THE AD HOC DUTY: A LANDOWNER'S DUTY TO PROTECT AFTER *DEL LAGO PARTNERS V. SMITH*

Scott W. Weatherford*

I. INTRODUCTION

"*The land possessor who simply wants to be sure to avoid any exposure to liability is left without guidance.*"[1]

A plaintiff is wronged if "she is harmed when the defendant breaches a social convention whose purpose is to protect people like the plaintiff from that kind of harm."[2] A judge's role in this analysis is to recognize the "community's coordinating conventions or practices."[3] Community's standards of coordinating behavior "may be developed so that certain goods can be achieved by some, or certain evils can be avoided by others, if everyone follows the practice."[4] In *Del Lago Partners v. Smith*, the Texas Supreme Court ignored this practice and clouded a dynamic area of law that is desperate for clarity.[5]

In *Del Lago*, the Court held a premises owner liable for failing to protect a drunken fraternity member from getting involved in a melee that had broken out throughout a bar.[6] The bar owner had a legal duty, the Court said, to make the bar reasonably safe, and failed to do so despite the plaintiff being fully aware that a fight was brewing and having ready means available for avoiding all injury.[7] The purpose of this note is not to criticize

*Candidate for J.D., Baylor University School of Law, July 2011; B.A., B.B.A., University of Texas at Austin, 2008. I want to thank my wonderful fiancée, Sam, for her enduring encouragement, guidance, and inspiration. I also want to thank my parents for their unwavering love and support.

[1] Del Lago Partners v. Smith, 307 S.W.3d 762, 796 (Tex. 2010) (Hecht, J., dissenting).

[2] Patrick J. Kelley, *Restating Duty, Breach, and Proximate Cause in Negligence Law: Descriptive Theory and the Rule of Law*, 54 VAND. L. REV. 1039, 1062 (2001).

[3] *Id.*

[4] *Id.*

[5] *See infra* Part IV.A.2.

[6] *Del Lago*, 307 S.W.3d at 777.

[7] *Id.* at 799–800 (Hecht, J., dissenting).

the Court's eventual decision, because, in all likelihood, it is the right decision. Instead, the purpose is to examine the practical effects of the Court's decision to grant review, only to espouse no general rule of law and obfuscate the once-clear law of premises liability.[8] Such an enterprise is irresponsible in light of the Court's duty to recognize community social obligations and craft rules of law consistent with those obligations.[9] The Court's job is "not to offer its musings on the case but to state a clear rule of law, which [the *Del Lago* Court] acknowledges it does not do . . . ."[10] Instead, the Court created an ad hoc duty that is improper in definition and scope.[11] Holding landowners liable for such an impromptu obligation places the fault in the wrong hands and transposes long-held community standards.[12]

Part II of this note provides an introduction to premises-liability law in Texas before the *Del Lago* decision, focusing on the existence and extent of a premises owner's duty. Part III outlines the Texas Supreme Court's decision and opinion in *Del Lago*. Part IV addresses the practical effects the decision will have on premises-liability law and premises owners in Texas. Finally, Part V concludes with a discussion on why the Court's opinion fails in its attempt to define the duty of care owed by premises owners and what, if anything, premises owners can do to uphold this newly-created ad hoc duty.

II. PREMISES-LIABILITY LAW IN TEXAS

Premises liability concerns a landowner's liability for injuries occurring on his property.[13] The concept developed from the law of negligence, in which a defendant's liability depends upon the existence of a duty owed to

[8] *See infra* Part IV.

[9] *See Del Lago*, 307 S.W.3d at 803–04 (Hecht, J., dissenting) ("The Court's job is not to offer its musings on the case but to state a clear rule of law, which it acknowledges it does not do . . . . [A] possessor of land is entitled to know, before injury has occurred, what the law requires and whether he has complied with it.").

[10] *Id.* at 803.

[11] *See infra* Part IV.A.

[12] *See infra* Part V.

[13] 59 TEX. JUR. 3d *Premises Liability* § 1 (2008) ("Premises liability law is the body of law that sets the guidelines involving duties owed by an owner or occupier of real estate to protect persons who enter that real estate from injury because of dangerous conditions and defects.").

the plaintiff.[14] Premises liability thus establishes the duty a landowner owes to persons entering his property.[15]

A. Premises Liability v. Negligence Liability

There are small but important differences between general negligence liability and premises liability in Texas. A landowner may be subjected to liability in two situations: (1) injury arising from a defect that exists on the premises (premises liability); and (2) injury arising from an activity or instrumentality on the premises (negligent-activity liability).[16] In a negligent-activity claim, the injury must have occurred as a result of malfeasance or affirmative contemporaneous conduct by the owner.[17] Alternatively, if the injury was based on nonfeasance, or caused by a latent condition created by an activity rather than the activity itself, a plaintiff claiming negligent activity is limited to a premises-liability theory of recovery.[18] In addition, a plaintiff may pursue a premises-liability claim if the injury was caused by some activity that occurred on the premises earlier and was not ongoing at the time of the injury.[19] In general, a premises-liability claim is more difficult to prove because it requires the additional element of proof that a condition existed on the property at the moment the injury occurred, or, in the alternative, that defendant's negligent activity was not ongoing at the time of the injury.[20] Other than those distinctions, a

[14] 1 TEXAS TORTS & REMEDIES § 20.01 (J. Hadley Edgar, Jr. & James B. Sales eds., rev. ed. 2010).

[15] *See* 59 TEX. JUR. 3d *Premises Liability* § 1 (noting that premises liability law is based on general negligence principles).

[16] Koch Refining Co. v. Chapa, 11 S.W.3d 153, 156 n.3 (Tex. 1999); *see* City of San Antonio v. Estrada, 219 S.W.3d 28, 32 (Tex. App.—San Antonio 2006, no pet.) ("Negligent activity and premises defect are independent theories of recovery. The Texas Supreme Court has explained that recovery on a negligent activity theory requires that the injury be a contemporaneous result of the activity itself rather than by a condition created by the activity."(internal citations omitted)).

[17] *See* Timberwalk Apartments, Partners v. Cain, 972 S.W.2d 749, 753 (Tex. 1998) (stating that failure to provide adequate security on the premises is ordinarily a premises liability claim); Crooks v. Moses, 138 S.W.3d 629, 639 (Tex. App.—Dallas 2004, no pet.) (holding that for the negligent-activity theory of liability to be applicable, the evidence must show that the injuries were directly related to the activity itself).

[18] *Crooks*, 138 S.W.3d at 639 (holding that a lack of contemporaneous activity on the premises precluded victim from prevailing on theory of negligent activity).

[19] Keetch v. Kroger Co., 845 S.W.2d 262, 264 (Tex. 1992) (slip and fall case where premises owner failed to remove an unreasonably dangerous substance from the floor of the store).

[20] An element of a premises liability claim is that the premises owner or occupier knew or

premises-liability claim and a negligent-activity claim require the same elements of duty, breach, and proximate cause.[21]

B. Existence of Duty

Whether a duty exists in a premises-liability case is a question of law for the court and turns on a "legal analysis balancing a number of factors, including the risk, foreseeability, and likelihood of injury, and the consequences of placing the burden on the defendant."[22] Liability may not be imposed merely because the invitee was injured on the premises.[23] Instead, to prove an action for premises liability, the invitee must establish the defendant-landowner knew or should have known of the condition that posed an unreasonable risk of harm.[24] A landowner's knowledge of such a risk of harm can be actual or constructive.[25] Actual knowledge is when the defendant has direct knowledge of the dangerous condition; constructive knowledge is what a person does not actually know but objectively should know or have reason to know.[26]

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reasonably should have known of the dangerous condition before the accident occurred. *Id.* at 268. Therefore, subsumed within this element is the requirement that a dangerous condition existed on the property. Also, to recover based on the theory of premises liability, the injury must have been caused by the condition, albeit created by a negligent activity, rather than by the negligent activity itself. *Crooks*, 138 S.W.3d at 639. On the other hand, under the theory of negligent activity, the claimant must only show that the injury directly related to the activity itself. *Id.*

[21] *See* Tab H. Keener, *Can the Submission of a Premises Liability Case Be Simplified?*, 28 TEX. TECH. L. REV. 1161, 1162–63 (1997).

[22] Gen. Electric Co. v. Moritz, 257 S.W.3d 211, 216–18 (Tex. 2008) (noting that "'[t]he reasonableness of an actor's conduct under the circumstances will be determined under principles of contributory negligence'" and not under the existence of a legal duty. The Texas Supreme Court made it clear that the determination of whether or not the premises owner owed a legal duty does not involve an analysis of the plaintiff's own comparative fault or contributory negligence.).

[23] Dickson v. J. Weingarten, Inc., 498 S.W.2d 388, 389 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ).

[24] *See* LMB, Ltd. v. Moreno, 201 S.W.3d 686, 688 (Tex. 2006) (including a defendant-landowner's "actual or constructive knowledge of some condition on the premises" as a required element of a premises liability claim).

[25] Corbin v. Safeway Stores, 648 S.W.2d 292, 295 (Tex. 1983) ("[W]hen an occupier has actual or constructive knowledge of any condition on the premises that poses an unreasonable risk of harm to invitees, he has a duty to take whatever action is reasonably prudent under the circumstances to reduce or to eliminate the unreasonable risk from that condition.").

[26] *See id.* ("The occupier is considered to have constructive knowledge of any premises defects or other dangerous conditions that a reasonably careful inspection would reveal.").

As a general rule, a premises owner has no duty to protect invitees from criminal acts by third parties because the owner does not have actual knowledge of the imminent criminal conduct.[27] An exception to this rule applies when the owner knows or has reason to know of a risk of harm to invitees that is unreasonable and foreseeable.[28] In addressing whether a risk of criminal harm is foreseeable, courts should consider factors such as whether "any criminal conduct previously occurred on or near the property, how recently it occurred, how often it occurred, how similar the conduct was to the conduct on the property, and what publicity was given the occurrences to indicate that the landowner knew or should have known about them."[29]

In *Timberwalk Apartments, Partners v. Cain*, the Texas Supreme Court addressed the circumstances under which a property owner could be held liable for failing to prevent a crime against an invitee.[30] Implementing the factors espoused above, they noted, "crime is increasingly random and violent and may possibly occur almost anywhere," and rejected the general duty to protect guests whenever crime might occur, because such a duty "would be universal."[31] Instead, courts must decide whether such a duty exists by using a framework to determine what the premises owner knew or should have known before the criminal act occurred.[32]

C. Extent of Duty

When a duty exists, the nature and extent of that duty a landowner owes to entrants on the property depends on the entrant's characterization.[33] An entrant can be characterized as an invitee, licensee, or trespasser.[34] For

[27] *See* Timberwalk Apartments, Partners v. Cain, 972 S.W.2d 749, 756 (Tex. 1998).

[28] *Id.*

[29] *Id.* at 757. The Texas Supreme Court now refers to these factors as the "*Timberwalk* factors." *See, e.g.*, Del Lago Partners v. Smith, 307 S.W.3d 762, 768 (Tex. 2010).

[30] 972 S.W.2d at 751 (involving an apartment tenant that was sexually assaulted in her apartment, suing the landlord for failure to provide adequate security).

[31] *Id.* at 756 ("If a landowner had a duty to protect people on his property from criminal conduct whenever crime *might* occur, the duty would be universal." (emphasis in original)).

[32] *Id.* at 757 (noting that the Timberwalk factors are used to determine this very inquiry).

[33] W. Invs., Inc. v. Urena, 162 S.W.3d 547, 550 (Tex. 2005) (noting that another difference between negligence and premises liability is that the duty in a premises action depends on the characterization of the plaintiff).

[34] Gailey v. Mermaid Pools of El Paso, 322 S.W.3d 346, 348 (Tex. App.—El Paso 2010, pet. denied).

purposes of this note, the analysis will only include the law as it applies to invitees. A property owner owes invitees a duty to use ordinary care to reduce or eliminate an unreasonable risk of harm created by a premises condition about which the property owner knew or should have known.[35] A property owner can reduce or eliminate such an unreasonable risk of harm either by adequately warning the invitee of the dangerous condition or making the condition reasonably safe.[36]

Prior to 1978, a plaintiff-invitee was required to prove that they had no knowledge of the dangerous condition that existed on the premises.[37] This requirement originates from the Restatement (Second) of Torts § 343, which states, "A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them."[38] In other words, this no-duty rule held that a premises owner has no-duty to reduce or eliminate open and obvious dangers which an invitee has or should have knowledge of.[39] In 1978, however, the Texas Supreme Court abolished the no-duty rule, holding that a landowner's duty is to be evaluated under general negligence principles.[40] The issue of whether the plaintiff-invitee knew or should have known of an open and obvious condition is now relevant to the issue of the plaintiff's contributory negligence, but does not eliminate the owner's duty of care altogether.[41] Therefore, the plaintiff's own decision to confront a known

[35] *W. Invs.*, 162 S.W.3d at 550.

[36] Del Lago Partners v. Smith, 307 S.W.3d 762, 771 (Tex. 2010). In general, the unreasonable risk of harm can be avoided by an exercise of "ordinary care" in an effort to protect the invitee. Fort Brown Villas III Condo. Ass'n v. Gillenwater, 285 S.W.3d 879, 883 (Tex. 2009).

[37] *See* Adam Dante Corp. v. Sharpe, 483 S.W.2d 452, 455 (Tex. 1972), *abrogated by* Parker v. Highland Park, Inc., 565 S.W.2d 512, 516–17 (Tex. 1978) (holding that the plaintiff has the burden to prove the existence of a legal duty, including the "burden to prove that [the plaintiff] did not possess actual knowledge of the danger, that [the plaintiff] did not fully appreciate the nature and extent of the danger, and that the danger complained of was not so open and obvious as to charge [the plaintiff], as a matter of law, with such knowledge and appreciation").

[38] *Del Lago Partners*, 307 S.W.3d at 797 (citing RESTATEMENT (SECOND) OF TORTS § 343 (1965)). The comments clarify that the "possessor is under no duty to protect the licensee against dangers of which the licensee knows or has reason to know." RESTATEMENT (SECOND) OF TORTS § 343 cmt. b.

[39] *See, e.g.*, Halepeska v. Callihan Interests, Inc., 371 S.W.2d 368, 378 (Tex. 1963).

[40] Parker v. Highland Park, Inc., 565 S.W.2d 512, 517 (Tex. 1978).

[41] *Id.* at 521. ("A plaintiff's knowledge, whether it is derived from a warning or from the facts, even if the facts display the danger openly and obviously, is a matter that bears upon his own negligence; it should not affect the defendant's duty.").

open and obvious danger is still a potential bar to recovery, but only if the plaintiff's percentage of responsibility for the injury is greater than fifty percent.[42]

The resolution of issues regarding a plaintiff's confrontation of known and obvious dangers, along with a landowner's general duty to protect against such a confrontation, were crucial to the *Del Lago* decision.[43]

III. *DEL LAGO PARTNERS, INC. V. SMITH*

The Texas Supreme Court based its narrow holding on a specific set of facts surrounding a brawl that occurred at the Del Lago resort on the shores of Lake Conroe.[44]

A. Background

The 300-acre Del Lago resort contained a bar staffed with a security force that included two off-duty law enforcement officers and a loss-prevention officer.[45] On the night of the incident, fraternity members and guests attended a reception and dinner before going to the bar, which was "very busy."[46] Later that evening, a group of ten to fifteen mostly male members of a wedding party entered the bar.[47] Immediately there was "tension in the air" between the fraternity and the wedding party that grew as the night went on.[48] Confrontations soon began, involving "cursing, name-calling, and hand gestures."[49] Eventually, men from each party squared up to each other, with "'veins popping out of people's foreheads.'"[50] Of the roughly seven employees working at the bar that evening, all testified that the men from both parties were "'very

[42] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 33.001 (West 2009).

[43] *See Del Lago*, 307 S.W.3d at 766, 777 (holding a landowner liable for plaintiff's injuries even though those injuries were a direct result of the plaintiff's confrontation of a known danger).

[44] *Id.* at 764–66.

[45] *Id.* at 765.

[46] *See id.*

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.*

intoxicated.'"[51] Several other confrontations occurred that included pushing, shoving, cursing, yelling, and several "'very tense'" moments.[52]

After almost ninety minutes of these heated altercations, the brawl erupted when the bar staff attempted to close down the bar.[53] The members of the two parties refused to leave, and the staff attempted to form a "loose line to funnel the customers toward a single exit."[54] Suddenly, "'all heck broke loose'" as "punches, bottles, glasses and chairs [were] thrown, and bodies [were] 'just surging. '"[55] The plaintiff, Smith, was standing against a wall observing the fight when he saw his friend being shoved to the floor in the middle of the melee.[56] Smith "waded into the scrum" to remove him, but an unknown person grabbed him and threw him up against a wall.[57] Smith's head hit a stud on the wall, and he suffered severe injuries including a skull fracture and brain damage.[58]

Smith brought a premises-liability suit against Del Lago, and a jury allocated fault at 51-49 percent in favor of Smith.[59] Smith was awarded a net amount of $1,478,283 plus interest and costs, and the divided court of appeals affirmed.[60] The Texas Supreme Court granted discretionary review.[61]

B. Premises Liability v. Negligence Liability

Smith brought the case against Del Lago under premises-liability and negligent-activity theories.[62] However, Del Lago objected to the submission of a negligent-activity theory.[63] The trial court agreed, and only submitted a premises-liability question to the jury.[64] The Court would not

[51] *See id.*

[52] *See id.* at 765–66.

[53] *Id.* at 766.

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *See id.*

[58] *Id.*

[59] *Id.* at 767.

[60] *Id.*

[61] *See* Del Lago Partners v. Smith, 206 S.W.3d 146 (Tex. App.—Waco 2006), *aff'd*, 307 S.W.3d 762 (Tex. 2010).

[62] *See Del Lago*, 307 S.W.3d at 775.

[63] *Id.*

[64] *Id.*

raise the issue on review because Del Lago itself persuaded the trial court not to submit the claim to the jury.[65]

The Court did, however, examine the issue notwithstanding the lack of preservation, noting that the case was properly submitted on a premises-liability theory.[66] The Court noted that it has repeatedly treated cases involving claims of inadequate security as premises-liability cases.[67] Smith "primarily complained of Del Lago's nonfeasance—its failure to remedy an unreasonably dangerous condition for ninety minutes and failure to react promptly once the fight started."[68] And although Smith did complain of some affirmative conduct, such as funneling the patrons through a single exit before the fight erupted, Del Lago argued that this evidence did not support a negligent-activity claim.[69]

C. Holding

Consequentially, the Texas Supreme Court analyzed the case only under the theory of premises liability.[70] The main issues on review were: (1) whether Del Lago owed a duty of reasonable care to protect Smith; and (2) whether Del Lago breached that duty by failing to warn of the danger or make the danger reasonably safe.[71]

1. Duty

Del Lago's principal argument was that it had no duty to protect Smith from being assaulted by another bar patron.[72] The Court preemptively asserted that it "ha[d] not held that a bar proprietor always or routinely has a duty to protect patrons from other patrons, and [does] not so hold today."[73] The Court cited to the Restatement (Second) of Torts[74], which states:

[65] *Id.*
[66] *Id.* at 776.
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *See id.*
[71] *See id.* at 770–71.
[72] *Id.* at 767.
[73] *Id.*
[74] *Id.* at 769.

> Since the [landowner] is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring, or are about to occur . . . . [If] he should reasonably anticipate . . . criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it . . . .[75]

Because tensions had been rising in the bar due to ninety minutes of heated altercations between two very intoxicated parties, it was foreseeable that a fight might eventually break out.[76] The employees working the bar at Del Lago observed the verbal and physical hostility in the bar and had actual and direct knowledge that a violent brawl was imminent.[77] A security officer testified that in a bar with a rowdy atmosphere, removal of aggressive patrons is warranted because verbal confrontations "can escalate into a fight."[78] In addition, fraternity members testified that a fight was not unexpected but merely "a matter of time" and "very, very obvious."[79] Because a property owner, "by reason of location, mode of doing business, or observation or past experience, should reasonably anticipate criminal conduct on the part of third persons, . . . [the owner] has a duty to take precautions against it."[80] As a result, the Court held that because Del Lago and its employees were aware of the "unreasonable risk of harm to invitees" that night, they had actual knowledge of imminent criminal conduct and therefore had "a duty to take whatever action [that was] reasonably prudent" to reduce or eliminate that risk.[81]

2. Breach

Del Lago next asserted that, assuming it had a duty to Smith, there was not legally sufficient evidence to establish a breach of that duty.[82] A breach of duty occurs if the premises owner either fails to adequately warn of the

[75] RESTATEMENT (SECOND) OF TORTS § 344, cmt. f (1965).

[76] *Del Lago*, 307 S.W.3d at 769.

[77] *Id.*

[78] *Id.* at 768.

[79] *Id.* at 769.

[80] *Id.* (quoting Exxon Corp. v. Tidwell, 867 S.W.2d 19, 21 (Tex. 1993)).

[81] *Id.* (quoting Corbin v. Safeway Stores, Inc., 648 S.W.2d 292, 295 (Tex. 1983)).

[82] *Id.* at 770.

dangerous condition or make the condition reasonably safe.[83] The Court concluded that the jury could have reasonably found Del Lago breached its duty for a number of reasons, including: (1) Del Lago failed to monitor and intervene during the obviously escalating confrontations; (2) the bar personnel were not provided with the training and adequate information needed to resolve the escalating situation; and (3) the front desk failed to immediately notify security of the fight when they were informed of it.[84] In short, "Del Lago's own conduct that night did nothing to decrease the danger and much to promote it."[85]

Finally, the Court easily dismissed the challenge to causation,[86] and, again, avoided announcing a general rule or proclamation:

> One need not believe that Del Lago has a universal duty to insure patrons' safety against all third-party crimes, or that prior criminal activity at Del Lago imposed a duty to post security guards in the bar at all times, in order to accept that on *this* record *this* sequence of conduct on *this* night in *this* bar could foretell *this* brawl.[87]

The Court affirmed the court of appeals, which upheld the jury verdict for the plaintiff,[88] which begs the question, "Why grant review in the first place?"

IV. PRACTICAL IMPLICATIONS

The Texas Supreme Court jumped over numerous hurdles and dodged frequent bullets to uphold the court of appeals, and seemingly announces no rule of law, as the Court admitted: "We do not announce a general rule today."[89] So why would the state's highest court grant review to announce no general rule?[90] The Texas Supreme Court acts under the Rules of

[83] *See id.* at 771.

[84] *Id.* at 771–72.

[85] *Id.* at 774.

[86] *See id.* at 774–77.

[87] *Id.* at 777.

[88] *Id.*

[89] *Id.* at 770.

[90] *See* David Weiner, *With Colorful Language, High Court Upholds Plaintiff's Win, Out of Order*, TEXAS LAWYER, Apr. 19, 2010, at 30 ("If the 6-3 court was not breaking any new legal ground, why did it write at all when it simply could have denied review and reached the same result without further fanfare.").

Appellate Procedure only on questions of law coming within its statutory jurisdiction and presented for review in the petition for review.[91] The statutory basis for this case lies in Texas Government Code Section 22.001, which states, "The supreme court has appellate jurisdiction . . . extending to all questions of law arising in . . . a case in which the justices of a court of appeals disagree on a question of law material to the decision."[92] After Smith was awarded a jury verdict, Del Lago appealed to the Waco Court of Appeals.[93] The court's opinion, which affirmed the jury verdict,[94] contained a lone dissent from Chief Justice Gray, who disagreed with the court's application of the *Timberwalk* factors and believed that "Del Lago did not owe a legal duty to Smith to protect him from the criminal acts of a third party."[95] Because of Justice Gray's dissenting opinion, the Texas Supreme Court had the option to exercise discretionary review.

Since *Timberwalk*, the Texas Supreme Court has a history of only granting review in premises-liability cases when it intends to reverse the pro-plaintiff jury verdict.[96] Not only did the state's highest appellate court grant review to affirm Smith's favorable jury verdict, it did so despite three biting dissenting opinions and numerous alternative avenues of disposal.[97] In addition, despite the Court's attempt to avoid announcing a general rule of law and merely set narrow precedential value, it created an unsettling rule of duty that could have easily been avoided altogether.

[91] *See* McCauley v. Consol. Underwriters, 157 Tex. 475, 478, 304 S.W.2d 265, 266 (1957); City of Deer Park v. State *ex rel.* Shell Oil Co., 154 Tex. 174, 186, 275 S.W.2d 77, 84 (1954).

[92] *See* TEX. GOV'T CODE ANN. § 22.001(a) (West 2009).

[93] *See* Del Lago Partners v. Smith, 206 S.W.3d 146 (Tex. App.—Waco 2006), *aff'd*, 307 S.W.3d 762 (Tex. 2010).

[94] *Id.*

[95] *See id.* at 167.

[96] *See* Trammell Crow Cent. Tex., Ltd. v. Gutierrez, 267 S.W.3d 9, 10–11 (Tex. 2008) (reversing jury verdict because the premises owner had no duty to protect against criminal acts of third parties); Wal-Mart Stores, Inc. v. Reece, 81 S.W.3d 812, 813 (Tex. 2002) (reversing jury verdict because the premises owner had no actual or constructive knowledge of the condition); CMH Homes, Inc. v. Daenen, 15 S.W.3d 97, 98 (Tex. 2000) (reversing jury verdict because risk of harm was not unreasonable); State v. Miguel, 2 S.W.3d 249, 250 (Tex. 1999) (reversing jury verdict because state's decision not to warn was a discretionary act protected by sovereign immunity); H.E. Butt Grocery Co. v. Resendez, 988 S.W.2d 218, 218 (Tex. 1999) (reversing jury verdict because there was no evidence of unreasonable risk of harm).

[97] *See generally* Del Lago Partners v. Smith, 307 S.W.3d 762 (Tex. 2010) (examining four different issues: legally sufficient duty, breach, and causation; and whether or not the case was properly tried as a premises liability claim, but affirming the court of appeal's judgment on all).

A. Ad Hoc Duty

The long-standing law has been that a premises owner has a duty to protect invitees from acts by third parties when the owner has actual or constructive knowledge of the imminent criminal conduct.[98] An owner will have actual or constructive knowledge of imminent criminal conduct when the owner knows or has reason to know of a risk of harm to invitees that is unreasonable and foreseeable.[99] In *Timberwalk*, the Court delineated the factors to be used to examine whether or not a premises owner had constructive knowledge of the risk of imminent harm.[100] In analyzing whether or not Del Lago had a duty to protect Smith from the results of the fight, however, the Court agreed with Justice Gray and ignored the *Timberwalk* factors, finding them inapplicable to the case because they are only used when the premises owner has no direct knowledge that criminal conduct is imminent.[101] Instead, the Court examined the nature and character of the premises and the contemporaneous indications of risk.[102] The nature and character of the premises was the ultimate factor relied upon to determine whether or not Del Lago had actual, not constructive knowledge of the imminent harm.[103] Such a factor, the Court reasoned, can make future criminal activity more foreseeable to premises owners.[104] In

[98] *See supra* Part II.B.

[99] Timberwalk Apartments, Partners v. Cain, 972 S.W.2d 749, 756 (Tex. 1998).

[100] *See id.* at 757 ("In determining whether the occurrence of certain criminal conduct on a landowner's property should have been foreseen, courts should consider whether any criminal conduct previously occurred on or near the property, how recently it occurred, how often it occurred, how similar the conduct was to the conduct on the property, and what publicity was given the occurrences to indicate that the landowner knew or should have known about them.").

[101] *Del Lago*, 307 S.W.3d at 768 ("The *Timberwalk* factors—proximity, recency, frequency, similarity, and publicity—guide the courts in situations where the premises owner has no direct knowledge that criminal conduct is imminent, but the owner may nevertheless have a duty to protect invitees because past criminal conduct made similar conduct in the future foreseeable."). In addition, the *Timberwalk* factors are not exclusive in making a foreseeability determination. *Id.*

[102] *See id.* at 768–69 (noting that "[t]he *Timberwalk* factors are not the only reasons that a criminal act might be deemed foreseeable"). Other courts have noted that the consideration of "other types of evidence" besides "similar incidents in the immediate vicinity" should be allowed in making foreseeability determinations. *Timberwalk*, 972 S.W.2d at 759 (Spector, J., concurring); *see also* Mellon Mortg. Co. v. Holder, 5 S.W.3d 654, 665 (Tex. 1999) (Baker, J., concurring) (stating that "the *Timberwalk* factors are not exclusive").

[103] *See Del Lago*, 307 S.W.3d at 768–69.

[104] *Id.* at 768.

addition, the Court noted, "[C]riminal misconduct is sometimes foreseeable because of immediately preceding conduct."[105]

Therefore, under *Timberwalk*, Del Lago did not, at the outset of the night, owe a duty to protect Smith from imminent criminal conduct due to recent, similar, public, or reoccurring criminal conduct that previously occurred on or near the property.[106] Instead, such a duty arose at some point during the night based on the immediate circumstances present in the bar, whenever Del Lago became actually aware of the threat of harm.[107] Essentially, the Court created an "ad hoc" duty to protect invitees that can arise at the spur of a moment's notice to any premises owner.[108]

Facially, the rule sounds relatively harmless: "a property owner . . . with actual and direct knowledge that violence is imminent has a duty to protect an invitee from imminent assaultive conduct by a fellow patron."[109] Theoretically and practically, however, the rule carries troubling concerns and may present property owners with disconcerting results.

1. A Rule in Conflict with Premises Liability

First, the Court has created a rule for a premises-liability claim that does not fit with the typical premises liability analysis. The basis for a premises-liability claim is a physical defect or condition on property.[110] Recovery on a negligent-activity theory, on the other hand, requires that "the person have been injured by or as a contemporaneous result of the activity itself rather

[105] *Id.* at 769.

[106] By holding the *Timberwalk* factors to be inapplicable, Del Lago's duty could not have arisen as a result of these circumstances. As such, the court should not have considered the fact that a fight had broken out in the same bar on the previous night. *See id.* at 768–69 (stating that, "Del Lago's duty arose not because of prior similar criminal conduct . . . .").

[107] *See id.* at 769 ("We hold that Del Lago had a duty to protect Smith because Del Lago had actual and direct knowledge that a violent brawl was imminent between drunk, belligerent patrons and had ample time and means to defuse the situation. Del Lago's duty arose not because of prior similar criminal conduct but because it was aware of an unreasonable risk of harm at the bar that very night.").

[108] *See id.*

[109] West v. SMG, 318 S.W.3d 430, 439 (Tex. App.—Houston [1st Dist.] 2010, no pet.). In *West*, the court also explained that the *Del Lago* court "recognized that criminal conduct may become foreseeable because of immediately preceding conduct." *Id.*

[110] *See* Kallum v. Wheeler, 101 S.W.2d 225, 229 (Tex. 1937) (Where decayed wooden floors gave way injuring a guest, the Court held "it appears to be settled in this state that one in possession of premises is under a duty to exercise ordinary care to make them safe . . . .").

than by a condition created by the activity."[111] Here, Smith's case turns on the alleged contemporaneous acts and omissions of Del Lago.[112] The Court fully admitted that Del Lago's duty did not arise until immediately before the fight broke out, when the bar owners became directly aware that such a fight was imminent.[113] Del Lago did not become aware of a defective condition on the property, but rather its duty was based on the conduct of people, namely, its employees.[114]

Moreover, the nature and existence of this ad hoc duty fits more appropriately within the context of negligent activity instead of premises liability because the existence of the ad hoc duty depends on contemporaneous activity of people, and "negligent activity cases arise from contemporaneous actions or omissions in the conduct of people."[115] Due to the strict timing requirements that form the basis for the duty,[116] this would indicate that when the ad hoc duty arises, it necessarily indicates a duty to prevent contemporaneous negligent activity, and not to protect against a defective condition on the property.[117] Previous courts have recognized that similar situations give rise to negligent-activity claims, not premises-liability claims.[118] Because of the Court's creation of this duty within the context of a premises-liability charge, "it opens almost any negligence dispute involving contemporaneous activities to being tried as a premises case," thus blurring the line between the two actions even further.[119]

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[111] Timberwalk Apartments, Partners v. Cain, 972 S.W.2d 749, 753 (Tex. 1998).

[112] *Del Lago*, 307 S.W.3d at 787 (Wainwright, J., dissenting).

[113] *Id.* at 769 (majority opinion).

[114] *Id.* at 788 (Wainwright, J., dissenting) ("Smith's case is about the conduct of people at the bar, but the trial court's charge defines negligence '[w]ith respect to the condition of the premises' . . . . [even though] Smith did not identify any defective or dangerous physical condition of the premises.").

[115] *Id.*

[116] As evidenced by the Court's declaration that Del Lago's duty arose based on immediately preceding conduct, and only when it became actually aware of such conduct. *Id.* at 769 (majority opinion).

[117] *See id.* (holding that Del Lago had a duty to protect Smith by defusing the brawl, although the duty had not arisen from a prior history of such incidents).

[118] *See* E. Tex. Theatres, Inc. v. Rutledge, 453 S.W.2d 466, 467–68 (Tex. 1970) (treating the failure to remove rowdy patrons before one such patron allegedly threw a bottle injuring another patron in a theatre as a negligent activity claim).

[119] *Del Lago*, 307 S.W.3d at 791 (Wainwright, J., dissenting).

Moreover, this ad hoc duty is further disconnected from premises-liability situations because one of the methods for avoiding premises liability is insufficient to uphold the ad hoc duty created by the Court. A possessor of land has long been able to discharge his duty to protect an entrant from a condition that poses an unreasonable risk of harm by giving an adequate warning or making the condition reasonably safe.[120] However, the Texas Supreme Court noted in *Del Lago* that in some circumstances, no warning can be adequate.[121] In effect, the rule is now "an adequate warning discharges a land possessor's duty except in circumstances when any warning hardly seems adequate."[122] Such a circumstance existed in *Parker v. Highland Park, Inc.*[123] In *Parker*, a woman tripped and fell at night in an unlit stairwell while leaving her apartment.[124] It was obvious that the stairwell was dark and potentially dangerous, and no warning of tripping in the dark would have kept the woman from falling.[125] The situation in *Parker* was one in which the only way to adequately uphold the duty imposed on the premises owner was to make the condition reasonably safe.[126] However, the ad hoc duty espoused by the Court in *Del Lago* is different from *Parker* because, in *Parker*, the woman had no alternatives; she could see the danger posed by the unlit stairwell but had to get down the steps somehow.[127] In *Del Lago*, Smith could easily have avoided injury from the fight by leaving early or through another exit, options that were not available to the plaintiff in *Parker*.[128]

[120] State v. Williams, 940 S.W.2d 583, 584 (Tex. 1996) (per curiam).

[121] *Del Lago*, 307 S.W.3d at 771 n.32 (noting that "in some circumstances no warning can adequately substitute for taking reasonably prudent steps to make the premises safe").

[122] *Id.* at 796 (Hecht, J., dissenting).

[123] 565 S.W.2d 512 (Tex. 1978).

[124] *Id.* at 514.

[125] *See id.* (The stairway was in total darkness and the plaintiff along with a friend tried using a flashlight to light up the steps, hence the plaintiff was clearly aware of the condition and the danger it posed.).

[126] *See id.* at 513 (The jury found that the plaintiff had received warning of the danger as she proceeded down the stairs; however, the court still affirmed the judgment imposing liability on the premises owner for being negligent in not causing the stairs to be properly lighted.).

[127] *See id.* at 513–14 (not making any suggestion that the plaintiff had any alternative other than taking the stairs). Moreover, in *Williams*, the court recognized that the availability of an alternative and the urgency for attempting to reach a destination were relevant considerations, albeit to determine whether someone's conduct, after possessing full knowledge of the danger, could be deemed negligent. *Id.* at 520.

[128] Del Lago Partners v. Smith, 307 S.W.3d 762, 796 (Tex. 2010) (Hecht, J., dissenting).

Therefore, when the ad hoc duty arises, a warning is insufficient to avoid liability even when the plaintiff could have averted the known danger altogether. This premise is completely inapposite to prior premises-liability law, which has held that a defendant is "not negligent unless it *both* failed to adequately warn [the plaintiff] and failed to make the condition reasonably safe."[129] This discrepancy could have been avoided under a proper negligent-activity analysis, which asks whether or not the defendant exercised the same ordinary care that a reasonably prudent person would have in the same or similar circumstances.[130]

2. Implications for Premises Owners

That the only method to avoid premises liability arising from the *Del Lago* ad hoc duty is to make reasonably safe a condition that was created by the conduct of patrons and completely avoidable on their behalf is but one practical concern for landowners.[131] Theoretically, the Court stated that "[w]e have not held that a bar proprietor always or routinely has a duty to protect patrons from other patrons, and do not so hold today."[132] Alternatively, the Court indicated that it had also not held that "a duty to protect the clientele necessarily arises when a patron becomes inebriated, or when words are exchanged between patrons that lead to a fight . . . ."[133] Unfortunately for premises owners, the Court failed to make clear when such an ad hoc duty actually arises, other than using vague references to "immediately preceding conduct" and reasonable foreseeability.[134]

Due to the lack of a clear rule of law, premises owners, and especially bar owners, will find themselves without any clear guidance on how best to protect themselves from liability.[135] Must there be a security guard within

[129] *Id.* at 779 (Johnson, J., dissenting) (emphasis in original) (quoting State v. Williams, 940 S.W.2d 583, 584 (Tex. 1996) (per curiam)).

[130] *See* Sibai v. Wal-Mart Stores, Inc., 986 S.W.2d 702, 707 (Tex. App.—Dallas 1999, no pet.).

[131] *See supra* Part IV.A.1.

[132] *Del Lago*, 307 S.W.3d at 767.

[133] *Id.*

[134] *See id.* at 769 ("[C]riminal misconduct is sometimes foreseeable because of immediately preceding conduct.").

[135] *See id.* at 803–04 (Hecht, J., dissenting) ("The Court's job is not to offer its musings on the case but to state a clear rule of law, which it acknowledges it does not do . . . . [A] possessor of land is entitled to know, before injury has occurred, what the law requires and whether he has complied with it.").

the bar at all times?[136] How many?[137] How well-trained and experienced must the security guard be?[138] At what point during heated altercations is the security guard required to intervene?[139] Must bar employees be trained in crowd-management and conflict resolution techniques?[140] "[T]he law does not require premises owners to take draconian measures to prevent all unlikely but theoretically conceivable types of crime."[141] To require such measures would be neither feasible nor desirable "because of both the additional cost and the chilling effect it could have on the activities of invitees."[142]

Moreover, the consequences of placing the burden of the ad hoc duty on a premises owner demonstrate the questionable nature of the duty itself. The existence of a duty is often determined by evaluating the burdens imposed on the premises owner.[143] The most precise way to formulate the negligence standard involves determining whether the burden of precaution is less than the magnitude of the accident, if it occurs, multiplied by the probability of occurrence.[144] For example, if a premises owner could easily

[136] *See id.* at 793 (Wainwright, J., dissenting) (discussing the unreasonably large cost of a stationary guard).

[137] *See, e.g.*, *id.* (Del Lago had three security personnel.).

[138] *See, e.g.*, *id.* (Two of Del Lago's security personnel were "experienced and well-trained" off-duty police officers, with a combined fifty years of police experience, and the security director was a twenty-year veteran fireman and paramedic.).

[139] *See id.* at 795 (arguing that "'[t]ensions' between bar patrons alone do not constitute an unreasonably dangerous situation").

[140] *See, e.g.*, *id.* at 793 (Two of Del Lago's security personnel were experienced off-duty police officers and the security director was a twenty-year veteran fireman and paramedic.).

[141] *Id.*; *see* Boren v. Worthen Nat'l Bank of Ark., 921 S.W.2d 934, 941–42 (Ark. 1996); Timberwalk Apartments, Partners v. Cain, 972 S.W.2d 749, 756 (Tex. 1998).

[142] *Del Lago*, 307 S.W.3d at 793 (Wainwright, J., dissenting).

[143] *See* Trammell Crow Cent. Tex., Ltd. v. Gutierrez, 267 S.W.3d 9, 18 (Tex. 2008) (Jefferson, C.J., concurring); Gen. Electric Co. v. Moritz, 257 S.W.3d 211, 218 (Tex. 2008); *Timberwalk*, 972 S.W.2d at 759 (Spector, J., concurring); Greater Houston Transp. Co. v. Phillips, 801 S.W.2d 523, 525 (Tex. 1990); *see also* Ann M. v. Pac. Plaza Shopping Ctr., 863 P.2d 207, 212 n.5 (Cal. 1993) (explaining that courts weigh foreseeability of the harm against other factors, including the burden imposed on the premises owner); McClung v. Delta Square L.P., 937 S.W.2d 891, 902 (Tenn. 1996) (holding that duty is determined by balancing the likelihood and gravity of harm against the burden imposed on the premises owner to prevent the harm).

[144] McCarty v. Pheasant Run, Inc., 826 F.2d 1554, 1556 (7th Cir. 1987). This standard is known as the "Hand formula" described by Judge Learned Hand in *United States v. Carroll Towing, Co.*, 159 F.2d 169, 173 (2d Cir. 1947). Expressed algebraically, conduct is negligent if

prevent a certain type of harm, the premises owner has a duty to exercise ordinary care to address the risk.[145] On the other hand, if the burden of preventing the harm is unacceptably high, there is no duty.[146] The Court in *Del Lago* has placed an impossibly high burden on premises owners across the state with this vague and amorphous ad hoc duty.[147] Not only are premises owners left without guidance in determining at what point during an altercation the ad hoc duty actually arises, but the Court is equally unclear in explaining what the premises owner must do to act reasonably and within the ordinary standard of care when the duty does arise.

In the landmark case of *Palsgraf v. Long Island R.R.*, dissenting Justice Andrews wrote, "Every one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others."[148] Texas law does not define duty so expansively; a duty arises instead "from risks of harm that are both foreseeable and not unreasonable for premises owners to prevent."[149] The ad hoc duty in *Del Lago* arose from a risk of harm that only became foreseeable moments before the injury occurred[150] and requires unreasonable, and sometimes impossible, methods to prevent.[151]

V. CONCLUSION

The Texas Supreme Court, in all likelihood, determined the correct outcome of the case based on the facts presented in *Del Lago*. However, instead of relying on the ad hoc duty to impose liability, the Court should

B < PL, where B stands for the burden of prevention or avoidance, P stands for the probability of loss, and L stands for the magnitude of the loss that would be avoided with the possible prevention or avoidance. *Id.*

[145] *See Del Lago*, 307 S.W.3d at 792 (Wainwright, J., dissenting).

[146] *See id.*

[147] *See id.* at 793 (arguing that the security measures demanded by the plaintiff impose an inordinate burden on Del Lago).

[148] 162 N.E. 99, 103 (N.Y. 1928)(Andrews, J., dissenting). Chief Justice Cardozo, writing for the majority, held that whether action or inaction is required to prevent harm is a question of duty. *See id.* at 101 (majority opinion).

[149] *Del Lago*, 307 S.W.3d at 794 (Wainwright, J., dissenting).

[150] *See id.* at 769 (majority opinion) (The duty arose at some point during an hour and a half of "escalating tension.").

[151] *See id.* at 793 (Wainwright, J., dissenting) (discussing the extraordinary measures that would have been required to avoid the harm).

have used an analysis grounded in negligent activity,[152] or, if it chose to impose premises liability, a theory based on inadequate security.[153] Instead, the Court created an ad hoc duty that corners premises owners.[154]

As amicus curiae, Mothers Against Drunk Driving noted, and the Court agreed that common sense dictates "intoxication is often associated with aggressive behavior."[155] Yet the Court now requires premises owners to prevent this extremely common threat of aggressive behavior at all times by exercising ordinary care, even when the danger can be fully appreciated and averted by a reasonable person.[156] "At some point, the ordinary care standard must mean something."[157] Ordinary care should not require premises owners to go around the room and tell adults who are in a "bar after midnight and into the wee hours of the morning about what was occurring and that there was potential for a fight."[158] The purpose of premises liability is not to be the ultimate insurer of patron security and insulate from all risk of injury; liability should only attach because an owner failed to do something substantively that caused injury to another, "not because they performed or failed to perform meaningless acts."[159] Premises owners must now, at a moment's notice, protect an entrant from a potentially dangerous condition that any reasonable person could clearly see, fully appreciate, and easily avoid. [160]

[152] The court ultimately chose not to decide the case on the theory of negligent activity because Del Lago did not properly preserve error or raise the issue on appeal. *See id.* at 775–76 (majority opinion).

[153] *See id.* at 796 (Wainwright, J., dissenting) ("This dispute is either a premises liability case for alleged inadequate security . . . or a negligent activity claim based on the contemporaneous acts or omissions of the Del Lago personnel and invitees . . . ."). The court has repeatedly treated cases involving claims of inadequate security as premises-liability cases. *See* Mellon Mortg. Co. v. Holder, 5 S.W.3d 654, 655 & n.3 (Tex. 1999) (plurality opinion) (discussing, in inadequate security case, prior "premises liability cases" and noting that Court's analysis "is complementary, not contradictory, to the traditional premises liability categories"); Timberwalk Apartments, Partners v. Cain, 972 S.W.2d 749, 753 (Tex. 1998) (holding, in inadequate security case, that jury was properly charged under premises-liability theory rather than negligent-activity theory).

[154] *See supra* Part IV.A.

[155] *Del Lago*, 307 S.W.3d at 768.

[156] *See id.* at 782 (Johnson, J., dissenting).

[157] *Id.* at 783.

[158] *See id.*

[159] *Id.* at 784.

[160] *See id.* at 796 (Hecht, J., dissenting).

Plaintiffs' attorneys involved with litigation resulting from bar fights will no doubt use this case for precedential value.[161] In addition, trial courts will use the authority in attempt to follow Supreme Court precedent. Despite the Court's attempt to prevent this by asserting a narrow holding,[162] an ad hoc duty has been created with indefinite parameters and impossible obligations.[163]

The existence or non-existence of a legal duty should not depend on the creation of judges but on "social obligations derived from the community's accepted ways of doing things."[164] Legal duties should be determined "categorically rather than ad hoc, should be based on sound policy, and should be as clear as possible."[165] The *Del Lago* ad hoc duty fails at all of the above, and premises owners in Texas are now faced with increased litigation and no discernable guidelines from the Court on how best to avoid it.

[161] In fact, they have already begun to do so. *See* Brief for Appellants at 9, Taylor v. Louis, 2010 WL 3879551, (Tex. App.—Houston [14th Dist.] September 23, 2010, no pet. h.) (No. 14-10-000654-CV) (arguing that "[t]he Supreme Court has recognized that if a landowner should reasonably anticipate criminal conduct on the part of third persons, either generally or at some particular time, she may be under a duty to take precautions against it").

[162] *Del Lago*, 307 S.W.3d at 770 ("We do not announce a general rule today. We hold only, on these facts, that during the ninety minutes of recurrent hostilities at the bar, a duty arose on Del Lago's part to use reasonable care to protect the invitees from imminent assaultive conduct.").

[163] *See id.* at 803 (Hecht, J., dissenting) (complaining about the court's refusal to announce a general rule and stating that "[l]egal duties should be determined categorically rather than ad hoc"); *see also* Kendall Gray, Del Lago Partners v. Smith: *Imprudently Correct*, THE APPELLATE RECORD BLOG (Apr. 13, 2010), http://www.appellaterecord.com/2010/04/articles/texas-supreme-court/del-lago-partners-v-smith-imprudently-correct/ ("No matter how the Court limits its holding, there is now a Supreme Court opinion on bar fights. There will be more lawsuits concerning bar fights. The Plaintiffs will argue that their facts are just as bad as *Del Lago*, and the Defendants will argue that they are not. Unresolved is where the line actually lies.").

[164] Kelley, *supra* note 2, at 1062.

[165] *Del Lago*, 307 S.W.3d at 803 (Hecht, J., dissenting).