unlike the expert testimony in *Noble* and *Nola M.*, Ms. Saelzler's expert stated in his declaration that reasonable security measures would have prevented the attack upon Ms. Saelzler: "[T]his attack, assault and battery, and attempted rape on the plaintiff would not have occurred had there been daytime security and a more concerted effort to keep the gates repaired and closed." *Saelzler*, 23 P.3d at 1148.

269. The Supreme Court of Connecticut explicitly rejected the notion that "the plaintiff was required to prove, to a *fairly strong degree of certainty*, that the conduct of [the assailant] was within the scope of the risk created by the defendant's negligence." *Stewart v. Federated Dep't Stores, Inc.*, 662 A.2d 753, 759 (Conn. 1996) (emphasis added), *rev'g*, *Doe v. Manheimer*, 563 A.2d 699 (Conn. 1989). Instead, "the plaintiff must show, by a *fair preponderance of the evidence*, that harm intentionally caused by a third person is within the scope of the risk created by the defendant's negligent conduct." *Id.* (emphasis added).

270. "Although there may be some criminals so reckless as to attack a person in broad daylight notwithstanding the presence of security guards, common sense suggests that such

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clude with absolute certainty whether the absence of security guards was a substantial factor in causing the assault, the question is a proper one for the jury to answer. While the majority drew inferences from the evidence that the presence of security guards on the premises would not have prevented the assault, a more compelling inference is that the utter lack of security guards was a substantial factor leading to the assault.<sup>271</sup> Therefore, even though Ms. Saelzler could not exclude the possibility that her assailants were tenants, Advanced Group 400 still did not satisfy its summary judgment burden.<sup>272</sup>

In addition, the *Saelzler* majority rejected a “common sense rule” for causation on the mistaken basis that adoption of such a rule “would prevent summary judgment on the causation issue *in every case* in which the defendant failed to adopt increased security measures of some kind.”<sup>273</sup> In fact, application of the common sense rule has been applied, perhaps somewhat transparently, in cases in which defendants were granted summary judgment when the plaintiff did not and could not possibly establish causation. “[I]n some situations, . . . reasonable security measures would never have prevented the criminal attack. These circumstances often involve extremely disturbed or [especially] determined assailants.”<sup>274</sup>

One such situation—highly publicized and extraordinary in its carnage and horror—led to the lawsuit in *Lopez v. McDonald’s Corp.*, which the California appellate court described as a “classic example” of abstract negligence.<sup>275</sup> In *Lopez*, James Huberty, armed with a variety of automatic weapons, walked into a McDonald’s restaurant with one intent in mind: to kill everyone in sight.<sup>276</sup> Twenty-one people died and eleven more were injured.<sup>277</sup>

In their suit against the restaurant, the plaintiffs alleged that McDonald’s “failed to provide adequate safety devices or security personnel to protect customers from dangerous and known risks.”<sup>278</sup> McDonald’s moved for summary judgment, contending that it owed its patrons no duty to prevent the massacre because it was unforeseeable and that its alleged lack of security precautions bore no “causal connection” to the attack.<sup>279</sup> The court con-

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appeal succinctly stated, “When a property owner supplies no security whatsoever—to say nothing of when it falls below the standard of care appropriate to the threat of crime on the premises—logic and common sense tell us absence of security is a contributing cause of most crimes occurring on that property.” *Saelzler*, 92 Cal. Rptr. 2d at 111.

271. For an extended discussion of this point, see *infra* Part V.C.

272. *Saelzler*, 23 P.3d at 1161 (Werdegar, J., dissenting).

273. *Id.* at 1153.

274. *Kadish v. Jewish Comm. Ctrs. of Greater Los Angeles*, 5 Cal. Rptr. 3d 394, 404 (Ct. App. 2003) (quoting Yokoyama, *supra* note 14, at 49).

275. 238 Cal. Rptr. 436, 449 (Ct. App. 1987).

276. *Id.* at 438.

277. *Id.* Huberty was killed by police. *Id.*

278. *Id.*

279. *Id.* at 438-39.



cluded that, while McDonald's did have a duty to protect patrons, McDonald's owed no duty to protect its customers from being massacred.<sup>280</sup> Despite having found that the restaurant owed no such duty to its patrons, the court went on to consider the causation issue.

In analyzing causation, the court first determined the scope of the restaurant's duty.<sup>281</sup> Noting that theft was the most common crime occurring at that particular restaurant, the court found that "McDonald's at a minimum should have provided protective measures such as security cameras and alarms designed to deter theft-related and ordinary criminal conduct because of the potential of identification and capture."<sup>282</sup> The court stated that, at most, McDonald's should have provided an "unarmed, uniformed, licensed security guard."<sup>283</sup>

Given this standard of care, the court determined that causation was impossible to prove because there was no possible way to show that a uniformed but unarmed security guard would have stopped Huberty from his vicious killing spree.<sup>284</sup> Although the court considered the testimony of plaintiff's security expert that security *generally* deters crime, the court pointed out "noticeably absent from his testimony is the opinion that the specific use of an unarmed, uniformed, licensed security guard would have acted as a deterrent and prevented the event or even minimized the extent of the harm suffered by plaintiffs."<sup>285</sup>

As in *Lopez*, *Thai v. Stang*<sup>286</sup> involved an assailant who committed a violent act in broad daylight. In *Thai*, the plaintiff, injured in a drive-by shooting in front of an ice skating rink, sued the rink owner for having taken inadequate security precautions.<sup>287</sup> The plaintiff presented expert testimony that the shooting would not have occurred had the defendant hired security personnel;<sup>288</sup> however, the defendant produced testimony contending the opposite.<sup>289</sup> Especially harmful to the plaintiff's case was the fact that the assailant

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280. *Id.* at 445-46. In less extreme situations, some courts have held that fast-food restaurants simply do not have the duty to hire security guards at all. *See, e.g.*, *Tucker v. KFC Nat'l Mgmt. Co.*, 689 F. Supp. 560, 563 (D. Md. 1988) (applying Maryland law and concluding that an owner of a "small fast food retail store" has no duty "to provide security guard service for its business invitees. Typically, these establishments are open, readily accessible to the public, small, well-lighted and well-trafficked. Every area of service is only a few feet away from publicly policed areas.").

281. *Lopez*, 238 Cal. Rptr. at 448 (citing *Noble*, 214 Cal. Rptr. at 398).

282. *Id.*

283. *Id.* at 449 (emphasis added).

284. *Id.* at 450.

285. *Id.* The court's observation echoes the rationale found in *Noble* and *Nola M.*, where the expert testimony, while noting that security precautions could have been improved, nevertheless failed to indicate that improved precautions would have prevented the assault.

286. 263 Cal. Rptr. 202 (Ct. App. 1989).

287. *Id.* at 203.

288. *Id.* at 204.

289. *Id.* at 207.

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was not only apprehended, but was deposed.<sup>290</sup> He testified that the presence of a security guard would have made no difference as to whether he would have committed the drive-by shooting.<sup>291</sup> Therefore, based on the assailant's deposition and the speculative nature of the plaintiff's expert testimony,<sup>292</sup> the court held that there was no causal nexus between the plaintiff's injuries and the defendant's alleged nonfeasance in failing to provide security personnel on the premises.<sup>293</sup>

Summary judgment in the landowner's favor was affirmed correctly in the *Thai* and *Lopez* cases because causation clearly could not be established. Common sense compels the conclusion that the assailants in *Thai*, who committed the drive-by shooting outside an ice rink, would not have been deterred in the least by a security guard, especially given the assailant's testimony. Similarly, common sense dictates that an unarmed security guard would not have deterred the assailant in *Lopez*: a homicidal maniac, armed to the teeth, and hell-bent on killing as many people as possible. Based on the extraordinary facts before it, the court could have simply rested its holding on the simple and sturdy premise that it defies common sense to conclude that preventative measures such as "security cameras, alarms and unarmed security guards . . . [would] have deterred . . . a maniacal, suicidal assailant unconcerned with his own safety, bent on committing mass murder."<sup>294</sup>

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290. *Id.* at 204.

291. *Id.*

292. *Id.* at 209. The court found that because the plaintiff's expert never "visited the [shooting] scene, interviewed [the victim] or the assailants, or even reviewed the police reports," the expert's testimony that the presence of a security guard would have prevented the shooting was "pure speculation." *Id.*

293. *Id.* at 207. See also *Reichenbach v. Days Inn of America, Inc.*, 401 So. 2d 1366, 1367 (Fla. Dist Ct. App. 1981) (holding in a case where the plaintiff was shot in a motel parking lot that "[t]here was no evidence that this incident was foreseeable or that the motel had any practical or reasonable method to protect its guest from or prevent this unprovoked hit and run attack."); *Hillcrest Foods, Inc. v. Kiritsy*, 489 S.E.2d 547, 550 (Ga. Ct. App. 1997) (while holding that drive-by shooting that injured restaurant patron was not foreseeable and therefore restaurant owed no duty to patron, the court stated: "In this drive-by shooting, the perpetrator was not even on the defendant's property, but rather was traveling on a busy public thoroughfare. It is difficult to imagine what effective action [the restaurant] could reasonably have taken which could have prevented a drive-by shooting even had there been a prior such event.").

294. *Lopez*, 238 Cal. Rptr. at 450. Another case that turned on common sense notions of causation is *Constance B. v. State of California*, 223 Cal. Rptr. 645 (Ct. App. 1986). In *Constance B.*, the plaintiff was assaulted by an unidentified person while at a highway rest stop at night. *Id.* at 646-47. Among the plaintiff's reasons as to why the rest stop was unreasonably dangerous, the court found but one worthy of extended discussion: the area between the parking lot and the restroom was poorly illuminated. The court explained that the plaintiff's own evidence refuted her argument that the lack of lighting was the cause of her assault. *Id.* at 652. Prior to the assault, the assailant stood at the "corner of a building whose outside walls were well-illuminated. The only inference to be drawn is that he was standing in the light." *Id.* at 652. The court reasoned that the assailant's indifference to being in the light near where the attack occurred demonstrated that better lighting in the area between the parking lot and the restroom would not have deterred his assault on the plaintiff. *Id.*

### C. The Court's Flawed Understanding of the Purpose of Security Guards

A critical question of fact for the *Saelzler* majority—and, unfortunately for Ms. Saelzler, the one that utterly lacked evidence—was whether her assailants were trespassing or were lawfully present on the premises.<sup>295</sup> The court reasoned that because Ms. Saelzler could not identify her assailants, she had failed to establish causation as a matter of law.<sup>296</sup> The court thought the assailants' identities were crucial because it considered the overriding, if not sole, purpose of security guards was to keep out intruders.<sup>297</sup> Because no evidence pointed towards the assailants' identities, the court ruled that it was just as likely that the assailants were lawfully present on the premises as it was that they were trespassers.<sup>298</sup> Therefore, according to the court, Ms.

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In contrast to *Constance B.* stands *Loeser v. Nathan Hale Gardens, Inc.*, 425 N.Y.S.2d 104 (App. Div. 1980), in which unknown assailants assaulted the plaintiff at night while he was in an unlit parking lot of his apartment building. Claiming that the defendant negligently failed to light the parking lot, *id.* at 106, the plaintiff produced testimony linking violent crime to the absence of lighting, which the court stated “is emphatically confirmed by common experience.” *Id.* at 107. The court found that there was sufficient evidence of causation to submit the case to a jury. “Although it is of course impossible to state with certainty that the assault would not have occurred if the lot had been properly illuminated, it was properly a jury question under all the circumstances to determine whether the absence of the lights in fact contributed substantially to the criminal assault and subsequent injuries.” *Id.* at 108 (citations omitted). *Constance B.* can be reconciled with *Loeser* because in the former case, common sense dictates that illuminating the parking lot would have had no deterrent effect on an assailant who, prior to attacking the plaintiff, was standing in a well-illuminated area visible to the public. In *Loeser*, the parking lot where the assailants attacked the plaintiff was unlit and the plaintiff produced expert testimony that the absence of lighting creates an enhanced opportunity for people to commit violent crime.

295. *Saelzler*, 23 P.3d at 1151-52.

296. *Id.* at 1152. Because Ms. Saelzler was a delivery person, rather than a tenant, and given the large number of apartment complex residents, it is hardly surprising that Ms. Saelzler would have no idea whether her attackers were tenants or trespassers. In other cases, where the plaintiff's claim for negligence depends on proving the assailant was an intruder, causation has been established when the plaintiff testified that he or she had never seen the assailant before and that the assailant used force to get into the apartment building. Compare *Rios v. Jackson Assocs.*, 686 N.Y.S.2d 800, 802 (App. Div. 1999) (holding that plaintiff did offer sufficient proof that the assailant was an intruder) with *Chattergoon v. New York City Hous. Auth.*, 701 N.Y.S.2d 375, 376 (App. Div. 2000) (holding that plaintiff did not offer sufficient proof that the assailant was an intruder).

297. *Saelzler*, 23 P.3d at 1151-52. Requiring a plaintiff to prove that the assailant was an intruder makes sense when the plaintiff, for example, is attacked in his or her apartment building and the plaintiff alleges that the defendant negligently failed to maintain locks to entry doors. See, e.g., *Rios*, 686 N.Y.S.2d at 802 (holding that plaintiff did have sufficient proof that assailant was an intruder); *Wright v. New York City Hous. Auth.*, 624 N.Y.S.2d 144, 145-46 (App. Div. 1995) (holding that plaintiff did not have sufficient proof that her assailant was an intruder).

298. *Saelzler*, 23 P.3d at 1151-52. Although not explicitly stated, it was presumably on this basis that the court found *Leslie G.* analogous. Because it was equally likely that the assailant in *Leslie G.* gained access to the plaintiff through the malfunctioning apartment garage gate as it was through other avenues, the plaintiff failed to establish a triable issue as to causation. Similarly, in *Saelzler*, because Ms. Saelzler failed to produce any evidence tending to show that the assailants were trespassers, she failed to establish a triable issue as to causation.

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Saelzler had failed to establish a triable issue of fact as to causation, because security would not have prevented the assault had the assailants been lawfully on the premises.<sup>299</sup>

The court's rationale, however, relies on the unsupported and unreasonable premise that Advanced Group 400 used security guards only to prevent intruders from trespassing.<sup>300</sup> This assumption taints the majority's opinion from the very start, from its economic policy concerns<sup>301</sup> to its misguided analysis of causation.<sup>302</sup> That assumption, however, is unfounded.

The court's misguided view of guard duty conjures up images of fortresses with sentries posted on towers poised to keep enemies out. But keeping trespassers out was but one function, among many others, carried out by Advanced Group 400's security guards at the twenty-eight building, 300 unit apartment complex that stretched over several acres. Advanced Group 400 employed security guards for a variety of purposes that went well beyond simply keeping out intruders.

First, the rampant criminal activity plaguing the apartment complex belies the notion that guards only functioned as gate-keepers, and not "crimestoppers" as well. The security logs, kept by the guards hired by Advanced Group 400, documented Advanced Group 400's knowledge of the rampant criminal activity taking place on its premises<sup>303</sup> and, through its use

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299. *Id.* at 1152.

300. Justice Werdegar vigorously disputed the majority's assumption that Advanced Group 400's primary purpose for hiring security guards was to prevent trespassers from coming onto the property. *Id.* at 1159 (Werdegar, J., dissenting). This "false premise," according to Justice Werdegar, was used by the majority as a foothold for its assertion that because Ms. Saelzler's assailants could have been residents of the apartment complex, and therefore lawfully present on the premises, Ms. Saelzler "cannot prove the identity or background of her assailants," and she has an "insurmountable proof problem." *Id.* at 1159.

301. The majority remarked that the burden of improved security measures would be borne ultimately by those least able to afford it. "[T]he ultimate cost of imposing liability for failure to provide sufficient daytime security to prevent assaults would be passed on to the tenants of low-cost housing in the form of increased rents, adding to the financial burdens on poor renters." *Id.* at 1152. Nevertheless, the assertion that Advanced Group 400 hired security guards only to serve as gate-keepers is contradicted by the guards' own security logs.

Moreover, what the majority neglected to indicate is that the duty to take security measures only arises by balancing the degree of risk with the costs of the burden imposed. And when the duty sought to be imposed is the hiring of security guards, a high degree of foreseeability must be shown, which can ordinarily only be satisfied through proof of prior similar occurrences. *See supra* Part II.B.2. Thus, the economic impact of hiring security is necessarily accounted for in determining whether a landowner must have security personnel. When Advanced Group 400 conceded it breached its duty to hire security guards, Advanced Group 400 forfeited any argument it had that the hiring of daytime guards posed an undue economic burden. In analyzing causation, where the courts in cases such as *Nola M.* and *Saelzler* bemoan the costly burden of guards; however, the courts are conflating improperly two discrete elements—duty and causation.

302. *See supra* Part V.B.

303. The trial court order and opinion indicated that "[Ms. Saelzler] presented evidence that [Advanced Group 400] knew of frequent recurring criminal activity" at the apartment complex. *Saelzler*, 23 P 3d at 1147.

of security personnel at night, “took some steps to control the situation.”<sup>304</sup> The complex was a “haven” for criminal activity, and Advanced Group 400 “knowingly allowed” crime at the complex to “flourish.”<sup>305</sup> The threat of crime in general, and assault in particular, on the grounds of the apartment complex, was high.<sup>306</sup> “[G]unshots, robberies, and sexual harassment of women, including sexual assaults and rapes” regularly occurred on the premises.<sup>307</sup> Thus, Advanced Group 400’s hiring of guards was driven, not only by the need to keep trespassers off the premises, but also by the urgent need to check the rampant crime inside the complex as well.

Second, the threat arose not just from intruders coming onto the premises but, more importantly, from those who lived at or otherwise had a right to be on the complex.<sup>308</sup> It appeared no one was safe from the antisocial and criminal activities disrupting the peace. A notorious street gang had taken up headquarters at the complex.<sup>309</sup> Pizza delivery drivers, fearing for their safety, refused to enter the complex and asked that customers meet them outside the apartment grounds.<sup>310</sup> In addition, the apartment manager had security guards “escort her to her vehicle whenever she left the premises.”<sup>311</sup> In the months leading up to the assault upon Ms. Saelzler, the police had been called to the complex numerous times to respond to assaults and other criminal activity.<sup>312</sup> As a result, the police advised Advanced Group 400 to hire security guards during the day—but to no avail.<sup>313</sup>

Finally, the security logs failed to corroborate the contention that the guards only prevented trespassers from entering.<sup>314</sup> Instead, these security logs reveal a quite different picture of what the guards actually did while on duty. While undoubtedly the guards did deter trespassing and ousted trespassers, it can hardly be said that dealing with trespassers was their primary purpose when the guards also “broke up fights, forced aggressive tenants or

304. *Id.* at 1148. Security logs, not surprisingly, have been used to demonstrate the foreseeability of criminal assault in other cases. *See, e.g.*, *Banks v. Hyatt Corp.*, 722 F.2d 214, 218 (5th Cir. 1984); *Rios*, 686 N.Y.S.2d at 802.

305. *Saelzler*, 23 P.3d at 1162 (Werdegar, J., dissenting).

306. *Id.* at 1147.

307. *Id.*

308. Much of the criminal and antisocial activity appears to have been caused by gang members who resided at the apartment complex. In response, Advanced Group 400 imposed “a nighttime curfew on juveniles, and posted notices threatening eviction of tenants involved with drugs or gang activities.” *Id.* at 1148.

309. *Id.*

310. *Id.* at 1147.

311. *Id.* at 1147-48. In a Florida case, the fact that restaurant employees were escorted to their cars at night was significant in leading the court to conclude that an assault upon a customer in the parking lot was foreseeable. *Foster v. Po Folks, Inc.*, 674 So. 2d 843, 846 (Fla. Dist. Ct. App. 1996) (“Po Folks has a policy of escorting its employees to their cars in the parking lot at night, raising an inference management was aware of the potential danger to its employees. Why not its customers?”).

312. *Id.* at 1147.

313. *Id.* at 1148.

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trespassers to leave the area, and evicted tenants involved in criminal or gang activity.”<sup>315</sup> Nighttime security personnel, rather than simply securing entry points into the complex, routinely patrolled the entire premises<sup>316</sup> and regularly approached and were approached by tenants who reported possible criminal activity.<sup>317</sup> These facts undermine the contention that security guards functioned only to keep trespassers out.

Thus, Advanced Group 400 obviously used its guards to prevent and stop the commission of crime.<sup>318</sup> Taken as a whole, the record “renders incredible the majority’s pretense that defendants’ nighttime security guards were—and that, impliedly, any daytime security guards would likewise have been” employed solely to exclude trespassers.<sup>319</sup> In addition, Advanced Group 400’s use of its guards to deter crime was for a reasonable purpose. It cannot be doubted that the presence of guards would have positive, secondary effects, such as deterring crime and other antisocial behavior.<sup>320</sup> Guards have a deterrent effect for a number of reasons. It seems far more reasonable to assume that people would choose to commit crimes in places devoid of security guards and other possible witnesses.<sup>321</sup> Many would-be criminals may be deterred based on the threat that a guard would be able to identify them or catch them in the commission of the crime.<sup>322</sup> Thus, a more rational view for the hiring of security personnel is to “deter *all* criminal behavior,

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315. *Id.*

316. *Id.* at 1159 (Werdegar, J., dissenting) (noting that “references to ‘continuous patrol of the complex’ appear in almost every patrol report in the record”).

317. *Id.* (Werdegar, J., dissenting) (“Numerous patrol officers’ reports, submitted by both sides, reveal that defendants’ guards secured and monitored vacant apartments, parking lots, carports and parked vehicles, swimming pool areas, a weight room, a storage shed, laundry rooms, and trash bin areas.”).

318. “Dozens of patrol reports note that security guards ‘checked for any suspicious activity’ *throughout* the complex.” *Id.* at 1159.

319. *Id.* at 1159 (Werdegar, J., dissenting).

320. See *Harris v. Pizza Hut of La.*, 455 So. 2d 1364, 1367 (La. 1984) (describing expert testimony stating that “the primary purpose of a security guard is deterrence of crime by a visible presence” and that “the highest degree of security would consist of an armed uniformed police officer in plain view”).

321. “When a property owner supplies no security whatsoever—to say nothing of when it falls below the standard of care appropriate to the threat of crime on the premises—logic and common sense tell us absence of security is a contributing cause of most crimes occurring on that property.” *Saelzler*, 92 Cal. Rptr. 2d at 111. See also *Dye v. Schwegmann Bros. Giant Supermarkets, Inc.*, 627 So. 2d 688, 696 (La. Ct. App. 1993) (Byrnes, J., concurring) (“Even an inattentive security guard is a better deterrent than no security guard.”); *Bowman v. McDonald’s Corp.*, 916 S.W.2d 270, 277 (Mo. Ct. App. 1995) (describing plaintiff’s offer of proof that “armed security guards were an effective deterrent to violent criminal activity” at restaurant); *Sunrise Village Assocs. v. Borough of Roselle Park*, 438 A.2d 945, 948 (N.J. Super. Ct. Law Div. 1981) (“[The] presence [of security guards] . . . could serve to decrease the occurrence of police responses and increase law and order in the area by serving as a deterrent factor. A security [sic] may also result in quicker police response and increase the chances to apprehend those responsible for breaking the law.”).

322. See *Harris*, 455 So. 2d at 1367.

not just trespassing, by *any* person (including tenants, not just unauthorized entrants).<sup>323</sup>

If the court were truly concerned with placing “unrealistic financial burdens on property owners” then why did it so readily assume that guards serve only the purpose of preventing trespassing?<sup>324</sup> The court failed to align its concern for imposing an inordinate financial burden on landowners with its primary purpose view of security guards.<sup>325</sup> Even though no evidence pointed to this cost-*inefficient* method of using security personnel, the court still made it an assumption in support of its concern for the heavy economic burden that hiring guards places on landowners. The employment of security guards can be a cost-effective method of deterring crime, because they can perform a variety of functions to reduce crime and to promote the peace.<sup>326</sup> Additionally, the hiring of guards may attract potential tenants and customers whose concern about their personal safety would be alleviated by the presence of security guards.<sup>327</sup>

In *Saelzler*, a triable issue of fact existed as to whether the assault on Ms. Saelzler would have occurred had security personnel been on duty. The assault appeared to be a crime of opportunity. There was no evidence in the *Saelzler* case that the assailants were acting under an insane delusion or were under the influence of drugs or alcohol. Therefore, a reasonable assumption can be made that the utter lack of security precautions, and especially the complete absence of daytime security guards, was a substantial factor resulting in the attack upon Ms. Saelzler.<sup>328</sup> Ms. Saelzler did not have the burden of proving that she was assaulted by a trespasser. Instead, she must only “raise a triable issue as to whether defendants’ failure to provide increased daytime security was a ‘substantial factor’ in causing her injuries.”<sup>329</sup>

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323. *Saelzler*, 23 P.3d at 1159 (Werdegar, J., dissenting).

324. *Id.* at 1145.

325. *Id.* at 1151.

326. Advanced Group 400 certainly used its security force to accomplish several objectives. See *supra* text accompanying notes 314-17. See also *Rotman v. Maclin Markets, Inc.*, 30 Cal. Rptr. 2d 130, 134 (Ct. App. 1994) (“[T]he primary job of a security guard is to protect the property of his employer, to provide a visible deterrent, and to observe and report crimes.”).

327. In the court of appeal decision, the dissenting justice, who asserted that the case should have been decided on the basis that Advanced Group 400 “owed no duty of care to prevent criminal attacks,” *Saelzler*, 92 Cal. Rptr. at 114 (Neal, J., dissenting), stated that “[e]ven without a duty, business owners and landlords would still provide security measures. The market would call forth these services for shoppers and tenants who wished them and were willing to pay higher prices or rents covering the added costs of the services.” *Id.* at 115.

328. *Saelzler*, 23 P.3d at 1157 (Kennard, J., dissenting).

329. *Id.* at 1159-60 (Werdegar, J., dissenting) (citing *Mitchell v. Gonzales*, 819 P.2d 872, 878-79 (Cal. 1991)).

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## VI. A SUGGESTION FOR CHANGE: SHIFTING THE BURDEN OF CAUSATION TO LANDOWNERS WHO BREACH THEIR DUTY TO PROVIDE SECURITY GUARDS

A. *Background—California Law Shifting the Burden of Causation*

In *Saelzler*, faced with the ideal opportunity to do so, but letting the chance slip away, the California Supreme Court should have shifted the burden of causation to Advanced Group 400 to prove that its lack of security precautions, most notably its negligent failure to provide daytime security personnel, was not a substantial factor leading to the attack upon Ms. Saelzler. Even assuming that the *Saelzler* majority correctly stated that the overriding, if not sole, purpose of patrolling guards was to keep trespassers off the premises, a highly questionable assumption,<sup>330</sup> Advanced Group 400's negligence in having absolutely no daytime guards on duty substantially contributed to Ms. Saelzler's inability to identify her assailants. The record indicated that as Ms. Saelzler entered the apartment complex grounds, she saw two of the three men who would later assault her loitering next to a propped-open gate.<sup>331</sup> The attackers, in other words, were standing next to what appears to have been a broken entry gate at the apartment complex's perimeter, part of the very area in which guards would have been assigned to patrol. Had guards been patrolling the perimeter of the complex, it seems reasonable to infer that a guard would have seen these two men and would have been able, at the very least, to describe them.<sup>332</sup> The utter lack of guards on the premises ensured that professionally trained personnel would not be available to identify or otherwise deter the assailants. Because of the absence of daytime security personnel at the apartment complex, which Advanced Group 400 conceded was negligent, the burden of proving the assailants' identities should have been shifted from Ms. Saelzler to Advanced Group 400, as the court of appeal had held.<sup>333</sup>

A majority of the California Supreme Court condemned the court of appeal's "novel" approach of shifting the burden of proof to defendants in this situation.<sup>334</sup> Stating that "such a drastic shifting of the burden of proof is unjustified by either the evidence in this case or prior statutory and case law,"<sup>335</sup> the majority held that "even a flagrant failure to provide such [security] measures would not justify shifting to defendants the burden of conclusively proving the absence of causation."<sup>336</sup> The court asserted that such a rule would unfairly expose defendants to liability even when their negligence had

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330. See *supra* Part V.C.

331. *Saelzler*, 23 P.3d at 1147.

332. In addition, the presence of security personnel itself may have been enough to deter the attack.

333. For a discussion of the court of appeal decision, see *supra* text accompanying notes 171-178.

334. *Saelzler*, 23 P.3d at 1154.

335. *Id.* at 1154.

336. *Id.*



nothing to do with causing the harm, thereby making defendants the “insurer of the absolute safety of anyone entering their premises.”<sup>337</sup>

The majority, however, failed to acknowledge well-established California case law that, in certain situations, allows the burden of causation to shift from the innocent plaintiff to the negligent defendant.<sup>338</sup> Advanced Group 400, by failing to hire any daytime security personnel, breached its duty to Ms. Saelzler. Advanced Group 400’s failure should be considered a sufficiently serious breach given that the duty to hire security guards will only be imposed when there is a high degree of foreseeability of criminal assault.<sup>339</sup> Under these circumstances, the court should have found applicable the holding in *Haft v. Lone Palm Hotel*, which, for policy reasons, justified shifting the burden of causation to the defendant.<sup>340</sup>

*Haft* involved a wrongful death action in which the decedents, a father and his five year-old son, drowned in the swimming pool of a hotel at which they were staying.<sup>341</sup> No one witnessed the drowning.<sup>342</sup> Despite conflicting evidence as to the decedents’ skill, or lack thereof, in swimming,<sup>343</sup> “the evidence [established] without conflict, that . . . defendants had . . . failed to provide any of the major safety measures required by law for pools made available for use of the public.”<sup>344</sup> Specifically, no lifeguard was present when the drownings occurred and there were no markings on the edge of the pool indicating the various depths of the pool.<sup>345</sup> In addition, no sign was posted warning that the pool was unattended.<sup>346</sup> The defendants were “unquestionably negligent as a matter of law” in failing to satisfy these safety measures.<sup>347</sup> Despite the flagrant breach of duty, the jury issued a verdict for defendants.<sup>348</sup>

On appeal to the California Supreme Court, the plaintiffs contended that the trial court erroneously refused to find that the defendants’ “breach of the most significant safety regulation—the statutory lifeguard requirement—was

337. *Id.* (citations omitted).

338. Interestingly, even though this point was made—albeit briefly—by Ms. Saelzler’s attorneys in her appellate brief, see Answer Brief on the Merits at 34-38, *Saelzler v. Advanced Group 400*, 23 P.3d 1143 (Cal. 2001) (No. S085736), both the majority and the dissents chose not to address the point.

339. See *supra* Part II.B.2.

340. 478 P.2d 465, 476 n.19 (Cal. 1970).

341. *Id.* at 467.

342. *Id.* at 468.

343. The decedents’ wife and mother, Mrs. Haft, testified that although her son and husband were not “real swimmers,” they could still tread water and “get around the pool.” *Id.* at 467. On the other hand, another witness testified that she heard Mrs. Haft exclaim, “My husband, my son, I told them not to swim,” and that [she] had also admitted that ‘they’ couldn’t swim,’ [and that] ‘they couldn’t put their faces under water.’” *Id.* at 467-68.

344. *Id.* at 467-68.

345. *Id.* at 468.

346. *Id.*

347. *Id.*

348. *Id.* at 469.

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a proximate cause of the deaths as a matter of law.”<sup>349</sup> A unanimous court ruled that the burden of proving causation should shift to the defendants, holding that “plaintiffs, in proving defendants’ violation of the statutory lifeguard requirement, sustained their initial burden of proof on the issue of causation; the burden then shifted to defendants to show that their violation was not a proximate cause of the deaths.”<sup>350</sup>

The court rejected the argument that plaintiffs failed to prove causation because they could not prove that a warning sign would have dissuaded the father and son from using the pool. The defendants, emphasizing the fact that no one else was present when the decedents were in the hotel pool, contended “that . . . the absence of a lifeguard must have been obvious; if the absence of a lifeguard was obvious . . . defendants’ failure to post a sign notifying decedents of this absence could be of no significance.”<sup>351</sup> In finding this argument without merit, the court noted that the “strength of the argument derive[d] not from its own merit but, instead, from the difficulty of proof facing an injured party attempting to counter this position.”<sup>352</sup> The court stated that a pool owner facilely could assert that another individual would have gone into a pool even if an appropriate sign had been posted; “it is quite difficult, in contrast, for a plaintiff, especially in a wrongful death action, to prove that a warning sign would have had the intended cautionary effect.”<sup>353</sup>

According to the court, the problematic aspect of establishing causation concerned “the total lack of direct evidence as to the precise manner in which the drownings occurred.”<sup>354</sup> With that in mind, the court recognized that “[a]lthough the paucity of evidence on causation is normally one of the burdens that must be shouldered by a plaintiff in proving his case, the evidentiary void in the instant action results primarily from defendants’ failure to provide a lifeguard to observe occurrences within the pool area.”<sup>355</sup> The absence of the lifeguard not only exacerbated the risk of harm to the decedents, “but also deprived . . . plaintiffs of a means of definitively establishing the facts leading to the drownings.”<sup>356</sup> Thus, “[t]o require plaintiffs to establish ‘proximate causation’ to a greater certainty than they have in the instant

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349. *Id.* at 470. When the accident occurred, California statutory law provided: “‘ Lifeguard service shall be provided for any public swimming pool which is of wholly artificial construction and for the use of which a direct fee is charged. For all other swimming pools, lifeguard service shall be provided or signs shall be erected clearly indicating that such service is not provided.’” *Id.* at 471 n.8 (quoting CAL. HEALTH & SAFETY CODE § 24101.4).

350. *Id.* at 469.

351. *Id.* at 472.

352. *Id.*

353. *Id.*

354. *Id.* at 474.

355. *Id.*

356. *Id.* at 474-75.

case, would permit defendants to gain the advantage of the lack of proof inherent in the lifeguardless situation which they have created."<sup>357</sup>

Moreover, reasoned the court, the sign required by the statute did more than merely alert visitors to the fact that no lifeguard was on duty. Rather, such signs "[give] notice of the general hazards present in the given swimming pool and most importantly serves as a continuing warning of the potential danger to the novice swimmer; the mere absence of a lifeguard hardly provides such cautionary advice."<sup>358</sup> Therefore, the court held that, because the defendants failed to have a lifeguard on duty and to post an appropriate warning, "the burden shifted to them to prove that their violation was not a proximate cause of the deaths; in the absence of such proof, defendants' causation of such death is established as a matter of law."<sup>359</sup>

Borrowing upon the rationale set forth in *Haft*, other California decisions have shifted the burden of causation to the defendant. Generally, shifting the burden of causation to the defendant has been applied when the defendant's negligence arose out of its "failure to comply with *mandatory requirements of a statute or regulation* [and the defendant's negligence] prevents plaintiffs from conclusively proving their injuries were proximately caused by that failure."<sup>360</sup> However, shifting the burden of causation has been applied in other contexts, where the defendant's negligence did not arise from violating a statutory duty. While many of these cases involve product liability actions, they have relevance to cases like *Saelzler*. One such case is *Campbell v. General Motors*.<sup>361</sup> In *Campbell*, the plaintiff, while riding in a bus manufactured by General Motors, was injured when she was thrown from her seat as the bus driver made a sharp turn.<sup>362</sup> The plaintiff alleged that General Motors defectively designed the bus by failing to place a protective rail adjacent to her seat.<sup>363</sup> At trial, General Motors moved for a nonsuit following the plaintiff's case-in-chief, asserting that the plaintiff had failed to prove that the bus design was defective, or, in the alternative, that the plaintiff had failed to prove that the lack of the handrail was the cause-in-fact of her injuries.<sup>364</sup> The trial court granted the motion.<sup>365</sup>

357. *Id.* at 475 (citation omitted).

358. *Id.* at 472.

359. *Id.* at 473. Some commentators have criticized the *Haft* decision for its lack of guidance as to when shifting the burden of causation would be appropriate in other situations. *See, e.g., Davies, supra* note 27, at 988 n.90 (remarking that the rationale for shifting the burden of causation rested on "a somewhat implausible construction" of statutory law, which did not require the presence of a lifeguard); David W. Robertson, W. Page Keeton Symposium on Tort Law, *The Common Sense of Cause in Fact*, 75 TEX. L. REV. 1765, 1783 (1997) (asserting that *Haft* fails to "offer much guidance as to when burden shifting is appropriate and when it is not").

360. *Fagerquist v. Western Sun Aviation, Inc.*, 236 Cal. Rptr. 633, 641 (Ct. App. 1987) (emphasis added).

361. 649 P.2d 224 (Cal. 1982).

362. *Id.* at 226.

363. *Id.* at 228.

364. *Id.* at 226-27.

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On appeal, the California Supreme Court reversed, finding that the plaintiff's proof of causation sufficed to take the issue to the jury.<sup>366</sup> In evaluating the plaintiff's claim, the court applied one of two alternative tests set forth in *Barker v. Lull Engineering Co.*<sup>367</sup> Under one test, the design of the product is evaluated via a risk/benefit analysis.<sup>368</sup> The court found that the plaintiff sought to "establish causation on the basis of the manufacturer's failure to provide a particular safety device."<sup>369</sup> The court applied the ordinary experience principle underlying causation, stating that "[u]nless very unusual circumstances exist, this type of claim presents a factual issue which can only be resolved by the trier of fact."<sup>370</sup> Noting that the plaintiff's injury may well have arisen from other causes, the court stated that "[t]he plaintiff in a strict liability action is not required to disprove every possible alternative explanation of the injury in order to have the case submitted to the jury."<sup>371</sup>

The court reasoned its holding was particularly justified because of the utter absence of the safety device.<sup>372</sup> Buttressing its rationale with a nod toward *Haft v. Lone Palm Hotel*, the court reasoned that allowing the defendant who fails to provide a safety precaution to avoid having the jury determine causation would discourage the taking of reasonable safeguards, "one of the major policy goals of strict liability."<sup>373</sup>

In *Galanek v. Wismar*,<sup>374</sup> a legal malpractice case arising from a failed products liability case, the court shifted the burden of causation to the defendant-attorney.<sup>375</sup> In *Galanek*, the plaintiff brought a malpractice action against his former attorney, who, while representing the plaintiff, allegedly failed to preserve a car crucial to plaintiff's products liability case against the car manufacturer.<sup>376</sup> As in *Haft*, the court in *Galanek* found that shifting the

365. *Id.* at 227.

366. *Id.* at 233.

367. 573 P.2d 443, 452 (Cal. 1978).

368. "[A] product may be found defective in design, even if it satisfies ordinary consumer expectations, if through hindsight the jury determines that the product's design embodies 'excessive preventable danger,' or, in other words, if the jury finds that the risk of danger inherent in the challenged design outweighs the benefits of such design." *Campbell*, 649 P.2d at 227 (quoting *Barker*, 573 P.2d at 454).

369. *Campbell*, 649 P.2d at 228 (citations omitted).

370. *Id.* The court relied on Dean Prosser's characterization of causation quoted previously. See *supra* text accompanying note 248.

371. *Id.* at 229.

372. *Id.* ("It is particularly appropriate that the jury be allowed to determine the inference to be drawn when the evidence indicates that a safety device, designed to prevent the very injury that occurred, was not present.").

373. *Id.* "To take the case from the jury simply because the plaintiff could not prove to a certainty that the device would have prevented the accident would enable the manufacturer to prevail on the basis of its failure to provide the safeguard." *Id.* (citing *Haft*, 478 P.2d at 475) (footnote omitted).

374. 81 Cal. Rptr. 2d 236 (Ct. App. 1999).

375. *Id.* at 242.

376. *Id.* at 238.

burden of causation to the defendant was proper because it was the defendant's negligence, rather than any fault of the plaintiff, that resulted in the plaintiff's inability to prove causation.<sup>377</sup> If the burden of proof were not shifted to the defendant, then the plaintiff would have had to prove that if he had the car, he would have won his underlying case against the manufacturer, but he would have to do this without the most important piece of evidence—the car itself.<sup>378</sup> Indeed, the products liability case was dismissed because the very evidence that could not be introduced at trial due to the attorney's negligence was the same evidence the plaintiff needed to win the malpractice case.<sup>379</sup> Because it was unquestionably the attorney's fault for failing to preserve the car, he, and not the plaintiff, should bear the burden of proof as to causation.<sup>380</sup>

*B. Why the Haft Rationale Applies to Third Party Crime Cases in Which the Landowner Fails in Its Duty to Hire Security Guards*

While the *Haft* case involved the defendant's failure to comply with duties arising by statute, the rationale advanced in *Haft* applies with equal, if not greater, vigor to cases such as *Saelzler*, where the landowner breaches its duty by failing to provide any security guards on its premises. Driving the *Haft* court's reasoning was the public interest that owners of pools subject to the statutory requirement should have lifeguards on duty.<sup>381</sup> When no lifeguard was on duty, these proprietors could satisfy their statutory duty only by posting a warning that stated no lifeguard was on duty, as well as providing "notice of the general hazards present in the given swimming pool."<sup>382</sup>

The logic of the *Haft* rationale applies with equal, if not greater, force to cases like *Saelzler*, and would support shifting the burden of causation from

377. *Id.* at 242.

378. *Id.*

379. *Id.* at 241.

380. *Id.* at 243. The continuing vitality of the *Haft* rule is evidenced in *Saffro v. Elite Racing, Inc.*, 119 Cal. Rptr. 2d 497 (Ct. App. 2002), in which the appellate court reversed summary judgment in a case where the plaintiff, a marathoner, suffered hyponatremia allegedly caused by the defendant's failure to provide runners with water and electrolyte fluids. The court instructed the trial court to determine whether the burden of causation should shift to the defendant. *Id.* at 502-03.

381. "Although the Legislature chose to delegate the authority to promulgate almost all of the specific regulations to the State Department of Public Health [CAL HEALTH & SAF. CODE, § 24102], the Legislature was sufficiently concerned about one particular safety issue—lifeguard service—that it elected to establish the prevailing requirements itself, in section 24101.4." *Haft*, 478 P.2d at 471.

382. *Id.* at 472 (citing CAL. HEALTH & SAFETY CODE § 24101.4 (repealed 1995) and 17 CAL. ADMIN. CODE § 7829). When no lifeguard was available, the pool owner would have to post an appropriate notice, which the Legislature intended would educate as well as warn potential users about the risks posed by a pool. The significance of the notice is that it "serves as a *continuing warning* of the potential danger to the novice swimmer; the mere absence of a lifeguard hardly provides such cautionary advice." *Id.* at 472 (footnote omitted) (emphasis added).

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the innocent plaintiff to the negligent landowner. In a case like *Saelzler*, the only protection that reasonably could be afforded to lawful entrants such as Ms. Saelzler, of dangerous premises, such as Advanced Group 400's vast apartment complex, would be the presence of security guards and other security precautions designed to prevent crime. Advanced Group 400's failure to hire security guards is akin to the hotel owner's failure in *Haft* to have a lifeguard on duty, or otherwise comply with the posted notice requirement. While it reasonably may be assumed that many if not most people know of the risks of swimming pools, it cannot be as easily assumed that people such as Ms. Saelzler, a delivery person, know the risk they are taking when they enter a sprawling, crime-infested apartment complex such as the one owned and operated by Advanced Group 400. In these situations, people are risking their personal safety unknowingly and do so without reasonable precautions taken to protect them.

Another significant parallel between the *Haft* and *Saelzler* cases is found in the *Haft* court's observation that plaintiffs would find it "quite difficult" to prove the causation if they must establish that the presence of the warning sign would have deterred the victims' use of the pool.<sup>383</sup> Imposing this requirement upon a plaintiff would almost certainly lead to the defendant's claim that the causal link between the failure to post the warning and the injury was speculative, because the requirement would essentially force the plaintiff to guess how the victim would have responded to the warning. The court concluded, however, that requiring plaintiffs to prove causation in this instance would significantly erode the incentive in the posting of such a warning, a dubious result that the court found contrary to legislative intent.<sup>384</sup>

Likewise, in a case like *Saelzler*, a plaintiff would be caught in a similar bind if required to prove causation when a landowner has a duty to provide security guards but fails to do so. There often will be no assurance that a security guard employed on the premises would have been in the right area to spot and then oust the intruder or otherwise prevent or stop the assault.<sup>385</sup> Allowing negligent landowners to avoid their duty on the basis that causation

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383. *Id.*

384. *Id.* at 477. According to the court,

Without [shifting the burden of proof on the issue of causation to the defendants] in the instant case, the promise of substantial protection held out by our statutory lifeguard requirement will be effectively nullified in a substantial number of cases. One purpose of the statute is to prevent a drowning in a pool where no one else is present to witness it and possibly to prevent it. If the pool owner can disregard the statute and retreat to the sanctuary of the argument that the plaintiff must prove the "cause" of the death which obviously is unknown, he can, without liability, expose his paying patron to the very danger that the statute would avoid. Since the pool owner violates the statute, since he creates the dangerous condition and exercises control over it, since the death occurs upon his premises with which he is familiar, since he profits from the presence of the pool, he cannot take refuge in the position that the burden of proof rests with the probable victim of his statutory violation.

*Id.*

385. See *supra* text accompanying notes 217-20 and Part V.B.

cannot be proven to this degree of certainty would, in effect, encourage landowners to neglect their duty and thus undermine the vital public policy to provide incentives for landowners to take reasonable steps to prevent foreseeable criminal activity.<sup>386</sup>

While *Campbell* and *Galanek* differ from *Saelzler* in that the former cases involve products liability claims, the rationale in *Campbell* and *Galanek* supports shifting the burden of causation in a case like *Saelzler*. In *Campbell*, the defendant-manufacturer of the bus, and not the plaintiff, was obviously in a better position than the plaintiff to provide information about the design and testing of the bus. In *Galanek*, the defendant-attorney lost the evidence that ultimately led to the dismissal of the plaintiff's products liability action. Similarly, in *Saelzler*, if the California Supreme Court's view of security guards is accepted, it is Advanced Group 400, and not Ms. Saelzler, that should bear the burden of proving that its failure to have security personnel on duty was not a substantial factor leading to the assault on Ms. Saelzler. Courts imposing the duty upon landowners to protect against foreseeable crime have done so because of the landowner's control over common areas of the property.<sup>387</sup> The California Supreme Court left no doubt that, in its view, the primary purpose of security guards is to prevent trespassing.<sup>388</sup> Thus, Advanced Group 400 should be faulted for not having security personnel patrol the apartment complex entrances. Advanced Group 400's egregious failure is particularly relevant since Ms. Saelzler came through a propped-open gate at which her assailants were standing as she entered the complex. If the court is correct that security guards should have been "stationed at every entrance," then it may be reasonably inferred that the assault on Ms. Saelzler either would not have happened or would have been aborted by the presence of security close at hand.<sup>389</sup> In addition, it seems reasonably probable that a guard posted at that entrance would have seen Ms. Saelzler's assailants and would be able to describe them and to identify whether they were trespassers or residents. Therefore, it was unfair to grant summary judgment for Advanced Group 400 since the very evidentiary hurdle that Ms. Saelzler failed to overcome was an obstacle placed in her path due to Advanced Group 400's failure to meet its standard of care. Denying Advanced Group 400's motion for summary judgment would be consistent with the *Haft*, *Campbell*, and *Galanek* decisions because in all of these cases the negligent defendant, rather than the innocent plaintiff, created the evidentiary void.

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386. *Saelzler v. Advanced Group 400*, 92 Cal. Rptr. 2d 103, 109-12 (Ct. App. 2000), *rev'd*, 23 P.3d 1143 (Cal. 2001). Professor Davies cogently observed that "if plaintiffs in this type of case are required to establish that the [assailants] in fact utilized security breaches to perpetrate the attacks, as opposed to the usual burden on causation, factual deficits become insuperable." Davies, *supra* note 27, at 994.

387. *See supra* Part II.A.

388. *See Saelzler*, 23 P.3d at 1151.

389. *Id.*

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The public interest in safety would especially be undermined in situations where the landowner had the duty to hire security personnel but neglects to do so. The California Supreme Court has made clear that, before a landowner will be required to hire security guards, the foreseeable risk to personal safety must be high, which means that such a duty is imposed only if there is a significant risk of being victimized by crime.<sup>390</sup> When the foreseeability of harm is sufficiently high, the landowner is obligated to employ security personnel and take other reasonable precautions to protect people's safety. When, however, the landowner fails in its duty to hire security and also fails to take other reasonable precautions, the landowner ought not to escape liability on the basis that the plaintiff cannot establish causation. Because of the steep showing of risk required to impose the duty on the landowner, which can be likened to the risk of an unattended swimming pool open to the public, the vital purpose underlying the duty—that of taking prudent steps to thwart a significant risk of criminal attack—would be undermined by allowing the irresponsible landowner to avoid liability, simply because the plaintiff could not establish causation with certainty.

Finally, in both *Haft* and *Saelzler*, the victims were foreseeable. In *Haft*, the victims, as paid guests of the hotel, were foreseeable users of the hotel swimming pool.<sup>391</sup> In *Saelzler*, Ms. Saelzler's status as a delivery person made her somebody to whom Advanced Group 400 owed a duty.<sup>392</sup> Moreover, the assault perpetrated upon Ms. Saelzler was the type of harm that security personnel are hired to protect against.<sup>393</sup> Therefore, those who are assaulted on crime-ridden premises are just as foreseeable as those who drown in unsupervised public swimming pools whose owners fail to post the requisite warnings. Ms. Saelzler is an innocent plaintiff who entered the premises, altogether unaware of the criminal history that had plagued the apartment complex.

## VI. CONCLUSION

The California Supreme Court decision in *Saelzler v. Advanced Group 400* undoubtedly represents the high point in insulating from liability negligent landowners sued for third party criminal conduct. In holding that the plaintiff, Marianne Saelzler, failed to establish a triable issue as to causation,

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390. See *supra* Part II.B.2.

391. "Since the risk of swimming pool drownings constituted the very hazard against which the statutory lifeguard requirement was designed to protect, there of course can be no question but that the instant actions embodied a foreseeable 'type of injury.'" *Haft*, 478 P.2d at 473 n.13 (citations omitted).

392. Advanced Group 400, by focusing solely on the causation element in moving for summary judgment, essentially conceded that it owed Ms. Saelzler a duty of care. *Saelzler*, 23 P.3d at 1149.

393. The notion that security guards were intended to prevent assaults at the apartment complex goes beyond the overly narrow depiction of the Saelzler court's view of security guards as intended solely to prevent intruders. See *supra* Part V.C.



the court misconstrued and misapplied long-settled California law regarding causation. In addition, the court forsook a prime opportunity to boldly shift the burden of causation from innocent victims of third party crime to negligent landowners who fail to abide by their duty to provide security personnel and instead hire none at all. Because the duty to hire security personnel will be found only when there is a high foreseeability of violent crime occurring on the premises, a breach of that duty is sufficiently serious to warrant shifting the burden of causation from the innocent plaintiff to the negligent landowner. As to its ultimate effect, the court's decision may well encourage cost-conscious landowners to refrain from taking reasonable steps to safeguard their patrons, tenants, and other innocent persons from the threat of third-party crime, especially in those areas most at risk of crime.