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CALIFORNIA SUPREME COURT LIMITS BUSINESS PROPRIETOR'S DUTY TO PROVIDE AN AUTOMATED EXTERNAL DEFIBRILLATOR, BUT LEAVES OPEN THE POSSIBILITY OF SUCH A DUTY IN HIGH RISK SETTINGS

SUMMARY

On June 23, 2014, the California Supreme Court ruled that a retail store operator serving the general public does not have a common law duty to have an AED ("automated external defibrillator") in place for use when a customer experiences cardiac arrest. The Court's analysis, however, leaves open the possibility that such a duty exists in businesses where there is a "heightened foreseeability of sudden cardiac arrest" such as in a health/fitness club. Although there is no statutory duty in California for senior communities to have AEDs, there may be a common law duty if it is determined that a heightened foreseeability of sudden cardiac arrest exists among residents of a senior living community.

FACTS

The case, *Verdugo v. Target Corp.*, was brought in federal court by Mary Ann Verdugo's family after she suffered a fatal heart attack while shopping at a Target department store. The plaintiffs argued Target should have reasonably foreseen that a patron might suffer such an attack and provided an AED due to the high number of unanticipated cardiac arrests each year and the large number of customers that shop in its department stores. The case was dismissed at the trial court level, but the federal Ninth Circuit Court of Appeals referred the matter to the

California Supreme Court to determine if Target has such a duty under California law.

NO LEGISLATIVE PREEMPTION ON THE SUBJECT OF AEDS

The Court first concluded that California's extensive statutory framework governing acquisition and use of AEDs (including Health and Safety Code § 1797.196 and Civil Code § 1714.21) was not intended, and may not be construed by California courts, to require a building owner or manager to acquire and install an AED in any building. However, it also concluded that the Legislature's enactments were not so pervasive as to fully occupy the subject matter so as to preempt the courts from determining that a duty to acquire and make available an AED may be included within the general common law duty of care owed by a business establishment to its patrons or customers.

COMMON LAW DUTY OF BUSINESS TO AID PATRONS

The Court noted that, because of the "special relationship" between a business and its patrons, the business must "take reasonable action to protect or aid patrons who sustain an injury or suffer an illness while on the business's premises" and examined whether that duty requires doing anything "beyond summoning emergency medical assistance" or providing "simple first aid measures."

PRECAUTIONARY MEASURES: BURDEN AND HEIGHTENED FORESEEABILITY

The ruling makes a distinction between the duty to take action *after* a patron suffers an injury or illness on the business premises and a duty to take precautionary steps *prior* to such an event. It also noted that the nature of some business activities (such as a fitness club) may contribute to the danger that a patron will suffer a cardiac arrest or other injury on the premises.

In determining whether Target had a common law duty to take the precautionary step of acquiring and making available an AED in advance of a medical emergency, the Court looked at (1) the degree of foreseeability that the danger will arise on the business's premises and (2) the relative burden that providing a particular precautionary measure will place upon the business. If the relative burden of providing a particular precautionary safety or security measure is onerous rather than minimal, absent a showing of a "heightened" or "high degree" of foreseeability of the danger in question, it is not appropriate for courts to recognize or impose a common law duty to provide the measure. In the absence of such heightened foreseeability, the determination whether a business should be required to provide a burdensome precautionary safety measure should more appropriately be made by the Legislature rather than by a jury applying a general reasonableness standard in a particular case.

The Court held that when the precautionary medical safety measures a plaintiff contends a business should have provided are costly or burdensome rather than minimal, the common law does not impose a duty on a business to provide such safety measures, absent a showing of a heightened or high degree of foreseeability of the medical risk in question.

AED BURDENS

The Court considered that apart from the initial cost of the AEDs themselves, significant obligations with regard to the

number, the placement, and the ongoing maintenance of such devices, combined with the need to regularly train personnel to properly utilize and service the AEDs and to administer CPR, as well as to have trained personnel reasonably available on the business premises, illustrated the magnitude of the burden. The Court ruled that compliance with these numerous obligations clearly implicates more than a minor burden.

NO HEIGHTENED FORESEEABILITY AT TARGET

With respect to the question of foreseeability, the Court concluded the plaintiffs' complaint did not point to any aspect of Target's operations, or the activities that Target's patrons engage in on its premises, which indicate a high degree or heightened foreseeability that its patrons will suffer sudden cardiac arrest on its premises. The Court recognized that the risk of such an occurrence is no greater at Target than at any other location open to the public. The court rejected plaintiff's argument that death is especially likely to result from sudden cardiac arrest that occurs in a big-box store "because it is impossible for emergency crews to reach a stricken invitee in time" in a large, heavily trafficked building.

LEGISLATIVE VERSUS COURT ACTION

The Court's opinion notes that numerous factors such as the nature of a business's activities, the relationship of those activities to the risk that a patron may suffer sudden cardiac arrest, the proximity of the business to other emergency medical services, and other potentially relevant factors that logically bear on the question whether, as a matter of public policy, an obligation to acquire and make available an AED should be imposed upon a particular type of business provide further support for the conclusion that that determination should be made by the Legislature rather than by a jury on a case-by-case basis. Factors such as the relative size of a retail business's premises, the number of patrons the business serves, or the amount of its owner's resources, however, according to the Court, did not lend themselves to the formulation of a workable common law rule that would provide

adequate guidance to businesses.

The Court noted that courts in other states (Illinois, Massachusetts and Connecticut) had allowed cases to go to trial on allegations of a common law duty to provide an AED to customers, but that all those decisions had involved fitness studios, where there was a heightened degree of foreseeability of cardiac arrest.

In conclusion, the Court determined that in light of the extent of the burden that would be imposed by a requirement to acquire and make available an AED, and the absence of any showing of heightened foreseeability of sudden cardiac arrest or of an increased risk of death, Target owed no common law duty to its customers to acquire and make available an AED.

IMPLICATIONS FOR SENIORS HOUSING OPERATORS

To encourage the voluntary acquisition of AEDs, most states have passed legislation affording immunity from potential civil liability, under specified circumstances, for businesses that acquire AEDs and make them available to their patrons. In California, the Legislature has encouraged and facilitated the provision of AEDs in many state-owned and state-leased buildings. Although California requires all health/fitness studios to make an AED available on their premises, no such requirement has been imposed on assisted living residences or other types of seniors housing properties.

Unlike fitness studios, the nature of the senior living community business does not necessarily contribute to any heightened foreseeability of cardiac arrest. Some senior communities do contain fitness facilities, however, and the operation of those programs may create a common law duty to provide an AED. Moreover, the nature of the senior community population, with residents who often are medically compromised, may create a heightened foreseeability of cardiac arrest that does not exist in a retail store. Certainly, a licensed care setting is more susceptible to such a claim than an unlicensed independent living property.

Even if state legislatures have not required senior communities to provide an AED, courts may find a common law duty to do so. The *Verdugo* decision declined to find such a duty in a retail store where no heightened risk was present, and indicated that legislatures, rather than courts, can better determine what kinds of businesses have a duty to provide an AED. Nevertheless, the *Verdugo* ruling leaves open the possibility that future court decisions will find that a senior living operator has a common law duty to provide an AED when there is a heightened foreseeability of cardiac arrest among its residents. It is doubtful that we have seen the end of litigation in this area and may expect an increase now that the common law liability landscape has been mapped by the *Verdugo* case.

As with CPR, the effectiveness of AEDs in saving lives, particularly in the case of older persons, is highly debated. AEDs are now commonplace, however, and considered by many to be a part of basic first aid. Given the prevalence of AEDs in public general assembly areas, the liability immunity statutes encouraging AED use, and a growing expectation or demand on the part of senior community residents for AEDs to be made available to them, senior living providers should seriously consider whether to make AEDs available on their premises.

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