Comments

Delgado v. Trax Bar & Grill: Determining the Scope of the Prior Similar Incidents Test in Terms of Efficient Resource Allocation

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OVER THE PAST TWO decades, the California Supreme Court's decisions in the field of premises security have been the subject of much criticism by courts and commentators alike.[1] Perhaps in recognition of this overwhelming criticism the California Supreme Court recently granted review of the Fifth District Court of Appeal's decision in *Delgado v. Trax Bar & Grill*.[2] Specifically, the court will address the following issue:

> *Does a tavern owner who voluntarily provides security guards to monitor the tavern's parking lot and control patron behavior thereby assume the duty to protect patrons from assault by others in the parking lot, or is the existence of such a duty still subject to the foreseeability analysis of Ann M. v. Pacific Plaza Shopping Center?*[3]

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* Class of 2005. I would like to thank Professors Joshua Davis, Rhonda Magee Andrews, and Michelle Travis for their helpful comments on earlier drafts of this Comment.

1. *See, e.g.*, Nola M. v. Univ. of S. Cal., 20 Cal. Rptr. 2d 97, 109 (Ct. App. 1993) (suggesting that "it may be time for the Supreme Court to reexamine the concept of duty it articulated in [*Isaacs v. Huntington Memorial Hospital*] in the context of a society which appears unable to effectively stem the tide of violent crime"); Onciano v. Golden Palace Rest., Inc., 268 Cal. Rptr. 96, 101–02 (Ct. App. 1990) (Woods, J., concurring in part, dissenting in part) (observing that the "totality of the circumstances" test leads to inequity); Ann M. v. Pac. Plaza Shopping Ctr., 863 P.2d 207, 216–18 (Cal. 1993) (Mosk, J., dissenting); Julie Davies, *Undercutting Premises Liability: Reflections on the Use and Abuse of Causation Doctrine*, 40 SAN DIEGO L. REV. 971, 973–74 (2003); Uri Kaufman, *When Crime Pays: Business Landlords' Duty to Protect Customers from Criminal Acts Committed on the Premises*, 31 S. TEX. L. REV. 89, 90 (1990); Stephen D. Sugarman, *Judges as Tort Law Un-Makers: Recent California Experience with "New" Torts*, 49 DEPAUL L. REV. 455, 455 (1999).

2. 134 Cal. Rptr. 2d 548 (Ct. App. 2003), *review granted*, 75 P.3d 29 (Cal. 2004).

3. CAL. APPELLATE COURTS, CASE INFORMATION: CASE SUMMARY—*Delgado v. Trax Bar & Grill* (2004), *at* http://appellatecases.courtinfo.ca.gov/search/mainCaseScreen.cfm?dist

The California Supreme Court should take this opportunity to once and for all propose a clear, coherent analysis capable of achieving consistent liability rules.

In resolving the issue before it, the court must implicitly determine the viability and limitations of the prior similar incidents test.[4] That is to say, if the court seeks to determine what the test *is not*, the court must first define exactly what the test *is*. The determination of the scope of the prior similar incidents test necessarily depends on a clear articulation capable of achieving consistent results. Although the court's adoption of the prior similar incidents test was motivated in part by the desire to achieve a predictable model of liability,[5] the body of conflicting interpretations, applications, and results demonstrates the court's failure in this respect.[6] This failure was not a result of flawed legal reasoning; rather, it was a result of the court's incomplete

=0&doc_id=278570&rc=1 (last accessed Feb. 7, 2005). On December 15, 2004, the California Supreme Court solicited supplemental briefing from the parties addressing "the effect, if any, of the 'negligent undertaking' doctrine upon the duty question presented in this case" and "the effect, if any, of *Taylor v. Centennial Bowl, Inc.*" CAL. APPELLATE COURTS, CASE INFORMATION: DOCKET ENTRIES (REGISTER OF ACTIONS)—*Delgado v. Trax Bar & Grill* (2004), *at* http://appellatecases.courtinfo.ca.gov/search/dockets.cfm?dist=0&doc_id=278570 (last accessed Feb. 7, 2005).

4. As adopted and modified by the California Supreme Court, the prior similar incidents test states that, in the context of imposing a high burden on the defendant landowner, for example, providing security guards, "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." *Ann M.*, 863 P.2d at 215.

5. *Cf. Ann M.*, 863 P.2d at 215 (noting the court's previous holding in *Isaacs v. Huntington Memorial Hospital*, 695 P.2d 653 (Cal. 1985), "tended to confuse the duty analysis").

6. *See* Avila v. Jado Props., Inc., 5 Cal. Rptr. 3d 141, 147 (Ct. App. 2003) (holding the foreseeability analysis of *Ann M.* is inapposite where the plantiff and defendant contracted for the provision of security guards during the time of the third party crime on defendant's premises), *review granted*, 82 P.3d 746 (Cal. 2004); Mata v. Mata, 130 Cal. Rptr. 2d 141, 145 (Ct. App. 2003) (holding foreseeability analysis of *Ann M.* is inapposite where defendant landowner assumed a duty by previously hiring security guards), *review denied*, 2003 Cal. LEXIS 2701 (Sup. Ct. Apr. 23, 2003); Morris v. De La Torre, 4 Cal. Rptr. 3d 568, 575 (Ct. App. 2003) (holding that, although prior incidents were not sufficiently similar to the gang attack giving rise to the litigation so as to provide the degree of foreseeability required to impose a duty to take reasonable measures to prevent *future* third party crimes on the premises, the special relationship doctrine imposed a duty on the landowner to take reasonable measures to respond to *contemporaneous* criminal attacks perpetrated in plain view of landowner), *review granted*, 81 P.3d 221 (2003); Claxton v. Atl. Richfield Co., 133 Cal. Rptr. 2d 425, 433–34 (Ct. App. 2003) (holding that, although there was no evidence of prior racially-motivated, gang assaults on the defendant landowner's premises, evidence of prior assaults were sufficiently similar to the instant third party assault to provide the requisite degree of foreseeability to impose a duty on the defendant landowner to provide additional security measures), *review denied*, 2003 Cal. LEXIS 5454 (Sup. Ct. July 30, 2003); Alvarez v. Jacmar Pac. Pizza Corp., 122 Cal. Rptr. 2d 890, 906 (Ct. App. 2002) (holding that prior third party crimes on the premises were not similar enough to impose a duty).

articulation of its sound reasoning in initially adopting the prior similar incidents test. Thus, the failure was one of incompleteness.

In order to complete the prior similar incidents test, the court now must identify the principles underlying its initial decision to adopt this test. The court must then refine the existing test to establish a predictable model of liability. With the necessary predictability ensured, only then may the court identify the scope, and hence the limits, of this test by effectuating the underlying policies the test seeks to further. Finally, the court must resolve the specific issue before it and determine whether the voluntary provision of security guards falls within the scope of the prior similar incidents test.

This Comment provides the California Supreme Court with guidance in its endeavors to complete the prior similar incidents test over eleven years after it was first adopted.[7] Part I provides a brief historical context of the development of premises security litigation and the emergence of the prior similar incidents test as the majority approach. This section also traces the evolution of California case law regarding foreseeable third party crimes. Part II discusses *Delgado*, focusing on the Fifth District's interpretation and application of the prior similar incidents test. Part III proposes that the most coherent explanation of the court's decision to adopt the prior similar incidents test is in terms of efficient resource allocation typical of law and economics. This part proposes a refinement to the current prior similar incidents test in furtherance of the intended efficient resource allocation. Part IV concludes by applying the completed test to the issue currently before the California Supreme Court, concluding that the scope of the prior similar incidents test, as properly conceived, includes those instances where a landowner voluntarily provides security guards. Therefore, under the refined prior similar incidents test, a landowner who voluntarily assumes the burden associated with providing security guards does not owe its patrons a duty to prevent third party criminal assaults absent prior similar incidents on the premises.

I. Background of Premises Security Litigation

A. Emergence of the Prior Similar Incidents Test

The law of premises liability is a separate branch of tort law dealing with the liability of landowners to persons entering their land.[8] A

7. *See Ann M.*, 863 P.2d at 215.

8. *See* David H. Estes, *Premises Liability for Owners and Occupiers of Real Property: A Legal Research Guide*, *in* 38 LEGAL RESEARCH GUIDES 1 (2000).

premises security lawsuit is a type of premises liability where the victim of a third party crime sues the owner or occupier of the premises where the crime occurred.[9] In order to prevail, the plaintiff must prove that the defendant owed the plaintiff a duty, that the duty was breached, and that the defendant's breach caused the plaintiff's injuries.[10]

Recognition of a cause of action for premises security has been a relatively recent development in premises liability.[11] Courts were initially reluctant to impose a duty on landowners under circumstances where liability attached to the intentionally injurious conduct of removed third parties.[12] However, in response to the increasing crime rate and growing public concern regarding violent crime, courts began to recognize a limited duty for landowners to prevent foreseeable third party criminal acts.[13] The *Second Restatement of Torts* recognizes this limited duty and provides:

> A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to (a) discover that such acts are being done or are likely to be done, or (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.[14]

In order to ensure that a landowner's duty remained limited, courts have held that the degree of foreseeability required to impose a duty could not be established absent prior similar incidents on the premises.[15] As a growing number of jurisdictions adopted this "prior similar incidents" test, so too grew the variations of judicial interpreta-

9. *See* ALAN KAMINSKY, A COMPLETE GUIDE TO PREMISES SECURITY LITIGATION 3 (2d ed. 2001).

10. *See id.*

11. *See* Kaufman, *supra* note 1, at 90.

12. *See id.*

13. *See* Laura DiCola Kulwicki, *A Landowner's Duty to Guard Against Criminal Attack: Foreseeability and the Prior Similar Incidents Rule*, 48 OHIO ST. L.J. 247, 247 (1987). The source of this limited duty is found in landlord-tenant law, where courts had previously imposed a duty on landlords to prevent foreseeable criminal acts on the landlord's premises. *See id.*

14. RESTATEMENT (SECOND) OF TORTS § 344 (1965).

15. *See* Michael J. Yelnosky, *Business Inviters' Duty to Protect Invitees from Criminal Acts*, 134 U. PA. L REV. 883, 891 (1986) ("The first group of cases to be considered narrowly limits the existence of the duty. Unless . . . the defendant inviter knew or had reason to know that criminal acts posing imminent probability of harm to an invitee were occurring . . . , no duty to protect arises.").

tion of the test.[16] Some jurisdictions interpreted the prior similar incidents test to require prior "identical" incidents.[17] These jurisdictions imposed a duty on a landowner only where there was evidence of a prior incident of the *same crime* occurring in approximately the *same manner*.[18] Other jurisdictions interpreted the prior similar incidents test to require a prior *criminal* incident.[19] These jurisdictions held that evidence of *any previous crime* on the premises imposed a duty on the landowner to take reasonable precautions to prevent all future third party crime.[20]

B. California Jurisprudence

California landowners owe a general duty to persons upon their land to maintain their premises in a reasonably safe condition.[21] In determining whether a specific type of conduct falls within the scope of this general duty, California courts consider the purpose of the plaintiff's presence on the premises along with 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 imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.[22]

In balancing these *Rowland* factors, courts recognize that foreseeability of harm is the most important factor.[23] Although this fact-intensive

16. *Compare* Butler v. Acme Mkts., Inc., 445 A.2d 1141, 1143–44 (N.J. 1982), *with* Morgan v. Bucks Assocs., 428 F. Supp. 546, 550 (E.D. Pa. 1977).

17. *See, e.g., Butler*, 445 A.2d at 1143–44.

18. *See id.*

19. *See, e.g., Morgan*, 428 F. Supp. at 550 (E.D. Pa. 1977).

20. *See id.* (denying defendant's motion for a new trial and judgment n.o.v. on the ground that evidence of prior car thefts in landowner's parking lot did not impose a duty to prevent subsequent criminal assault on a business invitee).

21. *See* CAL. CIV. CODE § 1714 (West 2004); Rowland v. Christian, 443 P.2d 561, 565–66 (Cal. 1968).

22. *Rowland*, 443 P.2d at 564 (rejecting the rigid common law rule predicating duty of care on the injured person's status as an invitee, licensee, or trespasser). Prior to *Rowland*, a landowner owed a duty "to take affirmative action to control the wrongful acts of third persons which threaten invitees where the occupant has reasonable cause to anticipate such acts and the probability of injury resulting therefrom." Taylor v. Centennial Bowl, Inc., 416 P.2d 793, 797 (Cal. 1966).

23. *See* Ann M. v. Pac. Plaza Shopping Ctr., 863 P.2d 207, 214 (Cal. 1993) (reasoning that "foreseeability is a crucial factor in determining the existence of a duty"); Kulwicki, *supra* note 13, at 247 (stating that foreseeability is "a key element" in determining the existence of a duty). Requiring a consideration of the foreseeability of the criminal con-

inquiry is often an issue for a jury, foreseeability as a matter of law is a question for the court.[24] Because this inquiry is a matter for the judiciary, the court generally retains broad discretion to consider all surrounding circumstances relevant to the determination of foreseeability.[25]

The primacy of foreseeability is perhaps more pronounced in premises security causes of action than in the context of general premises liability.[26] In premises security, the scope of a landowner's general duty of care includes a duty to take reasonable steps to secure common areas against *foreseeable* criminal acts of third parties that are likely to occur in the absence of such precautionary measures.[27] Nevertheless, even after California recognized a premises security cause of action, a divided court of appeal struggled to determine the proper foreseeability analysis.[28] Most courts adopted the majority approach, holding that the requisite foreseeability to impose a duty on a landowner could not be established absent a prior similar incident on the

duct is at first a very obvious practical concern; a defendant can never adequately take measures to prevent harm that, by its very nature, is unforeseeable. A tangential concern, and perhaps less obvious, is the underlying realization that imposing a duty to prevent unforeseeable harm will have no effect on the conduct of the individual defendant. *See* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 4–5 (1987). This realization is dependent upon the further assumption that people, in part, make decisions based on the effect those decisions will have upon their private resources.

24. *Cf.* W. PAGE KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 45 (5th ed. 1983) (noting that the determination of foreseeability as a matter of law in the context of causation is properly reserved for the court).

25. *See id.*

26. *See* KAMINSKY, *supra* note 9, at 8–9 (noting that the essential factor that determines whether a duty to provide protection exists in a specific case is the concept of foreseeability). Since the landowner's liability is dependant upon the intentionally injurious act of a third party, foreseeability of harm is perhaps more attenuated in a premises security suit compared to an "ordinary" negligence action, where liability rarely depends upon the act of a third party and almost never is tied to the intentional conduct of a third party. *See* Wiener v. Southcoast Childcare Ctrs., Inc., 88 P.3d 517, 524 (Cal. 2004) (distinguishing between liability for "ordinary" negligence and liability for the criminal acts of third parties).

27. *See* Frances T. v. Vill. Green Owners Ass'n, 723 P.2d 573, 578 (Cal. 1986) (Ct. App. 1986) (holding a duty to take affirmative action to control the wrongful acts of a third party will be imposed only where such conduct can be reasonably anticipated); Kulwicki, *supra* note 13, at 249.

28. *Compare* O'Hara v. W. Seven Trees Corp., 142 Cal. Rptr. 487, 491 (Ct. App. 1977) (applying the prior similar incidents test to become the first California court to hold a landlord liable for a third party crime on the premises), *with* Kwaitkowski v. Superior Trading Co., 176 Cal. Rptr. 494, 497 (Ct. App. 1981) (holding that the requisite degree of foreseeability to impose a duty on the landowner to take reasonable measures to prevent future third party crimes on the premises may be established by a totality of the circumstances).

premises.[29] A minority of courts, however, rejected the prior similar incidents test in favor of the traditional totality of the circumstances test common to other areas of tort law.[30]

In 1985, the California Supreme Court conducted its first comprehensive analysis of the role of foreseeability in third party criminal assaults.[31] Addressing the relationship between the degree of foreseeability required to establish a duty and the burden associated with that duty, the court in *Isaacs v. Huntington Mem'l Hosp.* concluded that foreseeability remained a "flexible concept" to be measured in proportion to the burden of the duty sought to be imposed.[32] The court then considered the manner by which courts should measure the degree of foreseeability under a particular set of facts.[33] Rejecting the "rigid" prior similar incidents test, the *Isaacs* court adopted the more flexible "totality of the circumstances" test.[34] In support of its decision, the *Isaacs* court cited four fundamental flaws with the prior similar incidents test: (1) it discouraged landowners from providing security against known dangers; (2) it prohibited the first crime victim from recovering while permitting recovery by subsequent victims; (3) it was "unworkable" and required courts to enunciate arbitrary distinctions between prior and subsequent crimes; and (4) it placed too great a burden on the tortiously injured plaintiff through the "rigid application of a mechanical [rule]."[35] The lack of a "prior similar incident," according to the court, does not prohibit the imposition of a duty where the nature of the premises, the nature of the surrounding premises, and general past experience were such that a reasonable landowner should have foreseen the particular criminal act.[36] Al-

29. *See, e.g., O'Hara,* 142 Cal. Rptr. at 491; Anaya v. Turk, 199 Cal. Rptr. 187, 191 (Ct. App. 1984); Riley v. Marcus, 177 Cal. Rptr. 827, 830 (Ct. App. 1981); Wingard v. Safeway Stores, Inc., 176 Cal. Rptr. 320, 324 (Ct. App. 1981); Jamison v. Mark C. Bloome Co., 169 Cal. Rptr. 399, 403 (Ct. App. 1980).

30. *See, e.g., Kwaitkowski,* 176 Cal. Rptr. at 497; Cohen v. Southland Corp., 203 Cal. Rptr. 572, 577 (Ct. App. 1984); Gomez v. Ticor, 193 Cal. Rptr. 600, 603–04 (Ct. App. 1983).

31. *See* Isaacs v. Huntington Mem'l Hosp., 695 P.2d 653 (Cal. 1985).

32. *Id.* at 658. This rule of proportionality by which the foreseeability of harm must be weighed against the burden, vagueness, and efficacy of the duty sought to be imposed has been adopted in all subsequent premises security cases. *See, e.g.,* Ann M. v. Pac. Plaza Shopping Ctr., 863 P.2d 207, 215 (Cal. 1993); Sharon P. v. Arman Ltd., 989 P.2d 121, 130 (Cal. 1999).

33. *Isaacs,* 695 P.2d at 658–62.

34. *See id.* at 659.

35. *Id.* At the time of the *Isaacs* decision, the California Supreme Court was recognized as one of the most activist, "pro-plaintiff" courts in the country. *See generally* Sugarman, *supra* note 1, at 456–57.

36. *Id.* at 657.

though not necessary to the finding of a duty, a prior similar incident is helpful to determine foreseeability.[37] Thus, the requisite foreseeability could be established despite the absence of prior similar incidents on the premises.[38]

In 1994, against the backdrop of widespread criticism of its *Isaacs* decision,[39] the California Supreme Court revisited the proper foreseeability test in *Ann M. v. Pacific Plaza Shopping Center*.[40] The *Ann M.* court commenced by recognizing that the rampant, unpredictable nature of violent crime in modern society significantly raised the burden associated with landowners preventing crime on their premises.[41] Relying on the rule of proportionality announced in *Isaacs*, the *Ann M.* court reasoned that the foreseeability of the criminal act must be balanced against "the 'burdensomeness, vagueness, and efficacy' of the proposed security measures."[42] Where the proposed security measure included hiring security guards—rarely a "'minimal burden'"—the imposition of such a heavy burden could only be supported by an equally high degree of foreseeability.[43] This degree of foreseeability was practically guaranteed by the prior similar incidents test.[44] Thus, the *Ann M.* court concluded: "[T]he 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."[45] In a footnote qualifying its holding, the court stated that "it is possible that some other circumstances such as immediate proximity to a substantially similar business establishment that has experienced violent crime on its

37. *See Isaacs*, 695 P.2d at 659; RESTATEMENT SECOND OF TORTS § 344(f) (1965).

38. *See Isaacs*, 695 P.2d at 659.

39. *See, e.g.*, Kaufman, *supra* note 1, at 97 (noting that at the time of the article California was the only jurisdiction to adopt the "totality of the circumstances" rule).

40. 863 P.2d 207, 215 (Cal. 1993).

41. *Id.*

42. *Id.* (quoting Gomez v. Ticor, 193 Cal. Rptr. 600, 606 (Ct. App. 1983)).

43. *Id.* at 215–16. (reasoning that to impose a duty on landowners based on a lesser showing of foreseeability would ostensibly make landowners the insurers of public safety).

44. *Id.* at 215.

45. *Id.* Although the language of the holding was limited to the substantial burden associated with the duty to provide security guards, it is unclear whether the prior similar incidents test applies to other preventative measures. In *Sharon P. v. Arman, Ltd.*, 989 P.2d 121, 130–33 (Cal. 1999), the court considered whether the scope of a commercial landlord's duty included maintaining previously installed surveillance cameras in operational condition. The court reasoned that the burden of reasonably maintaining surveillance cameras at a minimum required the hiring of personnel to monitor them—a burden no less than hiring security guards. *Id.* at 130. The *Sharon P.* court concluded that "[a]bsent any prior similar incidents or other indications of a reasonably foreseeable risk of violent criminal assaults in that location, we cannot conclude defendants were required to secure the area against such crime." *Id.* at 133.

premises could provide the requisite degree of foreseeability."[46] In a similar footnote, the court implied that the foreseeability required to establish a duty to provide security guards might be satisfied where the premises is "inherently dangerous."[47] However, the California Supreme Court later rejected the "inherently dangerous" premises argument.[48]

In an attempt to justify its decision to revisit *Isaacs*, the *Ann M.* court reasoned that the rule announced in *Isaacs* was unnecessary and therefore tended to confuse lower courts.[49] Specifically, the court contended that the record in *Isaacs* "contained evidence of prior, violent, third party attacks on persons on the hospital's premises in close proximity to where the attack at issue in that case occurred."[50] However, more problematic than the *Ann M.* court's apparent overruling of *Isaacs* was the *Ann M.* court's failure to account for the *Isaacs* court's reasoning when it had rejected the prior similar incidents test.[51] Specifically, although the *Isaacs* court recognized that judicial discretion in interpreting the "similarity" of prior and subsequent crimes could lead to arbitrary results,[52] the *Ann M.* court did not attempt to further define these terms in deciding to adopt this "flawed" test.[53] Thus, the foreseeability analysis of *Ann M.*, as it is currently conceived, appears incapable of producing consistent results. This conclusion is not merely theoretical but has been borne out by the divided courts of appeal over the past eleven years.[54]

Having relied on this ground in rejecting the test, and having ignored it in adopting the test, the court's inaction could hardly be considered an oversight.[55] The *Ann M.* court's deliberate decision not to provide further clarification of the test is more accurately viewed as a calculated attempt to retain judicial discretion in the face of adopt-

46. *Ann M.*, 863 P.2d at 216 n.7.

47. *Id.* at 216 n.8.

48. *Sharon P.*, 989 P.2d at 127.

49. *See Ann M.*, 863 P.2d at 215–16.

50. *Id.* (citation omitted).

51. It is one thing to say that the rule announced in *Isaacs* was unnecessary on the facts of the case; however, it is another to say, as the court did in *Ann. M.*, that the reasoning supporting the unnecessary opinion was incorrect, or at the very least irrelevant.

52. *See* Isaacs v. Huntington Mem'l Hosp., 695 P.2d 653, 658–59 (Cal. 1985) (noting that the prior similar incidents test merely replaced one ambiguous term—foreseeability—with two others—prior and similar).

53. *Cf. Ann M.*, 863 P.2d at 214–16.

54. *See supra* note 6 and accompanying text.

55. *See Ann M.*, 863 P.2d at 215 (also noting that one stated purpose of reconsidering *Isaacs* was to alleviate confusion generated by its previous opinion).

ing an otherwise "mechanical" rule.[56] Any advantages once gained by retaining judicial discretion, however, have since been outweighed by the lower courts' confusion. This confusion is the source of the current issue before the California Supreme Court: How may courts determine the limitations of the rule announced in *Ann. M* if the test is incapable of producing consistent results?

II. The Case: *Delgado v. Trax Bar & Grill*

The California Supreme Court recently granted review of the Fifth District's opinion in *Delgado v. Trax Bar & Grill*.[57] In *Delgado*, the plaintiff, Michael Delgado, visited Trax Bar & Grill ("Trax"), a bar owned by the defendant.[58] As is typical of such establishments, the combination of large crowds and alcohol contributed to fights, sometimes in the adjacent parking lot where patrons frequently congregated.[59] On weekend nights, Trax assigned two to three security guards to control the interior of the bar and one security guard to control the crowd waiting to get into the bar and loitering in the parking lot.[60] When Delgado left Trax, Jacob Joseph ("Joseph") followed Delgado out of the bar and confronted him in the adjacent parking lot.[61] Joseph and Delgado exchanged words, and when a fight between the two seemed imminent, Joseph called out to a group of friends in the parking lot.[62] The group, twelve to fifteen in number, surrounded Delgado and began punching and kicking him.[63] Although Delgado was initially able to flee the parking lot, the group caught up to him and held him down while Joseph hit him in the head several times with a baseball bat.[64] As a result of the assault, Del-

56. *But see Isaacs*, 695 P.2d at 658–59. This characterization of the *Ann M.* court's intention is consistent with its decision to leave open the possibility that "some other circumstances" might provide the high degree of foreseeability required to establish a duty to provide security or assume other similarly burdensome measures. *See Ann M.*, 863 P.2d at 215–16 n.7.

57. 134 Cal. Rptr. 2d 548 (Ct. App. 2003).

58. *Id.* at 549. The record at trial, although not included in the Fifth District's opinion, reflected that a security guard was assigned to patrol the area outside the entrance and the adjacent parking lot, where large groups of patrons would line up before entering the bar. *See* Appellant's Brief at 3, Delgado v. Trax Bar & Grill, 134 Cal. Rptr. 2d 548 (Ct. App. 2003) (No. F040180).

59. Appellant's Brief at 4, *Delgado* (No. F040180).

60. *Id.* at 3.

61. *Delgado*, 134 Cal. Rptr. 2d at 549.

62. *Id.*

63. *See id.*

64. *Id.*

gado lost consciousness and was hospitalized for sixteen days.[65] Delgado sued Trax on the theory of premises liability.[66]

At trial, a jury returned a verdict finding that Trax had a duty to prevent the assault on Delgado, Trax breached its duty, and that its breach solely caused Delgado's injuries.[67] On de novo review, the California Court of Appeal for the Fifth District reversed the trial court judgment, finding that Trax did not owe Delgado a duty to prevent the unforeseeable violent third party criminal assault.[68] Applying the foreseeability test of *Ann M.*, the Fifth District concluded Delgado failed to prove sufficient evidence of prior similar incidents on the premises.[69] Specifically, although the record contained evidence of prior incidents of "ordinary 'bar fights,'" Delgado presented no evidence that Trax experienced a prior instance of "a coordinated gang assault on an individual patron."[70] In distinguishing the prior "ordinary 'bar fights'"—some of which involved up to nine participants[71]—from the instant "coordinated gang assault," the court reasoned that Delgado's assailants were all of the same ethnicity, they were lying in wait in a manner typical of a gang, and the attack reflected some prior agreement.[72] Thus, since there was no prior "gang attack" on Trax's premises, Trax had no duty to prevent the assault.[73]

After concluding that Trax did not have a duty to provide security guards in the absence of prior similar incidents, the Fifth District next considered whether Trax's provision of some security guards removed the situation from the foreseeability analysis of *Ann M.*[74] In support of his argument that the voluntary provision of security guards amounted to an assumption of a duty, Delgado relied on a recent decision from the California Court of Appeals for the First District, *Mata v. Mata.*[75] In *Mata*, the defendant bar owner had previously provided security guards at the bar's main entrance on weekends.[76] On the

65. *Id.*
66. *Id.* at 550.
67. *Id.*
68. *Id.* at 552–53.
69. *Id.* at 552.
70. *Id.* Although the Fifth District did not address the issue, the court seems to imply that Trax owed its patrons a duty to prevent "ordinary 'bar fights.'" *See id.* (citation omitted).
71. Appellant's Brief at 6, *Delgado* (No. F040180).
72. *Delgado*, 134 Cal. Rptr. 2d at 552.
73. *Id.* at 552–53.
74. *Id.* at 551–52.
75. 130 Cal. Rptr. 2d 141 (Ct. App. 2003) (review denied).
76. *Id.* at 143.

night in question, the defendant recognized a patron as an individual he had previously banned from the bar for fighting with other patrons.[77] The defendant approached the patron and instructed him to leave.[78] The patron returned later that evening, entered the bar through an unguarded door, and shot three patrons, killing one.[79] The *Mata* court recognized that although a court must ordinarily balance the foreseeability of harm against the burden sought to be imposed, this analysis is "inapposite" where the defendant has already assumed the burden sought to be imposed.[80] The court concluded that the foreseeability of harm, and thus the prior similar incidents test, was "irrelevant" when a landowner assumes a duty to provide security guards.[81]

The *Delgado* court rejected *Mata* on three grounds.[82] First, the court concluded that the assumption of a duty rule was contrary to established precedent.[83] In *Sharon P. v. Arman, Ltd.*,[84] the California Supreme Court refused to create a new foreseeability analysis where a landowner provided, yet failed to maintain, various security measures.[85] Instead, the *Sharon P.* court held that the prior similar incidents test applied even where the security measures, if properly maintained, "might have diminished the risk of criminal attacks [on the premises]."[86] Second, the *Delgado* court reasoned that the "level of security a landowner must provide must remain tied to—and conditioned upon—the foreseeability of a particular type of criminal activity on the premises."[87] Fundamentally, the prior similar incidents test prohibits "the imposition of a limitless duty upon a business owner to prevent all criminal conduct simply because the business owner has undertaken to provide *some* security at the premises."[88] Third, the Fifth District separated the question of the landowner's duty from the issue of breach.[89] Specifically, the court stated that the foreseeability of the particular type of crime must be considered prior to, and inde-

77. *Id.* at 143–44.
78. *Id.* at 144.
79. *Id.*
80. *Id.* at 145.
81. *Id.*
82. *Delgado*, 134 Cal. Rptr. 2d at 551–52.
83. *Id.*
84. 989 P.2d 121 (Cal. 1999).
85. *Id.* at 130–33.
86. *Id.* at 132–33.
87. *Delgado*, 134 Cal. Rptr. 2d at 551.
88. *Id.*
89. *Id.* at 552.

pendent of, a consideration of whether the landlord negligently hired or trained the security guards.[90] The court concluded that Trax did not owe Delgado a duty to hire security guards to prevent the assault because there was insufficient evidence of prior similar incidents.[91] Further, Trax had not assumed a duty to provide adequate security by deciding to provide some security guards.[92]

III. Law and Economics

A. Generally

> For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics.[93]

Economics is a science of rational choice in a world of limited resources.[94] One goal of economics is to ascertain the most desirable distribution of these limited resources.[95] Although there are various theories of how to best model this distribution, most economists agree that the optimal distribution is one whereby the minimum aggregate costs produce the maximum aggregate benefits.[96] Central to any economic explanation of human affairs is the assumption that man is a rational utility maximizer in all areas of his life.[97] This concept of maximizing self-interest implies that people respond to incentives.[98] Thus, economics provides a scientific theory to predict the effects of laws on social behavior.[99]

Early legal scholars recognized that laws may provide incentives in a manner that deters conduct that is not justified on utilitarian grounds.[100] Later scholars argued that courts could use the deterent

90. *Id.*

91. *Id.* at 552–53.

92. *Id.* at 551–53.

93. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

94. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 3 (5th ed. 1998).

95. *See* A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 7–11 (3d ed. 2003). An additional consideration outside the scope of this Comment is equity—that is, the distributive effects of this initial assignment of legal rights.

96. *Id.* at 7.

97. *See* POSNER, *supra* note 94, at 3–4. The term "man" is used in its gender-neutral identifier of the singular human.

98. *Id.* at 4. ("[I]f a person's surroundings change in such a way that he could increase his satisfactions by altering his behavior, he will do so.").

99. *Id.* at 3.

100. *See* OLIVER WENDELL HOLMES, JR., THE COMMON LAW (M. Howe ed., 1963); *see also* William Shofield, Davies v. Mann*: Theory of Contributory Negligence*, 3 HARV. L. REV. 263, 269 (1890) (noting that the role of courts is to fashion a "rule of conduct which shall . . . tend to prevent like accidents from happening in the future"). *But see* Fleming James, Jr. & John

effect of laws to establish standards of conduct designed to promote efficient resource allocation.[101] In 1961, Ronald Coase suggested that, assuming no "transaction costs," the market will "correct" any initial inefficient assignment of legal rights.[102] According to this theorem, commonly referred to as the "Coase Theorem," if a legal right was assigned to a party that did not assign the most value to it, then that party will bargain with other parties that assigned a higher value to that legal right.[103] Eventually, the legal right will be assigned to the party that values it most.[104] In this instance, the system of possible transactions is said to be Pareto optimal; there is no further transaction that will benefit any party without also making another party worse off.[105]

The initial allocation of a legal right, however, is not altogether irrelevant. First, the Coase Theorem recognizes that, although it may be possible for parties to bargain when the rights at issue are not perfectly defined, an efficient exchange is far more likely to occur when the ownership of various rights is clearly defined at the outset of bargaining.[106] A second, more compelling argument for the initial efficient assignment of legal rights is the realization that all market transactions involve transaction costs.[107] Further, as Coase himself pointed out, some transactions involve costs that are so high that they

J. Dickenson, *Accident Proneness and Accident Law*, 63 HARV. L. REV. 769, 777–82 (1950) (suggesting that it was naïve to expect law to have a deterrent effect on the overall accident level). For a more recent discussion of tort law's deterrent effects, see generally Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377 (1994).

101. *See, e.g.*, Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960); Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L. J. 499 (1961).

102. *See* Coase, *supra* note 101, at 8 ("But the ultimate result (which maximizes the value of production) is independent of the legal position if the pricing system is assumed to work without cost."). "In general, [the costs of transactions] include the cost of identifying the parties with whom one has to bargain, the costs of getting together with them, the costs of the bargaining process itself, and costs of enforcing any bargain reached." POLINSKY, *supra* note 95, at 14.

103. *See* LANDES & POSNER, *supra* note 23, at 6–7, 16–17; POSNER, *supra* note 94, at 13–14.

104. *See* Coase, *supra* note 101, at 2–15.

105. *See* RICHARD CORNES & TODD SANDLER, THE THEORY OF EXTERNALITIES, PUBLIC GOODS, AND CLUB GOODS 22 (2d ed. 1996).

106. *See* Coase, *supra* note 101, at 8 ("It is necessary to know whether the damaging business is liable or not for damage caused since without the establishment of this initial deliniation of rights there can be no martket transactions to transfer and recombine them."); POLINSKY, *supra* note 95, at 14–16 (assignment of clear liability rules reduces the related transaction costs and increases overall efficiency).

107. *See* Coase, *supra* note 101, at 15.

might prohibit parties from engaging in the necessary exchange.[108] Under circumstances where an exchange's transaction costs exceed the potential gain from the exchange itself, the rational actor will not bargain and the market will not overcome an initial inefficient assignment.

When high transaction costs limit the ability of parties to privately establish duties of care, it is critical, from an economic perspective, for the court to make the correct assignment in the first place. This is a classic example of a "liability rule."[109] Based upon the initial assignment of a legal right via a liability rule, a party that violates the rights of another must pay the price of that violation in the form of damages.[110] In effect, an involuntary exchange takes place.[111] In the context of voluntary exchanges, there is at least an assurance that the Pareto superior outcome will eventually be achieved.[112] There is no such assurance in involuntary exchanges, where the compensation of the injured party may not put that party in a position, utility-wise, equivalent to his pre-accident state.[113] The question then is, How should courts initially assign liability rules in order to achieve the greatest possible efficiency?[114]

B. Economic Analysis of Tort Law

Law and economics is particularly well-suited in the realm of tort law.[115] The positive economic theory of tort law recognizes that "the common law of torts is best explained as if the judges who created the

108. *Id.* ("These operations are often extremely costly, sufficiently costly at any rate to prevent many transactions that would be carried out in a world in which the pricing system worked without cost.").

109. *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972).

110. *Id.*

111. *See* LANDES & POSNER, *supra* note 23, 30–31.

112. *See* POLINSKY, *supra* note 95, at 43. A transaction that makes one party better off and no person worse off is said to be a Pareto superior. POSNER, *supra* note 94, at 13–14; *see also* LANDES & POSNER, *supra* note 23, at 16–17 (criticizing the definition of Pareto efficiency and electing for the more workable Kaldor-Hicks wealth-maximization perspective of efficiency).

113. *See id.* Although one can argue that the injurer is better off because she has consented to the exchange by choosing the riskier course of action, this is stretching the limits of the type of consent that would be consistent with Pareto superiority. Tort compensation is determined by objective indicators without regard to the subjective valuation of a legal right underlying involuntary exchanges. *See* Calabresi & Melemed, *supra* note 109, at 1092. Thus, from a Pareto standpoint, there is a danger that the injured party will be undercompensated. *Id.* at 1108.

114. *See* Calabresi & Melamed, *supra* note 109, 1093–98.

115. *See* LANDES & POSNER, *supra* note 23, at 1.

law through decisions operating as precedents in later cases were trying to promote efficient resource allocation."[116] During the past half-century, American jurisprudence has accepted the economic theory of tort law as doctrinally appropriate.[117] As a general rule, the economic approach to tort law seeks to minimize inefficient accidents.[118] Another way of viewing this goal is to reduce the sum total of the costs of accidents ("CA") and the costs of accident prevention ("CAP").[119] An economic analysis does not seek to reduce the number of all accidents or even the cost of each accident.[120] Instead, the economic approach recognizes that at some point the cost of avoiding accidents would be greater than the cost of allowing the accident.[121] This goal is consistent with the notion of allocative efficiency—as long as the benefits of accident avoidance exceed the cost of prevention, it makes sense to invest in prevention; if, however, avoidance efforts become more costly than the cost of the accident itself, the continued use of resources to avoid these accidents would be allocatively inefficient.[122]

116. *Id.*

117. *See* POSNER, *supra* note 94, at 167–68.

118. *See* GUIDO CALABRESI, THE COSTS OF ACCIDENTS (1970). Calabresi identified three major types of costs that result from accidents. Primary costs are those associated with the harm to the injured party, such as the cost of medical care and lost earnings capacity. *Id.* at 26–27. Secondary costs, according to Calabresi, are "the societal costs resulting from accidents." *Id.* at 27–28. Tertiary costs are those associated with administering the tort system. *Id.* at 28. It is important to note that minimizing one cost may not always be consistent with minimizing another cost. *Id.* For example, a system that always accurately assigns the costs of accidents to those who cause accidents may be expensive to administer. Similarly, some efforts to reduce secondary accident costs may mean the party causing the accident does not feel the full impact of the harm done and may not take cost-justified steps to avoid the same accident in the future. *Id.* at 28–31.

119. *See* POSNER, *supra* note 94, at 5–7. If the imposition of a liability rule is intended to provide an incentive, a fair, albeit not entirely accurate, assumption is that the cost of accident prevention (CAP) approaches zero in the absence of a duty. Assuming this to be the case, a court should impose a prospective duty in situations where the cost of accidents after taking preventative measures plus the cost of those preventative measures is less than the cost of accidents without having taken such measures. It is not argued that there should be no duty where CA + CAP = CA, but merely that it should be recognized that the resolution of this equation necessitates a more complete consideration of secondary cost of accidents, accident deterrence, and liability outside of the closed system of the accident. *See id.* "Accidents," as used in this Comment, refers to any occurrence of injury on business premises, whether truly "accidental," the result of negligence, or an intentional tort committed by a third party.

120. *See* ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 300–02 (3d ed. 2000).

121. *See id.*

122. *See id.* The seemingly harsh conventional economic truth is that there may be an efficient level of accidents that results not just in property damage but also in personal injury and death.

Thus, tort law is concerned with preventing future accidents that are not cost-justified.[123]

The role of law and economics is to create liability rules that induce "injurers" to internalize the costs of accidents.[124] The rule serves as a warning that people who behave in a certain way that results in an accident must compensate the victim.[125] Thus, by altering the costs associated with conduct, the warning may deter inefficient behavior and reduce the overall cost of accidents.[126] In order to determine whether the cost of accident avoidance is greater or less than the cost of the accident, it is first necessary to identify the least costly measure that would effectively prevent the accident.[127] By structuring liability rules to provide incentives for rational maximizers to elect the most efficient accident avoidance measure, the person deciding whether to take the preventive measure can then make an informed decision, thus increasing the overall efficiency of the accident system. In order to produce this efficiency, law and economics not only seeks to allocate a legal right to the party that values it most, but also to assign the corresponding legal obligation to the party that is in the better position to ensure the desired outcome.[128] That is to say, the person making decisions regarding efficiency should be in the best position to both access the relevant information and implement the intelligent decision once made.[129]

IV. An Economic Analysis of the Prior Similar Incidents Test

Law and economics is a powerful tool for analyzing a vast range of legal problems.[130] The descriptive power of law and economics inheres in its ability to coherently explain legal rules that at first appear inconsistent in application.[131] According to this theory, the apparent inconsistency in many legal rules results from the judiciary's failure to recognize, or at least articulate, the underlying economic forces that

123. *Id.* Implicit to law and economics is the recognition that some accidents are "unavoidable" in that the burden of preventing them is so high that the individual actor will always choose to pay the cost of such conduct over paying the cost of accident prevention. *See id.*

124. *Id.* at 290.

125. *Id.*

126. *Id.*

127. *See id.* Law and economics not only requires the avoidance of inefficient accidents but also requires that this be achieved in the most efficient manner possible. *Id.*

128. *See id.* at 300–04.

129. *Id.*

130. *See* POSNER, *supra* note 94, at 3.

131. *See id.*

drive their decisions.[132] This inconsistency in a sense becomes a self-fulfilling prophecy as judges who incorrectly explain their decisions in the "characteristic rhetoric of opinions" actually conceal the underlying rationale.[133] Judges deciding subsequent cases further this concealment through misplaced reliance on incorrectly decided precedent.[134] The California Supreme Court's decision in *Ann M.* on premises security provides an example of how an incorrectly articulated, yet properly conceived, legal rule causes confusion. The application of law and economics is capable of resolving the confusion amongst the California courts by articulating a clear and coherent liability rule in terms of economic efficiency.

The California Supreme Court has adopted a framework that furthers efficient resource allocation.[135] In the context of premises security, the court stated that the framework for determining the existence of a landowner's duty to take affirmative measures to prevent third party violent crime required a balancing of the foreseeability of the injury against the burden associated with the duty sought to be imposed.[136] Assuming that the court's determination that an affirmative duty to provide security guards may not be imposed absent prior similar incidents on the premises, and further assuming that this determination is proper,[137] it is possible to analyze the proper interpretation of the prior similar incidents in terms of efficient resource allocation.

A. Efficient Resource Allocation in Premises Security

Applying the Coase Theorem to premises liability, crime avoidance would take place at the greatest possible efficiency regardless of the initial assignment of a legal right.[138] However, the transaction costs incident to premises liability prohibit the market from overcom-

132. *Id.*

133. *Id.*

134. *Id.*

135. *See, e.g.*, Rowland v. Christian, 443 P.2d 561, 564 (Cal. 1968).

136. *See* Sharon P. v. Arman, Ltd., 989 P.2d 121, 126 n.2 (Cal. 1999); Ann M. v. Pac. Plaza Shopping Ctr., 863 P.2d 207, 212 (Cal. 1993); Isaacs v. Huntington Mem'l Hosp., 695 P.2d 653, 658 (Cal. 1985).

137. *Cf. Ann M.*, 863 P.2d at 215. Although the *Ann M.* court qualified its holding by stating that it is possible that some other circumstances may provide the requisite "high degree of foreseeability," the court has never addressed the viability of this qualification. *Id.* This Comment assumes that the "other circumstances" exception to the prior similar incidents test is no longer viable.

138. *Cf.* POLINSKY, *supra* note 95, at 36–39, 43 (noting that if there are no transaction costs, in the context of a poluting factory, the most efficient outcome will be achieved regardless of the choice of remedy entitlement).

ing an initial inefficient assignment.[139] Therefore, it is imperative that the California Supreme Court's liability rules initially achieve efficient resource allocation. As previously stated, law and economics seeks to prevent only those accidents whose cost is greater than the cost of the most efficient means of preventing the accident and the cost of the accident after taking these preventive measures.[140] For purposes of this Comment, it is assumed that the aggregate cost comes primarily from two sources: (1) the cost of the injury to the victim, and (2) the cost of the preventative measures.[141] Using the law and economics rational maximizer model, the determination of the existence of a duty should provide incentives for people to act in furtherance of efficient resource allocation.[142] With the benefit of hindsight, courts would impose a duty on a landowner to take reasonable measures to provide adequate security guards only in those instances where the cost of providing such reasonably adequate security is the most efficient means of preventing the third party crime and the cost of the crime is reduced by a value greater than the cost of providing the security guards.[143] However, given that law and economics is prospective and concerned with shaping future conduct, efficiency is achieved by imposing a duty where the cost of a foreseeable third party violent crime outweighs the burden associated with the most efficient measure that could have prevented the foreseeable criminal conduct.[144] This relationship between foreseeability of harm and the burden of preventative measures is at the core of efficient resource allocation in premises security.

Assuming the substantial burden associated with providing security guards is constant, two implications emerge: (1) the more broadly courts define foreseeability, the more likely the court will impose a duty on a landowner to provide security guards; and (2) the more narrowly a court defines foreseeability, the less likely a court will im-

139. *See* LANDES & POSNER, *supra* note 23, at 133 ("The costs of transactions are prohibitive when the potential victims of accidents are numerous and unidentifiable third parties—travelers at railroad crossings, pedestrians, other drivers.").

140. *See* COOTER & ULEN, *supra* note 120, at 300–02.

141. *See* CALABRESI, *supra* note 118, at 26–27. For purposes of this Comment, the value for CA is limited to what Calabresi defined as "primary" costs associated with the number and severity of accidents. *See id.* at 26.

142. COOTER & ULEN, *supra* note 120, at 290.

143. *See id.*

144. *See* William M. Landes & Richard A. Posner, *The Positive Economic Theory of Tort Law*, 15 GA. L. REV. 851, 857–59 (1981).

pose a duty on a landowner to provide security guards.[145] The question then becomes, How does defining foreseeability in terms of prior similar incidents promote efficient resource allocation?

1. Efficient Resource Allocation Requires a Prior Incident

Efficient resource allocation requires liability rules that assign legal obligations to the party who is in the best position to access and analyze information relevant to an intelligent decision.[146] Unfortunately, in today's society, third party violent crime is rampant and largely unpredictable.[147] Because of the ubiquitous and unpredictable nature of third party crime, it is difficult to imagine any public premises that could remain completely insulated from third party violent crime.[148] To some extent, crime is "foreseeable" anywhere and at any time. In this respect, no one party is in a better position to access information because all parties are initially similarly situated with respect to the foreseeability of third party crime on a particular premises. Absent prior crime on the premises, both the landowner and the victim are in the same position with respect to relevant information. Where the parties are similarly situated with respect to information necessary to making informed decisions, placing a duty on a landowner is inefficient. The high transaction costs associated with administering such a burden shifting system would outweigh any potential benefit of shifting financial responsibility from the innocent victim to the equally blameless landowner. Thus, where the parties are similarly situated, the duty should follow the harm.

Where the landowner knows of prior violent third party crime on the premises, however, the landowner is in a better position to access relevant information as compared to the victim of third party crime. Typically, landowners, whether owners or operators of commercial premises, are involved with the day-to-day operation of their business. This regular involvement requires landowners to be present on the

145. Of course this is not always true. It is not difficult to imagine circumstances that satisfy a narrow definition of duty but do not satisfy the broader definition. For example, in jurisdictions that adopt a literal approach to the prior similar incidents test, a prior similar incident triggers a duty no matter how "unforeseeable" the subsequent third party criminal act would be under the totality of the circumstances approach.

146. *See* COOTER & ULEN, *supra* note 120, at 315.

147. *See* Ann M. v. Pac. Plaza Shopping Ctr., 863 P.2d 207, 215 (Cal. 1993) ("Unfortunately, random, violent crime is endemic in today's society.").

148. *See id.* ("It is difficult, if not impossible, to envision any locale open to the public where the occurrence of violent crime seems improbable.").

premises either personally or through an appointed agent.[149] The landowner is thus physically present on the premises more frequently and for longer durations than the ordinary patron. This temporal advantage allows for greater access to information. Additionally, the landowner's position of control over the nature of the premises requires the landowner to have a system of efficient information gathering, which empowers landowners to make intelligent decisions, thus promoting efficient resource allocation.

By requiring a prior criminal incident on the premises as a prerequisite to establishing a duty in *Ann M.*,[150] the California Supreme Court not only ensured that potential liability is assigned to the party with the best *access* to information, but it further ensured that this party has actually *received* this information. The prior incident rule explicitly and narrowly defined the element of notice for third party violent crimes on the premises. Generally, the element of notice is common to tort law.[151] A plaintiff may typically establish foreseeability through evidence that the defendant had "actual" or "constructive" notice of the information tending to make plaintiff's injury foreseeable. Actual notice is satisfied where the defendant knew of the circumstances making the accident foreseeable.[152] Constructive notice is established where the defendant *should have known* of the circumstances making the accident foreseeable.[153]

The prior incident requirement eliminates the possibility of proving constructive notice based on a totality of the circumstances. Instead, the plaintiff must prove either that the landowner had actual knowledge of the prior criminal conduct or that the prior criminal conduct was of a type that the landowner should have known of through exercising ordinary care.[154] This treatment of notice recognizes the reality that, once there is a prior crime on the premises, the

149. A difficult question, outside the scope of this Comment, in premises security litigation is the degree to which a landowner should incur liability based on prior criminal acts that occurred prior to the defendant's ownership of the property.

150. *See supra* text accompanying notes 44–46.

151. *See* CAL. CIV. CODE § 18 (West 1982); RESTATEMENT (SECOND) OF TORTS § 358 (1965).

152. *See* I.E. Assoc. v. Safeco Title Insurance Co., 702 P.2d 596, 598 (Cal. 1985).

153. *See* CAL. CIV. CODE § 19 (West 1982).

154. *See* Wiener v. Southcoast Childcare Ctrs., Inc., 88 P.3d 517, 520 (Cal. 2004) (noting that defendants' motions for summary judgment stated that they did not have actual notice of the prior incidents). Although a plaintiff may still prove constructive notice of the prior criminal act, the plaintiff may not meet her burden unless she first meets the heightened requirement of proving a previous criminal act indicative of the landowner's actual knowledge of that previous conduct.

landowner is likely to investigate and report violent third party crime because such conduct is likely detrimental to business.[155] This financial interest in the premises, combined with the widespread publicity surrounding many crimes,[156] makes it extremely likely that landowners will often in fact receive actual notice of prior third party violent crimes on the premises.[157] Nevertheless, even if the landowner did not have actual notice of the prior crime, it may still be possible to prove that the landowner should have known of the prior crime. Removing the totality of the circumstances test from the foreseeability analysis increases efficiency by providing an actual third party crime that the landowner can use in her efficiency calculation. Thus, by assuming that the cost of future accidents will be proportionate to the cost of the prior accident, the landowner can then compare the cost of permitting future crimes (CA) with the cost of taking reasonable measures to prevent that accident (CAP).[158]

A second advantage of defining notice in terms of prior incidents is that it serves to reduce the cost of information gathering. Relevant information regarding previous criminal conduct will flow towards landowners through the regular course of business. In this respect, landowners are only accountable for information that is already available at a minimal cost. This reduced cost of information gathering directly reduces the cost of accident prevention. Reduced accident prevention cost increases the likelihood that landowners will take preventative measures. A rational actor will choose the least costly course of conduct. Where the cost of prevention increasingly becomes lower than the cost of a greater number of accidents, accident prevention becomes the more efficient alternative on more occasions. Thus, the greater number of inefficient accidents that are prevented, the greater the overall efficiency of the accident system.

A further advantage of a bright-line notice rule requiring actual notice is that landowners have access to information regarding *when* they will be subject to liability for failing to take reasonable precau-

155. *See* KAMINSKY, *supra* note 9, at 104–06.

156. Of reported crimes, many are associated with police investigations, insurance reports, and even news investigations. *Id.*

157. Of course, it is possible that a landowner will not actually receive notice of the criminal conduct if the crime is not reported or the landowner is an absentee landlord.

158. *See* discussion *infra* Part IV.A.2. Although a landowner may have a duty to prevent similar incidents, for purposes of the initial efficiency calculation the values of the cost of the accident and the cost of accident prevention are obtained from the prior incident.

tions.[159] As previously discussed, the clear articulation of legal obligations increases the efficiency of resource allocation.[160] Under the rational decision maker model, before the decision maker can decide whether it is more efficient to permit or take reasonable measures to prevent an accident, the decision maker must know when she is in a position of potential liability. A clear liability rule also permits the landowner to prepare for the cost of assuming or avoiding liability. If the business owner decides to attempt to avoid liability and provide adequate security, then the owner may accurately pass the cost of this measure on to the customers who arguably receive the greatest benefit of the prevention.[161] If the owner decides not to provide security, the owner may then choose to insulate herself from liability by either self-insuring or obtaining insurance from a third party insurer. Where a landowner decides to obtain third party insurance, insurers may more accurately determine the premiums associated with the individual premises.[162]

The *Ann M.* court's requirement that a prior incident occur on the premises is consistent with the law and economics goal of providing decision makers with sufficient notice to make informed, intelligent decisions regarding liability. Given its purpose of providing notice, the prior similar incident requirement is satisfied when the following three conditions are met: (1) a previous similar crime occurred on the premises while the defendant landowner had control of the premises; (2) the landowner knew or should have known of the prior similar crime; and (3) the landowner had sufficient time after the previous similar crime and before the crime giving rise to the litigation so as to implement efficient preventative measures if taken.

159. At which point a landowner becomes potentially liable is different than for what they become liable, which is discussed more fully in the consideration of the effect of the similarity requirement. *See infra* Part IV.A.2.

160. *See* COOTER & ULEN, *supra* note 120, at 319–21.

161. Although law and economics is concerned with equity insofar as the distribution of wealth, risk, and costs, this Comment's primary focus is on the efficiency model. *See* POLINSKY, *supra* note 95, at 7. Thus, this Comment assumes that equity is not implicated in the premises security context. Obviously, where the costs are passed on to customers, this implicates the equity of such an efficient model. *See* Saelzler v. Advanced Group, 23 P.3d 1143, 1152 (Cal. 2001) (noting that in the context of a landlord's duty, "the ultimate costs of imposing liability for failure to provide sufficient . . . 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").

162. *See* POLINSKY, *supra* note 95, at 57–62.

Thus, the prior similar incidents analysis implicates a temporal relationship between the two crimes.[163]

As to this temporal element, when determining whether a crime is sufficiently prior, courts must address both ends of the timeline: (1) does a prior crime cease to provide sufficient notice over time such that the landowner and the victim are returned to an equal position of information access?; and (2) does a prior crime fail to provide sufficient notice if it does not allow the landowner sufficient time to make and implement an intelligent decision? As to the first question, in terms of efficiency, it seems that the duty flowing from a single previous crime should not be endless. At a certain point, the prolonged nonoccurrence of criminal conduct on the premises would likely cause the decision maker to decide that continued maintenance of crime prevention measures is in itself inefficient.[164]

This determination is consistent with the law and economics requirement that decisions as to efficiency be made by the most informed party. So long as maintenance of reasonable security guards no longer appears efficient based on information gained from the prior crime, then overall efficiency is obtained. If the prior crime occurred so long ago that the landowner is no longer in a position of increased access to information, however, then the high transaction costs of litigation would no longer justify the shift of financial responsibility from the injured party to the landowner. The question then becomes, How long is too long and who should make this determination? This determination is further complicated where the landowner has taken effective accident prevention precautions that could account for the nonoccurrence of subsequent third party crimes.[165]

163. In addition to this temporal relationship, notice also implicates a spatial relationship. As the *Ann M.* court pointed out, notice could be proven where a prior crime occurred on the premises of an immediately adjacent premises. *See* Ann M. v. Pac. Plaza Shopping Ctr., 863 P.2d 207, 215–16 n.7 (Cal. 1993). However, the spatial relationship is beyond the scope of this Comment, which assumes that the prior crime occurred on the premises.

164. Obviously, one consideration is whether the provision of the preventative measures is in fact preventing the occurrence of the criminal conduct on the premises, in which case the duty would flow from the prior occurrence until it is clear that there is another reason that crime is not occurring on the premises.

165. This issue is not fatal to the analysis, but is beyond the scope of this Comment. It is possible that either the legislature, experienced in determining the limits of such a staleness question in a manner similar to a statute of limitations bar, or the judiciary, able to accurately account for the rapidly changing nature and socio-economic composition of California, may properly make this determination.

On the other end of this spectrum, efficient resource allocation requires that the decision maker be allowed to process the information and implement a decision once it is made.[166] For example, requiring a landowner to implement preventative measures without sufficient time to react to multiple crimes as part of one larger crime would create a duty that a landowner could never meet. Therefore, efficient resource allocation would not ensue. However, unlike the uncertainty surrounding situations where the prior crime may have occurred so long ago that it may no longer provide a landowner with relevant information, courts and juries are familiar with conducting fact-based inquiries regarding the adequacy of time needed to implement reasonable preventative measures.[167]

The prior third party violent crime requirement is consistent with the underlying principles of law and economics. The reliance on a bright-line rule provides for efficient resource allocation by ensuring that the rational decision maker is the individual with the best access to the relevant information and that she is the person who is capable of effectuating her intelligent decision. The prior incident itself also reduces the cost associated with the information gathering process, thus contributing to an overall efficiency.[168] Finally, the requirement allows decision makers to obtain liability insurance and accurately pass on the costs to consumers.

2. Efficient Resource Allocation Requires a Similar Incident

Efficient resource allocation requires courts to assign a legal obligation to a party that is in a position to effectively implement its intelligent decision once made.[169] This requires that once the rational maximizer with the best access to relevant information determines accident prevention is more efficient than the accident, that person must be in a position to implement the most efficient, effective accident prevention means. When a rational decision maker decides to

166. *Cf.* COOTER & ULEN, *supra* note 120, at 315. Although efficient resource allocation places the burden of accident prevention on the party with the best access to information, this allocation would be meaningless if the party charged with making efficient decisions could not process this information. *Id.*

167. *See* KEETON, *supra* note 24, at § 31.

168. The cost of accident prevention includes the cost of acquiring enough information to take precautions sufficient to prevent the occurrence of an accident.

169. *Cf.* POSNER, *supra* note 94, at 5–7, 199–200. Where a goal of tort law is to reduce the sum of the cost of accidents and the cost of accident prevention, causing a landowner to internalize the cost of accidents through liability rules would never produce greater efficiency where the landowner's accident prevetntion measures could not reduce the cost of the accident, especially where the adminstrative costs of litigation are high. *Id.*

take accident prevention measures, she does so assuming that taking such measures will actually reduce the cost of future accidents at a degree greater than the cost of the most efficient preventative measure.[170] Thus, since liability rules assign the cost of an accident to the possessor of the legal obligation, efficiency is achieved where the scope of the liability rule includes only those accidents that the decision maker is able to prevent based on information acquired through the occurrence of the prior crime.[171] But, does the occurrence of the prior crime make the occurrence of other crimes equally foreseeable, and, if so, which other crimes? The similarity requirement provides a meaningful connection between the prior third party violent crime, the efficient accident prevention measures, and the criminal conduct giving rise to the litigation.[172]

The overall law and economics goal of efficient resource allocation includes the localized goal of reducing the sum total of the cost of the accident and the cost of accident prevention ($C_A + C_{AP}$). Absent a legal obligation ($C_A = 0$), a rational commercial landlord will not assume the cost of the accident, and thus will not take accident prevention measures ($C_{AP} = 0$). Upon the initial assignment of a legal obligation to a landowner, the landlord has not taken any accident prevention measures and the sum of the cost of the accident and the accident prevention is the cost of the accident itself ($C_A + C_{AP} = C_A$). If $C_A + C_{AP}$ is to be decreased, C_A must be decreased at a rate greater than the associated increase in C_{AP}. If there is no similarity between the prior crime and the subsequent crime, the preventative measures taken in light of the previous crime, if taken, might not prevent the occurrence of the subsequent crime. Thus, these measures might not reduce the cost associated with the subsequent, dissimilar accident.[173] If the landowner decided to meet her duty, there would be a slight reduction in the value of C_A for related crimes that were prevented and an increased value for C_{AP}. The total would likely not be less than the no fault liability model where the landowner took no precautions assuming that the change in the cost of accident prevention is equal

170. *Id.* It is irrational to take accident preventative measures that will not prevent the occurrence of the accident since it will increase the cost of accident prevention without an equivalent decrease in the cost of the accident.

171. POSNER, *supra* note 94, at 199–204.

172. *See, e.g.*, Ann M. v. Pac. Plaza Shopping Ctr., 863 P.2d 207, 215 (Cal. 1993).

173. This argument assumes that the only measures that a landowner would take are those that are related to the prior conduct. This is because a rational landowner would not attempt to protect against the virtually unlimited liability of preventing all subsequent unrelated crimes.

to the change in the cost of the accident (Δ CAP = Δ CA). If true, a rational actor would likely not take any preventative measures and instead direct her energy into insulating herself from the effects of the inevitable liability.

In order for the liability rules associated with the requirement of a prior criminal act to reflect the likely conduct of a rational actor, the scope of the landowner's liability should only be limited to the type of conduct that she could reasonably have prevented based on the foreseeability established by the prior crime. This consideration of prevention implicates a causal connection between the prior accident, the preventative measures, and the subsequent criminal conduct. Similarity is *not* a direct qualitiative comparison between the nature of the prior criminal conduct and the instant criminal conduct. Rather, in order to promote efficiency, two crimes are "similar" if the most efficient measures to prevent the prior crime *could* have prevented the subsequent crime from occurring.

Thus, under the law and economics interpretation of the similarity requirement, two crimes are sufficiently similar to impose a duty on a landowner if the same efficient preventative measures that could have prevented the prior crime could also have prevented the subsequent crime. The appropriate questions to ask in the foreseeability analysis are the following: (1) Was there a prior criminal incident on the premises?; (2) If a prior criminal incident occurred on the premises, is taking reasonable measure to hire and train security guards, the most-efficient, effective accident avoiding measure?; and (3) If providing reasonable security guards would have been the most efficient measure of effectively preventing the prior crime, is it more efficient to hire and train security guards, or to allow future occurrences of the prior crime? If after answering the preceding three questions it is more efficient to take reasonable measures to hire and train security guards, then the landlord's duty to prevent subsequent crimes extends only to those crimes that could have been prevented if the landlord had reasonably hired and trained security guards.

One implication of the revised similarity requirement is the tendency of the revised prior similar incidents test to be inclusive of lesser crimes. Common sense dictates that the more serious the prior crime, the heavier the burden associated with the preventative measures, and the more likely that other crimes could have been prevented. Thus, the occurrence of a violent assault would likely impose a duty to hire a security guard, and the provision of security guards would likely prevent lesser-included offenses and other crimes. Once providing a se-

curity guard is within the scope of a landowner's duty, however, she does not then become strictly liable for all criminal conduct on the premises. The court must determine on a case-by-case basis which crimes could have been prevented in light of providing a security guard in response to the prior crime. This would be consistent with the reality that the security guards cannot prevent all crimes, or even "lesser" crimes.[174]

A second implication of the revised similarity requirement is the manner in which the causal interpretation addresses the reasoning of law and economics by protecting the landowner from unpredictable, and thus uninsurable, liability. Ensuring that the prior and subsequent crimes are causally connected—due to the lack of preventative measures taken after the prior crime—increases the likelihood that the effects of the two crimes are likewise connected. The inference is not perfect, but it does provide some degree of predictability. The occurrence of these lesser offenses would likely be included in the overall insurance policy such that the landowner is over-insured. This problem, however, should remedy itself over time as the liability model becomes more familiar to landowners and insurers alike.

A third implication of this causal interpretation of the similarity requirement is that it ensures a predictable liability model. The prior incident requirement allows a rational decision maker to make intelligent decisions with regard to liability by ensuring that the landowner has notice of *when* she will be liable for her inefficient conduct.[175] However, the prior incident requirement lacks the quantitative component necessary to make a fully informed decision. That is, a landowner knows that once there is a violent third party crime on her premises she must compensate victims of subsequent identical crimes if providing security guards is the most efficient means of preventing that crime and she does not take reasonable precautions in the hiring and training of these security guards. The landowner will then decide whether it is more efficient to prevent future identical third party crimes or to reasonably hire and train security guards. The only information available for the landowner to make an informed rational decision is the cost of the prior accident.

Noticeably absent is the cost of other, similar foreseeable accidents. The actual cost of subsequent accidents may be significantly

174. *See* Delgado v. Trax Bar & Grill, 134 Cal. Rptr. 2d 548, 552 (Ct. App. 2003) (referencing the flying of airplanes by terrorists into commercial skyscrapers as such an event that would not be included under the scope of previous occurrences of violent assaults).

175. *See* discussion *supra* Part IV.A.1.

different from the cost of the prior accident on which the rational decision maker previously relied. Where a landowner correctly determines that it is more efficient to pay the cost of the accident than to prevent future occurrences of the prior accident, if the scope of the landowner's duty included other accidents associated with a higher cost, then it is possible that the cost of avoiding the accident was less than the cost of the subsequent accident. Thus, the landowner's once efficient decision is rendered inefficient after the fact and the landowner would, in effect, be punished for choosing the efficient course of action based on the then available information. Requiring that the prior crime be similar to the subsequent crime provides at least some assurance that the cost associated with the subsequent crime will be quantitatively similar to the subsequent crime.

A final implication of this similarity requirement is that landowners may pass on the cost of either incurring liability or insuring themselves in a manner proportionate not only to the accident prevention, but also to the foreseeable liability. This proportionality also ensures that third party insurers may more accurately predict liability and reflect that accuracy in their premiums.[176] All these advantages of limiting the scope of liability to prior crimes are either implicitly or explicitly reflected in the law and economics efficient resource allocation model.

The causal interpretation of the similarity requirement furthers the efficient resource allocation underlying the prior similar incidents test. If the occurrence of a prior crime imposes a duty to prevent that exact crime from occurring subsequently, this is because courts have recognized that the prevention of the cost associated with the crime is efficiently reduced where the landowner has a high degree of foreseeability.[177] Since this specific burden, the cost of accident prevention, does not change based upon the occurrence or nonoccurrence of subsequent crimes, the more crimes that the imposed burden prevents, the greater the reduction in the cost of accidents generally, and the lower the sum total of the cost of accidents and cost of accident prevention. Thus, the causal interpretation would promote more efficient resource allocation.

Nevertheless, once a court has applied the refined prior similar incidents test to find that a third party criminal act was sufficiently

176. *Cf.* COOTER & ULEN, *supra* note 120, at 323 (noting that insurance markets are competetive when the premiums collected from policy-holders equal the sum of the claims paid to policy-holders and the costs of administration).

177. *See Ann M.*, 863 P.2d at 215.

foreseeable, the court must still weigh the remaining *Rowland* factors when determining whether to impose a duty on the landowner.[178] In light of the high degree of foreseeability ensured by the prior similar incidents test, however, the practical role of these factors in the determination of a duty in the context of premises security tends to be confusing. It is well settled in California that foreseeability is the most important consideration when a court is determining whether to impose a duty on a landowner in a premises security case.[179] Further, it is fairly well established that the requisite degree of foreseeability to impose an affirmative duty to provide security guards will never be met in the absence of prior similar incidents of third party violent crime on the premises.[180] Therefore, in practice, a court that finds that the harm from a third party criminal act was so highly foreseeable as to establish a duty to provide reasonably adequate security guards may only find no duty where the other factors, individually or together, provide an equally compelling reason to not impose a duty so as to overcome the high degree of foreseeability of the third party crime. Although the proper role of the remaining *Rowland* factors is outside the scope of this Comment, it follows that a law and economics analysis that is consistent with many of these traditional policy considerations will almost always impose a duty to prevent foreseeable third party criminal conduct on the premises.

178. *See* Isaacs v. Huntington Mem'l Hosp., 695 P.2d 653, 662–63 (Cal. 1985) (considering the remaining factors before imposing a duty on the landowner to take reasonable measures to provide adequate security guards to prevent the foreseeable third party criminal attack); Shannon Sweeney, *"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, 525 (1999) (noting that California courts must still weigh the remaining *Rowland* factors in determining the existence of a duty in a premises security case).

> Courts should weigh:
>
> [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 imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.

Rowland v. Christian, 443 P.2d 561, 564 (Cal. 1968).

179. *See Ann M.*, 863 P.2d at 215.

180. *See id.* It is fairly well established that prior similar incidents are required to impose a duty to hire security guards because, although the court has never expressly rejected the viability of the "other circumstances" exception to the test, it has never relied on it either. *See, e.g.*, Sharon P. v. Arman, Ltd., 989 P.2d 121, 133 (Cal. 1999) (rejecting the "inherently dangerous" premises doctrine to prove foreseeability absent prior similar incidents).

Finally, once a court has applied the refined prior similar incidents test to conclude that it is proper to impose a duty on a landowner, it is then necessary to precisely define the duty. While imposing a strict liability regime is consistent with, and oftentimes preferable under, a law and economics analysis, the California Supreme Court has adopted a negligence regime in the context of premises security litigation.[181] Here, where the defendant landowner has taken reasonable care in the hiring, training, and maintenance of security guards, no breach will be found even if a plaintiff nevertheless suffers injury. Although the negligence regime permits victims of highly foreseeable third party crimes to go uncompensated where it would ordinarily be efficient to make the landowner compensate them, this limit on liability is justified by two related concerns underlying premises security generally. First, the unique nature of third party crime makes it likely that many crimes will occur no matter the reasonableness, or even vigilance, of the landowner's preventative measures.[182] Second, is the California courts' refusal to make landowners the insurers of public safety.[183] To hold landowners liable for the "failure to deter wanton, mindless acts of violence of a third person" regardless of the degree of care exhibited in the discharge of their duty would effectively make the landowner "the insurer of absolute safety of everyone who enters the premises."[184] Therefore, although holding a landowner strictly liable for the cost resulting from a third party criminal act upon a person on the premises might reduce the overall cost of the accident system, other recognized policy limits require that the landowner's duty be limited to taking reasonable steps to hire, train, and maintain security guards where there is a prior similar incident on the premises.

3. Efficient Resource Allocation is Consistent with Prior Case Law

Law and economics is doctrinally appropriate not only in its ability to provide a removed, coherent analysis to premises security litigation, but also because it is consistent with the previous decisions of the

181. *See, e.g., Isaacs*, 695 P.2d at 663 ("Once a court finds that the defendant was under a duty to protect the plaintiff, it is for the factfinder to decide whether the security measures were reasonable under the circumstances. The jury must decide whether the security was adequate." (citations omitted)).

182. Noble v. L.A. Dodgers, Inc., 214 Cal. Rptr. 395, 399 (Ct. App. 1985) ("No one can reasonably contend that even a significant increase in police personnel will prevent all crime or any particular crime.").

183. *See, e.g.*, Saelzler v. Advanced Group 400, 23 P.3d 1143, 1154 (Cal. 2001).

184. Nola M. v. Univ. of S. Cal., 20 Cal. Rptr. 2d 97, 108 (Ct. App. 1993).

California Supreme Court. Judicial reasoning is often consistent with economic rationale but expressed in non-economic language. Applying the law and economics analysis to the courts' reasoning over the past twenty years illustrates this phenomenon.

a. *Isaacs v. Huntington Memorial Hospital*

Although it may at first seem counterintuitive to include a case rejecting the prior similar incident test as support for the California Supreme Court's decision to later adopt the test, the court itself recognized that the reasoning behind the prior similar incidents test was present in this decision.[185] In *Isaacs*, the plaintiff, Dr. Isaacs, was shot once at close range while arranging some materials in the trunk of his car, which was parked in the defendant hospital's parking lot.[186] The plaintiff sued the hospital for the failure to "provide adequate security measures to protect [persons] against the criminal acts of third persons on its premises."[187] At trial, the plaintiff offered evidence that the hospital was located in a "high crime area" and that, although there had never been a shooting on the premises, it had been the location of numerous assaults and other criminal conduct over the years.[188] Applying the totality of the circumstances test to the facts before it, the court reversed the trial court's decision to grant the defendant's motion for a nonsuit.[189] In holding that the hospital owed the doctor a duty to provide adequate security measures, the court found that the occurrence of prior similar incidents, although not necessary to the finding of an affirmative duty, is helpful to determine foreseeability.[190] Thus, the *Isaacs* court considered evidence of prior, violent third party attacks on the premises, along with other evidence of foreseeability, to impose a duty on the defendant.[191]

185. Ann M. v. Pac. Plaza Shopping Ctr., 863 P.2d 207, 215 (1993). The *Ann M.* court reasoned:

> [The court was] not reluctant to revisit the rule announced in *Isaacs* because it was unnecessary for this court to consider the viability of the 'prior similar incidents' rule in order to decide the *Isaacs* case: the record contained evidence of prior, violent, third party attacks on persons on the hospital's premises in close proximity to where the attack at issue in that case occurred.

Id.

186. *See Isaacs*, 695 P.2d at 655.

187. *Id.*

188. *Id.* at 655–56.

189. *Id.* at 662.

190. *Id.* at 659.

191. *See id.* at 661–62.

The *Isaacs* court's reasoning is consistent with the law and economics methodology. Indeed, the reasoning that the court employed in rejecting the necessity of prior similar incidents was the very same reasoning upon which it later relied in adopting the prior similar incidents test.[192] Under the facts of this case, the court found neither the absence of a prior shooting on the premises nor the absence of violent crime at the exact location to be dispositive in its analysis.[193] Rather, the court reasoned that the occurrence of prior violent crime and reported threats of violence anywhere on the premises was sufficient for the court to impute knowledge of prior third party crimes on the premises.[194] Under the facts of the case, the court implicitly found that the prior assaults were sufficiently similar to the shooting of Dr. Isaacs.[195]

Additional support for the proposed causal interpretation of "similar" incidents is found in a controversial footnote in the *Isaacs* decision.[196] There, the court suggested that an affirmative finding of a duty would presumptively establish proximate causation since a thorough consideration of foreseeability as part of the duty analysis would necessarily satisfy the foreseeability requirement of the causation analysis.[197] Although the court subsequently rejected this mischaracterization of the proximate cause analysis,[198] this statement nevertheless sheds light on the court's reasoning at the time of the *Isaacs* opinion. Much like the rationale of the "causal interpretation" of the test's "similarity" requirement proposed herein, the *Isaacs* court appeared to look to the purpose of the similar incidents requirement, determining that the requirement is satisfied where the efficient preventative measures based on a landowner's notice of the previous crime could have prevented the subsequent crime.

b. *Ann M. v. Pacific Plaza Shopping Center*

In light of considerable dissension amongst the lower courts following the *Isaacs* decision,[199] the California Supreme Court "refined" the foreseeability analysis eight years later in *Ann M.* The *Ann M.* case involved a plaintiff who was raped by an unknown assailant inside a

192. *See Ann M.*, 863 P.2d at 215–16.
193. *See Isaacs*, 695 P.2d at 655.
194. *Id.* at 661–62.
195. *Id.* at 662.
196. *Id.* at 662 n.8.
197. *Id.*
198. *See* Saelzler v. Advanced Group 400, 23 P.3d 1143, 1153 (Cal. 2001).
199. *See, e.g.*, Nola M. v. Univ. of S. Cal., 20 Cal. Rptr. 2d 97, 102 (Ct. App. 1993).

large shopping mall.[200] At trial, the plaintiff introduced evidence of a lack of security guards, a broken "drop gate," the presence of "transients" on the premises, calls to police by employees afraid of persons loitering on the premises, and prior misdemeanor sexual assaults in the shopping center parking lot.[201] There was no evidence of previous violent assaults on the premises prior to the rape of the plaintiff.[202]

In addressing whether the scope of a landowner's duty specifically included the provision of security guards, the court reiterated the need to balance "the foreseeability of the harm against the burden of the duty to be imposed."[203] The court justified its "refinement" on the need for a more concrete test capable of achieving more consistent results.[204] In reasoning that the flexibility of foreseeability relied on in *Isaacs* was no longer a viable goal, the *Ann M.* court pointed to the endemic and unpredictable nature of crime and the heavy burden associated with the provision of security guards.[205] Relying on the uncertainty of deterring crime,[206] the court held that "the requisite degree of foreseeability [necessary to require the hiring of security guards] rarely, if ever, can be proven in the absence of prior similar incidents of violent crime on the landowner's premises."[207] The court did not elaborate on what factors a court is to use in determining these temporal and similarity elements. In light of the *Isaacs* court's concern over arbitrary distinctions between past and present crimes, this is particularly troubling since it likely was intentional.

Based on the facts of the *Ann M.* case, the court held that the violent criminal assault was not sufficiently foreseeable to impose a duty to provide security guards.[208] The court first addressed the absence of evidence that the owner of the shopping center had notice of

200. *See* Ann M. v. Pac. Plaza Shopping Ctr., 863 P.2d 207, 209–10 (Cal. 1993).
201. *Id.* at 210.
202. *Id.* at 216.
203. *Id.* at 215.
204. *Id.*
205. *Id.*
206. *See id.*; Hollywood Boulevard Venture v. Superior Court, 172 Cal. Rptr. 528, 530 (Ct. App. 1981) (reasoning "[n]o one really knows why people commit crime, hence no one really knows what is 'adequate' deterrence in any given situation" (citation omitted)).
207. *Ann M.*, 863 P.2d at 215. In a footnote, the court quaified its holding by stating that "[i]t is possible that *some other circumstances* such as immediate proximity to a substantially similar business establishment that has experienced violent crime on its premises could provide the requisite degree of foreseeability." *Id.* at 215–16 n.7 (emphasis added). Exactly what "other circumstances" qualify under this exception to the strict interpretation of prior similar instances, or even if there are any such circumstances, has not yet been resolved by the California Supreme Court.
208. *Id.* at 216.

any prior similar incidents on the premises.[209] Although the plaintiff alleged that there had been prior similar incidents, the court found that there was no evidence that the plaintiff had notice of any such incidents.[210] Although a landowner's duty includes a duty to exercise reasonable care to discover that criminal acts are being, or are likely to be, committed on the premises,[211] the defendant implemented a standard practice of recording all violent crime and the record contained no evidence of prior violent attacks.[212] Therefore, the *Ann M.* court clearly recognized the importance of interpreting the prior requirement as an assurance of notice in order to provide for intelligent decision making. Further, so long as the landowner instigates a reasonable system to record the information, the absence of such information is highly dispositive of notice under *Ann M.*

The court continued to discuss the similarity requirement by stating that the prior misdemeanor sexual assaults and robberies were not similar enough to the instant rape to satisfy the prior similar incidents test.[213] The court drew a distinction between the lesser non-violent crimes and the violent crime of rape. One explanation for this distinction along the level of violence inherent in the crime is that often non-violent crimes may be deterred by less burdensome measures than the provision of security guards. For example, in the case of robbery it is possible that any lesser means, such as increased lighting, security gates, or video cameras, would likely prevent the crime. In the event of violent assaults, however, frequently the only effective deterrence is properly hired and trained security guards. Thus, since the claimed duty involved the provision of security guards, absent prior crimes that may require the defendant to hire security guards in order to prevent future occurrences of those crimes, the defendant will not have a duty to hire security guards.

The *Ann M.* court's failure to further elaborate on the prior and similar requirements was not the only source of confusion following the opinion. Confusion as to the scope and viability of the prior similar incidents test resulted from the incomplete opinion in this case.[214] Specifically, the *Ann M.* court left open at least three possible ways to establish a landowner's duty to prevent third party crime: (1) proving

209. *Id.*
210. *Id.*
211. *See* Peterson v. S.F. Cmty. Coll. Dist., 685 P.2d 1193, 1197 (Cal. 1984).
212. *See Ann M.*, 863 P.2d at 216.
213. *Id.*
214. *See, e.g.*, Sharon P. v. Arman, Ltd., 989 P.2d 121 (Cal. 1999).

prior similar incidents of violent crime on the premises; (2) proving that the premises upon which the crime giving rise to the litigation occurred was within "immediate proximity to a substantially similar business establishment that has experienced *violent crime* on its premises;"[215] and (3) proving that the premises upon which the crime giving rise to the litigation was "so inherently dangerous that, even in the absence of prior similar incidents, providing security guards will fall within the scope of a landowner's duty of care."[216] Although the viability of the second means of proving a duty to hire security guards has yet to be resolved, the supreme court later addressed and rejected the third possibility.

c. *Sharon P. v. Arman, Ltd.*

In *Sharon P.*, the California Supreme Court reconsidered its previous dicta in *Ann M.* regarding the possibility that a premises classification as "inherently dangerous" could impose a duty to provide security guards absent proof of prior similar incidents on the premises.[217] In *Sharon P.*, the plaintiff was raped at gunpoint by an unknown assailant in an underground commercial parking garage where she had parked her car.[218] In the ten years preceding the attack during which the landowner owned and controlled the parking lot, there was no record of physical assaults or gun-related crime.[219] There was, however, evidence of seven armed robberies in the adjoining bank that was also owned by the defendant.[220] Despite the lack of prior similar incidents, the plaintiff argued that the inherently dangerous nature of the premises provided the requisite foreseeability to support the imposition of a duty to take reasonable measures to prevent her rape.[221]

The court rejected the plaintiff's argument that underground parking structures were inherently dangerous as a matter of law.[222] First, the court specifically rejected the argument "that *all* underground parking lots, regardless of their location or individual physical characteristics, are equally prone to violence such that they are inherently dangerous."[223] Second, the court noted the absence of facts sup-

215. *Ann M.*, 863 P.2d at 215–16 & n.7 (emphasis added).
216. *Id.* at 216 n.8.
217. *Sharon P.*, 989 P.2d at 124–25.
218. *Id.* at 123.
219. *Id.*
220. *Id.*
221. *Id.* at 124.
222. *Id.* at 127.
223. *Id.* (emphasis added).

porting a conclusion that there is something inherent in underground parking lots that distinguishes their safety from that of above-ground parking lots or other types of commercial property generally.[224] Third, the court recognized that such a per se rule would create "incongruous results."[225] The inconsistency between the *Ann M.* rule and the proposed per se rule was evidenced in the facts themselves: there were no reported incidents of crime on the premises and only seven incidents of "dissimilar" crimes on the adjoining premises.[226] Providing security guards for the ten years leading up to the instant sexual assault would have proven wasteful and would have made landowners the "insurers of public safety."[227]

Relying on the viability of the prior similar incidents test to accurately account for foreseeability when the premises is arguably prone to increased violent crime, the court again based its reasoning on notions of law and economics. If the court were to abandon the prior similar incidents test in these circumstances, then all commercial businesses that were deemed such an establishment would be forced to make the determination whether to meet the duty of hiring and training security based not on an intelligent decision grounded in facts, but upon generalized statistics. Whatever the landowner were to decide in regard to such a significant burden, she would likely have to pass on the cost of accident prevention (security) or accidents (liability and insurance) to the customer. The cost of the services would then become prohibitively expensive without any occurrence of prior violent crime and no evidence that such events would ever occur. Thus, the high cost of accident prevention is not close enough to a decrease in the cost of accidents, and the sum total would be disproportionately high.

By contrast, the prior similar incidents rule adequately accounts for the nature of the establishment. By requiring the occurrence of a prior violent crime, landowners and courts are no longer forced to deal with the speculative occurrence of crime. Rather, they may make intelligent and informed liability decisions knowing that the establishment has already experienced crime. This reliance on prior criminal conduct, overall, will reduce the waste that is inconsistent with an efficient system of resource allocation. In order for this increased effi-

224. *Id.*

225. *Id.* at 129.

226. *Id.* at 129–30 (implicitly recognizing that the instant sexual assault was not sufficiently similar to the armed bank robberies so as to impose a duty to hire security guards).

227. *Id.* at 130.

ciency to occur, the cost of the first accident, which may not have been prevented absent information gained from earlier examples of crime on the premises, must not be greater than the cost of the burden of providing security before the occurrence of the first violent crime. Although this equation involves too many variables to be accurately calculated, it is likely that the cost of one accident will not meet the cost of hiring and training security multiplied by the unknown variable of time (ten years in the case of *Sharon P.*). Thus, the ability of the prior similar incidents test to allow for more concrete information in intelligent decision making and to discourage wasteful conduct on the part of landowners accounts for the court's rejection of the "inherently dangerous" doctrine.

A final point addressed in the *Sharon P.* decision was whether there was sufficient foreseeability to impose a duty to provide "less burdensome" preventative measures, such as "adequate lighting" and maintenance of previously installed security cameras.[228] The *Sharon P.* court recognized that, because the scope of the duty required a balancing of the burden of the duty sought to be imposed against the foreseeability of such third party conduct, a court may apply a somewhat "broader" concept of foreseeability where "minimal security measures are at issue."[229] Under such a test, a prior nonassaultive third party crime may provide the requisite foreseeability regarding subsequent assaults where "it would be reasonable to anticipate that a person would be subject to violent attack if he or she were to be present at an otherwise foreseeable crime on the premises or if he or she were to interrupt such a crime in progress."[230] First, the *Sharon P.* court questioned whether the proposed "minimal obligations" "would have been effecting to protect against the type of violent assault that occurred here."[231] From this skepticism of the efficacy of the proposed measures, the *Sharon P.* court recognized that other courts properly "rejected claims of abstract negligence pertaining to the lighting and maintenance of property where no connection to the alleged injuries was shown."[232] Notwithstanding concerns of efficacy and proximate cause, the *Sharon P.* court concluded that there was insufficient evi-

228. *Id.* at 130–33. The court questioned whether these proposed measures were actually less burdensome since the proper maintenance of surveillance cameras required hiring and training persons to monitor the cameras and respond effectively when criminal activity is observed. *Id.* at 130.

229. *See id.* at 131.

230. *Id.*

231. *Id.* at 130–31.

232. *Id.* at 131.

dence of prior crimes under the "broader concept of foreseeability" to impose a duty on the landowner.[233]

The *Sharon P.* court's discussion of "minimal security" measures remains consistent with efficient resource allocation. First, the court's broader foreseeability analysis recognizes that foreseeability of subsequent third party crimes is not limited to the crime itself but also includes the foreseeable consequences of not taking efficient preventative measures and allowing the prior crime to later occur. Although the *Sharon P.* court discussed foreseeability in terms of a victim's presence at, or interruption of, a subsequent occurrence of the prior crime, both the broader foreseeability analysis and the law and economics interpretation of the prior similar incidents test define foreseeable crimes as crimes that would likely not have occurred had the landowner taken measures to prevent subsequent occurrences of the prior crime itself. Second, the court, although careful to distinguish duty from proximate cause, recognized that the efficacy of the proposed measure in preventing the subsequent crime was a proper consideration in the context of the duty analysis. Thus, the *Sharon P.* court recognized that foreseeability inheres a causal component distinct from proximate cause.

d. *Saelzler v. Advanced Group*

Although the court in *Saelzler v. Advanced Group* was concerned solely with the issue of causation, the court's analysis is instructive of the role of causation as it pertains to the duty analysis.[234] In *Saelzler*, a female Federal Express employee was assaulted while attempting to deliver a package to a resident of the defendant's apartment complex.[235] Although the plaintiff recognized her assailants as the same three young men she previously noticed loitering on the premises and immediately outside a broken security gate,[236] the true identity of the assailants was not known because the assailants alluded arrest by fleeing the scene of the assault.[237] The plaintiff alleged that the defendants had actual notice of frequent, recurring criminal and gang activity on the premises,[238] that these prior third party violent crimes included incidents of trespass, tampering with the security gates, sex-

233. *Id.* at 131–32.
234. Saelzler v. Advanced Group 400, 23 P.3d 1143, 1149 (Cal. 2001).
235. *Id.* at 1147.
236. *Id.*
237. *Id.*
238. *Id.*

ual assaults, and attempted and actual rapes,[239] and that defendant had previously undertaken providing security measures including frequently repairing broken security gates and hiring night time roaming security guards.[240] Further, the plaintiff's security expert opined that the daytime assault would not have occurred had the defendants hired full-time security and implemented a "more concerted effort to keep gates repaired and closed."[241]

The trial court granted the defendants' motion for summary judgment, finding that the plaintiff failed to establish that the defendants' alleged breach was the proximate or legal cause of her assault.[242] Although the "overwhelming evidence" of prior incidents established a duty for the defendant to provide increased security to prevent the highly foreseeable assault, the court concluded that plaintiff failed to establish a "'reasonably probable causal connection'" between the defendants' breach and her injuries.[243] In a divided decision, the Second District Court of Appeal reversed.[244] Applying an "ordinary experience" analysis, the Second District found "defendants' 'complete absence of required security measures' by itself reasonably could be deemed a contributing cause of any criminal activity in the area."[245]

The California Supreme Court granted review in order to consider whether the plaintiff had established a prima facie case of causation sufficient to survive the defendant's motion for summary judgment.[246] The *Saelzler* court considered whether, assuming that the defendants owed and breached a legal duty, the defendants' alleged

239. *Id.*

240. *Id.* at 1148.

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.* The court also held that defendants' failure to provide required security justified shifting the burden of proof to defendants to conclusively establish the absence of a causal connection. *Id.*

246. *Id.* at 1145. Interestingly, the court stated its purpose in granting review in the case was, in part, 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." *Id. But see id.* at 1158 (Werdeger, J., dissenting) (criticizing the majority's discussion of policy, a consideration reserved for the duty analysis, in its analysis of the "factual" inquiry as to causation).

negligence was a *substantial factor* in causing the plaintiff's injuries.[247] In determining when a defendant's alleged negligence is a substantial factor contributing to the plaintiff's injuries, the court noted that the "'mere possibility of such causation is not enough.'"[248] The plaintiff must actually prove by more than mere speculation or possibility that "it was more probable than not" that the proposed duty would have prevented the injury-causing conduct.[249] In the case, because the plaintiff admitted that she could not prove the identity of her assailants, and thus whether they were authorized residents or unauthorized trespassers, neither the plaintiff's allegation nor her expert's "speculative opinion" established that maintaining the security gates and hiring daytime security guards was a substantial factor in causing her injuries.[250] Thus, the *Saelzler* court held that the plaintiff failed to introduce specific facts sufficient to meet her burden in opposing summary judgment.[251]

The *Saelzler* court was equally unpersuaded by the plaintiff's reliance on a "rule of common sense" causation.[252] First, the court rejected the plaintiff's argument that a footnote in *Isaacs* supported her argument that an affirmative finding of foreseeability establishes the element of causation.[253] Instead, the court stated:

> *We did not intend to suggest in* Isaacs *that a general finding of the foreseeability of some kind of future injury or assault on the premises inevitably establishes that the defendant's omission caused plaintiff's own injuries. Actual causation is an entirely separate and independent element of the tort of negligence.*[254]

Second, the *Saelzler* court rejected the plaintiff's argument that the supreme court should adopt a practical approach to the causation issue, whereby common sense and experience should lead one to conclude that the complete absence of required security measures is necessarily a contributing cause.[255] The court reasoned that it would

247. *Id.* at 1149–54. The court actually reasons that "by reason of the prior criminal assaults and incidents on the premises, defendants may have owed a duty to provide a reasonable degree of security to persons entering them." *Id.* at 1151.

248. *Id.* at 1151 (quoting KEETON, *supra* note 24, at § 41) (footnotes omitted).

249. *See id.* at 1152.

250. *Id.* at 1151–52.

251. *Id.* at 1155.

252. *Id.* at 1153.

253. *Id.* at 1152–53 (citing Isaacs v. Huntington Mem'l Hosp., 695 P.2d 653, 663 n.8 (Cal. 1985) (finding that an affirmative finding of foreseeability during the duty analysis would establish a "close connection" between the defendant's conduct and the plaintiff's injuries)).

254. *Id.* at 1153.

255. *Id.*

be grossly unfair "to adopt a rule of common sense that 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."[256] The plaintiff, the court stated, bears the burden of proving a substantial link or nexus between omission and injury, and the injury itself does not constitute this missing link.[257]

The *Saelzler* court's review of the causation element on a motion for summary judgment is consistent with an efficient resource allocation interpretation of the prior similar incidents test. Although the *Saelzler* court recognized that there was a similarity between the defendants' conduct and the plaintiff's harm in both the causation and duty elements, it was careful to distinguish the degree of certainty of the connection between the defendants' conduct and *plaintiff's actual injury* in the context of causation and the defendants' conduct and the *foreseeability of the plaintiff's harm* in the context of a duty.

e. *Wiener v. Southcoast Childcare Ctrs., Inc.*

In 2004 the California Supreme Court considered whether a child care center and its property owner owed a duty to the parents of two children killed by a man who deliberately drove his car through a fence surrounding the center's premises.[258] In *Wiener*, the defendants owned and operated a childcare center located on a busy street corner.[259] The center's playground was adjacent to the sidewalk and street and was surrounded by a four-foot-high chain link fence.[260] One afternoon, a man intentionally drove his car "through the fence, onto the playground, and into a group of children," killing two and injuring several others.[261] The assailant was arrested, convicted of first degree murder, and sentenced to life without parole.[262] Although neither the childcare center nor the premises had ever before been the target of a violent third party crime before the childcare center operated the premises, a few noninjury traffic accidents happened near the premises.[263] Of particular relevance to the *Wiener* court's

256. *Id.*
257. *Id.*
258. Wiener v. Southcoast Childcare Ctrs., 88 P.3d 517 (Cal. 2004).
259. *Id.*
260. *Id.*
261. *Id.* at 519–20.
262. *Id.* at 520.
263. *Id.*

analysis was that only one freak accident occurred in which a vehicle went through the fence, but nobody on the premises was injured.[264]

The plaintiffs alleged that a sturdier barrier would have prevented the assailant's car from entering the playground and killing the children.[265] The defendants each moved for summary judgment, contending that the crime was a "wholly unforeseeable" criminal act under *Ann M.*[266] The defendants argued that neither defendant had notice of any prior similar acts that would place it on notice of a need for increased security.[267] They further argued that, even if they had notice of the prior incident, it was not a similar incident that would make the subsequent crime foreseeable.[268] In opposition to the summary judgment motions, the plaintiffs asserted that the defendants owed a duty as a matter of law to the plaintiffs because it was foreseeable that any vehicle could leave the road and strike the playground fence.[269] The plaintiffs argued that it did not matter whether the driver of the vehicle that killed the children acted negligently or with criminal intent because the risk of harm from an unsafe fence was the same.[270] The trial court granted summary judgment for the defendants after finding that the "plaintiffs failed to present evidence of prior similar incidents of violent crime or criminal acts and therefore failed to show defendants owed a duty to prevent [the subsequent third party crime]."[271] The court of appeal reversed, holding that "an 'errant' motorist careening through the fence accidentally was a foreseeable event."[272]

The California Supreme Court granted review to determine whether the prior automobile accident was sufficiently similar to the subsequent criminal incident to make the latter foreseeable, and thus impose a duty as a matter of law.[273] The *Wiener* court rejected the plaintiffs' argument that the similarity requirement should be interpreted in terms of "'the kind of harm' . . . suffered rather than the criminal act itself."[274] Under such a flawed analysis the nature of the harm was not dependent on the driver's criminal state of mind such

264. *Id.*
265. *Id.*
266. *Id.*
267. *Id.*
268. *Id.* at 521.
269. *Id.* at 520.
270. *Id.* at 520–21.
271. *Id.* at 521.
272. *Id.*
273. *Id.* at 521–25.
274. *Id.* at 523.

that "prior accidents made foreseeable any future occasions of cars crashing through the fence."[275] The *Wiener* court reasoned that such a test "did not give due consideration to the *criminal* nature of [the] injury-producing act," and thus created a duty test that is far too broad.[276] While the precise details of the third party's actions are not significant in an ordinary negligence action,[277] the court asserted that third party criminal acts are analyzed differently from ordinary negligence and, as such, courts require a heightened sense of foreseeability as provided by prior similar incidents.[278] This distinction is based on the difficulty in predicting when a criminal might strike and the difficulty in deterring third party crime generally. Applying the *Ann M.* balancing test to the facts in the present case, the *Wiener* court concluded that the defendants owed no duty to plaintiffs because the driver's brutal criminal act was dissimilar and thus unforeseeable.[279] Absent "prior similar criminal acts, *or even any indication of prior criminal acts or intrusions of any type in the surrounding businesses,* defendants here could not have been expected to create a fortress."[280]

The *Wiener* court held that foreseeability of a third party criminal act requires the occurrence of a prior similar *criminal* act.[281] The court's rejection of a "type of harm" interpretation of the similarity requirement is consistent with efficient resource allocation. If the court had accepted the proposed "type of harm" interpretation, a landowner would be responsible for deterring third party criminal conduct that might cause the same type of harm that a prior accident previously caused.[282] The landowner, however, would have neither notice of the type of criminal conduct that might cause such harm nor knowledge of the measures that might prevent it. Yet in order to meet its duty and avoid civil liability, it is likely that the landowner would need to take measures to prevent almost all types of third party criminal acts. Because of the extremely high cost of such preventative measures, it is likely that the landowner would not take any measures at all. Focusing on the criminal intent of the third party narrows the requisite foreseeability analysis and requires foreseeability to be propor-

275. *Id.* at 524.

276. *Id.*

277. *Id.* (citing Robison v. Six Flags Theme Parks, Inc., 75 Cal. Rptr. 2d 838, 841 (Ct. App. 1998)).

278. *Id.*

279. *Id.* at 525.

280. *Id.* (emphasis added).

281. *Id.*

282. *See id.* at 523–24.

tionate to the burden incurred in preventing subsequent criminal acts. By requiring a prior crime as a threshold, the landowner is placed in a position of better access to relevant information and may then decide how best to prevent similar incidents. Although the occurrence of a prior accident arguably places the landowner in a position of better access to information of the type of foreseeable injuries, this information is not relevant in a prevention context. Distinguishing crimes from ordinary negligence promotes efficient resource allocation by ensuring that foreseeability remains proportionate to the high burden of deterring third party crime.

B. Application of the Revised Prior Similar Incidents Test to the Issue Before the *Delgado* Court

The issue currently before the California Supreme Court in *Delgado* is whether the scope of the prior similar incidents test accounts for those instances where a landowner voluntarily provides security guards.[283] In addressing this issue, the court should first apply the revised prior similar incidents test to the facts before it to determine whether the defendant owed the plaintiff a duty. Then the court may address the scope of the revised prior similar incidents test.

1. Does Defendant Trax's Voluntary Provision of Security Guards Remove the Duty Analysis from the Scope of the Refined Prior Similar Incidents Test?

In *Delgado v. Trax Bar & Grill*, the Fifth District held that the voluntary provision of security guards does not change the foreseeability analysis from the prior similar incidents test.[284] The law and economics theory requires that the decision to voluntarily provide security guards be analyzed in terms of efficient resource allocation. Accepting the fact that hiring, training, and retaining security guards will never amount to a trivial burden, a landowner must realize that there is some incentive to taking such precautions. In the instances where there has been no prior criminal conduct on the premises whatsoever,

283. *See* CAL. APPELLATE COURTS, CASE SUMMARY, *supra* note 3. This issue is presently the subject of a current split between two California Courts of Appeal. *Compare* Delgado v. Trax Bar & Grill, 134 Cal. Rptr. 2d 548 (Ct. App. 2003) (holding that the provision of security guards in the absence of prior similar incidents does not amount to an assumption of a duty to do so with reasonable care), *with* Mata v. Mata, 130 Cal. Rptr. 2d 141 (Ct. App. 2003) (holding that landowners provision of security guards made the prior similar incidents test inapposite because the landowner had already assumed a duty to reasonably hire and train those security guards).

284. *Delgado*, 134 Cal. Rptr. 2d at 552.

it is fair to assume that the landowner's motivation in so doing is not the fear of ensuing civil liability, but rather the realization that the loss of business that would result from such a criminal assault would exceed the cost of providing security.[285] In the rational decision maker model, this is the only incentive that would be necessary since the expenditure of resources to provide security implies the responsibility to do so adequately. If a landowner spends money to provide security to prevent the loss of business incidental to the occurrence of a crime, then she would be in the best position to realize that the provision of inadequate security would result not only in the waste of those resources associated with training, but also in the lost business that she sought to prevent in the first place.

In contrast, holding that the voluntary provision of security guards would be, in many instances, the only way to incur liability, would undermine the incentive-based system. Whereas a business owner has the incentive to provide security regardless of a duty to do so where she determines that crime is probable, or even foreseeable under the totality of the circumstances, declaring that she has assumed a duty by doing so would not incentivize further investment in the training of security to ensure that it is never inadequate. Rather, it merely incentivizes the complete absence of security guards despite the landowner's realization that crime is likely. This is because the cost of not hiring security and suffering any consequential loss to business from a criminal attack on the premises will, on average, be less expensive than the sum total of hiring and training security, the consequential loss in business resulting from the criminal attack, the cost of litigating the adequacy of the security guards, and the possible civil damages if that security was found to be inadequate.

Clearly, when a rule is proven to have a result opposite to its desired effect through the application of an incentive-based interpretation, that rule must be abandoned. If the unsound legal reasoning offered in support of abandoning the prior similar incidents test is not

285. It is possible that the landowner is in fact providing security not out of a motivation to retain current business, but as a means of inducing new business through the appearance of secure premises. This scenario, however, would not fall within the intended policy of deterrence or the interpretive framework of law and economics since the landowner is concerned not with the result of such measures, but only the resulting appearance. These scenarios are more appropriately analyzed under the contracts doctrines of reliance and quasi contracts, where the California courts have held that a breach in the promise to provide adequate security may support an imposition of liability. *See* Avila v. Jado Props., Inc., 5 Cal. Rptr. 3d 141, 149 (Ct. App. 2003). The California Supreme Court has granted review in this case. Avila v. Jado Props., Inc., 82 P.3d 746 (Cal. 2004).

itself reason enough to maintain a consistent liability rule in situations where the landowner voluntarily provided security, the confusion incidental to the adoption of a novel liability rule should provide the additional reason required. Efficient resource allocation is dependent upon clear and predictable models of liability. The recognition of an exception to the rule creates ambiguity and uncertainty in the field. Landowners would again be uncertain of when their duty commenced and what the scope of that duty would be. Insurers would be reluctant to insure landowners who hired security guards just as they would be reluctant to insure landowners who did not. Thus, landowners would either be forced out of business by large liability insurance costs or would self-insure by charging high prices on goods in order to pass the cost of accident prevention onto their customers. They would also risk a loss of clientele sufficient to close business operations. In the end, the increased price of consumer goods would create a highly inefficient market wherein intrinsic value would no longer have a meaningful designation.

Therefore, the voluntary provision of security guards should not amount to an assumption of a duty to provide security guards. The duty analysis under these circumstances is properly subject to the revised prior similar incidents test. The ability of law and economics to further efficient resource allocation in premises security litigation lends well to the interests implicated in the voluntary provision of security guards. Treating the voluntary provision of security guards as an assumption of a duty is an inefficient allocation of resources and should rarely impose a duty for the landowner to prevent violent third party criminal assaults absent prior similar incidents of violent crime on the premises.

2. Was the Assualt on Delgado Sufficiently Foreseeable Under the Refined Prior Similar Incidents Test?

Having determined that the voluntary provision of security guards does not fall outside the scope of the foreseeability analysis of *Ann M.*, as part of its de novo review, the California Supreme Court should apply the revised prior incidents test in considering whether the assault on Delgado was unforeseeable as a matter of law.[286]

286. The analysis is as follows: (1) Was there a prior criminal incident on the premises?; (2) If a prior criminal incident occurred on the premises, is taking reasonable measure to hire and train security guards, the most efficient, effective accident-avoiding measure?; (3) If reasonable security guards is the most efficient measure of effectively preventing the prior crime, is it more efficient to hire and train security guards or to allow

The first inquiry is whether there was a prior third party violent criminal act on the premises. The occurrence of the previous "ordinary 'bar fights'" on the premises is undisputed.[287] These prior assaults are sufficient to establish foreseeability commensurate with a duty for Trax to prevent future occurrences of these bar fights. Certainly if the "similar" requirement is to mean anything, it must include subsequent criminal conduct that is identical to the prior third party crime.

The second inquiry is whether the most cost-efficient means of preventing future occurrences of identical crimes included hiring security guards. A "bar fight" is a violent criminal act, and the court has long recognized that this type of conduct often requires hiring and training of security personnel to effectively prevent future occurrences.[288] Thus, Trax owed a duty to hire security guards based on prior violent crime on the premises.

The landowner must consider whether it is more efficient to assume the most effective measure of preventing the crime or to absorb the cost of liability and obtain insurance. Here, Trax was in the best position to make this informed, rational decision. Thus, where it is clear that the landowner decided to hire security guards based on past crimes and in order to prevent future identical crimes, then it should be assumed that it was in fact more efficient to meet the duty of providing security guards than absorb liability.

The final inquiry is whether the previous duty to hire security guards *could* have prevented the occurrence of the subsequent crime at issue.[289] Since Trax already owed a duty to provide security guards, reducing the overall cost of accidents without increasing the related burden increases the efficiency of the system. Joseph's assault of Delgado was more than an "ordinary 'bar fight,'"[290] but this change from

future occurrences of the prior crime?; and (4) If it is more efficient to take reasonable measures to hire and train security guards, then the landlord will have a duty to prevent all subsequent crimes that could have been prevented if the landlord reasonably hired and trained security guards. *See supra* Part IV.A.2.

287. Trax does not dispute that it had experienced ordinary bar fights on its premises and knew of them. *See Delgado*, 134 Cal. Rptr. 2d at 551. In fact, it took affirmative measures of hiring and training security guards in part to prevent frequent bar fights. *Id.* at 550. Therefore, the "prior" requirement is satisfied, and the Fifth District and the defendant did not contend otherwise. *Id.* at 551.

288. *Cf.* Sharon P. v. Arman, Ltd., 989 P.2d 121, 130 (Cal. 1999) (stating that it was unlikely that security measures less than hiring a security guard could have prevented the violent crime).

289. *See supra* Part IV.A.2.

290. *Delgado*, 134 Cal. Rptr. 2d at 551.

an *ordinary* to an *exceptional* bar fight does not in itself limit the duty to prevent subsequent crimes that are not identical to the prior crime. If there were any means of preventing Joseph from assaulting Delgado, it would almost certainly require Trax to have provided numerous security guards—a very high burden.[291] Therefore, the crimes were sufficiently similar to satisfy the revised prior similar incidents test and establish the requisite foreseeability to impose a duty on Trax to have prevented the gang assault.

Conclusion

The California Supreme Court's decision to adopt the prior similar incidents test in *Ann M. v. Pacific Plaza Shopping Center* is supported by efficient resource allocation. The court's failure, however, to define the necessary elements of the test in terms of efficient resource allocation has caused confusion as to the efficacy and scope of the test over the past decade. By returning to the initial economic motivations behind the court's decision to adopt the test, the prior and similar elements may be coherently defined in a manner that effectuates the desired efficiency. This coherence also provides a consistent application of the test necessary to the court's definition of the scope and boundaries of the test. With this scope properly defined in terms of efficiency, it becomes clear that the voluntary provision of security guards is not subject to a different foreseeability analysis than the prior similar incidents test. Therefore, in the absence of prior similar incidents on the premises, a landowner who voluntarily provides security guards does not assume a duty to take reasonable measures to protect persons upon the premises from third party criminal acts.

291. Under this refined test it is, of course, possible that there would never be enough foreseeability to provide many security guards or that the criminal attack could never be prevented without police intervention.