Goodell: judge, jury, commissioner

By Paul Gelb

Questions about NFL Commissioner Roger Goodell's alleged lack of impartiality as the arbitrator in the so-called "Deflategate" scandal could be one of the most interesting parts of the New York federal court decision last week that vacated the NFL's four-game suspension against Tom Brady. The New England Patriots quarterback is accused of having a hand in deflating footballs during the playoffs last year.

The court listed but specifically declined to reach the issues of Goodell's ability to act as an impartial arbitrator. Yet, the court's extremely rare step of overturning the arbitrator's decision reflects that the judge likely felt there was some serious impropriety in the arbitration. And it renews questions more generally about the potential for abuse in the sort of captive arbitration proceedings that have become prevalent in sports, entertainment, and other industry-specific cases.

PAUL GELB
Drinker Biddle

In entertainment, for instance, some have raised the concern that contracts requiring arbitration with only certain arbitrators might result in "repeat provider bias" or "repeat player bias." The problem raised is similar to the maxim that when someone owes you a little money you have control over them, but when they owe you a lot of money, they then have control over you.

When an industry becomes a repeat player to one arbitration provider, even with good intentions, the possibility arises of the judge feeling beholden to one of the litigants because the arbitrators run the risk of themselves being judged by their repeat-business clients. Arbitrations are generally confidential, so there is no public record of how entertainment arbitrations have been decided over a large number of cases and over time. But the concern is often asserted.

The Deflategate ruling is a public example where perception of built-in bias or impropriety might have been a factor in a court's taking the very unusual step of overturning an arbitration award. The case arises in sports, not entertainment, and the arbitration provision and requirements that were involved are unique to sports, but the perception of the possibility of bias might have been a cause underlying the court's overturning the NFL's arbitration. In this sense, appearance can turn out to be just as important as fact.

The court vacated Goodell's decision against Brady on a few grounds. For one thing, the NFL's four-game suspension against Brady had been based on the punishment for a first violation concerning performance enhancing drugs, but there was no issue of performance enhancing drugs in the Deflategate accusations, and there was no legal basis to equate the punishment for these different offenses. The court also faulted the arbitration award because it was based on a finding that Brady had "general awareness" of misconduct by other people, but the NFL had not provided notice that this "general awareness" of acts by other people was a punishable offense. The court also centrally concluded that Brady had been denied equal access to investigative files and the opportunity to examine the co-lead investigator at the arbitration hearing.

The New York Times

New England Patriots quarterback Tom Brady surrounded by photographers after winning the AFC championship game against the Indianapolis Colts in Foxboro, Mass., Jan. 18, 2015.

U.S. District Judge Richard Berman held that the NFL's arbitration was "fundamentally unfair" because "in Article 46 arbitration appeals, players must be afforded the opportunity to confront their investigators."

All of this begs the question whether Goodell, who was allegedly involved in the events themselves and whom Brady accused of having "publicly prejudged" the issues, was the right person to have adjudicated the arbitration. It also raises questions about the involvement by the Paul, Weiss, Rifkind, Wharton & Garrison LLP law firm which, as the court noted, took on "dual and seemingly inconsistent roles as 'independent' investigator *and* counsel to the NFL." Goodell and the Paul, Weiss law firm gave the appearance of having alternated between being neutrals on the one hand and interested advocates on the other.

That's no way to run a railroad, and it likely cast a pall over the arbitration against Brady. It's exactly the kind of thing that offends reviewing courts. And it might be the underlying reason that Judge Berman ultimately chose to take the extremely rare step of vacating the NFL's arbitration decision.

Paul Gelb *is a litigator with Drinker Biddle & Reath LLP in Los Angeles. He has previously represented the Oakland Raiders against the NFL before the California Supreme Court.*

Shootings raise questions of property owners' duties

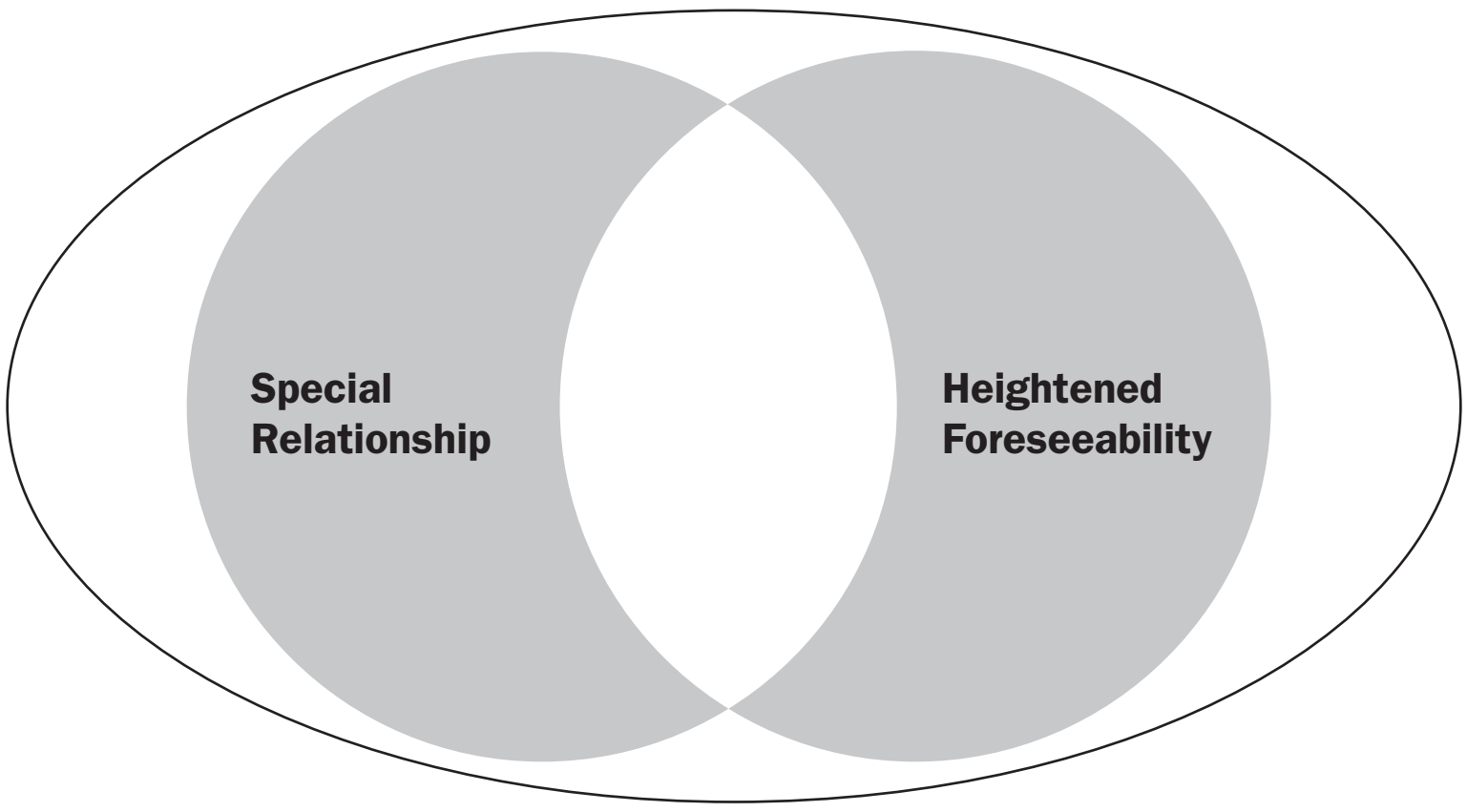
By Elia Weinbach

A few weeks ago, Regal Entertainment Group, a U.S. movie theater chain of 570 movie theaters announced a "Backpacks/Packages" policy on its website:

"Security issues have become a daily part of our lives in America. Regal Entertainment Group wants our customers and staff to feel comfortable and safe when visiting or working in our theatres. To ensure the safety of our guests and employees backpacks and bags of any kind are subject to inspection prior to admission. We acknowledge that this procedure can cause some inconvenience and that it is not without flaws, but hope these are minor in comparison to increased safety."

The policy is hardly new, but it has been implemented system-wide and is apparently not based on the particular experiences of any individual Regal movie theater. We now take it for granted that formerly "soft" targets will follow suit. In Los Angeles, one can't attend a basketball or baseball game, or even a Hollywood Bowl concert, without having to pass through a metal detector or having a handbag reviewed.

The recent spate of horrible crimes in movie theaters, a church, an elementary school, an IKEA store (in Sweden), and most recently, a televised shooting of two television news crew members while conducting an on-camera interview has become a fact of ordinary life, like Monday night football. Aurora, Charleston, Knoxville and Newtown have come to be known as more than just places on a map.



• The largest universe, depicted by the large circle, is all property owners.

• Within that universe are property owners (bars, restaurants, shopping centers, etc.) who owe special relationship duties to their customers.

• Within the universe are also property owners who have experienced criminal activity and are charged with a duty of heightened foreseeability and who also may owe special relationship duties.

Ever since Ms. Palsgraf was injured standing on a Long Island Railroad platform by an explosion caused by a fireworks package dropped by another passenger, the scope of the duty of care a property owner owes to persons who are in the reasonably foreseeable zone of danger has steadily expanded. *Palsgraf v. Long Island R.R. Co.* (New York, 1928). Yet random, violent crime is endemic in society and it is "difficult if not impossible, to envision any locale open to the public where the occurrence of violent crime seems improbable." *Ann M. v. Pacific Plaza Shopping Center*, 6 Cal. 4th 666, 678 (1993). When the harm results from a "sudden, intentional, malicious and criminal act of a third party, anticipation of harm as well as reasonable opportunity to prevent its occurrence may approach the impossible." *Rogers v. Jones*, 56 Cal. App. 3d 346, 351 (1976).

But property owners do have duties to insure the safety of their customers, patrons and invitees. (I'm referring generally to those who might owe duties whether they are title owners or commercial tenants.) The specific duties of property owners to their customers are not carved in stone though; rather, they are highly contextual.

The generic duty is to take reasonable steps to prevent harm from reasonably foreseeable risks. For criminal activity, these duties might include checking bags, providing security guards, escorting suspects off the premises, installing security video equipment, placing warnings on entry doors, and having airport-style metal detectors. No one-sized action fits all.

Even if property owners don't have personal experiences with criminal or tortious conduct, they still may owe "minimally burdensome" duties by virtue of their special relationship with their customers. These duties may include assisting customers if they get sick, walking patrons to their cars if there is a safety concern, or making 911 calls. It doesn't yet include providing automatic external defibrillators. *Verdugo v. Target Corporation*, 59 Cal.4th 312 (2014).

These principles apply in California to determine the nature and scope of the duties owed by property owners to their customers:

1. A property owner has a general duty to use reasonable care for the safety of customers and is liable for breach of the duty. *Taylor v. Centennial Bowl*, 65 Cal. 2d 114 (1966). A property owner has a duty "to take reasonable steps" to secure the premises against "foreseeable criminal acts of third parties that are likely to occur in the absence of such precautionary measures." *Ann M.* at 674.

2. The existence and scope of any duty depends on a number of factors including the foreseeability of the harm. *Margaret W. v. Kelley R.*, 139 Cal. App. 4th 141 (2006); *Delgado v. Trax Bar & Grill*, 36 Cal. 4th 224, 237 (2005).

3. Other factors that the courts consider in determining the existence and scope of a duty are the degree of certainty that a plaintiff suffered injury; the closeness of the connection between the defendant's conduct and the injury suffered; the moral blame attached to defendant's conduct; the policy of preventing future harm; the extent of the burden on defendant and the consequence to the community of imposing a duty; and the availability, cost and prevalence of insurance for the risk involved. *Ann M.* at 675 n.5.

4. Foreseeability is a question of law for the court. *Ann M.* at 678. In analyzing the existence and scope of a property owner's duty, the court must balance the foreseeability of the harm alleged against the burden of the duty to be imposed: the greater the burden of preventing the harm, the higher the degree of foreseeability required. Because the burden of employing private security guards inside a store to protect against third-party criminal conduct is great, "a high degree of foreseeability is required in order to find that the scope of a [property owner's] duty of care includes the hiring of security guards .... [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." *Id.* at 679.

5. A high degree of foreseeability is required to find that a property owner's duty includes the hiring of security guards and "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." *Delgado* at 238.

6. Foreseeability is measured by what the defendant actually knew, not by what the defendant could have or should have known, regarding the risk. A duty to prevent third-party criminal conduct can be imposed only if the criminal conduct was foreseeable. *Margaret W.* at 152. Foreseeability is the critical factor in the analysis. A lesser degree of foreseeability is required to impose a duty to take preventative measures that are simple or create only a minimal burden on the defendant, but a heightened duty is required to provide security guards or similar preventative measures. Whatever the measure of foreseeability is, it must be based on the defendant's knowledge and not what he should have known. *Id.*

7. Even in the absence of "heightened foreseeability" because of knowledge of prior similar criminal activity, the courts have found that a subset of property owners have a special relationship with their customers, patrons and invitees in shopping centers, restaurants and bars. *Delgado* at 244. The law imposes on such property owners a duty to undertake "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" (*Ann M.* at 674) and to protect against the conduct of third parties or assist another who has been attacked.

8. Even if there is no special relationship duty to prevent future criminal conduct, a property owner owes a special-relationship based duty to undertake reasonable and minimally burdensome measures to assist customers or invitees who face danger from imminent or ongoing injury. Such a minimally burdensome duty would include, for example, assisting a choking restaurant patron, placing a 911 call, calling the police, and escorting a patron to a car in a parking lot where there is a threat that the patron might be assaulted without such assistance.

Thus far, the heightened foreseeability duties have been individualized. That is, they only apply to specific businesses and not to categories of businesses or to businesses within a specified geographic area. Is that going to change?

All movie theaters and churches are now aware of the tragic murders in Aurora, Charleston and Knoxville. Is every church and every movie theater chain now going to be charged with "heightened foreseeability" duties in the foreseeable future? Or is it going to be only movie theaters and churches who actually experience such crimes? Or only movie theaters and churches within a defined area? Or will individual experience continue to determine and define the scope of an individual property owner's duties? It remains to be seen.

Elia Weinbach *is a judge of the Los Angeles County Superior Court.*

ELIA WEINBACH
L.A. Superior Court