

TORT LAW

Reexamination of Duties and Liabilities of Homeowners

by **Jeremy Robinson, Column Editor**

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Consider the plight of the homeowner. Anyone that has ever owned a home, condo, or other piece of residential property knows that there are a large number of costs, responsibilities, and chores involved in maintaining that property and keeping it habitable. As plaintiff's lawyers, we also know that in addition to the usual responsibilities, the law imposes upon homeowners certain duties with regard to the protection of third parties and consequent liability for the failure to fulfill those duties.

The exact boundaries of those legal duties, however, are hazy at best. Given the nature of the duty inquiry in the law (*i.e.*, it is essentially a question of whether a plaintiff is entitled to protection as a matter of public policy), the existence of a specific duty of care under a given set of circumstances tends to be subject to the caprice of the courts. Practically any conclusion can be rationalized by resort to "public policy," and new appellate decisions are constantly refining the scope of a homeowner's duty to persons injured on the premises.

It is probably safe to assume that everyone who reads *Trial Bar News* is familiar with the general duty of care imposed by law upon landowners. " 'Generally, one owes a duty of ordinary care not to cause an unreasonable risk of harm to others....' [Citation.]" *Padilla v. Rodas* (2008) 160 Cal.App.4th 742, 747. See also, Civil Code §1714. This, however, is only the beginning of the inquiry. In the case of a landowner's liability for injuries to persons on the property, the determination of whether a particular duty exists involves the balancing of a number of considerations (known as the "Rowland" factors from the landmark case of *Rowland v. Christian* (1968) 69 Cal.2d 108, 112) such as: the 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 the 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. See, *Rinehart v. Boys & Girls Club of Chula Vista* (2005) 133 Cal.App.4th 419, 430.

As the courts are quick to point out, the existence of a duty is not an immutable fact of nature, but rather an expression of policy considerations providing legal protection. *Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 472. As such – and as anyone who has ever faced a summary judgment motion in a negligence case knows – the existence and scope of a defendant's duty is a question of law. See, *Shin v. Ahn* (2007) 42 Cal.4th 482, 488.

This month, I wanted to draw your attention to a trio of recent cases addressing the scope of duty issue in the context of a residential homeowner. The first case of the batch is *Salinas v. Martin* (2008) 82 Cal.Rptr.3d 735. *Salinas* is a “dangerous dog” case in the mold of *Uccello v. Laudenslayer* (1975) 44 Cal.App.3d 504 and subsequent similar decisions. In *Salinas*, the defendant homeowner embarked upon a remodeling project at his house. The plaintiff was an employee of the general contractor hired to complete the project. He was allowed to store materials on site and was given express permission by the landlord to enter the yard “at any time” to retrieve equipment or materials he stored there.

The defendant homeowner also hired two men to perform “weeding and gardening” work on the premises. Those men owned two dogs, including a pit bull terrier, and the defendant agreed that they could keep the dogs loose in the fenced back yard and in a van they kept on the property. In the defendant’s view, the dogs seemed “tame and friendly.” The general contractor, however, expressed a different view of the dogs and communicated to the defendant that the defendant should not have a pit bull around this job site. The contractor thought the defendant understood the concern he conveyed that “the dog would attack someone.”

Ultimately, the plaintiff was attacked by the pit bull when he went to retrieve some items that were stored in the defendant’s yard. Apparently, that same day the defendant had given the dog owners permission to let the dogs roam in the backyard, but failed to inform the plaintiff of that fact or warn him of the presence of the dogs.

The defendant moved for summary judgment on the basis that he had no actual knowledge of the dangerous propensities of the dogs and therefore did not owe a duty to the plaintiff in accord with the *Uccello* line of cases. See, e.g., *Stone v. Center Trust Retail Properties, Inc.* (2008) 163 Cal.App.4th 608, 612 [when landlord has relinquished possessory interest in the land to a tenant, the plaintiff must show that the landlord had actual knowledge of the dangerous condition in question, plus the right and ability to cure the condition in order for liability to attach].

The *Salinas* appellate court disagreed, reversing the trial court’s order granting summary judgment on that basis. First, the court noted that the matter was not a case in which the plaintiff asserted passive neglect on the part of an absentee landlord for failure to inspect or take security measures to protect third parties from a dangerous condition on a tenant’s property. Instead, the defendant continued to control the premises at least intermittently while the construction project proceeded, and the dog owners were not the defendant’s tenants, but rather temporary invitees who performed landscaping services. And unlike tenants, they were neither vested with exclusive possession of the property nor were entitled to keep their dogs there without express permission granted by the defendant. Thus, according to the court, the essential foundation that underlies the circumscribed duty imposed upon absentee landlords was absent and, therefore, summary judgment was improper.

A more novel, but ultimately unsuccessful, attempt to establish a homeowner’s duty was the subject of *Ramirez v. Nelson* (2008) 44 Cal.4th 908. In *Ramirez*, a worker for an unlicensed contractor hired by the defendant homeowners to trim trees at their residence was electrocuted when his polesaw came in contact with an overhead high voltage line. The decedent’s heirs brought a wrongful death action against the homeowners, alleging they negligently failed to keep their property in a

reasonably safe condition, and failed to warn the contractor or his workers, including the decedent, about the hazardous condition presented by the high voltage power lines adjacent to their trees.

In support of their claim of duty, the plaintiffs made reference to Penal Code §385, subdivision (b), that makes it a misdemeanor for any person, either personally or through an employee, to move any tool or equipment within six feet of a high voltage overhead line. The plaintiffs then argued that Penal Code §385(b) sets forth a special duty of care with regard to the use of tools or equipment in close proximity to high voltage lines; that such duty was violated given that the decedent's polesaw came in contact with the power lines, causing his electrocution; and that if the decedent is found to have been the homeowners' "employee" at the time of the fatal accident because the contractor was unlicensed (see Labor Code §2750.5; *State Compensation Ins. Fund v. Workers' Comp. Appeals Bd.* (1985) 40 Cal.3d 5, 15), the defendant homeowners were vicariously liable for breach of that duty under the express terms of the statute. Following a defense verdict and a reversal by the court of appeal on the Penal Code §385(b) issue, the Supreme Court granted review to address whether that section sets forth a statutory duty of care owed by the defendant homeowners to the decedent. The Supreme Court concluded it did not. *Ramirez v. Nelson, supra*, 44 Cal.4th at 919. Penal Code §385(b), the court decided, was intended to prevent inadvertent contact with power lines and to make an employer vicariously liable for injuries to **a third person** caused by violations of that section by an employee of the employer. *Ramirez, supra*, at 919. It was not, however, designed to provide a separate duty of care by the employer to the **employee** who violates Penal Code §385(b). *Id.* The construction urged by the plaintiff would make "defendant homeowners vicariously liable in tort for the worker's own negligent acts or omissions which themselves violated the statute and proximately caused his fatal injuries." *Id.*

The final decision I wanted to address is *Padilla v. Rodas* (2008) 160 Cal.App.4th 742, a tragic case in which a two-year-old child drowned in the backyard pool of the homeowners when his parent left him unattended for about five minutes. The parent of the child brought a wrongful death action for negligence against the homeowners, asserting negligent supervision and premises liability based on an allegedly defective gate. The trial court granted the homeowners' summary judgment motion on the grounds that (1) they owed no duty, and breached no duty, of supervision, and (2) the parent could not establish that the absence of a self-latching closing mechanism on the gate at one of the entrances to the pool area was a cause of the accident because it was speculative as to whether the child entered the pool area through the gate or through one of the other points of access to the pool.

The appellate court affirmed, agreeing that a homeowner has no duty to supervise a child in the vicinity of a residential swimming pool when the child's parent is also present. *Padilla v. Rodas, supra*, at 748, 753. Examining the *Rowland* factors, the court of appeal noted that it was not necessarily foreseeable that the child's own parent would abandon him for some period of time and also concluded that imposing such a duty on homeowners would "unreasonably burden social and family relationships." *Id.* Accordingly, the court declined to find a duty on the part of the homeowners. *Id.* at 751-752.